Directors Who Misled Creditor Personally Liable

When a marquee company failed to pay for goods that it had received, the directors told the supplier that the company was waiting for an insurance claim to be settled, after which payments would be made as usual.

In reality, there was no insurance claim pending. A director of the marquee company later claimed that it was being sold. The supplier was told that when the sale went through, the creditors would be paid.

When the supplier remained unpaid, it not only claimed against the marquee company but also sought damages from the two directors.

The supplier argued that both of the representations made to it were false and that it had relied on them to its detriment, because it had, as a result, not issued proceedings earlier. In particular, it had not exercised its rights under a retention of title clause.

The judge ruled that the first representation was made falsely and the second was made recklessly because it was made without regard to whether the company could or could not pay its creditors. The supplier had suffered as a result because it had relied on the representations. The actions of the directors had dissuaded the supplier from repossessing its goods or suing for the outstanding sums due to it.

Accordingly, the directors had committed a deceit on the supplier and were personally liable to it for the sum it would have been able to recover under its retention of title clause.

The directors appealed, arguing (in effect) that the law prevents guarantees being actionable unless they are in writing. However, the Court of Appeal accepted that this rule did not apply because there was no question of further credit being offered. In this case, the misrepresentations related to the continuation of outstanding debts and dissuading the creditor from taking action to collect them.

If you are concerned about the ability of your business to avoid insolvency or are having problems persuading debtors to pay, we may be able to help protect your position. Contact us for advice promptly: delay is unlikely to improve matters.

Adjudicator's Decision Not Violation of Natural Justice

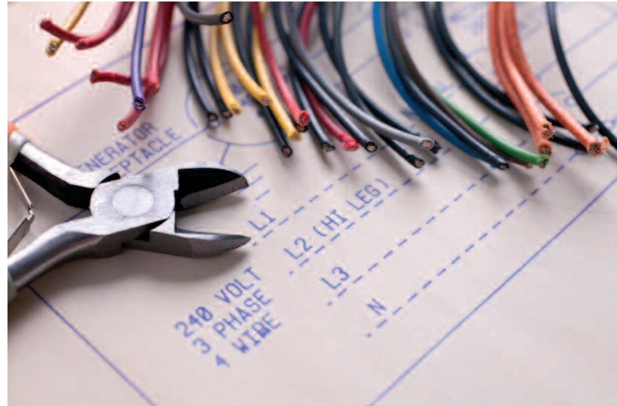
When an adjudicator in a construction dispute gives a ruling, the decision can only be appealed on a limited number of grounds. One of these is 'breach of natural justice', which means that the adjudicator's decision is so obviously flawed that natural justice would be offended if it were allowed to stand.

It is, unsurprisingly, difficult to win an appeal on these grounds and a recent case saw the court reject one such appeal. One of the interesting aspects of the ruling was that the court was careful to point out that the failure by the adjudicator to consider and address a substantive defence would be a breach of natural justice, whereas failure to consider and address an aspect of the defence would not.

If you are involved in a building or construction dispute, we can assist you in finding a cost-effective resolution.

Tenant Must Prove Improvement Claim

When a tenant wishes to undertake works to the property they rent, the consent of the landlord is normally required. A lease will normally contain a clause outlining how a tenant's improvements are to be treated for the purposes of setting the rent at the rent review. The inclusion or otherwise of the tenant's improvements in assessing the rent is also capable of being negotiated on an 'as arising' basis when the landlord's permission is being sought for the improvements.



In a recent case, a landlord and tenant were in dispute over the rent payable following a rent review. The tenant had used the premises as a data centre and the arbitrator appointed under the lease assessed the market rent based on that use. The rent thus set by the arbitrator was in excess of that which would be payable were the premises used as general offices.

The tenant claimed that the use of the premises as a data centre had required it to undertake considerable electrical works. Since the lease contained a clause that a tenant's improvements were to be excluded when determining the new rent, this should be set at the rate applicable for general office premises. The tenant therefore appealed the arbitrator's decision to the High Court.

However, the tenant was unable to substantiate its claim that it had paid for the necessary improvements to the electrical system to allow the premises to be used as a data centre. As a result, its appeal was rejected.

The absence of proof that the improvements were carried out by the tenant was crucial in the decision. It is essential to retain evidence of anything you may later need to prove. Had a licence to alter the premises been agreed between the landlord and tenant at the appropriate time, the argument would not have arisen in the first place.

Contact us for advice on all property law issues.

Reforms to the Employment Law System

The Government has announced its proposals for reform of the employment law system following its consultation, 'Resolving Workplace Disputes'.

The aim is to replace overburdensome regulation whilst safeguarding workers' rights, with a focus on settling disputes without resort to an Employment Tribunal (ET).

The proposals include:

- requiring all employment disputes to go to the Advisory, Conciliation and Arbitration Service for pre-claim conciliation before going to an ET;
- increasing the qualification period for unfair dismissal from one to two years. This is scheduled to take effect from April 2012;
- publishing a consultation on 'protected conversations', which would allow employers to discuss issues like retirement or poor performance in an open manner with staff without anything said being used in any subsequent ET claims;
- appointing Mr Justice Underhill to lead an independent review of the existing rules of procedure governing ETs. This will seek to address concerns that they have become increasingly complex and inefficient over time and are no longer fit for purpose;
- a consultation on the introduction of fees for anyone wishing to bring an ET claim. The consultation can be found at www.justice.gov.uk/downloads/consultations/charging-fees-in-et-and-eat.pdf. Consultation ends on 6 March 2012;
- giving Employment Judges discretionary powers to impose financial penalties on employers found guilty of breaching employment law whose behaviour in so doing had aggravating features;
- a further consultation on measures to simplify compromise agreements,

which will be renamed 'settlement agreements'; and
- consideration as to how and whether to introduce a 'rapid resolution' scheme, to offer a quicker and cheaper alternative to determination at an ET. Any proposals would then be the subject of a consultation.

In addition, following the 'Red Tape Challenge' review of employment law, views are now being sought on changes to the consultation rules for collective redundancies and on ways to simplify the Transfer of Undertakings (Protection of Employment) Regulations 2006. For further information, see www.bis.gov.uk/Consultations.

First Conviction Under the Bribery Act

A former Magistrates' Court clerk has become the first person to be convicted under the Bribery Act 2010. Munir Yakub Patel pleaded guilty to bribery and misconduct in public office. He admitted taking a £500 bribe from a member of the public in order to prevent details of a speeding charge from appearing on the Court database and also pleaded guilty to misconduct in public office for similar offences. He was sentenced to six years' imprisonment for misconduct in public office, to be served concurrently with a three-year sentence for bribery.

There are six key principles that should inform your organisation's policy for preventing bribery. These are that:

- anti-bribery procedures are proportionate to the bribery risks faced by the business and to the nature, scale and complexity of its commercial activities. They should also be clear, practical, accessible, effectively implemented and enforced;
- the top-level management of the organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They must foster a culture within the organisation in which bribery is never acceptable;
- the commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The risk assessment should be periodic, informed and documented;
- the commercial organisation applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks;
- the commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces; and
- the commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

We can advise you on implementing comprehensive anti-bribery measures that are commensurate with the activities of your business.

Overall Impression Crucial in Design Right

Design rights are not the same as copyright, but are valuable intellectual property assets nonetheless. Consider the traditional Coca-Cola bottle, which instantly conveys the brand image to the consumer.

Accordingly, companies are highly protective of their design rights and a registered design is protected in the UK for a period of 25 years.

However, the protection of a design does not mean that a similar design is incapable of being used, which was one of the reasons the Court of Appeal recently ruled that vacuum cleaner manufacturer Dyson's design rights were not infringed by a similar-looking model made by Vax.

The nub of the issue, however, was whether the two designs of vacuum cleaner gave a different overall impression to the 'informed user'.

The Court found that the distinctiveness of the Dyson and Vax designs was clear enough and the fact that they share some common features would not be sufficient to create confusion in the mind of an informed user as to which is which. It is the overall impression that is crucial.

Contact us for advice on how best to protect your intellectual property.

Commerciality the Key in Contract Interpretation

When a dispute arises concerning the meaning of a contract term that is capable of being interpreted in more than one way, the resolution is normally to be found in the interpretation that is most consistent with common business practice and sense.

The unclear wording of a contract involving bonds bought to guarantee contract performance or prevent losses arising from non-performance meant that a dispute wended its way to the Supreme Court, which took the view that the purpose of the arrangement for the purchaser of the bond must have included the circumstances which gave rise to the claim against the seller of the bond. There would be little commercial point in the transaction if it did not.

Accordingly, the application of common sense overrode the technical deficiencies in the wording.

Contact us for advice on any aspect of contract law.

OFT Rejects Predatory Pricing Claim

When a company engages in below-cost pricing or other 'predatory' practices, the Office of Fair Trading (OFT) is often called upon to investigate. Where anti-competitive practice is confirmed, the fines can be substantial, especially when the supplier is in a dominant position in the market.

However, a recent investigation shows how difficult it can be to prove the existence of predatory practices.

It concerned a company engaged in the supply of diagnostic testing services for veterinary practices. The following practices engaged in by the company were the subject of a complaint to the OFT:

- The supply of equipment to vets at a discount if they agreed to use its services;
- The supply of free or heavily discounted equipment to vets who spent a minimum amount each month on materials needed to use the equipment; and
- The supply of discounted testing services on a bundle of tests which included tests supplied by the company.

After a year's investigation, the OFT concluded that the company's conduct was such that it was unlikely to impair effective competition in the market and that there were therefore no grounds on which it should take action.

The OFT's decision is carefully presented and substantial, and serves as a useful guide to the approach it will take if these sorts of practices are adopted to win or maintain market share.

Contact us for advice on any competition law matter.

Online Payment of VAT – A Reminder

HM Revenue and Customs (HMRC) have issued a reminder that from 1 April 2012 all VAT-registered businesses must file their VAT returns online and pay their VAT electronically. At present, only newly-registered businesses and those with a turnover of more than £100,000 per annum have to file and pay their VAT online.

The new rules will cover VAT returns filed for accounting periods beginning on or after 1 April 2012.

HMRC are advising businesses that do not already do so to start completing their VAT returns online now, so as to avoid any last-minute problems.

Once you start filing your VAT return online, you will receive an email alert to remind you when the next one is due. From 1 April, paper returns will no longer be sent.

For more information, see www.hmrc.gov.uk/vat/.

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