SIMON BURN SOLICITORS

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Commercial Law UPDATE

Ignore the Planners at Your Peril

A landlord who decided to go ahead with a property development after the planners had turned it down ended up significantly worse off after he was successfully prosecuted.

Having had his application to turn his existing property into nine flats rejected, the landlord decided to let the property out as multiple occupancy units in breach of planning permission. He was eventually served with an enforcement notice by the local council, which he ignored. As well as the letting being a breach of planning law, some of the rooms let were illegally substandard in size.

Eight years later, he was found guilty of various planning offences, with the result that his criminal profits were the subject of a confiscation order for more than £550,000 and he was ordered to pay a fine of £65,000 and £80,000 in costs. If the confiscation order is not satisfied within three months, the landlord faces a jail term of more than five years.

The temptation to ignore planning decisions and proceed regardless is not one which normally has anything to recommend it. It can lead, as in this case, to dire consequences. Generally, property owners who engage on a reasonable basis with the local planning authorities have the best chance of being successful.

For information on what to do – and what not to do – as regards any planning or property development issue, contact us.

Tender Non-Compliance Can Prove Fatal

It is normal for larger contracts to be put out to tender and, given how prevalent the practice is, it is surprising that failures to meet the tender specifications – which are often highly detailed and very specific – are as common as they are, especially where this results in the rejection of the tender documents.

A recent Scottish case shows how important it is to get the procedures right. It involved a council which issued a fairly complex tender specification for three tranches of demolition work. A demolition contractor submitted a tender application for the work that omitted some financial information on two of the parts and had other non-compliances.

The tender application was rejected. The demolition contractor, facing a serious potential loss of business, made good the deficiencies the day it was informed its tender had been rejected for incompleteness of information.

The council declined to accept the revisions and closed the tender process. The demolition contractor went to court to force the council to reopen it.

The court refused to intervene. The council's decision had not been unreasonable or disproportionate.

The effects of failing to follow tender requirements precisely can be severe. We can advise you on the legal aspects of tenders and public sector procurement.

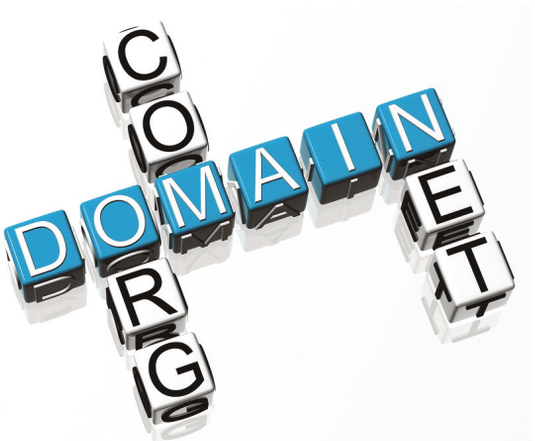
Backups Not For Sale

Backup copies of software are made routinely, and the sale of software no longer used is also commonplace, despite the fact that in many cases the software licence is not legally transferable.

However, what would the position be if the original purchaser decided to sell software that it no longer wished to use but the only available copy of it was a backup copy he had made?

The answer, according to the European Court of Justice, is that the backup cannot be legally sold without the permission of the owner of the copyright to the software, even if it is the only copy the original purchaser has.

Business Sales and Domain Rights



Buying and selling a business can be a complex matter and engaging a professional to make sure that deals are watertight and all the necessary actions are taken is a sound investment. In one case where that did not happen, a costly dispute developed between former colleagues in respect of a corporate website.

The case concerned a company that hired out photo booths for weddings and other events. One of the directors had registered an Internet domain name in the company's trading style. She eventually sold her shareholding to another director but remained the registered owner of the domain name. The share transfer was not professionally drafted and paid no attention to rights in the domain name.

Shortly after her departure, the director who owned the domain name established a rival business and redirected the domain name's traffic to her new venture. The company's response was to complain to Nominet, the independent body that oversees the registration of domain names in the UK. In upholding the complaint, a Nominet expert found that the domain name was an abusive registration in her hands and directed its transfer to the company.

The expert found that on selling her shares to the other director she had agreed to terminate her commercial relationship with the company and to divest herself of any rights to its name or trading style. Her continued use of the domain name was likely to confuse Internet users and was intended to draw customers away from the company. It disrupted the company's business and took unfair advantage of its goodwill.

It is easy to overlook the protection of intellectual property (IP) rights such as brand names and web domains when doing deals of this nature. We can advise you how to make sure your interests are fully protected and any IP the business owns is dealt with properly.

Branded Goods Sold Without Authority Can Lead to Prosecution

It is well known that the sale of counterfeit goods is a criminal offence and prosecutions are by no means unusual. A recent case looked at the position in which goods protected by a registered trade mark are offered for sale with the brand owner's branding, but by someone who is not authorised to sell them.

Goods sold this way are called 'grey goods' and their presence in the market is normally the result of their being imported from foreign markets where they are sold at significantly lower prices.

The case was brought as a preliminary matter to ascertain if the Trade Marks Act 1994 could be interpreted to mean that a criminal offence is committed 'where the proprietor of the registered trade mark has given its consent to the application of the sign which is its registered trade mark, or has itself applied its own registered trade mark, to the goods, but has not given its consent to the sale, distribution or possession of them'.

It was brought because the owner of the trade mark alleged that another company had been 'unlawfully selling in the United Kingdom branded goods by Ralph Lauren, Adidas, Under Armour, Jack Wills, Fred Perry and others' which were manufactured in countries outside the European Union and which were sold to the grey importers, without the authority of the intellectual property holder, by the factories that made them.

The case ended up in the Court of Appeal, which ruled that an offence could be said to have been committed.

The counterfeiting and unauthorised resale of branded goods is a major headache for brand managers and this case confirms that there are criminal as well as civil (restitutive) measures that can be taken for breaches.

If you are concerned that your brand equity is being undermined by the activities of others, contact us for advice.

Building Company Discovers Pitfalls of Oral Contracts

Every sensible businessperson knows that oral contracts are fraught with difficulty and that the results of a lack of formality can be ruinous. In one case that proved the point, a building company that carried out work worth hundreds of thousands of pounds on the basis of nothing more than a chat at a bus station now faces a lengthy court battle to be paid.

A mixed development had encountered difficulties and the company's manager said that it had been recruited at short notice to fill the shoes of other builders who had walked off site. During a meeting at a bus station adjoining the site, he said that he had agreed on the company's behalf to carry out works as directed by the site foreman. Due to concerns about the solvency of the main site contractor, the manager claimed that he had contracted with the latter's agent, who had agreed to take responsibility for paying all contractors engaged on the site.

The company's first two bills were paid, but it launched adjudication proceedings after the next two went unsettled. The agent challenged the adjudicator's jurisdiction on the basis that it had never had any contract with the company. However, with that reservation, it participated in the adjudication.

The adjudicator awarded the company £247,250 plus interest, and the latter applied to the High Court for summary enforcement of the award. In rejecting the application, however, the Court found that the agent had a realistic prospect of succeeding in its defence that there was simply no contract between it and the company. It was far from clear, on the evidence, who the

company had contracted with, if anyone. In the circumstances, there would have to be a full trial of the dispute.

You are best protected by having clear and unequivocal contract terms in respect of any significant business arrangements. Contact us for advice.

The Meaning Is What the Words Mean

When creating a contract of any kind – especially when the sums involved are large, as is typical in property and development contracts – it is essential to ensure that its terms unequivocally reflect your intentions before it is executed.

A recent case left a supermarket giant looking sheepish after the High Court ruled that its interpretation of a £12 million development contract was incorrect.

It involved an agreement between Asda and a second firm. This required the second firm to obtain planning permission and consent for highway works in connection with a proposed development and to obtain additional land.

The contract stated that it could be rescinded if four conditions had not been satisfied. When it considered that these had not all been met, Asda used its purported right to rescind the contract.

The legal argument between the two companies was based on whether the contract meant it could be rescinded only if all the four conditions were not met by the 'longstop' date or whether it could be rescinded if any one of the conditions was unmet by the longstop date. The contract wording read that rescission was possible 'if all of the Conditions have not been discharged in accordance with this Schedule by the Longstop Date'.

On appeal, the Court ruled that this meant that all four conditions had to have not been met for Asda to rescind the contract.

On the face of it, it would seem odd to agree a conditional contract which was written in such terms as, presumably, failure to meet any of the conditions would imperil the entire development.

However, the wording of the contract was clear – 'all' means 'all', not 'any'. Only if none of the four conditions were met by the longstop date could the contract be rescinded. The question of whether that was the case will now be argued in court.

For assistance with any contractual matter, contact us.

Data Misuse Brings £50,000 Fine

Spam texts are a source of irritation for many, and their use can lead to substantial fines, as a company in the North West has found out.

The company sent more than 400,000 unsolicited texts and the Information Commissioner's Office received more than 150 complaints from members of the public.

The net result was a fine of £50,000 for misuse of people's personal details.

Where a marketing database (including mobile phone numbers or email addresses) or list is 'bought in', you must ensure that you have the legal right to use the personal information it contains. In particular, you must not send electronic mail marketing to individuals unless:

- they have specifically consented to electronic mail from you; or
- they are an existing customer who bought (or negotiated to buy) a similar product or service from you in the past, and you gave them a simple way to opt out both when you first collected their details and in every message you have sent thereafter.

When marketing in this way, you must not disguise or conceal your identity, and you must provide a valid contact address so that those contacted can opt out or unsubscribe.

The maximum penalty for breach of the Data Protection Act 1998 is £500,000.

We can advise you how to make sure your marketing activity stays within the law.

National Minimum Wage Rates

The following changes to the National Living Wage (NLW) and the National Minimum Wage (NMW) rates came into effect on 1 April 2017:

- The NLW, which applies to those aged 25 and over, increased from £7.20 to £7.50 per hour;
- The NMW for 21- to 24-year-olds increased from £6.95 to £7.05 per hour;
- The NMW for 18- to 20-year-olds increased from £5.55 to £5.60 per hour;
- The NMW for 16- and 17-year-olds increased from £4.00 to £4.05 per hour; and
- The apprentice rate of the NMW, which applies to apprentices aged under 19 or those aged 19 or over and in the first year of their apprenticeship, increased from £3.40 to £3.50 per hour.

The accommodation offset increased from £6.00 to £6.40 per day for each day during the pay period that accommodation is provided.

The Department for Business, Energy and Industrial Strategy recently published the names of 360 businesses which failed to pay workers the NMW or the NLW. Those listed underpaid 15,520 workers a total of £995,233, with employers in the hairdressing, hospitality and retail sectors the most prolific offenders.

As well as recovering arrears for some of the UK's lowest-paid workers, HM Revenue and Customs also issued penalties of around £800,000.

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