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Directors could have personal liability for failing to prevent fraud

Directors who do nothing to prevent the occurrence of a fraud, even one from which they do not benefit, are in breach of their duties to the company even if they believe that the fraud would still have taken place had they tried to prevent it.

In a recent case, a company sought recompense from two of its directors following a substantial fraud: they argued that although they were aware of the fraud, they were not liable for it because it was committed by a third director, their brother, and benefited them only to a very limited extent. They argued that their liability was limited to the benefit they had obtained as a result of their brother's fraud. The two directors were, it seems, dominated by the fraudulent director and unwilling to challenge him, in spite of his having past convictions for fraud.

The third director used a variety of tricks to steal more than £60 million from the company. The other (non-family) members of the board were unaware of the fraud but his siblings that were aware argued that they could not have prevented the fraud, which their brother would have committed anyway. They played no active part, but merely failed to prevent it or to bring it to the attention of the other directors or the auditors of the company.

Perhaps unsurprisingly, the Court of Appeal was not at all impressed with this line of argument! A director's duties were held to be 'inescapable personal responsibilities'.

Charlotte Wood comments,

"The message for company directors of all sorts (no matter how involved they are in the day to day operations of the company) is that you will be in the firing line if there are breaches of the law of which you are aware and you fail to act in the appropriate way to prevent them. This also extends to bringing such matters to the attention of the appropriate officers or authorities. This could have far reaching consequences for those directors who have little or no involvement in the company on a regular basis. If you are a director and are concerned about things that are going on in your organisation, contact us for advice."

For further information and advice please contact Charlotte Wood on 01254 54374 or email charlotte.wood@forbessolicitors.co.uk

Right to light - right preserved

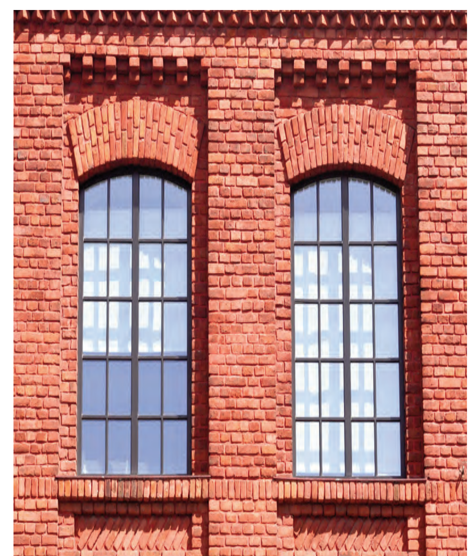
The right to light has been a continual source of disputes over the years and the Court of Appeal has recently heard another case dealing with this contentious subject.

It concerned a company that owned a piece of land and which made an agreement with a developer that allowed the developer to compromise its right to light. In the agreement, made in 1999, the company undertook to take no action to enforce its right to light.

Years later, a redevelopment project was planned for the land, which was the result of a compulsory purchase order. It was a much more substantial development than that envisaged in 1999 and the question arose as to whether the original agreement prevented the claimant from asserting its right to light, which would be materially affected by the new development.

Key to the decision was the wording of the original agreement in 1999. In it, the right to light was acknowledged, but the claimant had undertaken not to take action to enforce the right. However, under the proposed development at that time, there would have been no material effect on the light. The Court ruled that the claimant had not abandoned its right to light.

For further information and advice please contact Tim Hollingsworth on 01254 54374 or email tim.hollingsworth@forbessolicitors.co.uk



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Have you protected your logo?

The UK Intellectual Property Office has announced a review of its trade mark fees and services together with a public consultation aimed at reducing the cost and time taken to obtain trade marks. The proposals include giving a discount for the electronic filing of trade mark applications. This comes just weeks after the organisation that registers European wide trademarks announces dramatic reductions in its fees for registering Europe-wide trademarks.

Having a trademark can protect your business from having its brand and identity copied or used without permission. Costs of registration can be just a few hundred pounds. If you've spent time and money on developing your brand identity, registering a trademark could be a good way for you to protect that investment.

If you want to discuss how and why you should apply for a trademark or if you would like advice on and assistance in protecting any other intellectual property assets, please contact Alexandra Sagar on 01254 54374 or email alexandra.sagar@forbessolicitors.co.uk

Controlling shareholder can be an employee

In Secretary of State for Business, Enterprise and Regulatory Reform (BERR) v 1. Richard Neufeld and 2. Keith Howe, the Court of Appeal has confirmed that a shareholder and director of a company can also be an employee under a contract of employment with the company, even where that person has a controlling interest in, or even total control of, the company.

The facts of Mr Neufeld's case were as follows. He was managing director of A & N Communications in Print Ltd. (A&N) and held 90 per cent of the shares. The company went into insolvent liquidation. He first began working for Neufeld Press Ltd. in 1982 as a member of its sales team. In 1988 he became a shareholder and one of the company's three directors. In 2001, this undertaking was transferred to A&N. Mr Neufeld continued to work as part of the sales team, managed by the sales director, and worked a 60-hour week carrying out sales as well as management duties. He had loaned money to A&N as well as providing personal guarantees on the company's behalf. None of the three directors had a written contract of employment.

The Secretary of State had refused to meet Mr Neufeld's claim for redundancy money, notice money and holiday pay owing at the date of insolvency to be paid from the National Insurance Fund (NIF). His claim amounted to approximately £10,000.

Mr Neufeld brought a claim under Section 188 of the ERA and the Employment Tribunal (ET) dismissed his claim. It held that the fact that he had given personal guarantees on A&N's behalf, had lent money to the company and had control over it showed that in reality he was not an employee of the company when it became insolvent. In the ET's view, he was running his own business as a manager and major shareholder.

The Employment Appeal Tribunal (EAT) disagreed. In its view, the correct approach was to focus on the conduct of the parties in carrying out the 'purported' contract of employment. Other factors were only relevant in so far as they reflected upon that conduct. The EAT held that the ET judge had erred in law in taking into account irrelevant matters.

The Secretary of State for BERR appealed to the Court of Appeal. The appeal was heard at the same time as the other case because a salient factor in each was that the claimant was a controlling shareholder and a director of the company. The Secretary of State asked the Court of Appeal to clarify the approach to be adopted by the ET in these circumstances.

The Court of Appeal dismissed both appeals. In giving his judgment, Rimer LJ analysed the previous case law and authorities governing this question. In the Court's view, the correct approach is to first determine whether the alleged contract is genuine or a 'sham'. If it is genuine, is it a contract of employment rather than, for example, a contract for services? As the critical question in such cases is whether or not the employee was an employee at the time of the company's insolvency, it may be necessary to examine what has been done under the claimed contract, particularly where this is not in writing.

The fact of a person's control over the company will form a 'backdrop' against which the assessment of the conduct under the contract will be made, but will not ordinarily be of any special relevance in deciding whether or not that person has a valid contract of employment. Nor will the fact that they have share capital invested in the company or have made loans to it or given personal guarantees on its behalf. Such considerations will ordinarily be irrelevant in determining whether or not a valid contract has been created. They show an owner acting as an owner. They do not show that the owner cannot also be an employee.

For further information and advice please contact Peter Byrne on 01254 54374 or email peter.byrne@forbessolicitors.co.uk

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Are you displaying your company name correctly?

The Companies Act 2006 has brought in a huge number of changes to company law since the beginning of 2007 and one provision that came into force in October 2008 could have an impact on a vast number of companies and their directors.

Since October 2008 all active companies have had to display their company name at their registered office, at any place where their public records are kept and at any location at which they carry on business. The rules require that this display must be of a size that can be read with the naked eye and in a place that is visible to every visitor.

If you use any third party's address for your company's registered office, such as your accountant or solicitor's office, you need to check that these rules are met by the displaying of your company's details at those premises. The directors and the company will be liable for default and not any third party that fails to display this information. Failure to comply with the regulations is a criminal offence! The penalty for the directors or secretary in default is a fine.

It is therefore vital that you check that your company name is displayed at all of the required premises and that you meet the rules for the format of the display or else you could find yourself with a criminal record!

For further information and advice please contact Charlotte Wood on 01254 54374 or email charlotte.wood@forbessolicitors.co.uk

The importance of safety standards

A recent case highlights the importance for those working in the building industry of ensuring that they carry out work in accordance with the applicable health and safety requirements. In May last year, qualified scaffolders working for Sky Scaffolding (Midlands) Ltd. were erecting scaffolding on the pavement in Coventry City Centre.

The scaffolders began work early in an attempt to avoid working when the streets would be busy, but they were still working at 9.20 am, a very busy period. A steel pole fell from a height of five metres onto a member of the public, gashing her leg. The woman was immobilised for several weeks and still suffers from anxiety attacks as a result of the accident. At the time, the scaffolders were securing the site on account of the streets being busy but, according to the Health and Safety Executive (HSE) press release, they had 'failed to take more-robust [sic] steps to ensure that the system of work was effective to protect the public from simple human error such as dropped materials or tools during scaffolding erection'.

Use of the pavement had not been restricted, nor was it closed to pedestrians although, to prevent such accidents occurring, a workman had been given the task of asking pedestrians to wait when he was passing materials and poles up to his colleagues or while materials were being handled overhead. However, this job was too great a task for one individual as pedestrians were coming along the pavement in both directions. The workman failed to see the woman approaching and so did not ask her to wait.

The company was charged with not taking sufficient and suitable steps to prevent injury to passers by and with not conducting a sufficient and suitable risk assessment. It pleaded guilty in the Magistrates Court to breaching Regulation 3[1](b) of the Management of Health and Safety at Work Regulations 1999 and Regulation 10(2) of the Work at Height Regulations 2005 and was ordered to pay a fine of £4,000 and costs of £1,761. As of 16 January 2009, the maximum penalty the Magistrates can award for a single breach of either regulation is a fine of up to £20,000 or up to a year's imprisonment.

The HSE has stressed the importance of scaffolders segregating themselves from the public whilst conducting dangerous

overhead activities.

Information on construction safety and working at height can be found on the HSE website at:

www.hse.gov.uk/construction/index.htm and www.hse.gov.uk/falls/guidance.htm.

For further information and advice please contact Jonathan Holden on 01254 54374 or email jonathan.holden@forbessolicitors.co.uk

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Events

Plan, Protect & Recover

A guide to late payments

Wednesday 9th September 2009
East Lancs Chamber of Commerce
8.00am - 10.00am
Free of Charge

With continuous pressure on cash flow arising from the current economic climate, late payments are the last thing any business needs. In a recent survey by Chamber Members, it was highlighted that late payments still remain a big problem for many businesses.

The teams at Forbes Solicitors and The East Lancashire Chamber of Commerce have developed a short breakfast seminar to identify ways to effectively deal with late payments and highlight any areas that may require attention.

For further information or to book your place on the seminar please **contact Ashleigh Harris on 01254 222388, email** ashleigh.harris@forbessolicitors.co.uk or visit www.forbessolicitors.co.uk

Annual Employment Law Update 2009

6th October, Stanley House Hotel
22nd October, PNE Football Club

A full programme for this seminar is yet to be finalised but we will be bringing together employment law experts to give a full update on any changes in legislation that could affect your business.

To register your interest early, please **contact Catherine Butler on 01254 222305, email** catherine.butler@forbessolicitors.co.uk or visit www.forbessolicitors.co.uk

Cost: £45 +VAT

Former partners bound by accounts

Many businesses are run as partnerships and, when times get tough, it is not uncommon for a partnership to split up. One common problem when this happens is agreeing the financial position after the split. This is especially problematic when the applicable procedures are not clearly laid out in the partnership agreement.

A recent High Court case dealt with the question of the status of partnership accounts prepared for a year during which several partners had left a large partnership. The partners who left had made drawings on account of profits, for the period during which they were partners, which exceeded their profit shares as shown in the accounts. The accounts were prepared some time after they had left. The partnership sought to obtain repayment of the amounts overdrawn.

The partnership deed stated that the firm's accounts would be binding on all partners, subject to any objections raised in a stipulated time period. The firm's erstwhile partners claimed that the accounts could not bind them as they were no longer partners.

The Court agreed with the partnership's argument that the partnership accounts were binding on anyone who had been a partner during the period for which the accounts had been prepared. The former partners also had the right to raise objections to the accounts.

One lesson to be learned from this case is that it is important for partners to have knowledge of and understand their partnership accounts and to take advice where necessary to ensure they understand the financial risks they are taking. It is also sensible to have a written partnership agreement.

For further information and advice please contact Sarah Wilkinson on 01254 54374 or email sarah.wilkinson@forbessolicitors.co.uk

Cheer for owners of tenanted pubs

It is common for the licence of managed premises to be held in the name of the owner of the premises (such as a brewery) rather than that of the tenant, since it makes it administratively more simple if the tenant changes.

However, where the tenant then breaches the terms of the licence, this can cause problems. In a recent case, a brewery faced charges arising from breaches of the conditions on the premises licence. It was not denied that the offences had occurred, but the brewery denied it was liable for the offences because, whilst it was the licence holder, it did not carry out the licensable activity.

The brewery was convicted of four offences in the Magistrates Court, but the convictions were overturned on appeal to the High Court. It was held that the person responsible for the breaches was a matter of fact and that the mere fact that they held the premises licence did not mean that they were responsible for the licensable activities that took place on the premises.

For further information and advice please contact Adam Bromley on 01254 54374 or email adam.bromley@forbessolicitors.co.uk

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