GRANT SAW
SOLICITORS LLP
Incorporating Lawbridge Solicitors

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Your quarterly bulletin on legal news and views from Grant Saw Solicitors LLP

Commercial Law UPDATE

Damaged in Transit – Carrier Must Show Not Negligent

Goods are often damaged in transit and when they are of relatively high value, problems are especially likely to rear their heads.

A recent dispute involved a shipment of 20 containers of Columbian coffee beans which were transported via Panama in various ships. The ships docked at a number of ports and the containers were transported to Bremen in Germany.

Coffee beans are hygroscopic, and can be affected by moisture if shipped in unventilated containers unless preventive action is taken. In this case, inadequate measures were put in place and, when the containers were opened in Germany, the contents of all but two had moisture damage.

The owners of the coffee sued the carrier, alleging that it had failed to 'properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried'. The carrier denied liability, claiming that the 'inherent vice' of the coffee beans made them unable to withstand the normal levels of condensation they would be exposed to in transit.

As the owner had produced no evidence of negligence in the handling of the cargo, the Court of Appeal ruled in favour of the carrier. The Supreme Court overturned that decision on appeal, however.

It ruled that the legal burden of disproving negligence fell on the carrier. In the absence of evidence regarding the adequacy of the measures taken to prevent damage, the carrier was liable.

The practical point here is that if a cargo which is subject to deterioration is transported, it is sensible for the carrier to document the procedures adopted to prevent any anticipated damage. It is also important to understand the terms and conditions under which goods shipped are to be carried.

For advice on any such matter, contact us.

New National Minimum Wage Rates – A Reminder

Employers are reminded of the new National Living Wage (NLW) and National Minimum Wage (NMW) rates that came into effect on 1 April 2019:

- The NLW, which applies to those aged 25 and over, increased from £7.83 to £8.21 per hour;
- The NMW for 21- to 24-year-olds increased from £7.38 to £7.70 per hour;
- The NMW for 18- to 20-year-olds increased from £5.90 to £6.15 per hour;
- The NMW for 16- and 17-year-olds increased from £4.20 to £4.35 per hour; and
- The apprentice rate of the NMW, which applies to apprentices aged under 19 or those aged 19 or over and in the first year of their apprenticeship, increased from £3.70 to £3.90 per hour.

The accommodation offset increased from £7.00 to £7.55 per day for each day during the pay period that accommodation is provided.

Exchanging Secret Information? Always Get a Non-Disclosure Agreement!

Businesses that deal or hope to deal with one another often have to put security concerns to one side and share their confidential information. As a High Court case underlined, however, such exchanges should always be subject to a professionally drafted non-disclosure agreement (NDA).

An American company that specialises in putting together insured financing deals hoped to enter into a commercial partnership with a Bermuda-based company in a similar field. In order to facilitate negotiations, the former disclosed confidential details of its trading models and pricing to the latter.

The Bermudian company signed an NDA by which it agreed, amongst other things, to use the confidential information solely for the purpose of negotiating the proposed partnership. It also undertook to keep the information secret and to take all reasonable precautions to prevent unauthorised access to it.

After the deal fell through, however, the American company became concerned that the Bermudian company would breach the NDA and use the confidential information to further its own business so that it could offer competing services at a lower price. As the NDA contained an exclusive English jurisdiction clause, the American company launched proceedings in London.

In issuing an interim injunction against the Bermudian company, the Court found that the American company had established a serious issue to be tried. Damages would not be an adequate remedy if the NDA were breached and the balance of convenience also fell in favour of the order being granted.

The terms of the injunction have yet to be finalised, but the Court indicated that the Bermudian company would, amongst other things, be required to return all hard copies of the document in which the confidential information was contained and to delete any electronic copies from its day-to-day operating systems.

We can help you to protect your commercial interests in all negotiations.

Adjudication Payments Must Be Made First

Payments under building contracts can be a touchy issue and have led to numerous disputes. Adjudication proceedings are intended to make the process of resolving building disputes simpler, but they themselves are replete with legal challenges on a whole variety of issues, normally instigated when one party is unhappy with the adjudicator's decision.

Often such proceedings are accompanied by an unwillingness of the paying party to make the payment due while the legal proceedings are ongoing.

A recent decision of the Technology and Construction Court (TCC) has provided valuable guidance on this issue.

The case involved a dispute between a couple and a firm of builders that required two adjudications. The first decision of the adjudicator was that the firm appointed to carry out the building works should be paid a sum of a little over £100,000 plus interest. The couple who had employed the builder had failed to issue a 'pay less' notice as required under the contract. Such awards are payable immediately, but no such payment was forthcoming.

The second adjudication concerned the final value of the contract. This adjudication was opposed by the builder, who claimed the final value adjudication could not be commenced when the payment ordered under the first adjudication had not been made. The couple wished to set off that sum against the final account.

The TCC would have none of it: the second adjudication could not yet proceed. The judge commented that 'an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication'.

For advice on the conduct of any construction dispute, contact us.

Attempt to Block Online Sales Leads to Fine

The European Commission has fined a clothing brand more than £30 million for preventing retailers stocking its products from advertising in and selling to customers in other EU countries, in breach of the EU Geo-Blocking Regulation.

For advice on your rights and responsibilities in conducting online or foreign trade, contact us.

.eu Domains? Take Steps Now

In the event of a no-deal Brexit, the organisation that operates the register of .eu domain names has confirmed that UK businesses or UK-based persons will no longer be able to register .eu domains or renew the ones they have. In addition, those already holding them may be stripped of them at the volition of the registrar.

Even more seriously, where a 'copycat' .eu domain is registered, it would appear that there will be no right of redress against the abusive registration.

For those for whom a .eu domain is important, the ability to transfer the ownership of that domain to an EU establishment will be essential. It is thought that owners of .eu domains will have two months to accomplish this.

For more information on the legal impact of the UK's changing relations with the EU, contact us.

Forming a Company – There's Help at Hand

For those of you baffled by the intricacies of setting up a company in the UK and the myriad compliance obligations (company secretarial, Corporation Tax and PAYE, auto-enrolment pensions, VAT and Making Tax Digital to name but a few), the Government has put together webinars run by Companies House and HM Revenue and Customs to help you understand the whole process.

The first is aimed at helping company directors understand the filing requirements (details can be found at https://bit.ly/2WNHBcy) that apply to UK companies and the second is about payroll compliance (details can be found at https://bit.ly/2GcxLM3).

If you are struggling with the legal obligations relating to your business or any other commercial issue, contact us for advice.

Patent Invalid if No Novelty

One of the key requirements for a patent for a technical process innovation to be successfully defended is that there must be something genuinely innovative about the subject matter of the patent. There has to be 'novelty' and an inventive step.

On occasions, patent applications are granted where there is no such step. Where the subject of a patent is an obvious application of existing knowledge, the patent is subject to challenge.

In a recent case, an attempt to enforce patent rights for a method of preparation of blood plasma failed and brought about the revocation of the patent because it lacked novelty and an inventive step.

When Does Complete Mean Complete?

When a company failed to complete the construction of student flats on time and some were found to be marginally smaller than the agreed size, the company that had agreed to lease the building (the employer) refused to recognise that practical completion of the building had occurred. It argued that the smaller than specified room size (a little more than 3 per cent) was a 'material and substantial' defect in the programme of works which meant a valid certificate of completion could not be given.

This would give the employer the right to terminate the lease agreement.

The court found that, as a matter of fact, the rooms were smaller than specified and that this was not a 'de minimis' defect. The question of whether there was practical completion was, however, dependent on the facts – in this instance whether there was sufficient evidence that the room size was such that the intended purpose of the building was not able to be achieved. Would the smaller size of the rooms make them unsuitable or of materially less value? There was insufficient evidence on that point.

The standard definition of a material and substantial defect is somewhat vague in the usual JCT contracts, one of which was used here. Accordingly, if there are specific defects that will be regarded as preventing practical completion, it is worth considering including these in the relevant contract documentation.

If a dispute does arise, consideration should be given to the evidence that will be needed to persuade the court that the defects prevent practical completion…just being material and substantial on the face of it may not be enough.

For guidance on the conduct of any construction or development dispute, contact us.

Company No Shield for Directors Seeking to Avoid Payment

The main idea behind the creation of a limited liability company is that those investing in it can limit their risk to the loss of the capital they contribute. As well as the risk for investors being limited, the directors of the company will not normally be liable for the company's debts should it fail.

However, the latter is not always the case. The directors of a company owe a duty both to its shareholders and to its creditors, and, if the interests of either are imperilled, are expected to take steps to minimise their losses as far as reasonably practicable. When a company is in financial difficulty, the interests of creditors will take preference over those of the shareholders. If the directors fail in their duty or behave in a way that is improper, the protections that apply to them may drop away, leaving them liable for the company's debts.

This is precisely what happened in a recent case. A company had retained builders to carry out work on a property it leased. The property was the UK residence of the company's sole director and shareholder, who leased it from a second company owned by his brother. The brother was the key decision maker and funded the building works, both directly and indirectly.

When the relationship between the builders and their client soured and funding the works became an issue, the builders' invoices went unpaid and their contract was terminated, which was a breach of contract. The client company was placed in liquidation. When further funds became available, the brother's company gave the project to another firm of builders to complete.

The company that had originally placed the contract was a shell company and without assets. It was clear that the

original builders would receive nothing. They therefore took legal proceedings against the director of that company and his brother. The builders claimed that the two had induced the company to breach its contract and had entered into an 'unlawful means conspiracy' to prevent the builders receiving the payments lawfully due to them.

Both men were found liable for a variety of reasons. Chief among these was that the financial arrangements they put in place to complete the project were ruled to be the cause of the breach of contract. The two brothers were ruled to have colluded in an unlawful conspiracy to permit the company to avoid its legal obligations.

Attempting to use a corporate structure to avoid paying debts often fails. We can advise you how to minimise the risk of any contract you wish to enter into and how to proceed if people you are dealing with are attempting to avoid their responsibilities.

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