Turbervilles Solicitors

Inside Track

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The Business Newsletter of Turbervilles Solicitors

Government promises to cut red tape for businesses

The new Government has promised to reduce bureaucracy for businesses and to take urgent action to “boost enterprise”.

Its plans were outlined in its policy document, *The Coalition: our programme for government,* which covers more than 30 subject areas including banking, business, jobs, welfare, equality and taxation.

As far as business is concerned, it says it will “cut red tape by introducing a ‘one-in, one-out’ rule whereby no new regulation is brought in without other regulation being cut by a greater amount”.

It will also “end the culture of ‘tick box’ regulation, and instead target inspections on high-risk organisations through co-regulation and improving professional standards”. There will also be “sunset clauses on regulations and

regulators to ensure that the need for each regulation is regularly reviewed”. The Government will also "end the so-called ‘gold plating’ of EU rules, so that British businesses are not disadvantaged relative to their European competitors".

There’s a pledge to promote small business procurement “by introducing an aspiration that 25% of government contracts should be awarded to small and medium-sized businesses and by publishing government tenders in full online and free of charge”.

The word aspiration makes the pledge a little vague but many will still see it as a step in the right direction. There will also be a review of employment and workplace laws “to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive”.

The Government will promote equal pay and take a range of measures to end discrimination in the workplace.

The right to request flexible working will be extended to all employees but employers will be consulted on the best way to achieve this. The default retirement age will be phased out and there’ll be a review to set a date at which the state pension age starts to rise to 66, although that will not be sooner than 2016 for men and 2020 for women.

We shall keep clients informed of developments as new policies are introduced. In the meantime, please contact us if you would like more information about any of the issues raised in this article.

Director of insolvent film company found guilty of wrongful trading

A director of a film company has been found guilty of wrongful trading after entering into a production agreement without having sufficient funds to pay for the work being commissioned.

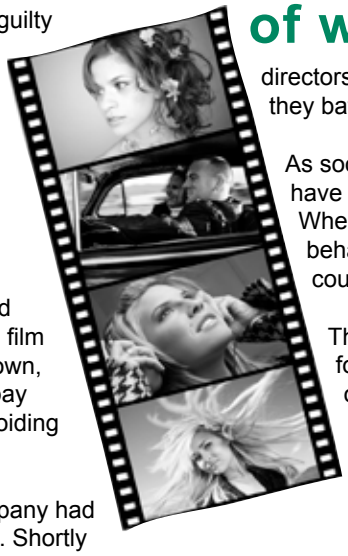
The case illustrates the risks involved in entering into contracts while a business is struggling to avoid insolvency.

The court heard that the director had engaged the services of a facilities house to produce a film at a time when he knew, or ought to have known, that his company had insufficient funding to pay for the work and no reasonable chance of avoiding insolvent liquidation.

When the agreement was drawn up, his company had a share capital of just £2 and no other assets. Shortly after production began, the company was compulsorily wound up after the facilities house obtained a judgment against it because it had failed to pay the agreed amounts.

The liquidator then brought an action for wrongful trading. The court held that the director had taken a casual attitude both to his duty to consider the best interest of his company and his duty to his creditors.

This is perhaps an extreme case because the director had been so casual about his duties, but it’s also true that many directors are not aware of the personal risks they run as they battle to stay solvent.



As soon as a company becomes insolvent, directors have a legal duty to protect the interests of creditors. When formal insolvency procedures get underway, the behaviour of directors over the previous few years could come under investigation.

They could become liable for wrongful trading if it’s found that they continued entering into contracts or accepting credit after they knew or should have known there was no reasonable chance of avoiding insolvent liquidation. The court could then order them to use their personal assets to help settle the company’s debts.

Many directors find it difficult to recognise or accept the point at which they become insolvent so they should seek professional help as soon as problems start to emerge.

Directors also have a legal responsibility to take action if they discover that other directors are acting fraudulently or dealing inappropriately with company funds. Failure to do so could render them liable for subsequent losses.

Please contact us if you would like more information about the issues raised in this article.

Landlord must pay damages for wrongful eviction

A landlord who repossessed and sold a property while the tenant was in prison has been ordered to pay damages for wrongful eviction.

It's an unusual case but a timely reminder of the dangers of taking the law into your own hands.

The landlord first entered the property and changed the locks while the tenant was away from home. The tenant returned and was able to gain entry, but shortly afterwards he was sentenced to a term in prison.

The landlord then entered the property again and sold it with vacant possession.

The tenant sought damages for wrongful eviction under the Housing Act 1988 on the basis that the landlord had wrongfully deprived him of the occupation of the premises.

The landlord put forward the defence that he believed that the tenant had abandoned the property and surrendered the tenancy. He submitted a counter claim to recover rent arrears.

The judge held that the tenant had not abandoned the premises and that the landlord had taken a calculated risk in re-entering and changing the locks.

He had no reasonable grounds for believing that the tenant was no longer at the premises.

That decision was upheld by the Court of Appeal which agreed that the tenant had not done anything that could amount to a surrender of the tenancy.

The case highlights the need for landlords to seek legal advice when faced with situations like this.

In order to mount a successful defence, the landlord would have to be able to prove that he believed, and that it was reasonable to believe, that the property had been abandoned.

If he is unable to do this then he is likely to be found liable for wrongful eviction. A more certain approach would be to seek a possession order.

Please contact us if you would like more information about landlord and tenant issues.

Building goes ahead because covenants not enforceable

A company has won the right to proceed with a housing development after a court declared that covenants which might have prevented the project were no longer enforceable.

The company had been granted planning permission to build on a landlocked plot behind some houses. To complete the project it needed to provide an access road through the grounds of one of those houses, which it also owned.

However, the land was subject to covenants in favour of a building society which had owned the land in the early 1900s. It had ceased to exist in 1929 and the issue arose as to whether those covenants, which prevented the building of a road, were still enforceable.

The High Court ruled that they were not as the building society no longer existed. The judge added that even if the society did still exist, the covenants would still not be enforceable. This was because they were only intended to be exercisable by the society or its successors while they held land in the area.

Once they had disposed of all the land that might be affected, the covenants could not be enforced against new owners.

Developers may also be interested to know that just before the General Election, Parliament approved a new package of measures designed to cut costs for developers and help them

complete building projects during the economic downturn. It followed measures introduced last October that allowed businesses and homeowners to extend existing planning permissions without having to go to the trouble and expense of submitting a new application.

Now the fees for extending those permissions are being cut dramatically. A Government statement said: "The fees for extending planning permissions are now being reduced so the fee for a major development that was previously as high as £250,000 will now be £500, the fee for smaller developments that was as high as £3,000 will now be £170."

Please contact us for more information about any of the issues raised in this article.

Accountants held liable for their missing partner's losses

Two accountants have been held liable for the losses caused by their partner who breached his duty of care to clients.

Four investors lost their money when the partner in question went missing after giving them investment advice. Judgement was later entered against him.

The investors then took action against the remaining two accountants in the firm for negligence and deceit. They submitted that the missing partner had given them advice in his capacity as a fully authorised member of the firm and in the course of the firm's everyday business, and so the other two accountants were liable for the losses. The accountants denied that their partner had been acting with their approval and said that he was not in fact authorised to give investment advice.

The court considered the evidence which showed that under an agreement drawn up by the accountants in 2005, the partner in question was not authorised to give investment advice even though he continued to do so.

One of the accountants was unaware that his partner was still acting as an adviser. The other accountant knew but turned a blind eye. Neither did anything to restrict their partner's authority and neither said anything to alert clients to the fact that he was not authorised to give investment advice.

He was therefore allowed to continue providing advice in the ordinary course of the firm's business and so the other two accountants were held liable for his actions.

Please contact us for more information about professional negligence issues.

Print firm wins compensation for negligent advice

A print firm has been awarded damages after receiving negligent advice when entering into a franchise agreement.

The firm had contacted a company which offered franchises to run design services under its name. The company identified one of its existing franchises which could be sold as a going concern.

Negotiations began and the printers were told that it would cost £15,000 to refit the premises once the business was purchased. This figure was then entered into the business plan.

The franchise company also told the printers that they would be given client data from the existing business prior to launch. The franchise agreement was then drawn up and signed.

However, the franchise company then refused to place the client data on to the new business's computer system as agreed. The cost of refurbishment also turned out to be double the figure stated.

The printers claimed damages on the basis that the franchise company had failed to exercise reasonable care when providing important advice. If they had known the true cost of the refurbishment, they would have negotiated a lower purchase price.

The court ruled that the franchise company had been negligent and in

breach of its duty of care when giving advice about refurbishment costs. It had also breached its contractual obligations by failing to provide the customer data as agreed and it was therefore liable to pay damages.

Please contact us if you would like more information about the issues raised in this article.

Firms are using unscrupulous tricks to delay payment

An increasing number of firms are using unscrupulous tricks to delay paying invoices for as long as possible, according to new research.

The business information provider, Creditsafe, found that 1 in 10 companies had been forced to reissue at least 20% of their client invoices in the last 12 months. Nearly 9 out of 10 companies had to reissue at least one invoice over the same period.

The research suggests that asking suppliers to reissue invoices is becoming routine for some firms who hope that

the move will restart the timescale for payment. This gives them the chance to hold on to their money for longer and so protect their liquidity.

David Knowles, Business Development Director, Creditsafe, said: "Unscrupulous accounts payable teams and finance directors are using every trick in the book to prevent paying invoices on time."

The most commonly used excuse for requesting a duplicate invoice is to claim that the original was never received. This is in spite of the fact that the original was sent by registered post. Some firms can become very arrogant, as in the comment from one director: "I'm too important to read my post so why would I know you billed me?"

Faced with such intransigence it is best to start taking action as quickly as possible. A straightforward solicitor's letter is often enough to secure payment because people then realise you are taking the matter seriously.

For those who still refuse to budge there are several other options available to get them to pay. In fact, firms can turn credit control into a profit making operation by recovering unpaid money in a way that earns more than enough to cover the cost of pursuing bad payers.

It's possible because businesses are entitled to levy a statutory late payment fee depending on the size of the debt and they can also impose punitive interest charges.

If this doesn't make the debtor pay, it may be necessary to issue a 'court order for questioning' against the company secretary. This is often enough to prompt many late payers into action but for those who still refuse to pay, there are other legal options available.

Please contact us if you would like more information about dealing with late payment.

Director wins the right to buy out 'unfair' colleague

A director of a golf equipment company has won the right to buy out a fellow director who had acted in an unfair and prejudicial manner.

The two men had set up a new company in which they had one share each and were joint directors. The relationship then broke down with the first director making several allegations about the way his colleague was conducting business affairs.

He complained that the colleague had withdrawn a large sum of money illegitimately from the company account and had run up unexplained debts on the company credit card. He had also altered the share structure to give himself greater voting power and then removed his colleague as a director at a meeting that was inquorate.

It was also alleged that he had registered his home address as the company's office address, and opened a new company bank account and wrongly paid company receipts into it. The second director disputed the allegations and the court held that, given the direct clash of evidence, deciding the facts of the matter would come down to appraising each director's credibility.

The judge said that the court preferred the evidence of the first director who was making the complaint. He answered questions in a frank and straightforward way and had tried to provide an accurate account.

His colleague, however, had been evasive and had lacked credibility. When pressed, he had made admissions that were against his own interest. The court held that he had conducted the company's affairs in a way that was prejudicial to his fellow director.

The court therefore held that the director making the complaint was entitled to buy his colleague's share of the company at a value to be agreed.

Please contact us for more information about issues relating to company law.

Employee ‘fit notes’ and time to train come into effect

The new system using “fit note” medical statements for employees who are ill has now come into effect.

Until now, a doctor could provide a medical statement giving an employee’s condition and indicating whether or not he was fit to work.

Under the new system, the doctor can add a new category saying the employee “may be fit for work”. This could be used if the doctor believes the employee could work as long as the employer provides appropriate support.

The employer doesn’t have to act on the doctor’s advice but it’s hoped the new system will help to get employees back to work sooner and so reduce absence through sickness. If the employer cannot or does not want to act on the advice then he can proceed as if the doctor had issued a statement saying the employee is not fit for work.

The new approach does not affect the employer’s obligations to pay statutory sick pay and make reasonable adjustments under the Disability Discrimination Act 1995.

Employers also need to be aware that workers in companies that employ more than 250 people now have the legal right to request time for training.

Time to Train, which was introduced in the Apprenticeships, Skills, Children and Learning Act 2009, came into effect in April this year. It will be extended to apply to all employees from April next year.

The legislation entitles employees to request time for training that is relevant to their work. This could be an accredited course that leads to a qualification, or it could involve unaccredited training that helps develop skills and improve business productivity.

The employer is obliged to consider the request but can turn it down if there are good business reasons for doing so. For example, the employer may feel that the training is not relevant or would not improve business performance.

Please contact us if you would like more information about employment law matters.

Businessmen win damages for confidentiality breach

Two businessmen have won damages from a venture capital company which breached a confidentiality agreement with them.

The two men had identified an opportunity to take over and develop a pawnbroking business. They wanted to be able to manage the new business and hold equity shares.

They approached a venture capital company for funds. During negotiations, they signed an agreement to disclose information which could be used to assess the project. This included their business plan and outlined the management posts they would occupy. The agreement stated that the information could only be used by the venture company to assess whether it wanted to proceed. The company decided that it did want to go ahead and put forward proposals which the two men accepted.

The owners of the pawnbroking business agreed to sell and due diligence began. However, the two men were then told that they would not be offered the kind of management roles they had outlined in their original business plan.

The venture company then completed the purchase and later made a substantial profit when it floated the new business on the stock market.

The two men took legal action and have been awarded damages for breach

of contract. The judge held that the confidentiality agreement meant the venture company had been obliged to provide the two men with the management roles specified in the business plan.

If it had wanted to proceed without them then it should have obtained their consent but it had not done so. The two men had not waived their rights and so were entitled to compensation.

Please contact us if you would like more information about contract law.

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