

Cox Cooper Ltd Solicitors

Autumn 2016

Your quarterly bulletin on legal news and views from Cox Cooper Solicitors

UPDATE
Commercial Law

In Business With a Friend? Don't Dispense With Formalities

When entering into a business partnership with someone you also consider to be a soulmate, putting in place formal agreements with them can seem inappropriate. However, personal relationships can turn sour and, in one case, the equity in a buy-to-let property was eaten up by the costs of a dispute after a friendship turned to acrimony.

The case concerned two businessmen who were in the building trade and who had worked in harmony for several years. They and their respective wives were personally very close. A flat was purchased and the men both carried out the renovation work, but the property was registered in the sole name of one of them.

Following a falling out, the owner of the legal title to the flat put it on the market. His partner, however, blocked any sale by seeking to place a restriction on the property's title. He argued that he had a 50 per cent stake in the property on the basis of an alleged oral agreement to that effect. He also said that he had contributed about £10,000 to the equity in the flat through deductions from his wages.

The registered owner denied that there had been any such agreement and insisted that the other man had been paid all that was due to him for his work on the project. Those arguments persuaded

the First-tier Tribunal (FTT), which found that the second man had no interest in the flat.

In overturning that decision, however, the Upper Tribunal (UT) noted potentially crucial fresh evidence, in the form of wage slips, which had not been before the FTT.

In those circumstances, the case was sent back to the FTT for reconsideration. However, in urging the former friends to settle their differences, the UT observed that the legal costs and the time and effort involved in pursuing the case were out of all proportion to the relatively modest equity in the flat.

Disputes such as this can lead to unnecessary expenditure and a great deal of wasted time. Having the appropriate legal documentation in force in circumstances like these is a worthwhile form of insurance against such eventualities.



Web Knock-Offs – Stopping the Rot

The Internet is a market for all sorts of goods – including 'knock-off' copies of well-known brands. These are widely available through e-commerce websites around the world.

In 2011, the UK brought in legislation which allows Internet service providers (ISPs) to block access to websites that infringe copyright. The orders have been widely used in the prevention of access to 'file sharing' sites, but not, until recently, with regard to sites that deal in goods which infringe trade marks, such as counterfeit branded goods.

Rather surprisingly, a 2014 decision which confirmed that ISPs can also block their customers from accessing such websites was appealed. The Court of Appeal has, however, recently confirmed the decision.

Vendors of name brands will be pleased to note that the brand owners will now be able to take stronger action to prevent the unfair competition that knock-off copies represent.

If your business is suffering because of the unlawful trade practices of another, contact us.

Failure to Keep Tenant Informed Means Notice Valid

Landlords can often move their offices several times during a long lease, meaning that the original address for service of documents on them becomes obsolete.

When a landlord does so, it is important for them to inform their tenant(s) properly and not rely on the fact that communications may have subsequently passed between them originating from the landlord's new address.

A recent case illustrates the point. It involved a tenant that wished to exercise its right to break its lease and so gave notice to that effect to the landlords at the address set out in the lease.

The landlords did not want to accept the break of the lease and used as their argument that they had moved premises. They relied on the rule set out in the Law of Property Act 1925 that a notice is validly served if it has been delivered to the 'last-known place of abode or address'. As the address in the

lease was no longer the address of the landlords, they argued that the notice was invalid.

The High Court took the tenant's side, ruling that it was reasonable for the tenant to assume that the address on the lease (which had not been changed in the property register at the Land Registry) was a valid address for service of the notice.

Landlords should ensure that when they move premises, they inform their tenants and change the relevant address at the Land Registry. We can assist you in the completion of the necessary formalities.



Director Not Liable for Company Insurance Shortfall

When a company received a claim for compensation from an employee who suffered an injury whilst using a circular saw, it became clear that the employer's liability insurance policy did not cover the risk of the injury: it specifically excluded claims arising from the use of 'woodworking machinery'.

The company went into liquidation and the injured employee, in an attempt to obtain compensation, took legal action against the sole director of the company.

The claim was based on the argument that the company was required by statute to have adequate insurance cover, which it did not. The relevant law provides that an employer may be prosecuted or fined for failing to have in place the appropriate insurance cover and that the criminal penalty can also be applied to 'any director, manager, secretary or other officer of the corporation'.

The case went to the Supreme Court, which rejected the claim, Lord Carnwath commenting that 'there is no

suggestion...that a person can be made indirectly liable for breach of an obligation imposed by statute on someone else'.

The case clarifies the position of a director in such circumstances. Whilst he or she can be held criminally responsible in appropriate circumstances, the 'veil of incorporation' will not be pierced to permit the injured party to take civil action directly against the director(s) under whose management the company breached its legal obligations.

The veil of incorporation exists to protect shareholders and (in some, but not all circumstances) directors of companies from the results of corporate actions, a company in English law being a separate legal person from its shareholders and directors.

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

Directors Ordered to Repay Withdrawals

Judging by the number of cases that crop up, it seems that not all directors understand two aspects of company law.

The first is that it is unlawful for a company to pay a dividend unless it has sufficient 'retained reserves' (broadly speaking profits) to make the payment.

The second applies in insolvency and prohibits directors from making a payment to themselves or their associates which prefers them over the creditors generally. In general, a director's loan has no right of repayment prior to the payments to other creditors.

In either instance, there can be repercussions and directors who sanction such payments can be made personally liable to the company.

In a recent case, the High Court ordered directors of a company to repay to the company's administrators sums which they had paid which compromised the money available to the company's other creditors.

We can advise you on the rights and responsibilities of directors in all circumstances.

Concurrent Delay Plea Failure Ends Saga Saga

Concurrent delay is a common problem in construction contracts. It arises when a delay in one area of work causes a delay in another. The result can be a cascading of delays, which normally means losses and disputes.

In a recent case involving the refurbishment of a cruise ship for Saga, the High Court had to consider the extent of the respective parties' liabilities when completion of the work was delayed.

The background was that engineering work had to be done to Saga's ship before the internal refurbishment could be completed. Various glitches occurred in the engineering work, which meant that this was finished two weeks behind schedule.

The shipyard that carried out the engineering work argued that Saga had contributed to the delay, because there were change orders issued for work to be done by Saga's contractors which had to be completed before the shipyard could continue its work. This, argued the shipyard, had held up progress on the engineering work until four days before the eventual completion of the work.



However, the Court found that, on the facts, the delays caused by the actions of the owners of the vessel had been subsumed within those which were the responsibility of the shipyard and therefore did not add to the delay. The delay attributable to the shipyard was already going to result in a later completion date and the extra work caused by the change orders did not extend that timeframe, despite the fact that some of that work was itself delayed.

Construction disputes can be complex. Our expert guidance will help you steer a successful path through the potential minefield of issues.

Surveyors Face Massive Cost Following Overvaluation of Development

Surveyors who valued a property development, the value of which collapsed in the 2008 financial meltdown, face a payout of more than £1 million following a decision of the Court of Appeal. The ruling has significant implications for the sector.

The claim was brought by a firm of bridging loan specialists who advanced money against a development in Berkshire based on the valuations provided by the surveyors. These proved to be optimistic, leaving the bridging loan provider nursing losses.



The loans were provided in two tranches, and the surveyors relied on a long-standing principle (the 'but for' principle), the effect of which would have been to limit the claim only to the losses resulting from the first tranche of the lending.

However, the Court of Appeal ruled that the lender's reliance on the valuation applied equally to the second tranche.

In principle, the main effect of the decision will be to increase risk for valuers and thus their professional indemnity premiums.

If you have suffered a loss resulting from a significantly incorrect valuation of a property, contact us for advice regarding what steps might be possible to obtain appropriate recompense.

ICO Publishes Guidance on Data Security

The seventh data protection principle governing the use of personal information, as set out in the Data Protection Act 1998, relates to data security. In practice, it means that organisations must have appropriate security in order to prevent the personal data they hold being accidentally or deliberately compromised. Breaches of data protection legislation can not only lead to your business incurring a fine – of up to £500,000 in serious cases – but can also have a damaging effect on the reputation of your business if poor security contributes to high profile incidents of data loss or theft.

The Information Commissioner's Office (ICO) has published new guidance, 'A Guide to Data Security', giving practical advice for small businesses on how to keep Information Technology systems safe and secure. This is in the form of 10 practical steps to enable businesses to decide how to manage the security of the personal data held.

The guidance can be found on the website of the ICO <https://ico.org.uk/>.

As referred to earlier, Internet service providers can be required to deny access to websites which are found to be dealing in 'knock-off' goods.

However, a recent decision of the Court of Justice of the European Union (CJEU) may have extended this principle, bringing landlords into the spotlight if one of their tenants supplies goods which infringe trade mark rights.

The case involved a market in Prague in which fake copies of designer goods were being sold. The proprietors of various brands whose trade marks were being infringed by the stallholders in the market applied to the Czech court to obtain an injunction forcing the landlords of the market to cease renting pitches to traders who infringed their intellectual property rights.

The landlords contested the application, arguing that the relevant EU Directive, which allows an injunction to be sought against an 'intermediary' whose services are used by a third party to facilitate the infringement of copyright, did not apply to a landlord.

The Czech court sought guidance from the CJEU, which ruled that an 'intermediary' could equally well be the provider of the physical location at which the infringing activity is carried out.

The potential implications for landlords who allow their tenants to undertake activities which breach the intellectual property rights of others are clear.

For advice concerning your rights and responsibilities as a landlord, contact us.

EU General Data Protection Regulation

In the UK, the Data Protection Act 1998 sets out the principles of data protection in compliance with European legislation.

The recent approval of the EU General Data Protection Regulation (GDPR) has imposed some changes on the operation of UK data protection law, though not to the principles which apply.

The changes, which are intended to strengthen and unify data protection for individuals within the EU, include:

- Increased powers for regulators to fine organisations which fail to comply with data protection law. Fines can be levied up to 10 million euros or 4 per cent of the organisation's worldwide turnover;
- Data controllers will have to be able to demonstrate compliance with the GDPR, which may mean introducing

additional records and procedures to prove compliance;

- The GDPR prohibits the assumption of 'implied' agreement for personal data to be retained and used. Consent must be 'freely given, specific, informed and unambiguous'; and
- A data subject can normally require that their personal data is deleted in appropriate circumstances.

This list is not comprehensive.

This legislation will continue to apply until Britain leaves the EU, and may well be substantially retained thereafter, depending on the Brexit terms.

For advice on how the GDPR affects your business or organisation, contact us.

Cox Cooper Ltd

Solicitors

Reg. office: Cambrai Court, 1235 Stratford Road, Hall Green, Birmingham B28 9AA

Telephone: 0121 777 0015 **Fax:** 0121 325 5400

E Mail: law@coxcooper.co.uk **Website:** www.coxcooper.co.uk

Directors: David Cooper Andrew Cox Business and Employment Law Specialists

Authorised and Regulated by the Solicitors Regulation Authority.

Company number 06213810. Registered in England & Wales.

The information contained in this newsletter is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances, please contact us.