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General

**'Minor Human Errors' Stymie Bid for Multi-Million-Pound NHS Contracts**

In public procurement exercises, the tricky business of uploading bids to e-tendering sites can be rendered more hazardous by leaving it to the last moment. In a case on point, a series of minor human errors led to a missed deadline and the loss of a company's chance to compete for a multi-million-pound NHS contract.

The company, a leader in its field with a turnover of around £38 million, intended to bid for information services contracts that were divided into four lots. It asserted that it was prevented from participating in the procurement process due to a difficulty in uploading a single document to an e-tendering portal.

Following an investigation, NHS England excluded the company from the tendering process on the basis that it had not submitted a compliant bid prior to the date on which the procurement exercise closed. In challenging that decision, the company characterised it as manifestly flawed and irrational.

Rejecting the claim, however, the High Court found that the portal was neither defective nor unsuitable for the task in hand. Its functionality was clearly explained to all tenderers, who each had to navigate it in the same manner and faced the same consequences if they failed to submit their bids prior to the deadline.

The problem did not lie in the design of the portal but in a series of minor human errors in its use. Those errors occurred in circumstances where the company had left it to the last moment to process its submission. It failed to meet the clearly stated deadline for reasons that were entirely its own responsibility.

Nothing happened to justify waiving the deadline and, having properly investigated the matter, NHS England was entitled to take the view that, were it to do so, there would be a very significant risk that it would not be complying with its equality and transparency obligations, resulting in unfairness for other tenderers.

**Partner Note**

*Inhealth Intelligence Ltd v NHS England [2023] EWHC 352 (TCC)*

Property

**Leasing a Flat Above Commercial Premises? Make Sure You Read This**

In a head-turning case, a flat tenant the value of whose home was reduced when the use of the commercial premises beneath him was changed from an estate agency to a bar and restaurant was awarded six-figure compensation.

After planning permission was granted in respect of the change of use, works were carried out, some of them structural, to prepare the commercial premises for their new purpose. The flat tenant was unhappy with the change, complaining of noise and fumes, and eventually sold his property for £470,000.

His damages claim hinged on provisions in his lease which permitted the landlord to carry out works on the structure of, and any development of whatever nature on, the building. Crucially, however, that entitlement was subject to a proviso that such works or development did not lead to a diminution in the value of the flat.

Upholding the flat tenant's claim, a judge found that the landlord had breached the terms of his lease and awarded him £105,000 in damages. That sum represented the difference between the price he obtained for the flat and what it would have been worth had the downstairs premises remained an estate agency.

In dismissing the landlord's challenge to that outcome, the High Court found that the judge's interpretation of the relevant lease provisions made good commercial sense. They were in the nature of a promise by the landlord not to exercise its rights in a manner that resulted in a fall in the flat's value.

Also rejected were the landlord's arguments that the provisions were only concerned with the effect of physical works to the building and that there was no breach of the lease in that the diminution in the flat's value arose from the change of use. The works involved development of the commercial premises, making physical changes to them so as to enable their use as a bar and restaurant.

We can advise you on any matters relating to commercial property, including lease provisions. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Dunward Properties Ltd v Isaac [2022] EWHC 3276 (Ch)*

Tax

**Company Director Relieved of Six-Figure VAT Returns Inaccuracy Penalty**

Directors whose companies fail to make accurate VAT returns can expect to receive stiff financial penalties – but only if such failures are deliberate. In a guideline case, a tax tribunal adopted a narrow interpretation of that word in relieving an alcohol wholesaler's sole director of a six-figure bill.

Following an investigation, HM Revenue and Customs (HMRC) formed the view that the wholesaler had entered into numerous transactions that were connected with the fraudulent evasion of VAT. Assessments in respect of potential lost revenue were raised against the company, together with a deliberate inaccuracy penalty.

The company withdrew an appeal against the assessments after entering liquidation. HMRC, however, went on to raise a personal liability notice (PLN) against its sole director on the basis that the inaccuracies in its VAT returns were wholly attributable to her. The PLN demanded that she pay a sum in excess of £900,000.

Ruling on her challenge to that bill, the First-tier Tribunal (FTT) had no doubt that the company should have known that the relevant transactions were connected to VAT fraud. It noted that due diligence documents relating to some suppliers, many of them newly established and having minimal apparent resources of their own, were littered with warning signs. There was no evidence that any critical thought was given as to whether or not to trade with a particular supplier.

Allowing the director's appeal against the PLN, however, the FTT emphasised that the burden of proof rested on HMRC. It noted that the test for whether an inaccuracy in a VAT return is deliberate is a subjective one: it is not a question of whether a reasonable taxpayer might have made the same error, or even whether a taxpayer failed to take reasonable steps to ensure that a return is accurate. What mattered was the knowledge and intention of the particular taxpayer at the time.

The FTT was ultimately not satisfied on the evidence that the company actually knew that the transactions were connected to fraudulent VAT evasion. In the absence of such knowledge, the inaccuracies in its VAT returns were not deliberate. Given that a penalty can only be levied personally against a director in the event of such deliberate inaccuracy, the PLN stood to be set aside.

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

**Partner Note**

*Bachra v The Commissioners for His Majesty's Revenue and Customs [2023] UKFTT 91 (TC)*

Company

**Fast Fashion Retailer's Founder Sees Off 'You Stole My Idea' Allegation**

Disappointed people often claim that others have made themselves rich by usurping their brilliant business ideas. However, as a High Court ruling in a case concerning a thriving online fashion company showed, proving such allegations can be an uphill struggle.

An entrepreneur claimed that he had conceived and developed a business plan for the sale of so-called 'fast fashion' through the use of social media and collaboration with reality TV stars. He asserted, amongst other things, that he had committed about £10,000 to the venture and that it was he who had come up with the company's name.

The company's share capital was subsequently subsumed into a group that floated on the Alternative Investment Market, raising about £125 million. In seeking a share of the fruits of success, the entrepreneur launched proceedings against the company's founder, alleging that he had revealed the business plan to him in confidence. He asserted that, in breach of his fiduciary duty, the founder had made unlawful use of the business plan and conspired with a friend to steal his idea.

The founder wholly denied those accusations and was adamant that the inspiration for the company came from elsewhere. He denied that he had taken advantage of the situation or breached any agreement with the entrepreneur. He had worked tirelessly to develop and grow the business towards its listing without any involvement or input from the entrepreneur.

Following a trial, the Court noted that it was incumbent on the entrepreneur to prove his case. On the documentary and oral evidence, it came to the firm view that the narrative of events advanced by the founder was true and that the narrative advanced by the entrepreneur was false.

The Court found that the idea behind the company and its business had emanated from the founder and his friend and that the entrepreneur had played no part in it. At the only meeting between the two men, the entrepreneur was sounded out as a potential investor, but matters proceeded no further than that. Given those findings, the entrepreneur's claim had to fail.

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

**Partner Note**

*Clements v Frisby [2023] EWHC 320 (Ch)*

Contract

**Interim Injunction Granted in Football Stadium Advertising Dispute**

If you feel that a commercial partner is backing out of its contractual commitments, or even intends to do so, swiftly taking legal advice is the first step towards protecting your position. A High Court case concerning pitch-side advertising at a football stadium clearly illustrated the wisdom of that approach.

A football club entered into an exclusive contract whereby it appointed a company to sell advertising space on its stadium's LED display and perimeter hoardings. The company contended that, at a subsequent meeting, the club's majority owner announced that it would immediately cease working with the company and that it had no intention of honouring its contractual obligations.

The club asserted in correspondence that the company had breached the contract by failing to comply with its dispute resolution provisions and that it was therefore entitled to terminate the same. However, the company launched proceedings and sought an interim injunction holding the club to the contract's terms pending a trial of the action.

Ruling on the matter, the Court found that the company had raised serious issues to be resolved at trial. If it ultimately succeeded in its claim, damages would not be an entirely adequate remedy. Given its assertion that it would suffer serious economic and reputational harm if it were unable to exercise its rights under the contract, the balance of convenience also weighed in its favour.

The Court granted an interim order which, amongst other things, required the club to make the LED display and hoardings available for the company's unobstructed use pending an expedited trial of the claim. The company undertook to pay the club damages if it subsequently turned out that the injunction should not have been granted.

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

**Partner Note**

*Sportfive UK Ltd v Nottingham Forest Football Club Ltd [2022] EWHC 3522 (Comm)*

Insolvency

**High Court Plays Crucial Part in Bid to Save COVID-Hit International Airline**

When multinational companies are at risk of insolvency, directors and creditors alike often look to the English courts for an orderly and fair resolution that will command respect around the globe. That was certainly so in the case of a Hong Kong-based airline whose business was devastated by the COVID-19 pandemic.

In the year to January 2020, the airline carried almost seven million passengers. Due to the pandemic and a decline in the number of people wishing to visit Hong Kong, that number fell to fewer than 218,000 in the year to January 2021. The airline's total indebtedness exceeded HK$49 billion and there was no dispute that it was both cash flow and balance sheet insolvent.

The airline launched proceedings in England seeking the High Court's sanction of a restructuring plan that was designed to secure its survival as a going concern. The plan involved the injection of HK$3 billion of new money into the business, the reduction of its aircraft fleet from 53 to 20 and the compromise of unsecured creditors' claims.

Ruling on the matter, the Court noted that the company is registered as an overseas company at Companies House. More than 40 per cent of its overall indebtedness is governed by English law. The company thus had a sufficient connection to this country to confer jurisdiction on the English courts.

Parallel proceedings were on foot in Hong Kong, where a scheme of arrangement in respect of debts not governed by English law had been approved by the required majority of creditors. A sanction hearing was pending in Hong Kong and it was not anticipated that the scheme would be opposed.

The Court noted that it was being asked to play its part in cross-border insolvency proceedings by working hand in glove with the Hong Kong scheme of arrangement. There was, it observed, something to be said for having a comprehensive plan in one jurisdiction, supported by parallel schemes in others, rather than having a jigsaw of interlocking schemes.

The restructuring plan only dealt with about HK$31.55 billion of the company's debts and would not, by itself, be sufficient to secure the desired commercial outcome. Under its terms, unsecured creditors stood to recover a maximum of not much more than 10 per cent of their money. The only alternative, however, was immediate insolvent liquidation, which would offer much lower rates of recovery. The creditors, the Court noted, were the best judges of where their commercial interests lay.

The plan had been approved by requisite majorities at creditors' meetings, on the outcome of which it was safe to rely. Creditors had a fair opportunity to participate in the process and were kept appropriately informed. In exercising its power under the Companies Act 2006 to sanction the plan, the Court noted that there was a reasonable prospect that it would not have acted in vain. Given the substantial majority of creditors in favour of the plan, it was unlikely that attempts would be made to undermine it in other jurisdictions.

It is vital to seek expert legal advice as early as possible regarding insolvency matters. Contact **<<CONTACT DETAILS>>** for assistance.

**Partner Note**

*In the Matter of Hong Kong Airlines Ltd [2022] EWHC 3210 (Ch)*

Intellectual Property

**Design Rights – Supermarkets Battle Over 'Strikingly' Similar Gin Bottles**

Fierce competition between retailers, particularly during the Christmas period, has a tendency to spill over into intellectual property disputes. Exactly that happened in a High Court case concerning design rights in festive bottles of gin.

A supermarket chain had registered design rights in gin bottles that featured internal LED lights and, when shaken, showers of golden flakes. Externally, they were decorated with an idyllic scene of deer standing amongst snow-laden trees. After a rival retailer began marketing similar products, the chain launched infringement proceedings.

Upholding the claim, the Court noted that the shape of the rival's bottles was either identical to those of the chain or so close that it was hard to see any real difference. The shape of their stoppers appeared identical. Both had an integrated light and falling snow effect, together with an external design featuring tree silhouettes.

The products were not identical – amongst other things, the rival's bottles were distinctly coloured and branded, their stoppers were darker in shade and their brighter and busier decoration did not feature animals. However, the Court found that those differences were of relatively minor detail.

When viewed cumulatively, the overall impression of the similarities between the products was striking. The Court concluded that the rival's marketing of the gin bottles complained of infringed four of the chain's registered design rights. Questions of remedy would be addressed at a further hearing, if not agreed.

For expert advice on any matters relating to intellectual property, contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Marks and Spencer PLC. v Aldi Stores Ltd [2023] EWHC 178 (IPEC)*

Employment

**Running a Business Via Group Chats and Instant Messaging Has Its Pitfalls**

Business owners who use social media group chats or instant messaging as an easy means of communicating instructions to staff may be prompted by an Employment Tribunal (ET) decision to consider other management tools.

The owner of a family-run plant nursery suffered from anxiety and, during a period in which he largely worked from home, communicated with staff by means of social media group chats. The tone of such messages was generally very informal and jokes and swear words were sometimes included.

He set high standards, actively running the business in his own particular way, and used the group chats to express concerns and to challenge or question members of staff. There was, however, a gulf in perception and expectation between him and the nursery's general manager as to what was, and was not, an appropriate managerial communication. His messages were not always clear or fully understood and the manager came to consider them as unprofessional.

The manager had expressed concern about criticisms of his performance contained in some of the owner's group chat postings. However, matters reached a head when he received a private message in which the owner accused him of being dishonest and telling falsehoods. It was that message which was the main or dominant factor in his decision to resign.

Upholding the manager's unfair constructive dismissal complaint, the ET accepted that the owner may honestly have believed that he was doing nothing wrong. He did not intend the private message to prompt the manager's resignation although, given its content, that was highly likely to be the result.

The difference between them was better described as a misunderstanding and there was no reasonable basis for accusing the manager of deliberate falsehood or dishonesty. The ET found that the message destroyed the relationship of trust and confidence that should exist between any employer and employee.

It amounted to a fundamental breach of the manager's employment contract. He could not reasonably have been expected to put up with it and his resignation was the almost inevitable consequence. The amount of compensation due to him would be assessed at a further hearing, if not agreed.

Contact **<<CONTACT DETAILS>>** for advice on any employment law matters.

**Partner Note**

*Thorns v Sutton T/A St Margaret's Nursery [2023] UKET 1402191/2022*

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