Commercial Client ~ October 2023

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General

**Would-Be Alcohol Wholesaler Falls Foul of the 'Fit and Proper Person' Test**

Would-be entrants into the alcohol wholesaling business must satisfy HM Revenue and Customs (HMRC) that they are 'fit and proper persons' to participate in such a heavily regulated trade. The demanding hurdles that must be jumped in order to pass that test were illustrated by a First-tier Tribunal (FTT) ruling.

When a woman sought registration as an approved wholesaler of alcoholic goods under the Alcohol Wholesaler Registration Scheme, HMRC asked her to provide a raft of information, including a detailed business plan, bank statements, letters of intent from prospective customers and an explanation of her sources of income.

In refusing her application, an HMRC officer was not satisfied that she was a fit and proper person to carry on the activity of an alcohol wholesaler. On the information that she had provided, the officer expressed doubt as to whether her proposed business would be credible or financially viable.

The officer found that she had failed to provide a list of all her monthly income sources or to explain how her business's start-up capital would be funded. Certain figures in her business plan were confused and she had given details of only two prospective customers. The officer further questioned whether she would be able to run an alcohol wholesaling business alongside her other commitments.

In dismissing her appeal against the officer's decision, the FTT noted that an alleged error in one of her tax returns cast doubt on her ability to operate as a wholesaler of alcohol, a controlled activity that requires careful record-keeping and transparency when mistakes are made. On that basis, the officer was fully entitled to consider that she had not satisfied the fit and proper person test.

The officer was further concerned that she had made inconsistent statements about her income and that she had not satisfactorily explained certain payments, including multiple large deposits of cash, into her bank account. Given the lack of clarity and credibility of some of her answers to HMRC's queries, the FTT could not see how the officer could have reached any other decision.

The FTT emphasised that it was open to her to apply for registration again and that, if she succeeded in addressing HMRC's objections and establishing her credentials as a fit and proper person, she should be able to obtain the approval sought.

**Partner Note**

*Nwadei v The Commissioners for His Majesty's Revenue and Customs [2023] UKFTT 724 (TC)*

Property

**Retail Tenant Forced to Relocate Receives Compensation for Permanent Loss of Profit**

When retail premises are compulsorily purchased by public authorities and forced to relocate, to what extent should compensation be paid for any resulting permanent loss of profit? The Upper Tribunal (UT) considered that issue in a guideline case.

Leasehold premises occupied by a national chain of jewellers were compulsorily acquired by a local authority as part of a town centre regeneration scheme. The tenant relocated its store to a nearby shopping centre where the overheads were substantially higher. The council nevertheless disputed its entitlement to compensation in respect of permanent loss of profits.

Ruling on the matter, the UT noted that the original store was on a prominent corner plot which benefited from high footfall. The tenant said that the store owed much of its resounding success to the fact that its occupational costs were less than half those of an equivalent unit in the shopping centre and that there was not much difference in their turnovers.

The UT found that there was no equivalent alternative premises to which the tenant could have relocated in lieu of the shopping centre. The new store was superior to its predecessor but it did not represent such good value for money, in that its profit margin was adversely affected by increased property overheads. That reduction in profit was directly attributable to the store's relocation.

Responsibility for the new store's reduced footfall and net sales could not be laid at the door of the compulsory purchase and relocation. However, the end result of the enforced move was that the tenant achieved a lower turnover at more expensive premises and had sustained a permanent loss of profit. It was thus entitled to compensation calculated by reference to the increased overhead costs.

The UT assessed the tenant's compensation in respect of permanent loss of profit at £318,469. That sum took account of relief from business rates and a rent-free period granted during the COVID-19 pandemic. Compensation in respect of relocation costs and professional fees was agreed and the tenant's temporary loss of profits arising from the relocation was calculated at £184,045. The tenant's total award came to £647,510.

We can advise you on all aspects of commercial property law, including compulsory purchase orders. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Warren James (Jewellers) Ltd v Watford Borough Council* *[2023] UKUT 153 (LC)*

Tax

**Suppression of Takings – HMRC Rains on Takeaway Pizza Company's Parade**

Companies that suppress their takings, thereby evading tax, may live on the fat of the land for a while. However, as a tax tribunal ruling showed, the corporate veil often affords limited financial protection to their directors when HM Revenue and Customs (HMRC) comes calling to rain on their parade.

The case concerned the sole director and shareholder of a company that provided a takeaway pizza business. Following an investigation, HMRC took the view that the company's turnover had been systematically supressed. Using its best judgment, HMRC assessed the company for £74,170 in VAT.

A penalty of £9,128 was imposed on the company in respect of two VAT periods on the basis that its behaviour had been deliberate. A personal liability notice (PLN) was raised against the director in the same amount after HMRC concluded that the company's inaccuracies were attributable to him.

The company, which had meanwhile entered liquidation and was eventually struck off, suffered a further blow when HMRC also issued it with a penalty in respect of unpaid Corporation Tax. As a result, the director was soon afterwards hit with a further PLN in the sum of £71,537.

After the director appealed, the First-tier Tribunal upheld the VAT PLN in full. In reducing the Corporation Tax PLN to £31,399, however, it found that HMRC had failed to prove that the company had acted deliberately in respect of part of its liability. The director's overall bill was cut from £80,666 to £40,527.

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

**Partner Note**

*Gopaul v The Commissioners for His Majesty's Revenue and Customs [2023] UKFTT 00728 (TC)*

Company

**'Reckless' Travel Company Director Ordered to Compensate Customers**

Those who manage companies in a reckless or incompetent manner can expect to be banned from holding directorships in future – but should they also be ordered personally to compensate customers who are left out of pocket? The High Court addressed that issue in a case concerning a failed travel operator.

The company, which provided African safari tours, was engaged in activities that required it to hold an Air Travel Organisers' Licence (ATOL). Despite having received a number of reminders from the Civil Aviation Authority, its ATOL was allowed to expire. It nevertheless illegally took new bookings from four customers in respect of holidays that should have been ATOL protected.

Booking forms were used which included the ATOL logo and the company's expired ATOL number, suggesting that it was appropriately licensed. A deposit paid by a fifth customer was also not refunded before the company entered creditors' voluntary liquidation. The customers received neither their money back nor the holidays they had paid for.

After the Secretary of State for Business and Trade launched proceedings under the Company Directors Disqualification Act 1986, the company's sole director and 80 per cent shareholder was disqualified from holding any company directorship for seven years. In only the second case of its kind, the Secretary of State also sought an order under Section 115A of the Act requiring him to compensate the customers for their losses.

In his defence, the director said that the company had traded well until its fortunes were hit by the Ebola pandemic and the Brexit referendum. He had hoped that difficulties in renewing its ATOL would be swiftly resolved. The company's collapse had left him in straitened financial circumstances and was a disaster for him on a personal level. He had not acted dishonestly and contended that orders under Section 115A should only be made in cases of fraud.

Upholding the Secretary of State's application, however, the Court found that he had taken a risk with customers' money and should face the full consequences of his actions. It was not a case of relatively minor negligence. The company had been repeatedly warned to cease taking licensable bookings and his incompetent and reckless conduct was both wilful and defiant. He was ordered to pay £81,405 in compensation, plus interest.

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

**Partner Note**

*The Secretary of State for Business and Trade v Barnsby [2023] EWHC 2284 (Ch)*

Contract

**Contract Adjudicators' Decisions Must Be Honoured Promptly – No Ifs, No Buts**

Those who willingly submit contract disputes to adjudication must, save in very exceptional cases, honour the outcome without delay – no ifs, no buts. The High Court resoundingly made that point in a guideline ruling.

The case concerned highway engineering and construction works carried out by a contractor to the order of a local authority. After a dispute developed, the contractor was successful in an adjudication. It subsequently launched proceedings with a view to enforcing the adjudicator's decision and sought summary judgment against the council for a sum in excess of £3 million.

The council conceded that the contractor was entitled to such a judgment. It did not, however, accept that the adjudicator's decision reflected the true state of its account with the contractor and said that it intended to refer the issue of the true value of the works carried out to a further adjudication.

In seeking a stay of execution pending the outcome of that further proposed adjudication, the council asserted that the contractor was insolvent. If ordered to pay the judgment sum straight away, the council argued that it might not be able to recoup money that the contractor might ultimately be directed to repay.

Ruling on the matter, the Court noted that the contractor's most recent filed accounts recorded a trading loss in the relevant year of over £38 million. Its mounting losses had wiped out its asset base, leaving it balance sheet insolvent with a total deficit of over £58 million. Its growing net current liabilities also indicated cashflow pressure.

The contractor was, however, part of a substantial multinational group and its parent company had offered the council a guarantee. The parent company enjoyed a very healthy balance sheet, showing a net asset position of about £1.5 billion, and was plainly balance sheet solvent. It was, the Court found, fanciful to suggest that it would be unable to repay a judgment sum of around £3 million.

In rejecting the council's application, the Court found no merit in its arguments. Its position was more than protected by the parent company's offered guarantee and there were no proper grounds for staying enforcement of the judgment. The council's conduct had, in certain respects, been unreasonable to a high degree and it was ordered to pay the costs of the stay application on the punitive indemnity basis.

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

**Partner Note**

*lun Griffiths (Contractors) Ltd v Carmarthenshire County Council [2023] EWHC 2269 (TCC)*

Finance & Investment

**Open Justice Principle Prevails in Disgraced Pensions Adviser's Case**

Litigants are often concerned that publicity surrounding their cases will have a grave impact on their private lives, even potentially exposing them to physical violence. As a case concerning a disgraced pensions adviser made plain, however, powerful reasons are always needed to displace the open justice principle.

In the context of advice that the man had given to members of a large occupational pension scheme, the Financial Conduct Authority (FCA) issued a decision notice by which it concluded that he lacked honesty and integrity and was therefore unfit to perform functions in relation to any regulated activity. A prohibition order was also made and he was issued with a penalty in excess of £2.2 million.

In referring the matter to the Upper Tribunal (UT), he challenged the penalty together with the breadth of the prohibition order, which he said made it very difficult for him to obtain paid employment. At a preliminary hearing, he contended that the decision notice should not be published prior to the outcome of the reference and that his name should not appear on the UT's register of pending hearings.

He contended, amongst other things, that such publication would infringe his human rights to life and to respect for his privacy and family life. Publicity relating to the matter would expose him and his family to a serious threat of violent reprisals and would harm his mental health and that of a vulnerable relative.

The UT accepted that he had been the subject of a level of unpleasant comment on social media and had endured a very difficult time. He had never expected the level of criticism that he had encountered. However, one incident apart, he had not been seriously threatened with physical harm. That incident had not resulted in an attack and he could not point to any other violent acts against him.

Rejecting his application, the UT found that he had failed convincingly to show that publication of the decision notice would pose a serious risk of physical harm to him or his family. There was no cogent evidence of a real threat that such publication would have a serious mental health impact or seriously harm his, or anyone else's, right to a private life.

The UT acknowledged that publication of the decision notice might reignite adverse criticism and result in disagreeable statements about him and possibly members of his family. He did not, however, dispute the core conclusions of the FCA in relation to his honesty and integrity and such a collateral impact was part of the price to be paid for open justice.

**Partner Note**

*Reynolds v The Financial Conduct Authority [2023] UKUT 234 (TCC)*

Intellectual Property

**Registering a Trade Mark is the Best Way to Protect Your Valuable Brand**

Having worked hard to establish the reputation of your product, there is nothing more annoying than a competitor marketing rival goods under a confusingly similar name. As a High Court ruling showed, however, registering a trade mark is a highly effective means of defending yourself against such conduct.

A company designed, manufactured and sold a range of high-visibility goods for use by equestrians which were branded with the word 'Mercury'. Its sole director swiftly complained after a competitor company began marketing hi-vis equestrian products the labelling of which included the same word.

After the company registered 'Mercury' as a trade mark, the competitor undertook a voluntary rebranding process, aiming to reduce and then cease its use of the word in connection with its products. Some infringing use continued, however, and the company launched proceedings.

Following a trial, a judge found the competitor liable both for infringing the company's trade mark and for passing off. An injunction was issued restraining the competitor from engaging in any further acts of infringement. The company elected to have its compensation assessed on the basis of the profits that the competitor had made from selling infringing goods.

Ruling on the matter, the Court found that the competitor had made a gross profit of £24,356 on selling goods bearing the Mercury mark. After deduction of overheads, the net profit figure came to £20,947. A further deduction was also made because the use of Mercury labels was not the sole factor driving the sale of the infringing goods. The company was awarded £12,568 in damages, plus interest.

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

**Partner Note**

*Equisafety Ltd v Battle, Hayward and Bower Ltd and Another [2023] EWHC 1821 (IPEC)*

Employment

**Treating Every Employee in the Same Way May Itself Be Discriminatory**

Anti-discrimination laws are often viewed as requiring employers to treat all their staff in the same way. However, as an Employment Tribunal (ET) ruling made plain, the positive duty to make reasonable adjustments to cater for disabled workers' needs may require them to be treated more favourably than their colleagues.

The case concerned a quality controller in a food packing plant who was disabled by back pain and depression. He worked 12-hour night shifts in the refrigerated plant and was on his feet for much of the time. After he had been absent on sick leave for nine months, his employer took the view that he would not be able to return to work and dismissed him on capability grounds.

After he launched proceedings, the employer asserted, amongst other things, that it had a clear and consistent policy in place and treated all its employees on long-term sickness absence in the same manner. Dismissing him, it contended, was a proportionate means of achieving a legitimate aim.

In upholding his disability discrimination claim, however, the ET noted that the duty to make reasonable adjustments, enshrined in Section 21 of the Equality Act 2010, is unique in that it requires employers to take positive action to avoid substantial disadvantage caused to disabled employees by aspects of their workplace.

That can in turn require employers to treat their disabled employees more favourably than others. Having a policy where all employees are treated the same is thus itself discriminatory as it does not allow an employer to treat individuals according to their personal circumstances, including any disability they may have.

Various reasonable adjustments could have been made that might have enabled his return to work. Amongst other things, he could have been deployed part time, given regular breaks, relieved of heavy lifting duties or provided with a seat or perching stool. The failure to obtain an occupational health or medical report prior to his dismissal also amounted to a failure to make a reasonable adjustment.

The ET accepted that lack of capability was a potentially fair reason for the man's dismissal and that the employer genuinely believed that there was no prospect of him being able to return to work. However, in also upholding his unfair dismissal claim, the ET found that that belief was not reasonably held. If not agreed, the amount of his compensation would be assessed at a further hearing.

Contact **<<CONTACT DETAILS>>** for advice on any employment law matter, including unfair dismissal and disability discrimination.

**Partner Note**

*Poniatowski v Wealmoor Ltd [2023] UKET 1306233/2020*

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