SIMON BURN
SOLICITORS

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Commercial Law UPDATE

New Competition Law Has Real Teeth

Under the old law relating to cartels, it was necessary to prove dishonest intent in order to obtain a criminal conviction when companies engaged in price fixing, market manipulation, bid rigging and so on. The civil law provides that breaches of competition law can lead to a fine, but the criminal law also provides for a prison sentence to be given to those who flout the law.

The difficulty in obtaining criminal convictions (because of the need to prove dishonest intent) has meant that there has so far only been one successful prosecution under the old legislation, which has allowed serious cases of market manipulation to go unpunished under the criminal law. To remedy the situation, new legislation (the Enterprise and Regulatory Reform Act 2013) came into effect on 1 April 2014, under which it is no longer necessary for dishonest intent to be shown in order to obtain a criminal conviction.

In addition, the functions of the Office of Fair Trading and the Competition Commission have now passed to the Competition and Markets Authority.

The practical effects of the changes are that a wider range of offences against competition law could become criminalised and that (for example) joint ventures which contain 'non-competition' clauses might unexpectedly fall foul of the law.

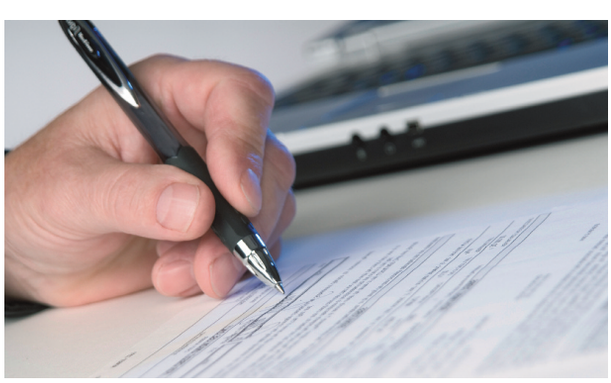
For advice on how to comply with competition law, contact us.

Lease Termination Notice Must Be in Specified Form, Rules Court

When a tenant failed to include precisely the right wording for exercising its right to break its lease, the court ruled that use of the exact words specified was not necessary and therefore disallowed the landlord's claim that the break notice was invalid.

The landlord appealed to the Court of Appeal, which reversed the decision, holding that since the lease said that the notice 'must' be given in a specific form, giving the notice in another form rendered it invalid.

The case, which has now racked up very substantial legal fees, illustrates the importance of paying attention to the precise terms of a lease. Had the notice been given by the tenant in the specified form in the first place, there would have been no argument.



Any property transaction carries the potential for being costly if a dispute arises, and great care should always be taken to ensure that the legal agreements are carefully drafted and complied with.

We can assist you to ensure that your property dealings are conducted in a way that protects your interests.

Contract Between Equals Enforceable

When a financial adviser quit his job and set up his own business with another adviser, the company he left sought damages for breach of contract.

He had previously sold the goodwill in his client base to his employer and that agreement contained a 'non-compete' clause which lasted for 12 months from the date he left the firm.

The financial adviser claimed that the clause was unreasonable and thus void.

The High Court had to decide whether the non-compete clause was reasonable and concluded that, since the two parties were negotiating with equal bargaining power and it did no more than was reasonable to protect the purchaser's position, it was enforceable.

The courts are not normally willing to interfere in contractual arrangements made between equals. For advice on structuring a contract to protect your commercial interests, contact us.

Landlords Keep Rent Paid in Advance

The overturning of a High Court decision concerning rent paid for a period after the end of a lease has restored the status quo in such cases – to the relief of landlords.

The case concerned a tenant which exercised the break clause in its lease having already paid rent for a period beyond the break date.

The tenancy was on the normal basis requiring payment of the rent due quarterly in advance. The tenant applied to the landlord for a refund of the rent paid for the period after the termination of the tenancy and the landlord refused on the ground that there was no express provision in the lease to refund a proportion of the quarterly rent paid where notice was given during the period for which rent had been paid.

The High Court held that the 'overpayment' should be refunded to the tenant as it was a reasonable term to imply into the lease. This decision flew in the face of earlier judgments in similar cases, so it was no surprise that the landlord appealed against it.

The Court of Appeal accepted the landlord's assertion that, in the absence of a term in the lease giving the tenant the right to a repayment in such circumstances, there was no such right.

The case illustrates how important it is to make sure that the wording of a lease is clear and precisely reflects the wishes of the parties to it.

Contact us for advice on any aspect of landlord and tenant law and assistance in making sure that any lease you sign means what you think it means.

Shadow Director Owed Company a Fiduciary Duty

Shareholders are not necessarily directors of a company, which may lead them to believe that they cannot be held responsible for the actions of the company in which they have a stake. However, when a shareholder (or anyone else) exerts sufficient sway over a director to influence the company's business, the court may consider them to be a 'shadow director'.

A shadow director is a person who is not formally on the board of directors but whose decisions are followed by the company in the same way as a director's would be.

In the event of a corporate insolvency, shadow directors have the same legal responsibilities as 'real' directors, as the shareholder of a company recently found out.

The shareholder had used his influence over the director to get the company to make payments to him and to provide him with a salary. When the company went into insolvent liquidation, court action was commenced against him.

It was claimed that he was a shadow director and therefore owed a fiduciary duty to the company and its creditors. The High Court accepted that the shareholder was a shadow director and also that he did owe a fiduciary duty to the company as regards the instructions he had given to the sole director, and that the duty had been breached by him when the company became insolvent.

The director now faces a massive claim for reimbursement of payments made improperly.

If you are concerned about any aspect of the governance of your company, particularly if the solvency of the company is in doubt, contact us for advice.

Goodwill Not Necessarily a Company Asset

The way in which a business is structured has many ramifications and can be especially important on sale, as a recent case shows.

It involved a bakery company specialising in the sale of Turkish style products. When the business was sold, the sale agreement showed the owner/director of the company as being the owner of the goodwill of the business. The goodwill was transferred to the buyer for nearly £500,000.

Only a year after the sale, the buying company went into liquidation and the liquidators sought to recover the payment for the goodwill on the ground that it had, in reality, belonged to the company and therefore the company sale as structured was a transaction at an undervalue and/or the payment to the director amounted to a misappropriation of the company's assets.

The liquidators lost, the court deciding that (despite clear guidance to the contrary by HM Revenue and Customs) the goodwill of a business can be separately owned from the other assets of the business.

Getting the legal structure of your business and ownership of assets right is important. We can advise you accordingly.

Agency Pays Breach of Privacy Damages

In an unusual case, which revealed that it is not just the press that is affected by the developing law of privacy, a PR agency that inadvertently disclosed details relating to a property agent's departure from his job has been hit with a substantial damages and costs bill.

The property agent had reached a settlement agreement with his employer in connection with his departure. The employer had retained the PR agency to give advice in relation to the matter. The PR agency made public confidential information relating to the property agent's departure, which led to his suit against it.

Following negotiations between the parties, the PR agency agreed to apologise unreservedly, in open court, and to pay the property agent an undisclosed sum in damages as well as a contribution towards his legal costs. The PR agency's lawyers said that the disclosure had resulted from an inadvertent mistake and that it was 'truly sorry for the distress and inconvenience caused' to the property agent.

If your business or reputation has been damaged through the unauthorised disclosure of confidential information, we will be happy to advise you.

ICO Issues New 'Must Do' Data Protection Guide

The Information Commissioner's Office (ICO) has published a new guide to protecting personal data, 'Protecting personal data in online services: learning from the mistakes of others', which it describes as outlining the procedures organisations must follow to ensure data security. It can be downloaded from the ICO website at www.ico.gov.uk.

Although the guide deals with the technical aspects of data security, data protection breaches can also have a financial impact under other areas of the law – contract and employment law, to name but two.

We can advise you on the legal issues relating to data security and how to ensure that your risk of financial loss in the event of a breach is minimised.

Changes to Directors' Disqualification and Company Ownership Disclosure Rules On the Way

The Government plans to make sweeping revisions to the regulations concerning the disqualification of directors.

These will generally operate to make the regime more punitive towards directors whose behaviour is deemed to warrant a penalty.

The changes include the introduction of the ability to ban from being a director of a British company a person who is convicted abroad of a criminal offence or who has an unsatisfactory background (for example, having been a director of foreign companies that failed).

When the behaviour of a director is sufficiently discreditable, the courts will be able to order the director to pay compensation to creditors of the company.

In deference to the increasing complexity of business structures, the time period for commencement of proceedings to disqualify directors after an insolvency is to be extended from two years to three.

The Government also proposes to take steps to ensure that the opacity attached to the beneficial ownership of UK companies is removed by the creation of a central registry of company beneficial ownership information.

The measures form part of the Small Business, Enterprise and Employment Bill currently before Parliament.

Protection From Post-Employment Acts of Victimisation

The Equality Act 2010 contains measures that protect employees from victimisation for having made a complaint of unlawful discrimination, but does that protection extend to events that take place after the employment relationship has ended? In *Rowstock Limited v Jessemey*, the Court of Appeal has ruled that it does, even though the wording of the Act suggests the opposite.

Mr Jessemey was employed by Rowstock Limited as a car body repairer. In January 2011, one year after his 65th birthday, he was told that the company no longer wished to employ men over 65 and his employer dismissed him without carrying out the statutory retirement procedures that were in place at the time. On 8 February 2011, the company provided an employment agency, through which Mr Jessemey was seeking work, with a very poor reference for him.

The Employment Tribunal (ET) upheld Mr Jessemey's claims of unfair dismissal and unlawful discrimination on grounds of age and agreed that he had been given a poor reference because he had commenced proceedings against his employer. However, the ET decided that it had no jurisdiction to give any remedy for the victimisation because, although discrimination and harassment post-termination are specifically prohibited under the Equality Act, Section 108(7) appears expressly to disapply the concept of victimisation where the employment relationship has ended.

The Employment Appeal Tribunal (EAT) refused to overturn the ET's ruling on the basis that it did not have the power to 'plug the gap' in the legislation. Mr Jessemey took his case to the Court of Appeal.

In reaching its decision, the Court made several observations:

- Firstly, post-termination victimisation was unlawful at the time the Equality Act was drafted and there was no rational basis for withdrawing that protection;
- Secondly, the purpose of the Act was to restate existing protections against discrimination, clarifying and enhancing the law where necessary, and there was nothing to suggest that the Government intended a change in the law;
- Thirdly, the explanatory notes to the Act contain a reference to

provisions, albeit unidentified, prohibiting post-termination victimisation;

- Fourthly, if post-termination victimisation were not prohibited, the UK would be in breach of its obligations under EU law; and
- Fifthly, no rational basis had been suggested for treating post-termination victimisation differently from post-termination discrimination and harassment.

In the Court's view, the Equality Act does prohibit post-termination victimisation and, in the light of the ET's findings, the case was remitted for the assessment of compensation.

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