SIMON BURN SOLICITORS

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Commercial Law UPDATE

Treasury Proposes New Construction Tax Regime

Hard on the heels of several cases dealing with whether builders on construction sites are employed or self-employed for employment law purposes, the Treasury has announced yet another review of the employment status of construction workers for tax purposes.

The review, only a few years after the system of taxation of workers in the building industry was overhauled, is designed to address the problem of 'false self-employment'. This occurs when workers are treated as self-employed for Income Tax and National Insurance purposes despite the fact that the way in which the work is carried out on a day-to-day basis demonstrates that there

is an employment relationship. The Treasury's proposals would treat all workers in the construction industry as employed except those who:

- provide the plant and equipment required for the job that they have been engaged to carry out. This would not include normal 'tradesman's tools', as these are traditionally supplied by tradesmen;

- provide the material necessary to do the work; or

- provide other workers to carry out the work under contract and are responsible for paying subcontractors.

The consultation can be viewed at http://www.hm-treasury.gov.uk/consult_false_selfemployment_construction.htm.

Discovering a Cover-Up – Tips for Directors

Dubious business practice will always exist but normally becomes more prevalent and is more often uncovered in times when business is tough. A director who discovers dubious business practices within his company can find himself in a difficult situation. This is especially common when a director finds that the true financial position of a company has been disguised.

What should you do if you find yourself in such a position?

Firstly, try to establish the facts of the situation and its impact and severity. Once that is known, consider the ethical principles which apply to company directors under the Companies Act and other legislation and your responsibilities as a director and under your contract of employment. Consider also your company's corporate policies and procedures.

If necessary, clarify your obligations by speaking with colleagues and/or your company's HR department. It is important when consulting with others not to breach confidentiality.

When deciding what to do next, taking legal advice is sensible. Taking the wrong action may have unpleasant consequences – however, doing nothing might be even worse. Remember that it is against the law (under the Public Interest Disclosure Act 1998) for an employer to discriminate against an employee who makes a 'protected disclosure'.

If you are faced with an ethical dilemma at work, we can advise you on the law.

Data Protection – New Two-Tier Notification Fee

Every organisation that processes personal information has a statutory duty under the Data Protection Act 1998 to notify the Information Commissioner's Office (ICO), unless they are exempt from so doing.

Notification involves the data controller informing the ICO of certain details about their processing of personal information. These details are used to make an entry describing the processing in the register of data controllers held by the ICO. The register is available to members of the public for inspection so that they can find out how personal information is being processed by data controllers.

From 1 October 2009 a new fee structure applies to notifications and renewals. Organisations with 250 or more members of staff and a turnover of £25.9 million or more are now required to pay a fee of £500, as are public authorities with 250 or more staff members. This higher rate does not apply to charities or small occupational pension schemes, however. For organisations with fewer than 250 staff members and those with a turnover below £25.9 million the fee remains at £35, as previously.

It is anticipated that the two-tier fee structure will augment the ICO's resources by approximately £4.7 million per year.

For further information, see http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/notification_fee_changes.pdf.

One Meeting is One Too Many

A recent competition law case saw a group of Dutch telecoms companies fined heavily by the European Court of Justice for anti-competitive behaviour, following a meeting between them in 2005 at which the decision was taken to cut the payments they made to mobile phone dealers.

The decision confirmed that a single meeting between competitors to discuss market strategy is sufficient to constitute anti-competitive collaboration.

Competition law is tough and affects markets on a local as well as national level. Price and tender fixing are dangerous practices and the potential fines are severe. At present, the Office of Fair Trading is conducting a number of investigations into anti-competitive behaviour. A recent investigation into bid-rigging in the construction industry led to fines in excess of £100 million.

We can advise you on how to steer a safe path through the competition law minefield.

Patent Stands Despite Disclosure of Art

The ruling in a recent patent dispute will give comfort to developers of products that are patented after the developer has already 'let the cat out of the bag'.

The general rule is that a patent cannot be defended if the subject matter of the patent (the 'art') has become public knowledge before the patent application is made. In the case in point, a firm sought to fight an action for patent infringement on the basis that the prototype of the subsequently patented design for a folding stair had been shown to at least three members of the public and photographed by them and that a photograph had appeared in the press which showed the prototype in the background.

The defendant firm argued that the disclosure was sufficient to make the art public knowledge. The claimant firm argued that this was not sufficient: the three people who had seen the prototype had no special interest in the design or knowledge of the manufacture of the folding stair. They would not have been able to describe its particular features after seeing it.

The UK Patent Court upheld the patent.

This case is interesting as it runs somewhat counter to other decisions. An appeal must therefore be a distinct possibility. Even though this case turned out well for the claimant, it makes sound commercial sense to ensure that all intellectual property which needs to be formally protected (i.e. anything not copyright) is kept firmly under wraps until it is safe to make it public.

You Can't Give it, Then Take it Away

A recent property case shows that the courts may take a dim view of granting a right and then taking it away.

The case involved an agreement under which the owner of land which was let to a water bottling firm sold adjacent land to a third party, reserving a right of way which ran from the water bottling plant to the main road. The right of way specifically included a right of access for lorries. The arrangement meant that the purchasers owned the land on either side of the entrance to the main road. The water bottling business was being operated in accordance with a temporary planning permission, which was subject to a number of conditions. As access to the water bottling plant was needed for lorries, one of the planning conditions was that the visibility for the exit to the road was adequate.

In 2001, the purchasers of the land put up fencing and planted shrubs which obstructed the visibility at the entrance. In 2004, the local authority refused to grant permanent planning permission for the water bottling plant, one of the reasons for the refusal being that the entrance to the main road was dangerous because of the lack of adequate visibility. In 2006, the water bottling business ceased and the landowner sought to rent out the site, but was unable to obtain planning permission for use because of the visibility issue.

The vendor of the land brought an action against the

purchasers and was successful. The Court of Appeal ruled that suitable visibility splays were essential for the exercise of the right of way and ordered the purchasers to remedy the position. The court also awarded the claimants £20,000 in compensation for their deprivation of commercial use of the land between 2006 and the restoration of the visibility splay.

In this case, the behaviour of the purchasers of the land, which gave insufficient consideration to the rights of the owner of the right of way, proved expensive.

This is probably a case which could have been avoided had the original agreement for the sale of the land been more tightly drafted. Fortunately for the vendor, the Court took a commonsense approach.

Contact us for advice on any property matter.

Are LLP Members Employees?

In many ways a Limited Liability Partnership (LLP) is as much like a company as a partnership. Recently, an LLP member who was required to retire from the LLP claimed he had been unfairly dismissed.

The Employment Appeal Tribunal concluded that he was not an employee of the LLP and could not therefore bring the claim. The main reason for rejecting his argument that he was, in effect, an employee was that the Limited Liability Partnerships Act 2000 provides that a member of an LLP is not to be considered an employee if, had the LLP been a normal partnership, he would have been considered a partner. If he would not, then the common law tests for determining whether he is or is not an employee are then used.

The Employment Tribunal had been correct to consider first whether the claimant was a partner in the LLP. Having found that he was, it correctly considered the common law tests and decided that they would not have conferred employment status on him.

It is always important in any partnership for the legal relations between partners to be clearly defined. Partnerships can present complex issues: we can advise as necessary.

New Supreme Court Replaces House of Lords

When the new legal year started on 1 October 2009, a new Supreme Court for the United Kingdom replaced the House of Lords as the highest appeal court in the land. It will act as the final court on points of law for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases.

Previously, the Law Lords were able to become involved in the debate and subsequent enactment of Government legislation (although, in practice, they rarely did so). The creation of the new Supreme Court means that the most senior judges are now entirely separate from the Parliamentary process.

Reliance on Pre-Contract Negotiations Revisited

The 2007 case involving Persimmon Homes and landowner Chartbrook Ltd. has now been decided in the House of Lords. The case turned on the meaning of an agreement which contained a 'grammatical ambiguity', which applied to a formula used to calculate the sum due under a property contract. This led Chartbrook to claim more than £4 million from Persimmon. Persimmon calculated its liability at under £900,000, basing its argument on pre-contract negotiations.

The Court of Appeal had rejected Persimmon's claim, ruling that relying on definitions of terms agreed in pre-contract negotiations was only appropriate when a claim for rectification was made. Rectification is the phrase used for a contract being altered to mean what both parties to it thought it meant originally. No claim for rectification of the contract had been made in the initial case, so the Court could not entertain one. In any event, the meaning of the contract was clear.

Persimmon appealed to the House of Lords, which overturned the decision of the Court of Appeal. It ruled that interpreting the contract under the ordinary rules of syntax made it commercially

nonsensical. The contract had to have the meaning that a reasonable person would have understood to be the intention of the parties to it when it was made.

We can assist you to make sure that the contract you sign incorporates the exact terms agreed in your negotiations.

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