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General

**Finance Chief Pays Price for Fraudulent Misuse of Company Credit Cards**

As every entrepreneur knows, you cannot hope to run a successful business without placing trust in senior employees. As a Court of Appeal ruling made plain, however, promotion to the upper echelons of management can provide opportunities for malignant individuals bent on fraud.

A couple who founded an international digital media company with a turnover of about £20 million a year championed the career of a longstanding employee who rose to become their head of finance. He rewarded their confidence in him by misusing the company's credit cards over a period of about three and a half years. He used them to make cash withdrawals and to make substantial purchases of personal clothing, watches and hotel accommodation for his family.

It was his job to monitor use of the cards and his deceit was rendered all the harder to detect by his cunning manipulation of internal accounting systems. His fraudulent use of the cards gave rise to a loss of about £53,000, but the couple said that the company's indirect losses came to many times that sum. The accounts he prepared for the company were entirely fictitious and wholly misleading. After his wrongdoing finally came to light, he was prosecuted and pleaded guilty to one count of fraud. He received a 56-month prison sentence.

Ruling on his appeal against that punishment, the Court noted that the couple had placed huge confidence in him and promoted his career at every step. The shock of discovering his betrayal had robbed them of their trust in other people and led them to question their own competency. They were subjected to the onerous task of unpicking his sophisticated cover-up and, understandably, enormous strain was placed on their marriage.

The company's directly consequential losses arising from the fraud were properly taken into account when passing sentence. Although he was of previous good character, had a young family and had expressed some remorse, his crime was motivated by pure greed. The Court nevertheless found that his sentence had been pitched somewhat too high and reduced it to 46 months. An additional one-month sentence, imposed after he failed to attend a sentencing hearing, was upheld.

**Partner Note**

*R v Gray [2022] EWCA Crim 1095*

Property

**5G Mobile Phone Masts Can't Be Located Just Anywhere – High Court Ruling**

5G mobile phone masts are sprouting up all over the country and most people would agree that there is a real need for them. However, as a High Court ruling showed, they are not wholly exempt from planning rules and they cannot be located just anywhere.

A mobile phone company argued that erection of a 15-metre-high mast in an urban street was vital to secure 5G coverage in the area. The proposal would ordinarily have been automatically permitted. The local authority's prior approval was, however, required because the site was in a conservation area.

Approval was refused on the basis that the mast and its accompanying cabinets would be an incongruous addition to the street scene. The council also took the view that the development would be visually intrusive, create visual clutter and detract from the area's character and appearance.

After the company appealed against that decision, a planning inspector found that the proposal would harm the setting of the conservation area and a neighbouring cottage. Granting the approval sought, however, he concluded that the harm would be less than substantial and was outweighed by the public benefits of the proposal.

In upholding a challenge to the approval brought by the cottage's owner, the Court found that the inspector failed to consider the potential impact of the development on the root system of a nearby English yew, which was protected by a tree preservation order.

The inspector further failed to grapple with the question of whether 5G facilities could be accommodated on the site of an existing mast which was located on the same street and only about 100 metres away. The inspector's decision was quashed and the Secretary of State for Levelling Up, Housing and Communities was directed to redetermine the company's appeal.

We can advise you on any matters relating to planning law. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Murtagh v Secretary of State for Levelling Up, Housing and Communities [2022] EWHC 2991 (Admin)*

Tax

**Fish and Chip Shop Chain Triumphs in Cash Sales Suppression Tax Appeal**

HM Revenue and Customs (HMRC) are always on the alert to spot businesses that suppress their cash takings with a view to avoiding tax. However, as a tax tribunal ruling concerning an insolvent fish and chip shop chain showed, suspicions of deliberate wrongdoing are not always justified.

The chain ran on a 'cash only' basis. During a period of about four years prior to the company that owned it entering liquidation, HMRC claimed that its takings had been systematically and deliberately suppressed to the tune of almost £1 million. On that basis, VAT and Corporation Tax demands were raised against the company which, together with penalties, came to more than £600,000.

The company's manager and principal shareholder was also issued with a personal liability notice (PLN) requiring him to pay almost £48,000 out of his own pocket. He denied any wrongdoing, contending that he had inherited a failing and loss-making business from his deceased father and ultimately failed to turn around its fortunes despite having tried very hard to do so.

Upholding his and the company's appeal, the First-tier Tribunal (FTT) noted that the sales sampling technique employed by HMRC during a covert inquiry into the chain's affairs was far from representative of its average takings. The process was flawed arithmetically, and there was no overall consideration of whether it was credible that the company could actually have underdeclared such a large amount of tax.

The FTT noted that, if the chain were as profitable as HMRC claimed, it was hard to see why it would have ceased trading. The company's bank statements consistently showed its account in debit and close to its overdraft limit. There was, in the end, no evidence of organised, widespread or deliberate suppression of sales. The tax assessments, penalties and PLN were all overturned.

Our expert lawyers have experience in handling all types of business tax issues. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Georgiou and Another v The Commissioners for His Majesty's Revenue and Customs [2022] UKFTT 455 (TC)*

Company

**Director Liable After Funds Earmarked to Pay Tax Extracted from Company**

Directors who cause or permit extraction of funds from their companies which should be used to meet tax liabilities can never rest easy. As a High Court ruling showed, they can ultimately look forward to being pursued relentlessly through the courts.

The case concerned a company that owed over £35 million in unpaid VAT, Income Tax and National Insurance Contributions (NICs) when it entered liquidation. It was alleged that tax and NICs deducted from employees' wages, together with VAT paid by customers, were not passed on to HM Revenue and Customs (HMRC).

The company's liquidators launched proceedings to recover sums which they claimed had been wrongfully abstracted from the company. Its case focused on a man who was found to be a director of the company, either on a de jure or de facto basis, from its incorporation to the date of liquidation.

Ruling on the matter, the Court found that there was no good or legitimate reason for the removal of the missing funds from the company. They were not extracted as part of a legitimate investment strategy, either on behalf of the company or for its benefit. The director breached the duty he owed to the company in causing or permitting the removal of funds which should have been used to satisfy the company's liabilities to HMRC.

The liquidators had to date succeeded in recovering over £13 million by realising the company's assets. After receiving credit for that sum, the director was ruled liable to pay £21,811,531 in equitable compensation and/or damages. Compound interest would be added to that amount. Further liability rulings were made against another of the company's former directors and three companies that had knowingly received parts of the missing funds.

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

**Partner Note**

*Umbrella Care Ltd v Nisa and Others [2022] EWHC 3139 (Ch)*

Contract

**NHS England Agrees to Suspension of £140 Million Procurement Exercise**

Legal challenges by losing tenderers to the outcome of public procurement exercises are relatively common, but it is very much rarer for a judge to be asked to nip such an exercise in the bud. That, however, is exactly what happened in a case concerning NHS contracts worth in excess of £140 million.

A company was intent on bidding for the contracts but, due to a mistake, there was a delay in its bid documents being uploaded onto an online portal. NHS England took the view that the company had not submitted a compliant bid by a strict deadline. On that basis, it refused to recognise the company as a tenderer or to evaluate its bid. The company launched proceedings, arguing that the refusal was unlawful.

The company applied for an interim injunction with a view to enforcing a suspension of the entire procurement competition until such time as its case could be heard and decided by a judge. During the hearing of that application, however, an accommodation was reached whereby NHS England agreed to such a suspension. It did so after becoming aware that a speedy trial of the company's claim could take place within a few months.

The High Court noted that NHS England was willing to live with that relatively brief delay to the tendering process. The Court did not require the company to give an undertaking to pay damages to NHS England in the event that its claim ultimately failed.

Our expert lawyers can advise you on any contractual matter. Please contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Inhealth Intelligence Ltd v NHS England [2022] EWHC 2471 (TCC)*

Intellectual Property

**Passing Off – Injunction Refused in Battle Between Premium Vodka Brands**

The owners of established brands often complain that trade rivals are mimicking the get-up of their products and trading on their hard-won reputations. As a High Court ruling in the context of the premium vodka market showed, however, proving such allegations can be a demanding task.

The case concerned a brand of vodka, annual sales of which had grown from almost nothing to in excess of £40 million over a period of just five years. Its manufacturer launched a passing off claim against the company behind a recently launched rival brand. In seeking a pre-trial injunction against the rival, the manufacturer asserted that the get-up of the latter's bottles was so strikingly similar to its own as to cause confusion amongst consumers.

Ruling on the matter, the Court found that the manufacturer had raised a serious issue to be tried as to whether unfair advantage was being taken of its reputation in the marketplace, the product of a multi-million-pound marketing campaign. Amongst other similarities, the Court acknowledged that the shape and dimensions of the rival's bottles were very close to those of the manufacturer's.

There were, however, also differences in their get-ups. The names of the two brands appeared prominently on their respective bottles and the Court noted that it is unusual for consumers to rely upon the appearance of a product alone, as opposed to its name, as indicating trade origin. Evidence of actual consumer confusion between the two products was, at best, inconclusive.

In refusing to grant the injunction sought, the Court found that the arguments were, at this stage of the proceedings, finely balanced. Given the harm that such an order would be likely to cause to the rival's business, the balance of convenience came down in its favour. In directing a speedy trial of the manufacturer's claim, the Court noted that the rival's success in fending off the injunction application did not necessarily mean that its defence would ultimately prevail.

Expert guidance in relation to any matters surrounding intellectual property rights is invaluable. Our specialist lawyers can advise.

**Partner Note**

*AU Vodka Ltd v NE10 Vodka Ltd and Another [2022] EWHC 2371 (Ch)*

Professional Negligence

**Art Dealership Cleared of Negligently Underselling Painting**

If you were to sell a work of art on the strength of professional advice only to see it sold on soon afterwards for a very much higher price, you might be forgiven for feeling hard done by. However, as a guideline High Court ruling showed, it by no means necessarily follows that the advice you received was negligent.

A family trust engaged an art dealership to act as its agent in the sale of a painting. A sale price of £1.15 million was achieved. It was agreed that, if it were a mere copy of a well-known 18th century painter's work, it would have been worth a fraction of that sum. However, if it were an entirely autograph original of the painter's work – in the sense of being perceived to be entirely by the artist concerned – it would have been worth a great deal more.

A deep clean of the painting following the sale uncovered a previously undiscovered signature. The work was hailed as a rediscovered masterpiece and, a few months after the original sale, it was sold on to a collector for an ostensible price of $10.5 million. The trust's response was to launch proceedings against the dealership, asserting that the painting had been negligently undersold.

In dismissing the claim and exonerating the dealership, however, the Court noted that there was no doubt in its mind at the relevant time that the painting was correctly attributed to the painter and his studio, rather than to the painter alone. Arguments that it had sold the work under a misapprehension that it was merely an anonymous copy of the artist's work were clearly wrong.

The trust's claim that the dealership should have obtained a second opinion from a leading independent expert regarding the painting's attribution also fell on fallow ground. The dealership believed that, if the painting were referred to the expert, there would be a significant risk that he would deliver a negative verdict, thereby harming its marketability and value.

The dealership was concerned that uncertainty as to the extent of the painter's role in creating the work would affect its market reception and that the outcome might be a very public failed sale. It took the view that a trade sale to an art market buyer who was prepared to take the associated risks was the preferable course of action. It believed that it had thereby obtained the correct price for the work.

Professional negligence claims can be very costly, in financial and reputational terms. Contact our expert lawyers as soon as possible in the instance of a claim.

**Partner Note**

*Countess of Wemyss and March and Another v Simon C. Dickinson Ltd [2022] EWHC 3091 (Ch)*

Employment

**Employers – Feelings of Unfairness Cannot Justify Penalising Whistleblowers**

Even employers who feel that they have been unfairly criticised have no excuse for targeting whistleblowers for detrimental treatment. An Employment Tribunal (ET) powerfully made that point in the case of a senior care worker who raised welfare and safeguarding concerns affecting residents in a care home.

After making the disclosures, both to the care home's owner and to public healthcare authorities, the woman was suspended. She resigned in the midst of a disciplinary process and launched ET proceedings.

Upholding her case, the ET found that she had made three protected disclosures in the reasonable belief that the information disclosed was substantially true. She had been subjected to various detriments – including her suspension – the imposition of which was materially influenced by her whistleblowing. In short, she was constructively dismissed because she blew the whistle.

The employer felt that the disclosures were tremendously unfair, but the ET had no hesitation in finding that it conducted itself in a manner calculated to damage or destroy the employment relationship of mutual trust and confidence and did so because she had the temerity to make protected disclosures. The employer thereby fundamentally and repeatedly breached her employment contract.

She did not receive the benefit of a proper investigation and the evidence indicated that the employer had no real interest in discussing her concerns or properly looking into them. The investigating and dismissing officers were one and the same and a disciplinary hearing had been conducted in an unprofessional manner that left her feeling humiliated. She was suspended without reasonable or proper cause.

The employer was ordered to pay her basic and compensatory awards in respect of her automatic and ordinary unfair dismissal, totalling £5,576. She was also awarded £16,875 for injury to her feelings.

Says **<<CONTACT DETAILS>>**, "It is important to recognise when workers' rights under the whistleblowing legislation are engaged. Contact us for expert advice."

**Partner Note**

*Letherby v Abraham Nursing Homes Ltd [2022] UKET 1600728/2021*

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