Commercial Client ~ July 2023

**Commercial Client Titles ~ July 2023**

**General**

Share Sales – Skeletons in the Corporate Cupboard Must Be Disclosed

**Property**

Members-Only Gym 'Used for Charitable Purposes' – Supreme Court Ruling

**Tax**

Is a Matchmaking Agency Providing Consultancy Services for VAT Purposes?

**Commercial Litigation**

Selling a Business? Warts and All Disclosure is Vital

**Company**

Missing Trader Fraud – Company Director Receives 12-Year Disqualification

**Contract**

Lending Money to Your Company? How and When Will You Be Repaid?

**Finance and Investment**

Spread Betting – Punter's 'Bad Decisions' to Blame for £1.8 Million Losses

**Em****ployment**

Protected Beliefs and Same-Sex Relationships/Transgender Issues

General

**Share Sales – Skeletons in the Corporate Cupboard Must Be Disclosed**

Skeletons in the corporate cupboard may dramatically reduce the value of shares but their existence must generally be fully disclosed prior to a sale. The vendor of a care home business found that out to his cost when he was ordered to pay more than £8 million in damages to the purchaser.

The case concerned the sale for over £30 million of two companies which, together with a wholly owned subsidiary of one of them, owned a portfolio of seven care homes. Ten days before the sale, one of the homes was the subject of an unannounced inspection by the Care Quality Commission (CQC).

Concerns raised by the CQC following the inspection mostly arose in relation to the home's COVID-19 policies and addressed questions of governance and the safety of residents. The CQC imposed a number of conditions on the home's registration as a service provider. Amongst other things, the admission of any new residents was prohibited without the CQC's consent.

After proceedings were lodged, the High Court noted that none of that was disclosed to the purchaser prior to the sale, as it should have been. The purchaser only found out about the CQC intervention a few days after the sale went through. The non-disclosure involved breaches of warranties contained in the share purchase agreement (SPA) and misrepresentation. The vendor accepted that it was to be treated as fraudulent and that damages should be assessed on that basis.

Ruling on the matter, the Court noted that the home's CQC rating was downgraded from 'good' to 'inadequate' shortly after completion of the SPA. Local authorities responded by ceasing to place residents in the home, which the purchaser eventually decided to close.

The Court found that, on the date of the SPA, the home had no more than bricks and mortar value. The purchaser was awarded damages to reflect the difference between the sum it paid for the companies and their actual value at the date of the SPA. Further damages were due in the light of the additional risk faced by the purchaser in relation to other homes in the portfolio. The purchaser's overall award came to £8,602,423.

**Partner Note**

*Care Tree Invest 2 Ltd v Bell [2023] EWHC 1151 (Comm)*

Property

**Members-Only Gym 'Used for Charitable Purposes' – Supreme Court Ruling**

In a decision of great importance to the charity sector, the Supreme Court has ruled that a gym run by a healthcare charity qualifies for 80 per cent relief from business rates notwithstanding that it is only open to members who pay monthly fees that might be viewed as unaffordable by those of modest means.

The registered charity, which runs hundreds of fitness and wellbeing facilities around the country, together with hospitals and medical centres, charged a standard rate of £80 a month to the gym's members. It also provided limited free services to non-members. It applied to the local authority for an 80 per cent rates reduction under Section 43 of the Local Government Finance Act 1988.

In rejecting that application, the council took the opinion that, viewed on its own, the gym was not being used for charitable purposes because the membership fees were set at a level which excluded those of modest means from enjoying its facilities. On that basis it contended that the public benefit requirement, which is an invariable condition of charitable status, was not satisfied.

In subsequently upholding the charity's challenge to that decision, a judge found that the question of whether the gym was used for charitable purposes did not have to be decided by reference to the activities carried on there, taken in isolation. The correct question was whether the charity was using the gym for the pursuit of its charitable purposes, viewed in the context of its charitable activities as a whole. The charity's entitlement to the rate reduction was later confirmed by the Court of Appeal.

Dismissing the local authority's appeal against that outcome, the Supreme Court noted that the mandatory 80 per cent rates reduction is afforded to ratepayers who are charities, or trustees for a charity, where the premises concerned are used wholly or mainly for charitable purposes.

The charity's purposes – including the advancement, promotion and maintenance of health and healthcare for the public benefit – were, as a matter of law, presumed all to be charitable in all the places where they are carried on and, viewed overall, to satisfy the public benefit requirement. The charity plainly used the gym for the direct fulfilment of its charitable purposes.

The Court acknowledged that, on the findings of the Court of Appeal, the facility was, putting it broadly, for the rich but not the poor. It noted, however, that the rich are as much a part of the section of the public benefited by the charity as are the poor. On the basis of the charity's registration, it had to be assumed that the poor were not excluded from benefit, on a view of the charity's activities in the round, even if they were excluded from use of the gym.

We can advise you on any matters relating to commercial property and business rates disputes. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*London Borough of Merton v Nuffield Health [2023] UKSC 18*

Tax

**Is a Matchmaking Agency Providing Consultancy Services for VAT Purposes?**

High-end matchmaking agencies do far more than simply introduce lonely clients to prospective life partners. In a guideline case, however, the Court of Appeal has ruled that – at least for the purposes of VAT – their services are not equivalent to those of a consultancy firm providing expert advice.

The case concerned a matchmaking agency that prided itself on the quality of the service it provided to its clients, including the careful verification and vetting of potential matches and post-introduction liaison. Its entry-level clients paid £15,000 for eight introductions over a 12-month period and its most expensive custom and bespoke services cost between £25,000 and £140,000.

The agency contended that it was providing the 'services of consultants…and other similar services…and the provision of information' within the meaning of Article 59(c) of the Principal VAT Directive. On that basis, it argued that its provision of services to clients located outside the UK and the European Union fell outside the scope of VAT. HM Revenue and Customs took a contrary view and appealed after the agency's arguments prevailed before the Upper Tribunal.

In upholding the appeal, the Court noted that the agency's sole obligation identified in the express terms of its client contracts was to supply introductions. The provision of information was not expressed as a freestanding obligation and there was no mention of the provision of advice. There was no doubt that a typical consumer would regard the provision of introductions as the most important element of the agency's service. That was what its clients were bargaining for.

The additional services provided by the agency, although important, were not an end in themselves and none of them was referred to in its client contracts. The Court concluded that the service provided by the agency was not a service habitually supplied by consultants or consultancy firms giving expert advice to a client. Nor was its service either data processing or the supply of information.

Our specialist team can assist you with all types of business tax issues. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*The Commissioners for His Majesty's Revenue and Customs v Gray & Farrar International LLP [2023] EWCA Civ 121*

Commercial Litigation

**Selling a Business? Warts and All Disclosure is Vital**

Share purchase agreements (SPAs) almost always contain warranties that require vendors to disclose any potential challenges or legal difficulties facing the relevant company of which they are aware. As a High Court ruling showed, any lapse in such disclosure can have grave financial consequences.

The case concerned the sale for over £10.9 million of a company that produced a software package that included an address lookup facility. Numerous warranties were contained in the SPA, by one of which the vendors confirmed to the purchaser that the company owned, or had licensed to it, all the intellectual property rights required to carry on its business.

In upholding the purchaser's subsequent breach of warranty claim, the Court found that the database on which the lookup facility was founded was principally derived from Royal Mail data that the company had obtained, under licence, from a third party. The company's use of the data had exceeded the terms of its licence, thereby infringing Royal Mail's copyright and/or database rights in a manner that was actionable.

There was conclusive evidence that the vendors were aware that the company was using the Royal Mail data in a manner that was almost certainly in breach of the relevant licence. The purchaser was awarded £3.5 million in compensation.

**Partner Note**

*Arani and Others v Cordic Group Ltd [2021] EWHC 829 (Comm)*

Company

**Missing Trader Fraud – Company Director Receives 12-Year Disqualification**

The law is relentless in its pursuit of directors who know, or ought to know, that their companies are being used as vehicles for VAT fraud. The former boss of a defunct mobile phones trading company found that out to his cost when the High Court disqualified him from acting as a company director for 12 years.

HM Revenue and Customs' (HMRC's) suspicions were raised after the company, which had no assets or investors and traded from its sole director's residential address, entered into three deals worth more than £10 million in a single VAT period. A VAT reclaim in excess of £1.7 million in respect of the transactions was rejected on the basis that they were connected with missing trader intra-community (MTIC) fraud.

After the company's subsequent appeal to the First-tier Tribunal was dismissed, an immediate misdeclaration penalty of £196,727 was imposed. The company was ultimately wound up at the behest of HMRC. The Official Receiver later launched proceedings against the director under the Company Directors Disqualification Act 1986. He emphatically denied any wrongdoing and asserted that he was the victim of a witch hunt or vendetta by HMRC.

In imposing the disqualification, however, the Court noted that the director was an experienced trader in mobile phones and had knowledge of the hallmarks of MTIC fraud and how it operates. Any suggestion that he was not completely au fait with what was going on was unrealistic and incredible. There was overwhelming evidence that the company – and through it the director – was aware that the transactions were connected with the fraudulent evasion of VAT. Alternatively, they had at the very least turned a blind eye to that fact.

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

**Partner Note**

*The Official Receiver v Kelly [2023] EWHC 1181 (Ch)*

Contract

**Lending Money to Your Company? How and When Will You Be Repaid?**

Shareholders and directors commonly lend money to their companies with a view to providing working capital or otherwise assisting their businesses. However, as a Court of Appeal ruling made plain, it is vital to formally record in writing the basis on which such loans are made and, in particular, the terms on which they are to be repaid.

The case concerned a successful commercial and residential property development company in which a businessman and two brothers were equal shareholders. The three were also the company's directors for 20 years until the businessman was removed from the board by a shareholders' resolution passed by the brothers.

The businessman launched proceedings, seeking to recover seven-figure, interest-free loans he had made to the company over the years to assist its business. The loans, together with sums loaned by the brothers, were credited to a directors' loan account. He argued that, in the absence of any specific agreement to the contrary, the loans were repayable on demand.

The brothers did not dispute that the company was very substantially indebted to the businessman. They argued, however, that the three of them had orally agreed that, save in the event of the company's sale or liquidation, the loans would not be repaid without the consent of all three of them. Following a hearing, however, a judge found that their defence to the claim had no real prospect of succeeding and entered summary judgment in the businessman's favour for over £2.3 million.

Dismissing the brothers' appeal against that outcome, the Court noted that, although it is commonplace for directors and shareholders to lend their companies money, it would be most unusual for them to bind themselves to leave it there indefinitely. A loan that is made other than for a fixed term is, on the face of it, repayable on demand and that is perhaps particularly so where a loan is interest free.

On the brothers' case, the businessman had advanced loans to the company on the basis that he could never recover them except with the brothers' consent or in the event of a sale or liquidation. He would have had no control over the money, which would have been tied up indefinitely, interest free. It was striking that there was no trace of any such unusual, and potentially draconian, term in any of the documents before the judge. Although his ruling was not free from flaws, it was open to him to conclude that the brothers had no viable defence to the businessman's claim.

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

**Partner Note**

*Malik v Henley Homes PLC [2023] EWCA Civ 726*

Finance and Investment

**Spread Betting – Punter's 'Bad Decisions' to Blame for £1.8 Million Losses**

Providers of spread betting services are required to be transparent about risk and take steps to identify vulnerable punters who might be prone to getting in over their heads. In the case of a businessman who lost a seven-figure sum speculating on oil prices, however, the High Court found that those obligations were met.

The successful, self-made entrepreneur speculated that the price of a particular type of oil, which had collapsed during the COVID-19 pandemic, would soon start to rise again. After he placed a series of time-limited spread bets, however, his prediction sadly turned out to be wrong. When the provider via whom he had placed the bets closed his positions, he had lost in excess of £1.8 million.

He later launched proceedings against the provider, seeking his money back plus substantial damages. He asserted that the provider had not done enough to ensure that its service was appropriate for him and had given him misleading information regarding the expiry date of relevant spread betting contracts. But for those lapses, he said that he would neither have placed the bets nor suffered any loss.

Ruling on the case, the Court accepted that one of the provider's web pages showed a misleading expiry date on which certain positions would be closed and losses or gains crystallised. However, that had no contractual force and accurate information was available elsewhere. The businessman knew that his spread bets were not open ended and was in any event aware of the correct expiry date.

The Court accepted that the provider's policy on assessing the appropriateness of its products for particular clients did not in certain respects match its actual approach. That, however, did not alter the fact that its information gathering in respect of the businessman was perfectly adequate. He was clearly aware that the trades were risky and the Court formed the view that he was keen to shift blame for his disastrous financial decision-making onto others.

Dismissing the claim, the Court found that the provider was entitled to take account of his extensive experience of high-risk online trading and had not breached industry rules or acted in breach of contract. It was clear that he was prepared to bet on the relevant market rising when every indicator was that it would fall. He simply made very bad decisions and joined the majority of those who engage in spread betting in losing money.

For expert advice on any matters relating to finance and investment law, contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Day v Forex Capital Markets Ltd [2023] EWHC 1349 (Comm)*

Employment

**Protected Beliefs and Same-Sex Relationships/Transgender Issues**

The often-heated debate concerning same-sex relationships and transgender issues can hardly have escaped anyone's notice. In the case of a school pastoral worker who was dismissed after expressing her forthright views on the subject on social media, however, the Employment Appeal Tribunal (EAT) sought to impose legal order on the fray.

The secondary school where the woman worked had received complaints about her social media posts relating to relationships education in primary schools. She was suspended and, following a disciplinary process, dismissed. She later launched Employment Tribunal (ET) proceedings asserting that she had suffered direct discrimination because of, or harassment relating to, her protected beliefs.

In rejecting her claim, however, the ET concluded that the reason for her dismissal was not because of, or related to, her protected beliefs. It found that the measures taken by the school were due to its concern that someone reading her posts could reasonably form the opinion that she held homophobic and transphobic views, something she vehemently denied.

Upholding her challenge to that outcome, the EAT noted that it was expressing no views as to the merits of the national debate and that its role was confined solely to determining questions of law. It emphasised, however, the fundamental importance of the woman's human rights to freely express herself and to manifest her religious beliefs. Such rights are, it noted, the pillars of any democracy and it matters not whether the beliefs in question are popular or mainstream or even whether their expression may cause offence.

The ET was entitled to find that it was the school's concern about how others might view the posts that underlay each of the steps taken against her. It failed, however, to ask itself whether there was a close or direct link, or nexus, between her posts and her protected beliefs. Had it done so, it would have concluded that there was such a nexus.

When determining the reason why the school acted as it did, the ET was required to consider whether its actions were prescribed by law and necessary for the protection of the rights and freedoms of others. It was thus obliged to perform a proportionality assessment before deciding whether the actions were because of, or related to, the manifestation of her protected beliefs, or were in fact due to a justified objection to the manner of that manifestation. The case was remitted to the ET for rehearing.

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

**Partner Note**

*Higgs v Farmor's School [2023] EAT 89*

These articles are provided for general interest and information only. They do not constitute legal advice. Whilst every effort is made to ensure that the content accurately reflects the law in England as at the date of its transmission, no liability is accepted for any loss or damage arising from any act or omission resulting from any information contained herein.