SIMON BURN SOLICITORS

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Commercial Law UPDATE

Directors – You Need Protection

Directors of companies which become insolvent can find themselves in the firing line if they are found to have been complicit in the company engaging in 'wrongful trading' – continuing to trade and to incur debts when there is no realistic prospect of the company avoiding insolvent liquidation. In such circumstances, directors may be required to contribute personally towards the losses of the creditors.

A director's duty in such circumstances is to act in the best interests of the creditors of the company. Some directors are unaware that when an insolvent company is liquidated, the liquidator is required to prepare a report on the conduct of the directors, which can be used as the basis for a decision to ban a director from holding directorships or to require a director to make a contribution to the company's creditors.

It is therefore very important for company directors to ensure they keep abreast of the company's current financial position and to take advice when doubts arise: the defence against a charge of wrongful trading is that the director took every reasonable step to minimise losses to the creditors of the company.

If you are unable to persuade your fellow directors to take your advice, you should be doubly careful: for example paying some creditors and not others can create a liability. Pleading ignorance is not a defence: directors are expected to keep themselves up to date with the company's financial position.

The Institute of Directors has published a useful guide for directors, which can be downloaded from the Internet at http://www.iod.com/intershop root/eCS/Store/en/pdfs/duties responsibilities.pdf.

If you are concerned about your responsibilities as a director, we will be pleased to advise you.

Additional Payment Caught for CGT

When a company is being taken over, there are many ways to structure the transaction. A recent case shows how important it can be to make sure that such transactions are correctly structured for tax purposes.

It involved a company director, who sold his shares for cash to the buyer of the company. In addition to the money for the shares, the purchase agreement provided that the company would make a further payment as directed by him. The further payment was made to a third party, who paid it into a pension scheme for the director.

Although the facts were complex, the issue revolved around whether or not the payment into the pension scheme was part of the consideration for his shares for Capital Gains Tax (CGT) purposes. HM Revenue and Customs (HMRC) argued that it was, whilst the director argued that it was not. In court, HMRC's argument prevailed.

Had the payment into the pension scheme been made before the agreement was made for the sale of the shares, it would not have constituted consideration for the shares for CGT purposes. Company share sale agreements are often complex and there are many potential pitfalls. We can advise on all aspects of company purchases and sales.

Buying from an Administrator – Pitfalls

With businesses becoming insolvent in large numbers, opportunities abound to acquire assets from their administrators. However, the low prices sought for the assets are due, at least in part, to the additional risk to the purchaser.

Here are some of the main issues to be aware of when buying property from an administrator:

- Vacant possession of a property will not normally be guaranteed and the cost of clearance of items left in the building should be borne in mind;
- No guarantees or warranties regarding the property will be given – undertaking proper due diligence to reduce risks is advisable;
- There may be items that appear to be a part of the property being sold which do not in fact belong to the insolvent business; and
- The administrator acts only as agent for the insolvent company and will accept no liability for errors or omissions.

Buying a property from an administrator is a risky business. We can help you to control the legal risks.

Right to Light – Right Preserved

The right to light has been a continual source of disputes over the years and the Court of Appeal has recently heard another case dealing with this contentious subject.

It concerned a company that owned a piece of land and which made an agreement with a developer that allowed the developer to compromise its right to light. In the agreement, made in 1999, the company undertook to take no action to enforce its right to light.

Years later, a redevelopment project was planned for the land, which was the result of a compulsory purchase order. It was a much more substantial development than that envisaged in 1999 and the question arose as to whether the original agreement prevented the claimant from asserting its right to light, which would be materially affected by the new development.

Key to the decision was the wording of the original agreement in 1999. In it, the right to light was acknowledged, but the claimant had undertaken not to take action to enforce the right. However, under the proposed development at that time, there would not have been a material effect on the light. The Court ruled that the earlier agreement did not mean that the claimant had abandoned its right to light.

We can advise you on any commercial property or landlord and tenant matter.

New Minimum Wage Rates Announced

The Government has announced new National Minimum Wage (NMW) rates that will apply from 1 October 2009.

For workers aged 22 and over, the rate will increase from £5.73 to £5.80 an hour. The rate for 18- to 21-year-olds will rise from £4.77 to £4.83 and for 16- and 17-year-olds the rate will increase from £3.53 an hour to £3.57.

The accommodation offset will rise from £4.46 per day to £4.51 from 1 October 2009.

In addition to the rate changes, the Government has accepted the recommendation of the Low Pay Commission (LPC) that the adult rate of the NMW should be extended to 21-year-olds. This will be implemented from October 2010.

The LPC has also recommended that information on employers who have shown a wilful disregard for NMW legislation should be publicly available. The Government has committed itself to developing proposals to achieve this, taking into account the practical issues involved.

The Government will also consider the LPC’s proposal that a minimum wage be introduced for apprentices and will respond in full to this when it sets the LPC’s remit for 2010.

The former Department for Business, Enterprise and Regulatory Reform (now the Department for Business, Innovation and Skills) has already announced that the NMW Regulations are to be changed so that tips and service charges can no longer be used to make up staff salaries to the minimum legal level. This change will take effect in October 2009.

Redundancy Dismissal and Age Discrimination

A recent case (*Killa v Electronic Motions Systems Ltd*.) illustrates the danger when making redundancy dismissals of failing to use objective criteria or a proper selection process to determine which employees are to go, and of not offering employees suitable alternative work where this is available.

59-year-old Mr Killa was employed by Electronic Motions Systems Ltd. as an electronic engineer. He was selected for redundancy without a proper selection process based on objective criteria being applied. At the end of the first redundancy consultation meeting, he was dismissed with immediate effect and asked to leave the company's premises. He was not allowed to return to work. Although suitable alternative work was available, this was not offered to Mr Killa.

Mr Killa brought a claim of unfair dismissal and age discrimination.

The Employment Tribunal (ET) found that his dismissal was unfair, both procedurally and substantively, and, as his employer could not explain the reasons for its actions, his selection for redundancy dismissal amounted to age discrimination.

The ET found that Mr Killa had done all he could to mitigate his loss by trying to find a new job, including training as an electrician to make it easier to find work.

The ET observed that 'it is not, unfortunately, the case that someone aged 59, 60 or over competes on a level playing field with younger people. The reality is that age discrimination exists and is likely to be highly influential in limiting his opportunities'. Mr Killa was awarded compensation of £90,361, including loss of earnings, loss of benefits and damages for injury to feelings on account of the manner in which he was dismissed.

When selecting workers for redundancy, objective criteria must be used and it is advisable to agree the basis for selection with employee representatives. Written records of the process should be kept. Selecting older workers in the absence of any objective justification for so doing is a risky strategy.

No Immediate Review of the Default Retirement Age

Opponents of the mandatory retirement age of 65, contained in the Employment Equality (Age) Regulations 2006, are disappointed that the new Equality Bill does not contain measures to abolish it. However, the Government has confirmed that it will undertake an evidence based review of the default retirement age in 2011. This will allow time to see how the Regulations are working and help businesses plan in the knowledge that there will not be an imminent change. If the review concludes that a default retirement age is no longer necessary, the Government will take action to remove it.

Register It or Lose It

There can be few, if any, musical instruments as instantly identifiable as the Fender Stratocaster® and Telecaster®. Although the names have been registered trade marks owned by the Fender Corporation for many years, the company had not attempted to register the distinctive body shapes of the instruments until recently. The shapes of the headstocks of both guitars and their logos have long been registered as trade marks.

Regrettably for Fender, the existence of widespread copying of the shapes for more than half a century (both guitars were introduced in the 1950s) has led to millions of 'fake Fenders' being sold throughout the world.

The US Federal Trademark Trial and Appeal Board rejected Fender's application after it was opposed by 17 other guitar manufacturers.

If you have distinctive designs, failure to protect them may lead to significant losses.

Bad Advice – Delay Can Mean Loss

With the economy as it is now, all sorts of problems which were not obvious in better times are starting to become evident and in some cases the quality of advice received years earlier is becoming subject to question.

If you are concerned about advice you have been given, make sure you act promptly: the time limits for bringing an action are strict.

A recent case in the commercial court illustrates the point. It dealt with the question of whether or not a claim for negligence was 'out of time'. The normal time limit for bringing a claim is six years after the loss is suffered. The claimant argued that it had suffered the loss several years after receiving the allegedly negligent advice and that the time limit for making a claim ran from when the loss was crystallised. The defendant firm argued that the time limit must run from the time that the potential for loss was first discovered.

The defendant won – thereby avoiding a £20 million payout in compensation.

The moral of the story is that if you have relied on advice given which was negligent, you should consider bringing a claim as soon as you can see that a loss may occur: leaving it until the loss becomes actual, as opposed to latent, may cost you your right to claim.

Future Discounts Are Not Present Reductions in Sales

HM Revenue and Customs have won a case in the High Court, against high street retailer Boots, which will have implications for schemes that offer future discounts on purchases to customers. It involved the VAT status of 'voupons', which had been given to customers and which entitled them to a £5 discount on a future purchase.

Boots contended that this entitled them to reduce the amount on which they accounted for VAT on the original sale by the value of the voupon. In the view of the High Court, however, no reasonable VAT Tribunal could have come to that conclusion: the voupon could affect the VAT payable only when redeemed against a purchase.

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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