SIMON BURN
SOLICITORS

Autumn 2022

Commercial Law UPDATE

Alcohol Wholesaler Succeeds in 'Fit and Proper Person' Appeal

Businesses that operate in highly regulated fields can be permanently shut down at the stroke of an official pen. However, as a case concerning the wholesale liquor trade made plain, the law requires that such decisions are reasonable.

The case involved a company that was found by HM Revenue and Customs (HMRC) not to be a fit and proper person to trade as an alcohol wholesaler. Approval to carry on that regulated activity under the Alcohol Wholesaler Registration Scheme was therefore refused.

In upholding the company's appeal against that outcome, the First-tier Tribunal (FTT) found that the decision-maker made an erroneous finding of fact that a key person involved in the company's business had sought to deceive HMRC. On the evidence, it concluded that there was no such intention to deceive.

When considering whether the company was a fit and proper person, the decision-maker wrongly approached the matter on the basis that all of the nine criteria set out in HMRC guidance had to be met. The criteria were not exhaustive and he should rather have considered all relevant facts and circumstances in the round.

Given those errors, the FTT found that the decision could not reasonably have been arrived at. It was not satisfied that, had the decision-maker taken the right approach, approval would in any event have been refused. The decision was quashed and HMRC was directed to review the company's application for approval in the light of the FTT's ruling.

Our expert lawyers have experience in handling all types of business tax issues. Contact us for advice.

Upper Tribunal Business Rates Ruling Marks High Street's Sad Decline

Britain's high streets have changed immeasurably in recent decades and many once proud buildings are no longer attractive to retailers. An Upper Tribunal (UT) ruling in the context of a business rates dispute reflected that sad history of decline.

The case concerned a substantial four-storey building located in the high street of a market town. It was formerly occupied by a major supermarket chain but that tenant, together with many other large retailers, had relocated to an out-of-town shopping park. The building's top two storeys were in a state of disrepair and the dispute concerned only the property that comprised its ground-floor retail space and storage basement.

At the behest of the property's freeholder, the Valuation Tribunal for England had reduced its listed rateable value from £92,000 to £57,000, thereby also reducing business rates payable on the property commensurately. The freeholder, however, appealed to the UT on the basis that there was very little, if any, demand from mainstream tenants for large town-centre retail properties.

The freeholder asserted that the property had a negative rental value and that it should be entered in the rating list at a nominal value of £1. After considering the building's recent rental history, expert evidence and rents paid by tenants of a few comparable properties, the UT found that the property had a rateable value of £17,750, the equivalent of £11 per square metre.

We can advise you on any matters relating to commercial property law. Contact us for guidance.

ATOL Protection – Reckless Travel Agency Boss Receives Directorship Ban

Millions of air travellers take comfort from the well-known 'ATOL protected' logo. In coming down hard on a reckless travel agency director, the High Court took firm steps to ensure that their confidence is not misplaced.

The travel agency's business suffered a sudden downturn due to the Brexit vote and an outbreak of the Ebola virus in Africa. For some time after its Air Travel Organisers' Licence (ATOL) expired, it persisted in taking new bookings illegally. Booking forms issued to four clients continued to bear the ATOL logo. They and a fifth client, who had paid a deposit, received neither holidays nor refunds.

When the agency eventually entered creditors' voluntary liquidation, it was estimated to owe creditors over £500,000, including more than £80,000 to the five clients. In those circumstances, the Secretary of State for Business, Energy and Industrial Strategy launched proceedings against the agency's sole director and majority shareholder under the Company Directors Disqualification Act 1986.

Ruling on the matter, the Court found that the director had acted neither dishonestly nor with a view to personal gain. He believed that issues concerning the renewal of the agency's ATOL would be swiftly resolved. He and members of his family had lost personal funds they had invested in the business and he was at all times motivated by a desire to keep the agency afloat.

However, the Court found that, as sole director of a company that was operating in a highly regulated framework, he was woefully reckless and incompetent. Clients' money had been placed at significant risk and consumers might have suffered further loss had the agency not ceased trading.

By his conduct, he risked undermining public trust in the ATOL scheme and exposed the agency to a threat of criminal sanction. He caused clients to be misled into believing that they had ATOL protection and exposed them to significant risk of substantial financial loss. Upholding the Secretary of State's application, the Court disqualified him from acting as a company director for seven years.

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

Ukraine War Sanctions – Insolvency Practitioners Must Tread Carefully

Sanctions imposed in response to the Ukraine war have resulted in a busy time for insolvency practitioners. However, as a High Court ruling underlined, they need to tread carefully to avoid the risk of themselves breaching the sanctions regime.

The case involved an English holding company that owned numerous gold mining and exploration assets in Russia. Neither the company nor its Russian subsidiaries were subject to sanctions, but their imposition had a devastating impact on its business to the point where it was unable to pay its debts as they fell due.

Administrators were appointed and launched emergency proceedings under the Insolvency Act 1986, seeking a direction giving liberty to proceed with a sale of almost all the company's assets for a sum in excess of $600 million. They had, on legal advice, reached a settled view that the sale would not give rise to any breach of sanctions. They nevertheless appreciated that there was a risk in that regard.

Ruling on the matter, the Court noted that the administrators were acutely conscious of the responsibilities that went with their position as officers of the Court and that the Court will not permit its officers to act in a way which would clearly be dishonourable or improper. Their concern in that respect was one of the principal reasons why they had sought a judicial direction before proceeding with the transaction.

Having heard no argument from the Office of Financial Sanctions Implementation, the Court was not prepared to grant a formal declaration that the sale would not fall foul of sanctions. It found, however, that it was unnecessary to make such a declaration before granting the administrators the direction sought.

It had no hesitation in finding that there was nothing dishonourable in the proposed transaction. On the contrary, the administrators wished to discharge their duties by entering into a transaction that they considered would be in the interests of the company's creditors, including HM Revenue and Customs who were estimated to be owed between £10.6 million and £14.8 million in VAT.

They had taken the sanctions seriously and considered their implications carefully in the light of expert advice. With the company's financial position swiftly deteriorating, they had reached a rational view that the transaction was the best course to take in the interests of all stakeholders. In granting the relief sought, the Court was satisfied that there was little apparent practical risk that the proposed sale would breach sanctions. Such a risk had not been entirely eliminated, but it was not such as to make it inappropriate for the administrators to enter into the transaction.

It is vital to seek expert legal advice as early as possible regarding insolvency matters. Contact us for assistance.

MTIC Fraud – Tax Tribunal Relieves Export Company of £10 Million VAT Bills

International trading companies are expected to carry out careful due diligence on their clients and suppliers to ensure that they avoid unwitting involvement in tax fraud. However, in relieving a long-established business of multi-million-pound VAT assessments, a tax tribunal found that it did just that.

The case concerned a successful company that had, for 40 years, been involved in the grocery export trade. In raising VAT assessments against the company totalling almost £10 million, HM Revenue and Customs (HMRC) asserted that it had, in the course of a single year, entered into no fewer than 374 transactions that were connected to missing trader intra-community (MTIC) fraud.

HMRC argued that there were numerous factors pointing to a reasonable conclusion that the company knew or should have known that the transactions were connected to fraud. During the relevant period, it was said to have entered into a new line of business that almost doubled its turnover. Although the transactions generated little profit, HMRC contended that it should have been apparent to the company that such a massive increase in sales was too good to be true.

For its part, the company queried why such a reputable and long-established trader would put its very existence at risk for a small increase in profits. The transactions, it asserted, were all straightforward wholesaling deals, consistent with legitimate trading. Low margins on the transactions were said to be explained by the company's desire to enter a potentially lucrative new market.

In upholding the company's appeal against the assessments, the First-tier Tribunal rejected HMRC's case that the due diligence it performed in respect of the transactions was at best inadequate and flawed and at worst merely window-dressing. It acted responsibly in engaging an independent professional firm, recommended by its buying group, to complete due diligence reports.

The company considered those reports and queried the contents of at least one of them. They were, on several occasions, viewed by experienced HMRC officers who seemed satisfied with their contents. No suspicions were highlighted. To the extent that the transactions were connected to MTIC fraud, HMRC had failed to show that the company either knew or should have known that was the case. The company took every reasonable step in its power to prevent participation in tax fraud.

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Offering Internships? You May Have to Pay the National Minimum Wage

Employers who offer unpaid internships often feel that they are acting benevolently in giving inexperienced people a chance to learn the ropes. However, many interns have a legal right to be paid the National Minimum Wage (NMW) and, as one case showed, a failure to remunerate them accordingly can have grave consequences.

The case concerned two former unpaid interns at an online publishing company who complained to HM Revenue and Customs that they had not been paid the NMW. An investigation ensued, which culminated in the company being issued with a notice of underpayment. It was directed to pay the interns a total of more than £5,000 and received a penalty of £9,207 for its failure to pay the NMW.

Challenging that outcome, the company asserted that the interns were not 'workers' within the meaning of the National Minimum Wage Act 1998 and were therefore not entitled to receive the NMW. It said that they were mainly engaged in shadowing experienced personnel and that tasks they performed were for their own benefit and of no benefit to the company. It contended that, had it considered them workers, it would have sacked them for their slow and under-par performance.

Rejecting the appeal, however, an Employment Tribunal noted that, by virtue of Section 28 of the Act, there is a presumption that an individual qualifies for the NMW unless proved otherwise. The interns, who were not students or volunteers, did not fall into the category of workers undergoing training or work experience who are excluded from entitlement to the NMW.

Their roles were not confined to shadowing and some of the tasks they carried out were clearly in furtherance of the company's business. The suggestion that they provided no benefit to the company was disingenuous. There was a verbal contract between them and the company and they were expected to work to it. They could not substitute others to perform their tasks and, far from being free to come and go as they pleased, they were required to be in the office for eight hours a day.

Expert employment law advice is essential in situations such as this. Contact our team for guidance.

Selling a Business? The Structure of the Deal Can Have Huge Tax Implications

One good reason why professional advice should always be obtained before selling a business is that the structure of the deal can have very significant tax implications. In a case on point, a tax-efficient tweak to a share transaction achieved a multi-million-pound tax saving.

An information services business agreed in principle to sell its shares in a company for a total of $80.44 million, of which $21 million would be cash, the remainder consisting of ordinary shares in the purchaser. Only after striking the deal did the seller realise it could be structured in a more tax-efficient manner.

The receipt of $21 million in cash would have triggered a £2.8 million tax liability in respect of the resulting chargeable gain. However, in reliance on professional advice, the seller agreed that, instead of the cash, it would receive redeemable preference shares in the purchaser to the same value.

The advantage of that arrangement was that it benefited from an exemption contained in Section 135 of the Taxation of Chargeable Gains Act 1992. The exemption applies to share-for-share exchanges. So long as the seller retained the preference shares for 12 months prior to redemption, the proceeds would not be treated as a chargeable gain.

In asserting that the arrangement was ineffective for tax purposes, HM Revenue and Customs (HMRC) relied on Section 137 of the Act. It contended that the main purpose, or one of the main purposes, of the arrangement was the avoidance of liability to Capital Gains Tax or Corporation Tax. That argument, however, failed to persuade the First-tier Tribunal (FTT).

Whilst accepting that the avoidance of tax was one purpose of the arrangement, the FTT found that the seller's main subjective aim was a commercial one and that it did not view tax considerations as particularly important. The tax advantage was significant in absolute terms but, in relative terms, it represented less than 5 per cent of the total value of the transaction. The FTT noted that the time, effort and expense that the seller had devoted to tax issues was not significant in the context of the overall deal.

In dismissing HMRC's appeal against that outcome, the Upper Tribunal found that the FTT correctly focused on the seller's subjective intentions and that there was no basis for disturbing its factual conclusions. It was entitled to find on the evidence that the transaction was entered into for bona fide commercial reasons and that, so far as the seller was concerned, the tax advantage was not particularly significant when viewed in context. The avoidance of tax was not its main purpose, or one of its main purposes, in entering into the transaction.

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

Get in touch with us if you would like advice on any of the issues raised in this bulletin or on any other commercial law matter.

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