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General

**Bidding at an Auction? Do You Understand Your Legal Obligations?**

There are few things more thrilling than bidding at an auction, but raising your paddle has very real legal consequences. A case on point concerned a businessman who mistakenly believed that he was acting solely on behalf of a company when he bought two foals at a bloodstock auction for over £320,000.

The businessman was a director of a newly incorporated bloodstock company that he hoped would make a healthy return for investors under an Enterprise Investment Scheme (EIS). He successfully bid for the colts at auction before the company had obtained its EIS advance assurance approval. In the event, that approval was never forthcoming and the company attracted no investors.

After the company failed to pay for the colts, the auction house took back possession of them and incurred a loss when it re-sold them at a substantially lower price than the businessman had agreed to pay. The auction house launched proceedings against him to recover that loss.

Upholding the claim, the High Court expressed some sympathy for the businessman, who believed that he was bidding solely as the company's agent. That, however, did not afford him any defence to the claim. His purchase of the colts was subject to the auction house's conditions of sale, which had the effect of rendering him and the company jointly and severally liable to pay for them.

**Partner Note**

Tattersalls Ltd v McMahon [2021] EWHC 1629 (QB)

Property

**Royal Park Boathouse Can't Be Removed by Departing Contractor**

Those who are awarded public contracts very often make substantial investments in property and equipment so that they can perform their obligations – but who owns the product of such investments? The High Court considered that issue in a case concerning a lakeside boathouse situated in a royal park.

A company was awarded a contract to operate a public boating service in the park, which was owned by the Crown. It invested a six-figure sum in erecting a new boathouse. After its contract was not renewed at the end of the contractual term, it announced its intention to remove the boathouse.

The company asserted that it retained ownership of the boathouse, which remained a chattel rather than a fixture. It said that the facility had been designed so that it could be assembled in parts and subsequently dismantled. It argued that it had invested in the facility on the basis that it could be removed in the event that its contract came to an end, by the passage of time or otherwise.

The charity that managed the park and the Secretary of State for Digital, Culture, Media and Sport launched proceedings with a view to retaining the boathouse in situ. They sought declarations to the effect that it was constructed to form part of the park and that it was Crown property.

Ruling in the claimants' favour, the Court found that the boathouse consisted of both its superstructure and the underlying concrete slab to which it was fixed. Partially cut into a slope, it was anchored to the land and was designed to be permanent and immobile. Removal of the superstructure would result in substantial destruction of its components, thus inhibiting the company's ability to erect it elsewhere.

The purpose for which the boathouse was built was the permanent improvement and enhancement of the land. It was inextricably linked to the boating concession, a service that could only be operated from the lakeside. There was no concerted intention on the company's part to design the boathouse as a temporary structure that could easily be dismantled and removed.

The contractual documents, whilst not expressly stating who would own the boathouse following its construction, supported the claimants' case that the company had no proprietary or contractual right to remove any part of the structure. Having been annexed to the land, the building belonged to the Crown.

The Court rejected the company's plea that it was expressly or impliedly encouraged to believe that, after making a considerable investment in the boathouse, it would retain ownership of the building. Given that the company was contractually bound to fund the facility's construction, any such belief would not, in the absence of an explicit assurance, have been reasonable. There was nothing unconscionable in the claimants seeking to assert their rights of ownership and occupation.

Our specialist lawyers can advise you on all matters involving commercial property – including land ownership and occupation. Contact us for guidance.

**Partner Note**

The Royal Parks Ltd and Another v Bluebird Boats Ltd [2021] EWHC 2278 (TCC)

Tax

**Hotel Management Company Director Pays Personal Price for VAT Default**

If your company is trading in default of its tax obligations, the corporate veil may very well afford you no protection against the financial consequences. The sole director and shareholder of a hotel management company that failed to register for VAT found that out to his personal cost.

Following an unannounced visit to the hotel, HM Revenue and Customs (HMRC) officers conducted an investigation and concluded that the company had failed to pay over £200,000 in VAT over a period of about 13 months. On the basis that the company's default was deliberate, its director was issued with a personal penalty totalling over £130,000.

Challenging the latter bill before the First-tier Tribunal (FTT), the director said that he had told the hotel's manager to register the company for VAT and was unaware during most of the period that that had not been done. The FTT, however, noted that he was in complete control of the company and that it was his responsibility to ensure that the crucial step had been taken.

It was not disputed that the company's turnover was such that it should have been registered for VAT throughout the relevant period and the penalty had been properly calculated on the basis that its default, although not concealed, was deliberate. The director had failed to discharge the burden of proving that HMRC had overestimated the hotel's takings during the period. His appeal was dismissed.

If you are embroiled in a legal dispute with the tax authorities, our specialist lawyers can advise you.

**Partner Note**

O'Doherty v The Commissioners for Her Majesty's Revenue and Customs [2021] UKFTT 244 (TC)

Commercial Litigation

**Non-Compete Agreements and Restraint of Trade – Supreme Court Ruling**

Commercial negotiations routinely take place under the aegis of non-disclosure and non-compete agreements so that all involved can speak and act openly without fear of future disadvantage. In an important ruling, the Supreme Court helped to dispel long-standing concerns that, for all their benefits, such agreements may be in unlawful restraint of trade and thus unenforceable.

The case concerned a group action, involving more than 50,000 claimants, against a motor manufacturer whose vehicles were alleged to have been fitted with devices that manipulated emissions tests. A law firm (LF1) issued a claim form against the manufacturer and intended to apply for a group litigation order (GLO).

LF1 approached another law firm (LF2) that had greater experience in undertaking group actions, with a view to them collaborating in the litigation. At LF1's behest, LF2 signed up to a non-disclosure agreement that included a non-compete clause. LF2 agreed that, for a period of six years, it would not accept instructions from or act on behalf of any other group of claimants in the proposed group action.

Although no formal agreement was ever reached between them, the firms embarked on a process of informal collaboration. During that process, LF2 recruited claimants for its own group action and proceeded to issue its own claim form and its own application for a GLO. LF2 ultimately agreed with another law firm to work together on the litigation. LF1 responded by launching proceedings, alleging that LF2 had breached the non-compete clause.

The High Court found that the non-compete clause was enforceable and granted LF1 an injunction requiring LF2 to cease involvement in the group action for six years. That decision was, however, subsequently reversed by the Court of Appeal.

In unanimously upholding LF1's challenge to that outcome, the Supreme Court found that the protection afforded to it by the non-compete clause extended to the period of informal collaboration. It was agreed that the non-compete clause was in restraint of trade, but the extent of that restraint was reasonable as between the law firms and was not contrary to the public interest in the promotion of free commerce.

The non-compete clause was reasonably necessary to protect LF1's legitimate interest in protecting its own proposed group claim against LF2 setting up a rival group claim. It was logical and necessary that the restriction should last for six years as that period roughly equated to the limitation period that applied to the group litigation.

Says <<CONTACT DETAILS>>, "Expert legal advice is essential in all litigation. Preparing the best possible evidential support is vital, as is compliance with the rules of litigation practice."

**Partner Note**

Harcus Sinclair LLP and Another v Your Lawyers Ltd [2021] UKSC 32

Company

**High Court Enables High-Interest Lenders' Painful Exit from the Market**

Short-term lending to consumers at high rates of interest was once all the rage, but it has since become the target of a deluge of customer complaints. In paving the way for two hard-pressed lenders to exit the controversial market, the High Court addressed the grave financial consequences of the debacle.

The lenders had received tens of thousands of claims for redress from dissatisfied borrowers. They had so far paid out more than £80 million to settle claims, funded by their parent company. The lenders estimated that their eventual liabilities could well exceed £1 billion and, on the worst possible scenario, they could reach £3 billion. They said that they were not in a financial position to pay such sums.

In those circumstances, the Court was asked to approve a scheme of arrangement whereby the lenders' liabilities to borrowers and in respect of Financial Ombudsman Service fees would be assumed by a new company that would be established as a special purpose vehicle (SPV). The parent company had agreed to plough £50 million into the SPV to form a pool to meet such liabilities and would also pay the estimated £20 million cost of running the scheme.

Ruling on the matter, the Court noted that, under the scheme, borrowers who did not lodge their claims within six months would have their claims barred. It was estimated that they would recover no more than 6 per cent of their claims. Given that claims typically fell within the band of £500 to £1,000, the sums recovered by individuals were therefore likely to be small.

On the other hand, it was argued that the scheme would benefit borrowers in that the lenders would otherwise be forced into insolvency. The Court accepted that, if that happened, borrowers would receive nothing. From their point of view, the limited fruits of the scheme were said to be better than nothing. After the scheme became operational, the lenders would quit the market and be wound down.

The Court noted that the Financial Conduct Authority did not support the scheme and had expressed a number of what it viewed as serious concerns regarding its terms. In the event, however, it had decided not to appear in court to oppose the scheme as a matter of company law.

Approving the scheme, the Court accepted that it represented a fair and rational outcome. There was nothing to gainsay evidence that, due to its own financial position and the need to maintain solvency ratios, the parent company could not sensibly pay more than £50 million into the SPV. Any funds remaining following the winding down of the lenders would also be remitted to the SPV.

Our lawyers have expertise spanning every area of company law. Contact us for specialist advice.

**Partner Note**

In the Matter of Provident SPV Ltd [2021] EWHC 2217 (Ch)

Contract

**Suspension on Award of Fire Brigade Safety Equipment Contract Maintained**

If you feel that you have been treated unfairly in a public contract tendering exercise, you are anything but powerless and should take legal advice straight away. A High Court case on point concerned the award of a contract for the supply of protective breathing equipment to a municipal fire brigade.

Recent years have brought significant improvements in safety apparatus used by firefighters and, against the background of the Grenfell Tower disaster, the brigade was anxious to update its officers' equipment. A company that had provided respiratory apparatus to the brigade for 10 years was one of those who tendered for a fresh 10-year contract. The contract was, however, awarded to a trade rival after it scored higher than the company, both in terms of quality and price.

The company launched proceedings against the brigade under the Public Contracts Regulations 2015, arguing that the tendering process was seriously flawed. It asserted, amongst other things, that the rival's tender was abnormally low and that there were manifest errors in scoring bids. The allegations were disputed by the brigade but, by operation of Regulation 95(1) of the Regulations, award of the contract was automatically suspended pending resolution of the dispute.

In rejecting the brigade's application to lift the suspension, the Court found that the company had raised serious issues to be tried. If the suspension were lifted in error, the company would not be adequately compensated by an award of damages. The same could, however, also be said of the brigade if the suspension were maintained in error, thus delaying the award of an important contract.

The Court acknowledged that the public interest in the timely introduction of new protective equipment was a very strong factor in favour of lifting the suspension. However, the Court was in a position to accommodate an expedited trial of the dispute within a matter of weeks. Such a brief delay would not have any major impact on the progress of the equipment improvements. The balance thus came down in favour of maintaining the suspension until the outcome of the trial.

For advice on any contractual matter, please contact <<CONTACT DETAILS>>.

**Partner Note**

Draeger Safety UK Ltd v The London Fire Commissioner [2021] EWHC 2221 (TCC)

Intellectual Property

**Indirect Consumer Confusion – Bourbon Supplier Wins Trade Mark Battle**

The average consumer is not a fool, but trade mark law is all about mistakes and unwitting assumptions they might be expected to make. The Court of Appeal made that point in a case concerning competing brands of bourbon.

A supplier of luxury bourbon held UK and EU trade marks to protect its exclusive use of its brand name, which prominently featured the word 'eagle'. It launched infringement proceedings against a trade rival that marketed its bourbon under a name that included the same word.

Following a trial, a judge found that there was a significant, but not overwhelming, similarity between the branding of the two products. Given that average consumers of top-quality bourbon could be taken to be more discerning than most, there was little likelihood that a significant proportion of them would be directly confused into thinking that the products were one and the same.

Upholding the supplier's claim, however, the judge found that the similarities in packaging created a risk of indirect confusion amongst bourbon buyers. There was a danger that some consumers might mistakenly believe that both products came from the same source or that their producers were economically linked.

In rejecting the rival's challenge to that outcome, the Court noted that trade mark law is all about discerning the probability or otherwise of consumers making mistaken assumptions. The judge correctly proceeded on the basis that average bourbon buyers would not necessarily stop to check labels to see whether or not the competing products were linked to a single supplier.

The judge did not descend into speculation in detecting a risk that consumers might assume that the brands were economically related and that the supplier's bourbon was a special version of the rival's product. The rival's argument that the supplier's bourbon was too niche a product to give rise to a likelihood of consumer confusion also fell on fallow ground.

For expert advice regarding trade mark infringement or any other matters relating to intellectual property, contact <<CONTACT DETAILS>>.

**Partner Note**

Liverpool Gin Distillery Ltd and Others v Sazerac Brands LLC and Others [2021] EWCA Civ 1207

Employment

**Tribunal Condemns 'Inept and Misjudged' Workplace Bullying Investigation**

Employers who fail to conduct workplace disciplinary proceedings fairly risk serious financial and reputational consequences. In one case, an Employment Tribunal (ET) roundly condemned a company's handling of a bullying investigation as a catalogue of ineptitude and misjudgment.

The case concerned a business development manager who was accused of bullying a subordinate. Whilst accepting that she could sometimes be abrupt, she denied that she was a bully or that she had any intention to cause distress. She was dismissed following a lengthy investigatory and disciplinary process.

After she launched proceedings, the ET ruled that her summary dismissal, without notice, was wrongful. The evidence was entirely consistent with her inadvertently having caused stress to the subordinate. Given the lack of any proof of malign intent on her part, her conduct did not meet the employer's policy definition of bullying and thus did not amount to gross misconduct.

The ET made numerous criticisms of the conduct of the investigatory and disciplinary process. In rejecting her unfair dismissal claim, however, it found that the decision-maker genuinely believed that she had behaved inappropriately. The ET was just persuaded that it fell within the band of reasonable responses for the company to consider that the process was, in the circumstances, adequate.

Upholding her challenge to that ruling, the Employment Appeal Tribunal (EAT) found that it was one of those rare cases where an ET had reached a perverse conclusion. Given the catalogue of failings identified, there was no basis on which a reasonable ET could find that the process fell within a reasonable band. Subject to any submissions to the contrary, the EAT ruled that the unfair dismissal claim should be remitted to the same ET for reconsideration.

Our specialist team can advise you on any matter relating to unfair dismissal claims. Contact <<CONTACT DETAILS>>.

**Partner Note**

Brown v Veolia ES (UK) Ltd

Health and Safety

**Spa Hotel Appeals Against Legionella Bans**

It is hard to imagine circumstances that might outweigh the imperative of maintaining public health and safety. The point was made by the case of a spa hotel which had its pools and hot tubs placed off limits after a former guest was admitted to hospital suffering from Legionnaires' disease.

After the man was taken ill, the hotel's manager agreed voluntarily to prohibit use of its showers, indoor hot tub and indoor swimming pool until water sample results were received. Public Health England subsequently informed a local environmental health officer (EHO) that samples taken from the pool had tested positive for legionella and that it had been confirmed that the indoor hot tub was the source of the former guest's infection.

The company that owned the hotel was served with three prohibition notices that forbade use, respectively, of the indoor hot tub, the pool and an outdoor hot tub. The company appealed to an Employment Tribunal (ET) against the latter two orders. The manager asserted, amongst other things, that all appropriate safety precautions had been taken and that the hotel was the subject of a malign campaign due to its zero-tolerance policy in relation to non-paying guests.

Dismissing the appeal, however, the ET noted that Legionnaires' disease can be fatal. The EHO had taken the view that the initial voluntary prohibition had not succeeded in preventing use of the pool. That was vehemently denied by the manager but, on the evidence, the EHO's conclusion that use of the pool would present a serious risk of personal injury was incontrovertible.

The ET acknowledged that there was no direct evidence that the outdoor hot tub posed a risk to human health. However, it was the type of facility that can give rise to legionella infection. In the light of the loss of trust between the EHO and the manager, the former was entitled to conclude that a prohibition order in respect of the outdoor hot tub was justified.

**Partner Note**

Melville Hall Hotel Ltd v Isle of Wight Council (Environmental Health Service). Case Number: 1400878/2020

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