Cox Cooper Ltd
Solicitors

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

Commercial Law UPDATE

Insolvency Changes

A number of changes to insolvency law are to be brought into effect over the next several months.

What follows below is a snapshot of some of the more important ones.

A new regime for the conduct of creditors' meetings is to be introduced, the practical effect of which will be that the proposals of the insolvency practitioner as regards the insolvent entity will be deemed to be accepted unless ten per cent of the creditors (by value) object. A formal meeting will not be held unless requested by at least ten per cent (by value or number) of the creditors.

Administrators will be given the same powers as liquidators of companies to bring claims for wrongful or fraudulent trading.

Directors of insolvent companies are at increased risk of having compensation orders made against them and face an extension to the period – from two years to three – within which an application to disqualify them from acting as directors can be brought. Compensation orders can also be brought against non-directors who advise a director who becomes disqualified.

In addition, changes to the Insolvency Act 1986 that are being introduced on 1 October 2015 will mean that a person will no longer be able to be made bankrupt if they fail to pay a judgment debt of as little as £750 (a sum which has remained the same for 19 years).

Under the revised regulations, a petition for bankruptcy will only be able to be presented if the debt due is £5,000 or more.

If you are owed a sum between £750 and £5,000 by a debtor who is resisting all blandishments to pay, contact us promptly. Time is running out to threaten bankruptcy on smaller debts and the threat can often be a powerful incentive for recalcitrant debtors.

Rogue Directors Must Face the Music

In a decision that will cause palpitations for miscreant directors, the Supreme Court has made a ruling that will comfort creditors of insolvent companies who might otherwise be left to nurse losses without any hope of recompense.

The case concerned a company which was put into liquidation and the liquidators brought proceedings against its former directors alleging a conspiracy to commit 'carousel fraud' to the company's detriment. The alleged fraud involved the fraudulent trading of 'Trading Scheme Allowances' under the European Emissions Trading Scheme.

The directors attributed the misdoings to the company and denied liability. However, the Court ruled that where a creditor falls victim to a fraudulent or dishonest act which is committed by a director or directors, who in turn are in breach of their fiduciary duty to the company, then the creditors have the right to take action against the director(s).

For advice on what steps you can take to protect your interests in the event of the insolvency of a person or company that owes you money, contact us.

Consumer Protection Enhancement – Time to Get Ready

Businesses that deal with the public are reminded that legislation will come into effect soon to give consumers better protection under the law than they currently enjoy.

The Consumer Rights Act 2015 received the Royal Assent on 26 March and becomes law on 1 October 2015. It applies to virtually all contracts between traders and consumers for the sale of goods and services and the provision of digital content. The Act is extensive – it runs to more than 100 clauses and contains ten schedules – and is designed to offer consumers comprehensive protection and enhanced rights of redress.

Businesses affected by the new legislation can access guidance designed to enable them to comply with its requirements by the time it comes into force via the Trading Standards Institute 'Business Companion' at www.business-companion.info/en/news-and-updates/consumer-rights-act.

The Act repeals the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.

For advice on complying with your legal obligations to your customers, contact us.

Nuisance Calls and Texts Law Change

Since 6 April 2015, changes to the law have given the Information Commissioner's Office (ICO) enhanced powers to take action against companies making nuisance marketing calls and sending spam messages.

Previously, the ICO could only issue a civil monetary penalty if it could prove that the company engaged in nuisance marketing activity had caused 'substantial damage or substantial distress'. That requirement has now been removed and the ICO just has to prove that the company was committing a serious breach of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

The Regulations permit companies to make marketing phone calls without a consumer's prior permission but they must first check the Telephone Preference Service to make sure the individual has not opted out of receiving marketing calls. Permission is required before sending marketing text messages and companies should always provide details of how the recipient can opt out of receiving any future messages.

In 2014, the ICO received 175,330 reports of nuisance calls and texts and issued £360,000 worth of penalties between April 2014 and March 2015. Now that the legal threshold has been lowered, the level of penalties will no doubt increase.

Anyone who receives unsolicited communications of this kind can notify the ICO directly or report texts to their network operator by sending them, free of charge, to 7726.

ICO guidance on carrying out direct marketing can be found on the ICO website www.ico.org.uk.

Contact us for individual advice on the law relating to electronic marketing.

Failure to Comply With Contract Timings Costs Building Company

Timing stipulations in commercial contracts can be inflexible and failure to comply with them can be very costly indeed. In a recent case, a building company's failure to submit an interim application for payment at the time specified has resulted in a considerable delay in the receipt of more than £480,000.

The company had been employed by a local authority to build new classrooms for a primary school. The contract provided for payment to be made in instalments but required that applications for payments be served on particular dates.

When the council refused to pay an interim bill for £484,759, the company referred the dispute to an adjudicator who directed the council to meet the demand. However, in upholding the council's challenge to that decision, the High Court found that the company's application for payment was invalid in that it had been submitted six days earlier than it should have been.

The payment schedule laid down in the contract was strict and its terms had not been waived by the council. In those circumstances, the company was ordered to repay the money to the council. The Court, however, acknowledged that the company may be entitled to a further payment when it submits its final account.

Cash flow is often critical to the successful management of building projects, and failure to adhere to the agreed regime for payments can cause significant difficulties.

For assistance in the negotiation of your contracts, contact us.

Government Bans Exclusivity Clauses in Zero Hours Contracts

The first commencement order made under the Small Business, Enterprise and Employment Act 2015, which received the Royal Assent on 26 March 2015, has banned exclusivity clauses in zero hours contracts with effect from 26 May 2015.

Specifically, Section 153 of the Act inserts a new section 27A into the Employment Rights Act 1996 that renders unenforceable any provision in a zero hours contract that prohibits a worker from doing work or performing services under another contract or under any other arrangement, or any provision that prohibits the worker from doing so without the employer's consent.

Further proposed measures (included in the Draft Zero Hours Workers (Exclusivity Terms) Regulations 2015) intended to prevent employers sidestepping the ban are expected to follow.

In addition, from 26 May 2015, the financial penalty payable for failing to pay the National Minimum Wage is set at 100 per cent of the arrears owed to each worker to whom the notice of underpayment relates, with the maximum penalty increased from £20,000 per notice to £20,000 per worker.

Public Contract Tender Dispute Highlights Need for Care

In a further case that illustrates that tendering for public contracts can be fraught with risk, a local authority was accused of breaching its duties of equal treatment and transparency and was sued for substantial damages by a disappointed bidder.

Following a tendering exercise, the council awarded to a charity a contract to provide support services to domestic abuse victims. This was undertaken by a tender in which the responses of the tendering organisations were 'scored'. A non-profit-making company, which currently provided those services, objected and launched proceedings under the Public Contracts Regulations 2006.

The company claimed that the scores its tender was originally given by bid evaluators were later systematically reduced by 'moderators' so that it failed to win the contract. Individual scores were also marked lower than they should have been and the 'added value' the company offered was said to have been ignored.

Under the Regulations, the award of the new contract was automatically suspended when the company lodged its complaint. In seeking to lift that moratorium, the council argued that the company's attack on the fairness of the tendering process was 'hopeless' and that any further delay would impact on service users.

However, in refusing the council's application, the High Court found that it had failed to engage with the details of the company's complaints and that the latter had raised serious issues to be tried. The loss of its contract would be catastrophic for the company and it was appropriate that the suspension should remain in place pending final determination of the dispute by a judge.

Tenders for work, especially those in the public sector, can present significant complexities on both sides. We can assist you to ensure that your tender procedures are legally compliant and, if the tendering process is flawed, your rights are protected.

Input VAT Evidence and HMRC Discretion

It is commonly thought that for input VAT to be reclaimed from HM Revenue and Customs (HMRC), a valid VAT invoice is an absolute prerequisite. However, HMRC are permitted to accept other evidence and, although this is discretionary, they are obliged by their internal procedures to 'balance the need to protect the revenue against the need to ensure that businesses pay no more tax than is properly due from them'.

Whilst a valid VAT invoice to evidence the payment of the VAT is always the preferred proof, there are a number of cases in which the Tax Tribunal has accepted other evidence, such as where invoices have borne the wrong purchaser name due to error, where original invoices were not available but copies could be found and so on.

If a dispute about the validity of a claim does arise, HMRC's decision to disallow the deduction of input tax may be overturned if their discretion was not used in the taxpayer's favour and this was unreasonable.

In practice, that can be a high bar to overcome. If you have concerns about the legal validity of your VAT or other accounting procedures, contact us for advice.

Members Only Sign (Nearly) Enough

When a Conservative club objected to customers of a neighbouring chip shop making unauthorised use of its car park, the owner of the chip shop argued that the car park had been used by the shop's customers and suppliers for many years and that the continued use without opposition by the club had led to the establishment of a legal right of access.

It was salient that at no point in the past had the club made any attempt to enforce its right to restrict the use of the car park to its members.

The argument ended up in court and the decision of the lower court in favour of the owner of the chip shop was appealed. The Upper Tribunal (UT) reversed the decision, largely on the ground that a notice had been visible in a prominent position in the car park for many years which read 'Private car park. For the use of patrons only. By order of the committee.'

However, the UT did conclude that the notice was insufficient to deny the chip shop owner the right of pedestrian access over the car park for its suppliers and customers.

The right to appeal the decision to the Court of Appeal was granted, so this may well not be the end of the matter.

However, the case makes it clear that if you have issues with others making use of your land, you should take appropriate steps to ensure that a right of access is not allowed to arise. Whilst a notice is one such step, there are other, more positive measures which can be taken to prevent loss of your rights over your land.

For advice on protecting your property rights, please get in touch.

$30 Million Contract Dispute Hinged on a Single Word

A case in which the outcome of a $30 million dispute hung on the interpretation of a single word illustrates that the drafting of commercial contracts is not for the uninitiated and is better entrusted to legal professionals.

An investment bank had agreed to provide advice with a view to raising capital for a natural resources company and arranging its sale. It was agreed that, if a sale of the business on certain terms were 'consummated' within 12 months of the contract's completion, a success fee would be payable to the bank.

A sale of shares in the company was agreed in principle during the 12-month period; however, the $1.5 billion transaction was not completed until some time later. A judge found that the sale had been 'consummated' when the sale agreement was reached and that the bank was entitled to a fee of $29,907,000.

In allowing the company's appeal, the Court of Appeal noted that 'consummate' is an ordinary English word and not a legal term with a specific meaning. Its most common meaning is 'complete' and the judge's finding was inconsistent with the contractual language.

We can help you make sure that any contract you enter into protects your interests.

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