Turbervilles Solicitors

Inside Track

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The Business Newsletter of Turbervilles Solicitors

Could you make a profit pursuing late payers?

The stakes have never been higher for businesses when it comes to dealing with the problem of late and non-payment of invoices.

Record numbers of firms are going out of business every day. Their demise is often caused by their inability to recover money owed to them. Thankfully, there are many options available when it comes to dealing with debtors.

If handled properly, firms can turn credit control into a profit making operation by recovering unpaid money in a way that earns more than enough to cover the cost of pursuing bad payers.

For example, businesses are entitled to levy a statutory late payment fee and charge punitive interest if invoices are not paid on time. If this doesn't make the debtor pay, it may be necessary to issue a 'court order for questioning' against the company secretary.

This is often enough to prompt many late payers into action but for those who still refuse to budge, there are various legal options available. However, firms should think carefully before agreeing to Individual Voluntary Arrangements as they can break down after only a few payments.

Be wary too of debt management companies which may try to persuade you to accept less than you are owed.

Many firms, especially smaller ones eager to hold on to customers, have been reluctant to take action in the past.

However, attitudes have hardened during the economic downturn with more and more companies refusing to allow bad debt to threaten their business. The best approach is to get good legal advice and act quickly.

Please contact us if you would like more information about credit control and debt collection.

Surveyors must pay £18m after giving negligent advice

A firm of surveyors must pay £18m in compensation after giving negligent advice to clients involved in a major property deal.

The surveyors were hired by a consortium of developers to assess the commercial prospects of a factory outlet shopping centre. The centre was in a listed building on two floors.

The developers acquired the lease on the centre for £62.85m based on the valuation produced by the surveyors. However, the centre was not a commercial success.

The developers took legal action alleging that the surveyors had been

negligent in overstating the commercial rents that could be achieved, and failing to prepare an accurate assessment of the centre's ability to attract consumer spending.

The High Court held that the surveyors owed a duty to the developers to exercise a reasonable standard of care and skill in producing the required assessments and valuations.

They failed to fulfil that duty because they did not have the experience or expertise to provide satisfactory professional advice and should not have taken on the project.

The surveyors had failed to carry out proper and due diligence, and had failed to adequately consider the impact of competing centres.

As a result of the inaccurate valuations, the developers had paid £18m more than the centre was worth and so were entitled to reclaim that amount from the surveyors.

Please contact us if you would like more information about professional negligence issues.

Directors in court after failing to keep company records

The importance of keeping accurate written records of directors' dealings and activities was highlighted in a recent case before the Court of Appeal.

It involved five directors of a property company that had gone into liquidation.

The liquidator began proceedings to make the directors repay money owing on loan accounts and to pay compensation for misfeasance and breach of fiduciary duty. Three of the directors denied any wrongdoing or that they owed any money, and two denied that they were directors at all.

At trial, the judge was concerned about the lack of company documentation and had to rely largely on oral evidence from the directors. He found this to be self-serving and unconvincing.

He found against the directors and said that had their version of events been true, it would have been supported by documentary evidence. The Court of Appeal has now upheld that decision. It said that contemporaneous documentation was of the utmost importance when assessing evidence.

It was significant when it was present, and it could also be conspicuous by its absence, as in this case.

Please contact us for more information about the issues raised in this article or any aspect of company law.

When TUPE does not apply

When a business is transferred from one owner to another, the rights of employees are protected by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE).

This means the employees of the previous owner become employees of the new owner on the same terms and conditions.

But what happens when the services provided by the new owners are different to those supplied by the original owners?

The issue arose in a case involving Nottinghamshire Healthcare NHS Trust. It closed one of its care homes and the residents were then moved to homes of their own. Responsibility for their care was then transferred to two independent providers.

Some of the care workers were offered jobs with the new providers. The Trust and the staff involved believed that TUPE applied, but the new providers disagreed.

The case reached the Employment Appeal Tribunal which held that TUPE does not apply if the services are not essentially the same under the new provider as they were under the former provider.

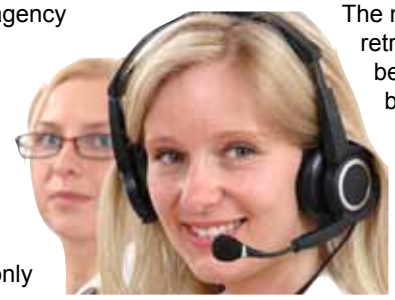
In this case, the services were clearly different because the former residents of the care home were now living in their own homes and were being helped to enjoy more independent lives.

TUPE was also not applicable for a second reason. The care home was no longer operational and so there was no longer a single, economic entity being transferred to which TUPE could apply.

Please contact us if you would like more information about TUPE and the issues raised in this article.

Changes to regulations on agency workers take effect

The changes to the regulations covering agency workers have now come into effect.



It means that agency workers who fulfil the same role with a firm for 12 continuous weeks are entitled to the same basic employment conditions as employees.

The regulations apply even if the person only works for a few hours each week.

From the first day in a temporary role, agency workers must be given access to any collective on-site facilities which are available to comparable employees.

These facilities include staff canteens, childcare, parking and transport. Temporary workers must also be given access to information on relevant job vacancies within the business.

Once the 12-week period is complete, the employer must also give more entitlements including salary, overtime pay, shift allowances, bonuses, lunch vouchers and annual leave.

These rights are in addition to those which temporary and agency workers already enjoy under the Working Time Regulations 1998.

The new rules took effect on 1st October and are not retrospective. If an agency worker was in place before that date, the qualifying period will still only begin on 1st October.

The overall number of employment cases being brought to tribunals has fallen by 8%, but the number of age related claims continues to rise.

The latest figures from the Tribunals Service cover the period from 1st April 2010 to 31st March 2011. There were a total of 218,100 claims during that period, a fall of 8% on the previous year.

However, while it may be good to see the number of claims fall, it should be remembered that the latest figures are still 44% higher than in 2008/09.

The statistics show that the number of age discrimination claims has risen steadily over the last three years. There were 3,800 claims in 2008/09. That rose to 5,200 in 2009/10 and then increased to 6,800 last year.

Please contact us if you would like more information about employment law issues.

New proposals to allow more firms to avoid audits

The Government has put forward proposals to allow more small firms to avoid the need to submit audited accounts – saving businesses in the UK an estimated £206m a year.

EU regulations list three criteria by which firms can be regarded as small for accounting purposes. These are:

- no more than 50 employees
- balance sheet total no more than £3.26m
- no more than £6.5m in turnover

To obtain an exemption in the UK, companies must currently fulfil both the balance sheet and turnover criteria. The Government is now proposing to change this so that just meeting any two of the three criteria will be enough to qualify for an exemption. This could free an estimated 36,000 UK companies from the need to have an audit.

Ministers have been conducting a public consultation seeking views on the proposals.

The Minister responsible for Corporate Governance, Edward Davey, said: "The proposals are aimed at removing EU gold plating and freeing up enterprise, which ultimately benefits the whole UK economy and will help put us on the path to long-term, sustainable growth." It's proposed that the changes will apply for accounting years ending on or after 1st October 2012.

Meanwhile, ministers are also planning to introduce legislation in 2012 to exempt most subsidiary companies from mandatory audit.

However, this would depend on their parent company being prepared to guarantee their debts.

Please contact us if you would like more information about issues relating to company law.

Mistakes can be costly when drawing up deeds

When drawing up deeds it is vital to meet all the legal requirements – otherwise the document could prove invalid and cost you thousands of pounds, as one firm found recently.

The case involved a financial services company that entered into an invoice discounting facility with two directors of a client firm.

A deed was drawn up providing guarantees and warranties that the directors would be liable for outstanding debts if their firm ceased trading. The directors signed the document in front of witnesses and then handed it over.

Later, the directors' firm did go out of business and the finance company sought to recover some of its money under the arrangement set out in the deed.

The directors refused to pay so the case went before the High Court. It ruled that the deed could not be enforced because

it had not been properly "delivered".

Deeds are a more formal agreement than contracts. It is not enough that they are signed and witnessed.

They also have to be "delivered" to the other party, which in practice means the other party has to make it clear that they wish to be bound by the agreement.

That did not happen in this case. The court found that the document the directors signed contained notes saying that changes would be made.

From this, the directors were entitled to expect that an updated version of the deed would be drawn up for them to sign.

This did not happen and so the deed could not be said to have been "delivered".

The ruling said: "The critical thing is that the person who has signed the deed must have separately indicated that he intends to be bound by the deed.

"Mere signature is not enough. Nor is it enough that what looks like a deed has been given to the person who appears to be the beneficiary of it – the issue is not whether the document has been physically handed over to the beneficiary, but whether the person whose deed it is supposed to be intended to be bound by it."

Please contact us if you would like more information about the issues raised in this article or any aspect of contract law.

Common sense is needed when interpreting contracts

Business "common sense" should be applied when interpreting and applying commercial contracts, the Supreme Court has ruled.

Delivering the ruling, Lord Clarke said: "If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other." The issue arose in the case of six companies that had each contracted to buy a ship for $33m from

a Korean manufacturer. Payment was to be in instalments and each company was provided with a refund guarantee by a Korean bank.

The shipbuilder went out of business before the ships were completed so the companies sought to recover their money under the guarantee.

A dispute then arose as to the meaning of a phrase in the bond which stated that the bank would pay the buyers "all the sums due to you under the contract".

The bank insisted that this did not include all of the money that the buyers had paid out. The case went all the way to the Supreme Court, which has now ruled in favour of the buyers.

Lord Clarke said that the language in a contract "would often have more than one potential meaning".

He then added: "One would naturally expect the parties to agree (and the buyer's financiers to insist) that in the event, for example, of the insolvency of the builders, the buyers should have security for the repayment of the pre-delivery instalments which they paid.

"The buyer's construction is to be preferred because it is consistent with the commercial purpose of the bonds in a way which the bank's construction is not."

Please contact us if you would like more information about contract law or any of the issues raised in this article.

Employer 'not at fault' for street light injury to child

The need for employers to have the correct legal and training procedures in place was shown in a recent case in which a child was injured as she walked under a street light.

The accident happened as the light was being repaired. The workman detached the reflector to inspect it but it fell just as a mother and her two-year-old daughter were passing underneath.

The reflector struck the little girl, who suffered a cut that required stitches.

The Health and Safety Executive (HSE) carried out an investigation which found that the accident was entirely preventable. Temporary barriers should have been used to cordon off the area around the lamp. There were no such barriers, but the HSE found that no blame could be attached to the employer because the employee "had been properly trained by his employer to carry out this kind of work safely".

The HSE took no action against the employer but prosecuted the workman who was fined £2,250 and ordered to pay costs.

HSE Inspector Zameer Bhunnoo said: "Individual employees must realise that they face criminal prosecution by the HSE if they show a reckless disregard for health and safety, putting others at serious risk."

Please contact us if you would like more information about the issues raised in this article.

Demand for rented accommodation has been outstripping supply

There are now so many tenants looking for rented accommodation that the private rental sector (PRS) may soon be unable to meet demand, according to new research.

The Association of Residential Letting Agents (ARLA) says that the number of its members stating that there are more tenants than properties has reached the highest level since records began.

A survey of ARLA members found that 74% of agents believe that demand is outstripping supply. This has remained constant for the last four quarters.

The survey also found that the average period tenants remain in one property has reached a record 19 months. This is because people are wary of trying to find a new property in such a competitive market.

ARLA says that the PRS is running out of space to cater for demand and so there's a need for more properties to be made available.

Tim Hyatt, president of ARLA, said: "The reality is that there is a finite amount of rental property and unless both housing supply and mortgage availability improves then renters will find that their options in the market are reduced." The increasing demand for rented property has prompted many landlords to increase their portfolios over the last few years. It has also tempted new buy to let landlords into the market and that trend is continuing.

Buy to let property remains attractive but landlords need to ensure they are up to date with all the legal requirements and draw up professional tenancy agreements in order to protect their investment and avoid any costly problems.

Please contact us if you would like more information about buy to let properties.

New law will 'help SMEs protect patent and design rights'

A new law has come into effect which should make it easier and less daunting for small and medium sized businesses to protect their patent and design rights.

There have been examples in the past of firms being unwilling to protect their rights because of uncertainty over how much it would cost.

The Patents County Court (Financial Limit) Order 2011 helps to reduce that uncertainty by creating a clear definition of which cases should be heard in the Patents County Court (PCC) and which should go to the High Court. It also sets a damages cap of £500,000 for cases heard in the PCC. The developments are significant because the costs involved in bringing a case to the PCC are generally much lower than those in the High Court.

Previously, companies bringing a case could incur considerable costs just in settling disputes over whether it should be heard in the PCC or the High Court.

This deterred many firms from taking legal action because they could not be certain of the financial risks. The change brings much more certainty. Less complex cases with a value of less than £500,000 will automatically fall within the jurisdiction of the lower and much cheaper PCC.

It's hoped the change will encourage small businesses to innovate and develop new products and systems.

Intellectual Property Minister Baroness Wilcox said: "It will also provide clarity over the legal processes, certainty over the risks and give small enterprises the confidence to stand on an equal footing with financially stronger companies."

Please contact us if you would like more information about the issues raised in this article.

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