Commercial Client ~ November 2021

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**General**

Restaurateur Who Suppressed Takings Reaps a Bitter Harvest

**Property**

Private Property Rights v Telecommunications Infrastructure Needs

**Tax**

International Hauliers – Ignorance of a Contraband Load May Be No Defence

**Company**

Company Accounts Cannot Be Retrospectively Adjusted for Convenience

**Contract**

Penal Clause 'Cunningly Concealed' in Telecommunications Contract

**Data Protection**

Misdirected Emails – Law Firm Sees Off Data Protection/Confidentiality Claim

**Insolvency**

Carillion Group Insolvency Triggers Guideline Worker Consultation Ruling

**IT, Internet and Media**

Film Studios Faced by Piracy Scourge Granted Internet Blocking Orders

**Em****ployment**

Employer Pays for Bypassing Trade Union – Supreme Court Ruling

General

**Restaurateur Who Suppressed Takings Reaps a Bitter Harvest**

Business owners who suppress their sales figures and underpay tax may live high on the hog for a while, but their wrongdoing is always likely to catch up with them in the long run. In a case on point, a restaurateur lost his livelihood and ended up personally liable for more than £180,000 in tax.

The man was the sole director of a company that owned the restaurant. Following an investigation, HM Revenue and Customs (HMRC) identified what it contended were deliberate and concealed inaccuracies in the company's VAT returns. The company went into liquidation after HMRC raised back-tax and penalty demands totalling over £445,000. The man was later disqualified from acting as a company director for nine years. He did not dispute Insolvency Service findings that he had caused the company to suppress and conceal sales figures.

Matters did not end there, however, as HMRC had also issued him with a personal liability notice (PLN) in the amount of £183,540. He challenged the PLN before the First-tier Tribunal (FTT). HMRC argued, however, that he should not be permitted to proceed with an appeal that had been lodged 19 months after the expiry of a statutory time limit.

The man contended that his brother had day-to-day responsibility for the restaurant business and that his role was largely confined to that of a waiter. Due to long-term mental health difficulties, he simply could not cope as the company's tax affairs spiralled towards disaster. If he were not permitted to appeal, he feared that he would be made bankrupt and would lose his family home.

The FTT expressed sympathy with the man's health issues. However, in refusing permission for him to mount a late appeal, it found that he was not incapable of managing his affairs throughout the long period of delay. He was not prevented by his mental health issues from seeking professional advice. Refusing permission to appeal would achieve finality and, given a number of weaknesses in his case, it would not cause him a demonstrable injustice.

**Partner Note**

Ali v The Commissioners for Her Majesty's Revenue and Customs [2021] UKFTT 358 (TC)

Property

**Private Property Rights v Telecommunications Infrastructure Needs**

One reason why the rooves of many tall buildings positively bristle with aerials is that private property rights sometimes have to take second place to the overriding need for a modern telecommunications network. As one case showed, however, property owners are not obliged to just sit back and allow telecommunications infrastructure to be foisted upon them.

An infrastructure company wished to have access to the roof of a tall commercial building so that surveyors could assess its suitability as a site for telecommunications apparatus. The building's long leaseholder was willing to grant access in principle, but objected to the company's proposal to perform invasive works, including drilling holes and cutting the roof covering in order to discern its underlying structure.

After a negotiated resolution could not be reached, the company referred the matter to the Upper Tribunal (UT). It urged the UT to exercise its power under Paragraph 26 of the Electronic Communications Code to impose an interim agreement on the leaseholder that would permit the works to proceed.

The leaseholder asserted that the building was for various reasons unsuitable as a location for telecommunications equipment. It accepted that the company had a good arguable case that an agreement should be imposed enabling surveyors to access the roof. In resisting the proposed invasive works, however, it pointed out, amongst other things, that the roof was coated with a proprietary material that would be very difficult to reinstate if pierced or damaged.

Ruling on the matter, the UT noted that any owner of a valuable, high-quality building might be understandably reluctant to allow contractors over whom it has no authority or control to interfere with its structure. The leaseholder had legitimate concerns that the company was seeking unrestricted rights to do undefined works, constrained only by the purpose for which they would be undertaken.

The UT declined to impose an agreement authorising invasive works on the roof at this stage. Once a non-invasive survey had been carried out, it would be open to the company to return to the UT and seek further rights, if considered necessary. The UT expressed the hope that the dispute could be resolved by agreement and that a further reference would not be required.

We can advise you on any matters relating to commercial property law. Contact us for guidance.

**Partner Note**

Cornerstone Telecommunications Infrastructure Ltd v St Martin's Property Investments Ltd and Another [2021] UKUT 262 (LC)

Tax

**International Hauliers – Ignorance of a Contraband Load May Be No Defence**

The onus is on international road transport operators to take reasonable steps to ensure that their vehicles are not used for smuggling contraband. As one case showed, hauliers who fail to exercise caution are exposed to heavy penalties whether or not they have actual knowledge of an illicit cargo.

The case concerned a lorry that had 549.5 kg of undeclared unprocessed tobacco on board when seized by customs officers at Dover. It was accepted that neither the vehicle's driver nor the haulier for whom he worked had any prior knowledge of the smuggling attempt. UK Border Force (UKBF), however, declined to return the vehicle until such time as the haulier paid a £17,390 fee, a sum equivalent to 20 per cent of the contraband's £86,952 revenue value.

Rejecting the haulier's appeal against that decision, the First-tier Tribunal (FTT) noted that it had not challenged the vehicle's seizure within the prescribed statutory time limit. The seizure was thus deemed to be lawful and the vehicle was liable to forfeiture under the Customs and Excise Management Act 1979.

Although the haulier and the driver were neither responsible for nor complicit in the smuggling attempt, the FTT observed that international trade and transport always carries a risk of smuggling and those engaged in it are required to take precautionary measures. Heavy penalties for infringements of customs regulations serve as a necessary deterrent.

The safety implications of the haulier's surprising admission that it routinely did not know what goods it was transporting were a cause for concern. The circumstances in which the tobacco was loaded onto the lorry should have alerted any adequately trained driver that something was amiss. Basic checks on the consignor of the goods and their destination were not carried out. Overall, there was nothing unreasonable or disproportionate in UKBF's stance.

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

**Partner Note**

Bosak v The Director of Border Revenue [2021] UKFTT 342 (TC)

Company

**Company Accounts Cannot Be Retrospectively Adjusted for Convenience**

A company's accounts cannot be retrospectively adjusted to meet the convenience of its directors. The High Court made that point in ruling that the reclassification of a director's loan account just before a company entered liquidation was of no legal effect.

The sole director of the intermittently profitable company blamed its insolvency on third-party bookkeeping failures. At the last minute before the company entered liquidation, the six-figure balance of her director's loan account was reclassified as 'drawings'. That was on the basis that she had taken the money from the company as salary, rather than as loans. The company's liquidators launched proceedings against her with a view to recovering the sum concerned.

The crux of her defence to the claim was that she was paid £6,000 a year in salary, a sum that was not commensurate with a director who often worked 15 hours a day for a company with an approximate annual turnover of £500,000, eight staff and hundreds of clients. Payments from the erstwhile director's loan account should have been recorded as drawings of salary and she was entitled to retain them.

Ruling on the matter, the Court found that the reality of the situation was that it was at all times intended or hoped that the company would ultimately make enough money to declare dividends that would be used to cancel out the sum due on the loan account. Money had been withdrawn from the company as payments on account of future anticipated dividends and was never intended to be salary.

The purported reclassification of the payments as drawings could not alter the basis on which they had been paid or received during the company's prior trading periods. Were such retrospective accounting adjustments possible, the Court had little doubt that most company owners or directors would adopt a similar practice. They would simply approve salary payments to themselves below the Income Tax threshold and then make additional drawings in the hope of earning sufficient dividends by the end of the year to pay off any debt arising to the company.

The sums that had been advanced to the director, and not accounted for as either salary or dividends, came to £286,421. Notwithstanding her attempts, on advice, to re-characterise those payments as drawings, they remained due and owing to the company as a debt. She was ordered to repay the total sum to the company, together with interest.

For advice on any aspect of company law, contact us.

**Partner Note**

Bass and Others v Buchanan [2021] EWHC 2740 (Ch)

Contract

**Penal Clause 'Cunningly Concealed' in Telecommunications Contract**

Onerous terms and conditions cunningly hidden amidst the small print of a contract are likely to be viewed as entirely worthless by a judge. The High Court made that point in trenchantly criticising a contract presented by a mobile phone and telecommunication services company to a social care provider.

The company had offered to supply connections for 800 mobile phones to be used by the provider's carers for a minimum period of 48 months at a monthly rental of £9,600. It asserted that the provider committed itself to the deal when its chief executive signed an order form and that its standard terms and conditions were incorporated in the contract.

Amongst those terms and conditions was a clause which stated that, in the event of the order being cancelled, the provider would be required to pay an administration charge of £225 per connection. After the provider cancelled the order prior to connection, the company billed it for £180,000 plus VAT. The provider declined to pay that sum and the company launched proceedings.

Dismissing the claim, the Court found that the clause was particularly onerous and unusual. The amount of the administration charge bore no relationship to the company's actual administrative costs and was out of all proportion to any reasonable estimate of its loss arising from the cancellation.

The Court ruled that the clause was not incorporated in the contract in that it was not reasonably and fairly drawn to the provider's attention. It was in any event a penal clause and therefore void. The densely typed, voluminous and complex terms and conditions were not in any way user friendly to any reader, let alone a non-legally qualified one.

The order form made express and clear reference to the terms and conditions, which were accessible online, but it did not explain their essential purpose or give any indication of the substantial potential consequences of cancellation. The form positively obfuscated the nature of the contract and it was not surprising that the provider was misled into believing that it was simply a precursor to entering into a contractual relationship with a mobile network service provider. No attempt whatsoever was made to highlight the penal clause.

The Court accepted that it was a contract between two commercial parties and that the provider had every opportunity to access and read the terms and conditions. The offending clause, however, was positively and cunningly concealed in the middle of a thicket of words where none but the most dedicated reader could have been expected to discover it. The case came very close to one of misrepresentation.

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

**Partner Note**

Blu-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

Data Protection

**Misdirected Emails – Law Firm Sees Off Data Protection/Confidentiality Claim**

Misdirected emails are a nightmare for any business and can give rise to grave legal consequences. In a case on point, a law firm found itself on the receiving end of a damages claim after sending a demand for payment of school fees to the wrong address.

On instructions from a client, the firm intended to send an email and attachments to a couple who were alleged to owe school fees in respect of their daughter. Due to a one-letter typographical error, the email was mistakenly sent to another person with the same surname and initial as the child's mother.

The couple subsequently launched proceedings against the firm alleging misuse of confidential information, breach of confidence, negligence and breaches of the General Data Protection Regulation and the Data Protection Act 2018. They asserted that the incident had caused them distress, sleepless nights and worry to the point where they felt ill.

Ruling on the matter, the High Court noted that the recipient of the email, who was unknown to the couple personally, had swiftly notified the firm of its error. At the firm's request, she confirmed that she had permanently deleted the email. Although the email revealed the couple's names and address, it disclosed no other especially personal matters, such as bank details or medical information.

There was no evidence that the email had been transmitted to anyone other than the recipient or that the information it contained had been misused. Very rapid steps had been taken to remedy the error and it was inherently implausible that the incident had caused the couple or their daughter significant distress or worry.

In the 21st century, no person of reasonable fortitude would reasonably suffer the distress claimed, arising from a single breach that was quickly remedied. Any breach of confidentiality or data protection rules was, frankly, trivial and the couple's claim in respect of time spent dealing with the matter was plainly exaggerated.

The couple having failed to establish a credible case that they had suffered more than trivial harm as a result of the incident, the Court granted the firm summary judgment in respect of the claim. Given the speculative nature of their case, the couple were ordered to pay the firm's costs on the punitive indemnity basis.

**Partner Note**

Rolfe and Others v Veale Wasbrough Vizards LLP [2021] EWHC 2809 (QB)

Insolvency

**Carillion Group Insolvency Triggers Guideline Worker Consultation Ruling**

There may be 'special circumstances' that excuse an employer from full compliance with worker consultation requirements before making mass redundancies – but what exactly does that mean? The Employment Appeal Tribunal (EAT) considered that issue in a case arising from the compulsory liquidation of the Carillion group.

The multinational construction and business services group employed about 18,000 UK workers when it entered liquidation in January 2018. The insolvency process was described as the largest and most complex of its kind in UK history. About 1,000 of those employees who were made redundant launched Employment Tribunal (ET) proceedings, seeking protective awards on the basis that the group had failed to comply with the consultation requirements enshrined in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

The group conceded that there was a failure to consult workers' representatives. It contended, however, that there were special circumstances, within the meaning of Section 188(7) of TULRCA, that meant that it was only required to take all such steps towards compliance as were reasonably practicable.

It asserted that it was presented with a sudden and unforeseen disaster over the weekend preceding its entry into liquidation. Although it had been confident of survival, the group's nadir came after the government refused financial help or to support an administration process. When key stakeholders in turn declined to approve short-term lending arrangements, compulsory liquidation became the only option. From that point onwards, mass redundancies were inevitable.

Following a preliminary hearing, however, the ET found that those circumstances were not special, in the sense of being uncommon or out of the ordinary, and that there had been no sudden intervening events over the crucial weekend. The group had been in decline since at least July 2017 and there was no evidence that the government was in the habit of providing support to businesses in the group's position. Lenders had, prior to the weekend, indicated that any further support from them was conditional on support from the government.

In dismissing the group's challenge to that ruling, the EAT could find no flaw in the ET's conclusions. The ET directed itself correctly in law and, having found that there were no special circumstances, it was not obliged to go on to consider whether the group had done all that was reasonably practicable to comply with its consultation duty.

The EAT noted that the obligation to consult workers' representatives includes a requirement to provide information on a wide range of matters, including the reasons for proposed redundancies, the method of carrying out dismissals and the method of calculating redundancy payments. Even if dismissals could not be avoided, such information would be highly valuable to employees facing the distressing prospect of redundancy.

**Partner Note**

Carillion Services Ltd (In Compulsory Liquidation) and Others v Benson and Others [2021] UKEAT 2021-000269

IT, Internet and Media

**Film Studios Faced by Piracy Scourge Granted Internet Blocking Orders**

Wholesale copyright infringement – otherwise known as piracy – has been a feature of the internet almost since its inception. In coming decisively to the aid of six major film and television studios, however, the High Court showed that perpetrators, even if based abroad, have nowhere to hide.

The case concerned five websites that provided their users with links to others from which copyright-protected movies and TV shows, which would otherwise have only been available on subscription, could be downloaded free of charge. Although the websites did not provide the content themselves, they created a user-friendly environment for users, complete with accessible catalogues of copyright works.

The studios launched proceedings under Section 97A of the Copyright, Designs and Patents Act 1988, seeking orders requiring the UK's six largest internet service providers (ISPs) to block user access to the websites. The ISPs did not oppose the application.

Granting the orders sought, the Court noted that the websites were all operated from abroad. There was no evidence that any of them had a legitimate purpose and the studios' efforts to contact their operators had not resulted in their activities being curtailed. The operators clearly knew, or had to be taken to know, that they were providing access to copyright works that had been placed on the internet without the studios' consent.

The websites were operated for profit. English was their default language and their services were clearly targeted at UK users. By providing links to pirated works, they purported to grant rights that were not theirs to give. They positively encouraged and facilitated infringing acts of copying by users. Given that the public had no legitimate interest in downloading infringing copies of copyright works to the detriment of the studios, the orders were both justified and necessary.

If your trade has been adversely affected by internet piracy, our expert media lawyers can provide you with advice and representation.

**Partner Note**

Columbia Pictures Industries Inc. and Others v British Telecommunications PLC and Others [2021] EWHC 2799 (Ch)

Employment

**Employer Pays for Bypassing Trade Union – Supreme Court Ruling**

Employers cannot with impunity make direct offers to trade union members with the aim of pre-empting the collective bargaining process. The Supreme Court made that point in confirming awards of compensation to 57 workers whose employer bypassed their trade union in search of a pay deal.

The manual and shop floor workers were all members of a trade union. Following a ballot of workers, their employer recognised the union on a non-legally binding basis and they commenced formal annual pay negotiations. A pay offer was made but, after a further ballot, it was rejected.

The employer's response was to make pay offers directly to workers, thus bypassing the union. Workers were warned that they might be given notice if no agreement were reached and 97 per cent of them accepted direct offers. The employer then reached a collective agreement with the union on similar terms to the direct offers.

The workers involved in the case complained to an Employment Tribunal (ET) that the direct offers contravened Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. Their claims were upheld and they were each awarded £3,800 in respect of each direct offer that had been made to them. The awards were confirmed by the Employment Appeal Tribunal but the employer later appealed successfully to the Court of Appeal.

Ruling on the workers' challenge to that outcome, the Supreme Court noted that, in certain circumstances, Section 145B confers on workers who are members of an independent trade union which is recognised, or seeking to be recognised, a right not to have offers made to them by their employers.

The provision takes effect where the acceptance of an offer by a group of workers would have the prohibited result that terms of their employment would not, or would no longer be, determined by collective agreement with a union. Employers bear the burden of proving that their sole or main purpose in making such offers is not to achieve that prohibited result.

In upholding the appeal, the Court noted that what Section 145B prohibits is an offer which, if accepted by all the workers to whom it is made, would have a particular result. It is the causal link between the presumed offer and the prohibited result that matters, rather than the particular content of the offer. There must at least be a real possibility that, had an offer not been made and accepted, workers' terms of employment would have been set by collective agreement.

On the basis of that interpretation, the Court ruled that there is nothing to prevent an employer making an offer directly to its workers in a matter which falls within the scope of a collective bargaining agreement provided the employer has first followed, and exhausted, the agreed collective bargaining procedure.

What the particular employer had done, but could not do with impunity, was to make a direct offer to its workers, including union members, before the collective bargaining process that it had agreed, albeit in honour only, to follow had been exhausted. The workers' compensation awards were restored.

Legal advice is essential if you want to avoid falling foul of trade union legislation. Contact <<CONTACT DETAILS>> for guidance.

**Partner Note**

Kostal UK Ltd v Dunkley and Others [2021] UKSC 47

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