Turbervilles Solicitors

Inside Track

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Failure to consult with tenants costs landlord £270,000

A corporate landlord has been left with a bill of £270,000 after failing to consult properly with tenants.

The case involved five leaseholders at a block of flats which required major renovation. The landlord was entitled to recover most of the cost through service charges as long as there was full consultation with the tenants.

This involved letting the tenants have a say in which company should be awarded the work. However, the landlord only provided the tenants with details of one of the four tenders before serving notice that the contract had been awarded. The tenants objected and refused to pay their share.

The case went before the Leasehold Valuation Tribunal which concluded that the landlord had not given tenants the chance to consider the different tenders and so had not complied with the Service Charges (Consultation Requirements).

This meant the landlord could not recover the costs as expected. The liability of each lessee was limited to just £250 and so the landlord would have to pay the remaining £270,000 necessary to carry out the work.

The case went all the way to the Court of Appeal, which accepted that the decision seemed harsh on the landlord. However, it said the financial consequences for the landlord were irrelevant. It was impossible to view the consultation failure as minor or merely technical.

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

Businesses fear both rising debts and falling profits

New research has revealed that businesses are becoming increasingly worried about the twin problems of rising debts and falling profits.

Surveys carried out by the insolvency trade body R3 show that one in five businesses (19%) are worried about the amount of debt they owe to their creditors. At the same time, more than 850,000 businesses are experiencing decreased profits.

More than 40% of businesses had seen a reduction in sales volume and 32% had seen their market share reduce. The R3 research shows that smaller businesses owe an average of about £110,000 to their bank, £82,000 to trade creditors and £27,000 to the Crown. It is the debts to trade creditors that cause business owners the most concern.

The President of R3, Steven Law, said: "In a fragile recovery, debt is an important part of working capital in most businesses. With VAT rises and the impact of public sector cutbacks yet to be felt in full, many businesses are concerned about their ability to repay the money they owe in fragile conditions.

"Worry about trade debts is often more keenly felt as businesses deal with this creditor group on a day to day basis - these debts can therefore seem more obvious than those owed to the bank or the Crown.

"Early professional advice is the best way to allay fears over debt levels.

"Ascertaining whether your current debt levels are sustainable should fiscal and monetary policies change is an important challenge for all businesses."

It is also important, of course, for creditors to take action as soon as debts begin to mount up to avoid the risk of debtors defaulting. It is often the case that taking early legal action is the difference between recovering the debt and not being paid.

Please contact us if you would like more information about credit control and debt collection.

Director banned from revealing company information

A director has been banned from revealing confidential information that could damage his former company.

The issue arose after the director became embroiled in a dispute with his company that involved court action.

The judge found in favour of the company and described the director as having an "attitude of blatant disregard for the truth, for the accuracy of public records, for the validity of company resolutions and for the rights of fellow directors". The director resigned shortly after that judgment but his dispute with the company continued.

The company manufactured golf products and was involved in a patent dispute with another manufacturer.

The director threatened to offer his services to the other manufacturer during the resulting court proceedings. That could have involved him revealing confidential information. His former company sought a perpetual injunction restraining him from doing so.

The court granted the injunction after deciding that the director had shown a blatant disregard for the rights of his former company, and had revealed an intention to damage and destroy it.

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

Small firms will 'still struggle' with burden of EU bureaucracy

The moratorium on new employment laws for small firms has now come into effect but business groups say that EU regulations will remain a major burden.

The moratorium was announced in the Budget and covers start-up businesses and small firms with fewer than 10 employees. HMRC is defining a start-up firm as a business that began trading after 6th April this year.

The moratorium lasts for three years and applies to all new domestic regulations coming into effect after 1st April this year. However, much of the employment law affecting the UK comes from the EU and this is not included in the moratorium.

The Federation of Small Businesses (FSB) says this means that small firms will still be overburdened with red tape from Brussels. They will still have to deal with new regulations including the Agency Workers Directive, Parental Leave Directive and the Pregnant Workers Directive. John Walker, FSB National Chairman, said: "The FSB has welcomed the Government's commitment to help ease the burden of regulation on these businesses, but we are concerned that regulations coming in from Europe will hit small firms harder. It is disappointing that some of the most burdensome aspects of employment regulation are not included."

The Institute of Directors says the Government should make the moratorium permanent, "otherwise there is a danger that when the three-year exemption expires, micro firms will be hit by a wall of regulation".

It means small firms will still need to keep up with changes in regulations over the next three years so they are able to comply when the moratorium ends.

Please contact us if you would like more information about complying with regulations.

Penalties imposed on construction firms 'were too harsh'

The Competition Appeal Tribunal has ruled that penalties imposed on construction firms for using cover pricing were too harsh and should be reduced.

The Tribunal said it was important to make a distinction between simple cover pricing and bid rigging, which is much more serious.

Bid rigging involved firms joining forces as a cartel in order to enable one of them to win a contract at a lucrative rate. Cover pricing was less damaging. It usually happened when a company was invited to tender for a contract it may not want or be unable to carry out.

The company might fear that if it didn't submit a tender, it could be taken off the customer's approved list and not be invited to compete for contracts in future. In those circumstances, the company might ask a rival firm to provide it with a cover price to submit. This price would be inflated and ensure there was no chance of winning the contract, but it would mean that the company would remain on the customer's approved list.

The Office of Fair Trading (OFT) recently imposed penalties totalling £129.2m on 10 construction companies that were found to have used cover pricing. The companies argued that the penalties were disproportionate for "simple" cover pricing and the Competition Appeal Tribunal has now ruled in their favour.

It said that the OFT had made a number of miscalculations when imposing the penalties and had fined the companies 5% of their turnover. The Tribunal held that this was disproportionate when the maximum penalty for "the most heinous infringements" was only 10%. The penalties should therefore be reduced to 3.5% of turnover.

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

Company must repay £200,000 after breaching contract

A company must repay £200,000 after failing to carry out work to a high enough standard on a property it was selling.

The company had entered into a contract with a buyer which required that a number of renovation and conversion works should be carried out before completion.

The buyer paid a £100,000 deposit followed by a further £100,000 interim payment once work got underway. However, when the time came to complete the sale, the buyer said some of the work had not been carried out as agreed and refused to proceed.

The seller claimed the work had been done as agreed and refused to do any more. The buyer said this amounted to a repudiatory breach of contract and asked for a refund of the £200,000 it had paid, plus interest.

The court held that the matter boiled down to which of the required tasks remained outstanding or had not been completed adequately, and whether any of these deficiencies could justify a claim of breach of contract.

The judge said that the law did not give the buyer total discretion to decide whether or not the work had been carried out properly. The law simply required that the tasks should be completed to a good and workmanlike standard, and meet the buyer's reasonable expectation.

The court considered evidence from experts on both sides and concluded that the work had not been completed or carried out to these standards and so the contract had been breached. The buyer was therefore entitled to a full refund of the £200,000 plus interest.

Please contact us if you would like more information about the issues raised in this article or any aspect of contract law.

Tribunal service expects rise in employment claims

Employment claims look set to continue rising, according to an official report by the Tribunal Service. This is in spite of the fact that claims are already at record levels.

Judge David Latham, who is president of the employment section of the Tribunal Service, says there have been several new employment laws over the last year which have impacted on tribunals.

The new developments include the new statutory system of fit notes, additional paternity leave and new rules governing no win, no fee agreements.

In his annual statement, Judge Latham also highlighted how the Equality Act reforms the law in a number of important areas relating to equality and discrimination. He said: "It is expected that this will increase the number and variety of claims made to the Employment Tribunal." The warning comes at a time when claims to employment tribunals are already at a record high. Judge Latham said: "For the financial year ended 31st March 2010, the number of claims lodged with employment tribunals was 236,100, representing an increase of 56% on 2008-2009.

"Whilst this increase included a substantial rise in multiple claims, single claims alone increased by 14% over the previous financial year. The result was that in that financial year claims with the Employment Tribunal were at the highest level ever."

The latest figures show that the number of claims continues to rise. For the three months to 30th June last year, the number of claims lodged with employment tribunals was 44,306. That was 4% higher than in the same period in 2009.

Companies may wish to review their employment policies to reduce the risk of expensive claims against them.

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

Officer tried to sell company using misleading figures

Buying and selling businesses can be fraught with difficulties as highlighted in a recent case before the High Court.

It involved a company that wanted to sell one of its subsidiaries. A Chief Operation Officer was appointed to oversee the sale and a purchaser was found.

The officer prepared an information memorandum which described the products manufactured by the subsidiary, listed its main customers and provided figures for actual and projected income.

However, while the negotiations were still continuing, one of the subsidiary's most important customers telephoned the officer saying that it was taking its business elsewhere. The officer did not tell the purchasing company about this and the sale went ahead.

When the purchaser discovered what had happened, it took legal action to have the purchase agreement rescinded on the basis that it had been misled about the figures and should have been informed in advance that a major customer was withdrawing its business.

The officer denied that there had been any deception. He said that he had not believed that the customer would take its business elsewhere. He had regarded it as merely a negotiating strategy to obtain lower prices.

However, the customer's representatives gave evidence that when they had told the officer that they were withdrawing their business, he had asked them not to tell anyone as it would make it impossible for the sale to go ahead.

The court held that the officer had intended to fraudulently misrepresent the true position and so the purchaser was entitled to rescind the agreement.

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

Directors guilty of wrongful trading

The directors of a development company have been found guilty of wrongful trading after continuing with a project long after they should have known it was bound to fail.

The case involved the directors of a company which was set up to acquire a plot of land worth £900,000 and build industrial trading units. They borrowed £437,000 on the basis that some of the units had been pre-sold. However, the sales figures overstated the position.

The directors then fell into dispute with one of the contractors brought in to work on the site.

The contractor suspended work on the project. The bank was not told about this and went ahead and honoured further payments authorised by the directors.

The development company then went into liquidation. The liquidator sought declarations that the directors were guilty of misfeasance, breach of fiduciary duty and wrongful trading because they had allowed work to continue on the project when they had known, or ought to have known, that it was bound to fail.

The court held that at the outset of the project, the directors had honestly believed that it would succeed.

However, the position changed once work got underway. The contractors quickly carried out work to a value that exceeded the amount available to pay them.

The only honest thing to do at that stage was to stop the development so a full appraisal could be carried out and so the bank could be informed. In spite of this, the directors tried to continue until insolvency was unavoidable.

The court held that the directors should have known that there was no realistic chance of avoiding insolvent liquidation and so continuing with the development constituted wrongful trading.

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

Recession sparks rise in landlord and tenant disputes

The recession has sparked a surge in the number of disputes between landlords and business tenants, according to new research.

Figures compiled by the legal publishers Sweet & Maxwell show a 43% increase in disputes in the High Court in London involving landlords and tenants of commercial property.

The numbers rose from 28 in 2008 to 40 in 2009, the latest year for which data is available. However, these figures only cover cases involving sums above £25,000. It's thought there were many more disputes involving lower figures.

Sweet & Maxwell also point out that thousands of disputes are settled by negotiation or arbitration and don't get to court.

The researchers put the increase down

to the economic downturn which has prompted businesses to try to reduce their overheads by shedding excess office and retail space. In the haste to cut costs, legal obligations can become blurred.

Some of the trigger points include tenants trying to reduce their costs by scrutinising service charges and their contractual obligations. There has even been legal action over whether or not a service charge covers Christmas decorations in a shopping centre.

Disputes can also arise when tenants try to sub-let some of the space they no longer need, sometimes at a sub-market rent. Landlords may fear that this could have a detrimental effect on future rent reviews and consequently, the investment value of the property.

Lease assignment can be another point of contention if the tenant tries to hand over to someone the landlord considers inappropriate or unable to meet the necessary financial or legal requirements.

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

Anti-competition clause 'too restrictive to be enforced'

Great care is needed when drawing up restrictive covenants; if they are not tight enough they may not be effective, but if they are too restrictive the courts may not enforce them.

A recent case gives a good insight into how the courts may view certain anti-competition clauses.

It involved an estate agency and one of its former employees. The firm's terms and conditions contained a clause which stated that for 12 months after leaving the firm, employees could not solicit the agency's customers, could not set up a rival business within 5 miles of their former office, and could not induce former colleagues to join them.

The anti-competition clause was put to the test when one of the agency's employees left and set up a rival firm only 1.7 miles from the agency branch where he used to work. The agency took court action to enforce the clause but met with only partial success.

The court held that the former employee had solicited the agency's clients and so imposed an injunction preventing him from doing so again.

However, the court found that he was not in breach of the clause preventing him from inducing former colleagues to join him. The evidence was that former colleagues had approached him rather than the other way round.

The court also declined to uphold the clause about not setting up a rival firm within five miles. It held that most of the work carried out by the employee while he was with the agency involved non-recurring business. This was not capable of creating a customer connection worthy of protection.

The clause was too wide in its scope and amounted to an excessive restraint of trade. It was therefore void and unenforceable. The agency was sufficiently protected by the anti-solicitation terms.

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

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