SIMON BURN
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Commercial Law UPDATE

First Conviction Under New Corporate Manslaughter Law

A workplace death in 2008 has led to the first conviction of a company under the Corporate Manslaughter and Corporate Homicide Act 2007.

Alexander Wright, who was 27 at the time of his death, was investigating soil conditions in a pit when it collapsed, killing him. In the first successful prosecution under the Act, Cotswold Geotechnical Holdings was found guilty of corporate manslaughter over his death. The company was fined £385,000, which it has the option of paying over a 10-year period due to its present financial position. Charges against the company's managing director were dropped in October last year owing to his ill-health.

The Act was passed to make it easier to prosecute companies over health and safety breaches resulting in fatalities. Previously, it was necessary to identify a 'controlling mind', usually a director of the company, in order to establish criminal liability. This proved especially difficult in the case of larger entities: the only successful prosecution under the previous legislation involved a one-man company. There were several noteworthy failed

prosecutions – in particular regarding the Herald of Free Enterprise disaster and the Hatfield rail crash.

This case involved a small company where executive responsibility was easier to establish: indeed, the judge stated that the director who could not be prosecuted due to his ill-health 'was in substance the company'. It remains to be seen how effective the Act will be in prosecutions of larger organisations.

We can advise you on any aspect of health and safety law.

Winding Up Your Company – Warning

There are hundreds – possibly thousands – of companies listed as 'dormant' at Companies House and often these are retained rather than wound up because although they do not trade, they do contain assets.

For more than a quarter of a century it has been possible to wind up a company informally and distribute the assets amongst the shareholders by using a procedure described in HM Revenue and Customs (HMRC) extra-statutory concession C16. The concession allows dividends paid as part of a scheme to wind up a company to be treated as returns of capital, and thus subject to Capital Gains Tax (CGT), rather than dividends, which are subject to Income Tax (IT).

However, the term 'informally' is one which should not cause complacency, as more recently it has been noted that the return to shareholders of the share capital of the company without a formal winding-up is strictly unlawful.

This position was dealt with by a further concession, which regularised the position if the distribution to the shareholders was £4,000 or less. In practice, HMRC have ignored the issue, but it is widely rumoured that proposed new legislation will make distributions exceeding £4,000 subject to IT, which will bring many such distributions into the IT net.

In many cases, a straightforward solution will be found in the 'purchase of own shares' legislation.

We can advise on all company law matters.

Agent's Acceptance Binds Landlord

A tenant that served a break notice on its lease to the wrong person had a lucky escape recently when the court ruled that the notice was valid because the landlord's agent had accepted it and this had the effect of waiving the defects in serving it.

The tenant wished to terminate its lease. During the period of tenancy, the landlord had changed and the tenant mistakenly served the notice on its former landlord. The former landlord advised the tenant of its mistake and the tenant then emailed the notice to the new landlord, which forwarded it to the managing agent.

The managing agent responded to the tenant, indicating that the termination of the lease was acceptable and asking that the notice be readdressed to the current landlord.

The landlord claimed that the notice was invalid because it had been sent by email (the lease specified it had to be served by hand, by post or by special delivery) and it was addressed to the wrong person.

The tenant argued that the managing agent's acceptance of the notice bound the landlord.

The court agreed that sending the notice to the landlord was sufficient to inform it of the tenant's intention to break the lease, despite it being addressed to the wrong person, and that a reasonable person would accept that it was a notice to break the lease. Although it was not a valid notice under the lease, it was validated by the response from the managing agent.

Furthermore, the court agreed that the managing agent's acceptance of the notice received was sufficient for the tenant to rely on and acted to prevent the landlord from challenging the notice. A mere acknowledgement of receipt of the notice might not have had the same effect.

Notices should always be dealt with carefully. However, where errors occur, the courts will generally try to make sure that consideration is given to what is reasonable in the circumstances.

Shareholder Cannot Unreasonably Withhold Consent

A shareholder must act reasonably. This was the conclusion of the court when faced with a situation in which a shareholder sought to force a company to give him documents by refusing to give permission for a share valuation to be done by the company's accountant if it did not. The share valuation was required in the circumstances by the company's articles of association. Such provisions are common in company articles to decide the value of shares when shareholders leave the company and are required to offer their shares to the existing shareholders.

A prior ruling of the court concluded that, in such circumstances, there is a tripartite agreement between the company, the shareholders and the company's accountant. By refusing to agree to the valuation, the shareholder sought to create a stalemate if the information he sought was not provided.

The company therefore went to court to obtain a ruling that the articles should have implied into them a term that the

agreement of the shareholders to the share valuation would not be unreasonably withheld. The court agreed.

If you are having problems with shareholders in your company, or require advice on the reorganisation of shareholdings, contact us.

Tenancy Deposit Schemes – Not All Joy for Landlords

Landlords may well be feeling relieved that the courts have indicated that they will decline to impose a sanction against a landlord who fails to comply with the requirement to protect a tenant's deposit under an Assured Shorthold Tenancy (AST) by lodging it in an approved scheme, provided that the requirement has been complied with by the date of the court hearing.

However, landlords of properties let under ASTs should remember that until the tenant's deposit has been protected, they may be precluded from taking action for repossession of the premises.

Can You Rely on a Specialist?

It is common in construction projects for different functions in the construction and management of the project to be carried out by different organisations.

Whilst the division of labour among specialists clearly creates cost efficiencies, it can also create issues over who is responsible to whom and for what when things go wrong.

In a recent case, the construction of a Co-Op supermarket in Kent led to problems when the concrete slab on which it was built settled and began to slope. Remedial work was necessary.

The usual web of contractors, subcontractors and specialist advisers had been involved in the project. The main contractor sought damages from the specialist consultant civil and structural engineers that it had retained for the project, claiming that they had failed to use 'reasonable skill, care and diligence'. The civil and structural engineers had relied on a report prepared for them by a firm specialising in ground stabilisation and the ground stabilisation works had been placed with a subcontractor by the main contractor.

Predictably, several actions ensued, most of which were settled out of court.

In court, it was decided that the claim against the civil and structural engineers must fail, because they were entitled to rely on the advice of the specialist contractor and did not need to undertake an independent feasibility study.

The court did set out a variety of factors which must be taken into account in determining whether reliance on an expert was reasonable. Ultimately, this will depend on the individual facts in each case.

For advice on any construction dispute, contact us.

Burden of Proof for Disqualification of Directors

A High Court decision has confirmed that for the purpose of obtaining an order disqualifying a person from acting as a director on the grounds that they are not a fit person to do so, the burden of proof required is the civil burden (balance of probabilities), not the criminal one (beyond a reasonable doubt).

The Secretary of State has the power, under the Directors Disqualification Act 1986, to ban a person from acting as a director of a company for up to 15 years and this power is frequently used when the conduct of a director is sufficiently unsatisfactory. Disqualification proceedings are frequently brought in the wake of company insolvencies.

If you are concerned about the behaviour of fellow directors or that your company may be trading while insolvent, contact us for advice.

Loss Must be Proven to be Actionable

Losing an experienced team of employees can be a severe blow to a business and it is not uncommon for firms to 'poach' such teams.

To minimise the risk of such a loss, there are steps that a firm can take, although the extent to which protection is available is limited. This is because the law, in general, wishes to promote the free movement of labour and to prevent unnecessary restrictions on a person's ability to earn a living. Accordingly, 'non-competition' clauses are notoriously hard to enforce.

A recent case illustrates the difficulties firms may face. It involved an insurance broker, one of whose teams left to work for a competitor. The three employees involved were summarily dismissed on the grounds that they had breached their contracts of employment by attempting to induce clients to leave their employer and also by attempting to entice other employees away.

Their former employer sued them for damages, alleging breach of their fiduciary duty and breach of contract.

When the matter came to court, however, the former employer was unable to demonstrate that it had suffered a loss. The breach of contract claims against two of the employees were upheld, which made their dismissals justifiable. However, an entitlement to compensation for damages had not been proven.

A claim against the firm which hired the three was also dismissed: again, no damage to the business of the former employer had been demonstrated.

Costs were awarded against the former employer.

Court Implies Only 'Reasonable Skill'

A developer who relied on the advice of a firm of quantity surveyors (QS) without fully formalising their terms of engagement in the form of a contract found recently that the court was unwilling to imply into the terms of engagement a duty by the QS to value only work which had been properly executed by the contractor.

The developer retained the QS to value work done by a building contractor and reported by the architect. The architect was instructed to inform the QS of any defects in the work done which would affect the valuation. The defects which formed the basis of the dispute were not reported. Despite this, the developer sued the QS as well as the contractor and the architect.

The court found that the responsibilities of the QS could not be regarded as so stringent as to imply that they were responsible for a valuation taking account of all defects, not just those reported to them, in the absence of a specific legal agreement to that effect. The firm was required to act with reasonable skill and care as would any QS of ordinary competence and experience when preparing the valuations of work done based on the works properly executed. In this, their reliance on the architect to inform them of work which affected the valuation was appropriate. They had no positive obligation to inspect the works which they were valuing.

We can help you to ensure that any contractual agreements you make reduce your legal risk as far as possible.

Graphical User Interface Copyright Decision

Graphical User Interfaces (GUIs) are the pictorial means by which computer users can interact with their machines and, as such, they are often designed with great care and at great expense.

It is no surprise, therefore, that the creators of GUIs wish to protect their designs and a recent decision of the European Court of Justice has confirmed that protection for GUIs is available under the laws of copyright.

However, the operation of the GUI (i.e. the computer code underpinning the GUI) is not capable of being protected as a computer program.

SIMON BURN
SOLICITORS

123 PROMENADE, CHELTENHAM, GLOUCESTER, GL50 1NW
TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888 DX 7404 CHELTENHAM

43 TEMPLE ROW, BIRMINGHAM, B2 5LS
TELEPHONE: +44 (0)121 371 0301 FAX +44 (0)121 371 0302

E-MAIL: SIMON.BURN@SIMONBURN.COM

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