Turbervilles Solicitors

Inside Track

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Accountant to pay for enticing away former clients

When buying a business it's important to ensure that the seller doesn't try to entice away clients or customers once the sale goes through.

For this reason, most firms will insist on a covenant preventing the seller from setting up a rival business or soliciting his former customers for a specified period. The value of this approach was illustrated in a recent case before the High Court.

It involved an accountant who decided to sell his business. The buyer insisted on a clause in the sale agreement preventing the accountant from "canvassing, soliciting or endeavouring to entice away" his former clients for three years.

This was honoured for the first two years but then the seller got a job with another accountancy firm which offered him commission if he introduced new clients. This encouraged the accountant to approach his former clients. The firm that bought his business found out about it and took legal action to enforce the covenant. The accountant denied that he had solicited his former clients but the High Court was unconvinced. The judge held him to be a dishonest and unreliable witness. It found that he had enticed five of his former clients to switch to his new employers.

This meant that the buyers had lost fees totalling £31,875. The accountant was ordered to repay this amount to the buyer as compensation.

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

When shareholders fall out and refuse to meet …

Relationships between shareholders in small companies are often tense, but what happens if they refuse to allow meetings to take place that could determine the future of the business?

The issue arose in a case involving a taxi firm that had two shareholders who were also directors.

The minority shareholder played no active part in the business but her husband worked as the accounts manager. The majority shareholder discovered that the accounts manager was withdrawing money on a monthly basis without authorisation. He challenged him about this and as a result, their relationship quickly deteriorated.

The majority shareholder then decided to call an extraordinary general meeting with a view to ratifying the dismissal of the accounts manager, and to remove the minority shareholder as a director. However, the minority shareholder did not respond to enquiries about whether she would attend the meeting. If she did not attend, the meeting would be inquorate and so ineffective.

Faced with this stalemate, the majority shareholder applied for an order under the Companies Act 2006 allowing the meeting to be held and considered valid despite being inquorate.

The High Court granted the application on the basis that the two shareholders were at deadlock. Trust had broken down and the current state of affairs was unsustainable. The meeting needed to take place for the sake of the viable governance of the company and to protect its future.

If this resulted in decisions that infringed the rights of the minority shareholder, she could take further legal action to protect her interests.

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

Contract means English firm must apply Indian law

Companies entering into contracts with businesses abroad need to take care over the small print if they want any future disputes to be settled under UK law.

Failure to do so could prove costly, as one UK company recently discovered. The company entered into an agreement with an Indian supplier to provide it with products to be sold in the UK.

It was part of the company's standard terms and conditions that disputes with foreign partners should be settled under English law. It drew up a purchase order, which included those standard terms and conditions, and proceeded with the contract on that basis.

However, the Indian supplier never saw the full purchase order; it only saw the purchase order number. This led to difficulties when a dispute arose later and the English company sought an injunction ordering the Indian supplier to provide the products as agreed.

The Court in England held that the dispute would have to be settled under Indian law. It held that the Indian supplier could not possibly have subscribed to the English company's terms and conditions as it had not seen them.

It followed therefore that those terms could not have been incorporated into the contract.

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

Surge in number of UK companies now facing critical difficulties

There's been a large increase in the number of firms facing critical difficulties, according to new research.

The Red Flag Report produced by Begbies Traynor shows that 186,554 UK businesses were experiencing significant or critical financial problems in the first quarter of this year.

That was a 15% increase on the same period in 2010. Sectors that are dependent on discretionary spending were the worst affected.

Taken year on year, the number of businesses showing signs of distress in the Bar and Restaurant sector rose by 68%. The increase was 60% in the Leisure and Culture sector and 23% in the Sports and Recreation sector.

Professional Services firms have also been badly hit with a 61% increase in the number facing significant or critical problems.

The research also shows that more and more firms are taking a tougher line to ensure invoices are paid, rather than wait as they may have done in the past and risk seeing the debtor go out of business. A spokesman for Begbies Traynor said: "High levels of legal actions taken against debtors indicate that creditors are attempting to maximise cash collection right across their customer base.

"The hike in oil prices and January's VAT increase has made cash flow and credit control essential priorities for most businesses with some seeking payments through the courts."

With cash flow problems at crisis point for many firms, it is not surprising that they are taking legal action to ensure payment and to protect their futures.

Many find that a letter from a solicitor is often enough to secure payment. For more entrenched debtors there are several other legal options to take, up to and including court action.

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

Number of businesses grows despite economic climate

The number of businesses in the UK has been growing despite the economic downturn.

That's the picture that emerges from figures released by the Department for Business, Innovation and Skills (BIS).

The latest statistics show that the total number of businesses rose by 48,000 to 4.5m between the start of 2009 and the start of 2010. That was an increase of 1.1%.

Business and Enterprise Minister Mark Prisk said: "Private sector enterprises will create growth in our economy so it is encouraging to see that the number of businesses at the start of 2010 had increased. This was a difficult period, and these figures show the resilience of British business.

"I am determined that the Government will do everything it can to create the right environment for these businesses to now expand and grow, and also to encourage more people to set up on their own."

It's pleasing to see so many new businesses setting up despite the difficult economic climate.

However, if they are to succeed, start-up businesses need to consider a variety of issues from employment matters to business contracts and leasehold agreements. There could also be concerns about how to structure the business. Getting good legal advice at the outset can prevent damaging problems emerging later.

We have helped numerous new businesses get off the ground and are able to offer advice on such matters as whether to set up as a sole trader, partnership or a new company. We also have valuable contacts including accountants, surveyors, valuers and financial advisers who can provide added value to the services we provide.

Please contact us if you would like more information about starting up a new business.

Be careful about who you allow to sign your contracts

A recent case in the High Court has highlighted the need for firms to keep a tight control on who signs contracts on their behalf.

It involved a recycling firm which found itself tied into a hire contract for three years when it thought the arrangement was only on a month by month basis.

The confusion arose when a landfill manager signed a contract on the firm's behalf to hire a high-speed shredder. The contract contained a clause saying any disputes that might arise would be referred to an adjudicator.

The firm used the shredder until it was no longer needed and then gave one month's notice to end the hire arrangement. The hire company insisted that the contract was for three years.

The adjudicator ruled in favour of the hire company so the matter was taken to the High Court.

The recycling firm said the landfill manager was not an employee and had no authority to enter into a long term contract. He only had authority to enter into monthly agreements. However, the High Court ruled in favour of the hire company. It held that the recycling firm must have been aware that its landfill manager had arranged for a significant number of machines to be hired and used at the plant.

There was no evidence to suggest that the hire company had been made aware that the manager did not have the authority to enter into long term agreements and therefore the three-year contract had to stand.

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

Mistake turns redundancies into unfair dismissals

Businesses need to ensure they follow the correct procedures when making redundancies. Otherwise mistakes can lead to claims of unfair dismissal, as happened in a recent case involving a company that needed to lay off a number of staff.

The company had selection procedures in place and used them to assess which employees should be chosen for redundancy. It followed its own criteria correctly but then failed to inform the employees of their scores during the formal step 2 meeting required by the statutory dismissal and disciplinary procedures.

Three employees who were then chosen for redundancy appealed on the basis that they had not been informed of their scores. The employment tribunal ruled that the company's failure to provide this information breached the statutory requirements.

The failure meant the employees did not know why they had been selected and so were not in a position to respond. The

tribunal said this amounted to automatic unfair dismissal. That decision has now been upheld by the Employment Appeal Tribunal.

Meanwhile, a company director has been held personally liable for the discriminatory dismissal of a pregnant employee. The director owned and ran an estate agency. He was the sole shareholder.

One of his employees gave him a letter confirming that she was pregnant. Within minutes of reading the letter, he told her that she was being made redundant. This came as a complete shock to the employee who had not been previously told that there was a threat of redundancy.

She brought a claim of pregnancy discrimination. However, the agency was then sold to another company, which was owned by the same director who dismissed her.

He argued that only a business acting as an employer could dismiss an employee. He therefore, as an individual, could not be held responsible.

The Central London Employment Tribunal disagreed. In its judgement it said that "it is entirely clear that an individual may be liable for discrimination by dismissal".

The employee was awarded £22,000 in compensation.

Please contact us if you would like more information about employment law and redundancy procedures.

Landlords still facing unfair terms from letting agents

The Office of Fair Trading (OFT) has warned that consumer landlords are still being presented with potentially unfair terms in contracts with some letting agents.

The warning follows the enforcement case last year against Foxtons for breaching the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). Foxtons agreed to amend some of its terms concerning sales and commissions after the High Court ruled that they were unfair.

The OFT estimates that its enforcement order has provided an annual benefit of at least £4.4m for landlords that use Foxtons.

However, although there is no longer a problem with Foxtons, the OFT is

concerned that some other letting agents seem to be unaware of the High Court ruling and are still offering terms that may be unfair.

The OFT is determined to crack down on unfair terms and the Property Ombudsman has just issued a code of practice for letting agents to follow.

The code states that agents cannot include sales commissions in their agreements with landlords. Nor can they charge commission where the landlord instructs someone else to renew the lease.

Amelia Fletcher, OFT Chief Economist, said: "There is evidence of continuing poor practice by some letting agents, who need to go further to make their contracts transparent and fair."

Landlords may also want to seek legal advice to ensure that they are not being treated unfairly in their agreements with letting agents.

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

Company director is found guilty of wrongful trading

A director has been found guilty of wrongful trading after taking money for services his company could not provide.

The director was the sole shareholder of a company that tried to provide a DX mailing service. He allowed an employee to market the business and take advance payments from customers who entered into contracts for DX services.

This money was then paid to the director and the employee for their personal benefit, even though the company was never in a position to provide those services.

The company was later wound up when the Revenue tried to recover outstanding VAT. The liquidator sought a declaration that the director was guilty of misfeasance, breach of trust and wrongful trading. The court granted the declaration saying that the director was negligent in taking money when the company was unable to provide the required services.

There was no evidence that he exercised any control over the employee's activities. A reasonably diligent person, with the general knowledge, skill and experience expected of a sole director, would not have acted as he did. His actions showed a total disregard for his duties, which included protecting the company's creditors.

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

Breaking point - so when do vacant premises really become vacant?

A commercial tenant failed to exercise a break clause correctly because it was still carrying out repairs to the leased premises after the day it should have given up vacant possession.

The case involved a company that had two break options on a warehouse that it leased. The first date was for April 2009 and the second was for December 2009. The tenant decided to exercise the break clause on the April date. The landlord drew up a schedule of dilapidation repairs that needed to be carried out in accordance with the lease.

A site inspection was carried out two days before the termination date. The warehouse was then empty and all the tenant's fixtures and fittings had been removed. The tenant agreed that a few more minor repairs were needed and arranged for the work to be done.

However, the tenant's contractors didn't complete the repairs until six days after the termination date. The landlord said this meant the break clause had not been properly exercised and demanded rent until the next termination date in December.

The tenant disputed this but the court found in favour of the landlord.

The tenant appealed on the basis that it was unjust to say a failure to complete a few minor repairs on time amounted to a failure to give up vacant possession.

In also submitted that it had not tried to exclude the landlord from the premises after the break clause termination date. The Court of Appeal, however, upheld the original decision.

It held that the fact that the tenant had not tried to exclude the landlord from the premises was irrelevant. What mattered was that the tenant had failed to satisfy the conditions of the break clause.

These demanded that the tenant had to give up possession to the landlord by midnight on the designated date and not a minute later.

Please contact us if you would like more information about landlord and tenant issues.

Director breached duty when using borrowed equipment

The Court of Appeal has upheld a ruling that a director breached his fiduciary duty when he made personal use of some equipment that had been loaned to his company.

Fiduciary commitments simply mean that a director must act in the company's best interest and avoid any conflict between his personal interests and his duty to the company.

In this case, a waste management company was loaned some equipment by one of its customers. The equipment was old and dilapidated but the director was able to use it when renovating a property he owned.

The equipment was not made available by the director for the company to use for its business purposes. When the matter came to light several years later, the company issued proceedings against the director for breach of duty.

The judge held that the director should account to the company for the six-month period that he had the equipment.

That decision has now been upheld by the Court of Appeal.

It held that fiduciary duties included an obligation not to make a secret profit.

In this case, the no conflict duty extended to preventing the director from depriving the company of the opportunity to use the loaned equipment for its own purposes.

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

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