

Brexit – Some Business Implications



The business press has been awash with 'post-Brexit' predictions of various sorts, but some of the

implications requiring the most forward planning have attracted relatively little comment.

After the UK Government formally begins the withdrawal process from the EU, there will be lengthy exit negotiations and no changes in the law are anticipated for at least two years. However, businesses will need to plan ahead for the eventuality.

In the event that a free trade agreement is negotiated between the UK and the EU, the UK will need to continue to comply with many aspects of EU law. For example, much of UK employment and environmental law stems from the EU and, in some instances, goes beyond EU law in terms of protection of workers' rights and the environment. In practice, little change is to be expected.

However, there are specific issues that UK businesses should be thinking about, which include:

■ **VAT Compliance.** The present system of VAT recovery and compliance is likely to change, as VAT will be recovered for EU acquisitions under Article 13 of the relevant Directive, rather than Article 8. In practice, this means that recovering VAT incurred in

EU countries may well take considerably longer after Brexit. It is also possible that multiple VAT registrations will be required in different EU countries. This may pose a substantial additional compliance cost.

■ **The European Company** (also known by its Latin name *Societas Europaea* or SE). UK businesses using the European Company will wish to consider the suitability of continuing to do so in changed circumstances.

■ **Intellectual Property.** At the moment, trade marks can be obtained through the use of the 'Registered Community Design' and 'European Union Trade Mark', which have EU-wide effect. How this will work in practice for UK-based businesses after Brexit is uncertain, although it will clearly be in both sides' interests to preserve a very similar system, which is the outcome of many years' negotiation.

■ **Debt Collection.** At present, there is a simplified procedure for the enforcement of debts across the EU. It remains to be seen if this will be preserved. If not, this may be a reason to set up a trading location within the EU to manage sales to EU businesses.

At this stage, it is important to remember that nothing substantial is expected to happen for at least two years. However, Brexit may have implications for future plans and business structures, and it will be important to consider your options – especially if you have substantial business relations with entities in other EU countries – and be prepared for the likely eventualities.

We can provide advice specific to your business circumstances and will keep you abreast of changes likely to affect you.

Pest Calls Telemarketing Company Fined Record £350,000

If you are considering using telemarketing, it is essential to comply with the applicable law, as was illustrated by a recent case in which a company that 'deliberately defied' the law and initiated over 40 million such calls was hit with a record £350,000 fine.

In particular, calls should not be made to private individuals who have subscribed to the Telephone Preference Service, and care must also be taken to safeguard personal data – a requirement of the Data Protection Act 1998.

We can advise you on the law applicable to your chosen marketing methods.

Overheads Not Ignored in Claim for Profits

One of the ways by which a business can obtain recompense for the breach of its intellectual property (IP) rights is to make the infringing organisation account to it for any profit that they have made.

This sounds all well and good, but it can be particularly difficult to ascertain what the 'correct' amount of profit is – particularly where the IP infringed is only part of the product which has been sold.

In a recent case, a company that manufactures shop fittings found that its patent was infringed by a competitor's design that used an essentially identical panel 'insert' system for its shop fitting display product.

Once the breach of patent was established, the argument turned to how much of the profit on the infringing company's sales could be claimed by the company whose patent had been infringed. In the first hearing, the judge concluded that 'the fact that it was a modest section makes no difference. The sale of that section of the panel both caused the sale of the panel as a whole and the latter sale was a foreseeable

consequence of the former.' He therefore awarded the claimant company all of the profits made on the sales of products which infringed its IP.



The infringing company appealed, successfully arguing that a proportion of its overhead costs should be deducted in arriving at the 'true' profit it earned on the sales of the infringing products.

The claim was remitted to the lower court to decide the appropriate reduction.

For advice on any commercial dispute, contact us.

Tenants Cannot Assign Leases to Their Own Guarantors, Court Rules

In a decision that clarifies a problem area of the law and will be required reading for commercial property professionals, the High Court has ruled that it is not legally possible for a tenant to validly assign a lease to a guarantor of that lease.

The case concerned a retail shop which had been let by company A to company B, with company C standing as the latter's guarantor. After company B went into administration, the lease was purportedly assigned 'with company A's consent' to company C. A dispute later arose as to whether

the assignment was valid and whether company C was bound by various covenants under the lease.

In ruling in company A's favour, the Court found that, by operation of Section 25(1) of the Landlord and Tenant (Covenants) Act 1995, a tenant is precluded from assigning a lease to its guarantor and that any agreement which seeks to give effect to such an arrangement is void. The Court concluded that the lease was still vested in company B and that company C remained bound by its guarantee.

New Protocol Aims to Help Tenants Do Alterations

A new protocol has been developed, the aim of which is to make it easier for tenants to resolve issues when they want to make alterations to the premises they rent.



The protocol involves the tenant preparing an application for consent to the works, containing the relevant plans and information, which is then submitted to the landlord. The tenant will normally undertake to meet the landlord's reasonable costs in dealing with the matter.

Within five days of receipt, the landlord should respond to the tenant to confirm receipt of the application and whether or not it contains sufficient information to enable it to make a decision. The landlord's decision should not be unreasonably delayed and should enable the tenant to understand the reasons for it and, if consent is given, any conditions that are attached.

In the event of a disagreement, the first attempt at resolution should be by way of alternative dispute resolution rather than legal proceedings.

It is clear that both sides should retain formal records of any variation or ancillary agreements made and, in particular, whether or not the leasehold alterations are to be taken into account on a rent review or renewal.

For assistance in the negotiation of any alteration involving tenanted premises, contact us.

Guidance on How the Apprenticeship Levy Will Work

On 6 April 2017, the way in which apprenticeships in England are funded is changing. Some employers will be required to pay a new apprenticeship levy, and there will be changes to the funding for apprenticeship training for all employers.

The levy will apply to employers across all sectors. It will be set at a rate of 0.5 per cent of an employer's wage bill, excluding other payments such as benefits in kind, and will be collected via the PAYE system. Employers will receive an annual allowance of £15,000 to be offset against the levy payment. The effect of this allowance is that the levy will only be payable by employers with wage bills in excess of £3,000,000 (estimated as fewer than 2 per cent of employers). Those with a lower wage bill will not pay anything.

The Government has published guidance providing information on how the apprenticeship levy will work and explaining the principles on which apprenticeship funding and the levy will operate. The topics covered are:

- Paying the apprenticeship levy;
- Accessing money paid under the scheme;



- Buying apprenticeship training;
- Information for all employers on what apprenticeship funding can be spent on; and
- Eligibility for training.

The guidance, which can be found at <http://bit.ly/1SYtZ88>, also gives the dates on which further information will be made available.

Broken Trading Relationship? Don't Let it Get Out of Hand!

Breakdowns in commercial relationships are an unfortunate fact of business life and a good lawyer can help to broker a sensible compromise. However, in one case where that did not happen, former trading partners spent 13 costly days in the High Court battling it out over little more than £300,000.

The case involved a company which had supplied consignments of rice to another company over a lengthy period before they fell out. The former claimed to be owed about £317,000 in respect of unpaid invoices, but the latter denied that it owed a penny and counterclaimed for various sums. Amongst other things, the defendant company claimed that certain batches of rice delivered were not of the quality required and that others were affected by mould.

In considering the case, the Court was required to resolve 11 detailed issues and to hear extensive oral evidence from the companies' employees and from pricing experts. The task

was not made easier by arguments that written contractual arrangements had been added to and amended by a number of ad hoc oral agreements.

The Court found in favour of the company that raised the claim on the principal issues in the case and the defendant company was ordered to pay £291,688. The latter's counterclaim succeeded to the extent of £12,782.

This case illustrates the benefits of reaching a negotiated settlement where possible. The Court heard further argument in relation to interest and legal costs, which, when decided, are likely to exceed the sums at stake in the dispute.

Effective litigation management is an area requiring experience and considerable expertise. For assistance in settling a commercial dispute without a 'cost spiral' resulting, contact us.

Unreasonable Building Contract Term Unenforceable

Contracts have to be reasonable to be enforceable, and that is one good reason why professional drafting is essential. In a case which clearly illustrates that point, the High Court has ruled that a clause which required notification of defects in building works within an unrealistically brief period of time was not worth the paper it was written on.

The clause stated that a contractor had to be notified of any alleged defect in its work within 28 days of its appearance and, in any event, within one calendar year of

the completion of the project. When structural problems were discovered nine years after the work was completed, the contractor sought to avoid the case coming to court...but the Court found that the term fell foul of the Unfair Contract Terms Act 1977, so the case could proceed.

For advice on negotiating construction contracts that are both enforceable and offer the maximum possible protection of your interests, contact us.

Public Ownership and Control Register – What This Means for You

Increasing public disquiet over the use of 'tax haven' companies and trusts to disguise the beneficial ownership of businesses and properties has led to the Government taking steps to improve the transparency of ownership. Such arrangements are often used for money laundering and/or aggressive tax avoidance (and sometimes evasion) activities or to hide undisclosed or illegal assets from the authorities.

Since 6 April 2016, it has been compulsory (under the Register of People with Significant Control Regulations 2016) for most UK companies and Limited Liability Partnerships (LLPs) to disclose publicly the details of their owners and who has ultimate control over them. All relevant organisations are required to keep a register of People with Significant Control (PSC) and, from 30 June 2016, this information has to be filed by most companies for public inspection at Companies House.

A PSC can be a UK-resident individual or company. A PSC is required to inform a company or LLP of their interest. Failure to comply with the Regulations will constitute an offence which may lead to imprisonment for up to two years per

offence. The interest to be disclosed need not be a direct interest and the legislation will normally catch PSCs involved with UK companies through the medium of an offshore company or trust if they have significant control over the non-UK entity.

In a limited company, a PSC is anyone who:

- directly or indirectly holds more than 25 per cent of the company's nominal share capital or controls more than 25 per cent of the voting rights; or
- exercises or has the right to exercise significant influence or control over the company or a trust or firm that would be a PSC in its own right; or
- has the indirect or direct right to control the composition of a majority of the board of directors.

The rules for LLPs are very similar.

For advice on what you need to do to comply with the Regulations, contact us.

SDLT Clarification Sought on Mixed-Use Properties

Owners of mixed-use properties will know that the Stamp Duty Land Tax charged on commercial properties is not the same as that charged on residential properties.

There is also considerable confusion over the definitions used in different parts of statute law as to what 'commercial' as opposed to 'residential' property is and over details relating to completion and occupation of buildings, planning status and the treatment of land associated with buildings.

The Chartered Institute of Taxation has been in discussion with HM Revenue and Customs in a bid to iron out some of the uncertainty in these areas and a consultative process is now in train with a view to issuing revised guidance in the near future.

We can assist you with any property law issue.



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