SIMON BURN
SOLICITORS

Summer 2017

Commercial Law UPDATE

GDPR Guidance Published by Information Commissioner's Office

The General Data Protection Regulation (GDPR) will come into force in May 2018. It imposes stringent new rules concerning the holding and management of data and also the use of personal data for commercial purposes.

One of the key principles is that marketing communications should not take place without the 'informed consent' of the recipient.

To that end, a hurried consultation was launched on 2 March 2017, with a closing date of 31 March 2017, on draft guidance on the rules over what will constitute 'consent' under the GDPR. This and other information on the GDPR can be found on the website of the Information Commissioner's Office www.ico.gov.uk.

The GDPR will affect almost all organisations. The fines for failure to comply can be massive (20 million Euros or 4 per cent of world turnover) and the regime will impose onerous new obligations on many businesses.

For advice on how the GDPR will affect you and how to comply, contact us.

Legal Deadlines – Solicitor's Evidence Sufficient

The legal system is replete with strict time limits, and failing to comply with them can have disastrous consequences. In one case, a residential tenant who blamed the vagaries of the post for the late arrival of a legal document came within an ace of forfeiting his right to seek an extension of his lease.

The tenant had failed to agree terms for an extension with his landlord and had six months in which to lodge an application with the First-tier Tribunal (FTT). His solicitor gave evidence that he had posted the application three days before the deadline, that he had paid the correct postage and that it should have arrived in time.

The FTT, however, ruled that the application had been made late and that it thus had no jurisdiction to consider it. The application had been stamped as received by the FTT almost three weeks after the expiry of the time limit. As the application had not been sent by recorded delivery, there was no certificate to prove the date on which it had been put in the post.

In overturning that ruling, the Upper Tribunal found that the FTT had applied the wrong legal test. So long as the application was posted in time to achieve delivery before the deadline, it did not matter if it was delayed or did not arrive. A certificate of posting was not required and the FTT had breached procedural fairness in rejecting the solicitor's evidence as to the date on which he posted the document.

In general, leaving things until just before the deadline is a risky strategy and, in any event, the precaution of sending the form by recorded delivery would have provided certain proof of posting. Using a solicitor to ensure you comply with all necessary regulations and can prove you have done so is sound common sense.

Removing or Modifying Covenants Over Land

Covenants over property are a potential nightmare for developers but fortunately there are circumstances in which a covenant can be removed.

If the beneficiaries of the covenant for which removal is sought cannot be persuaded by negotiation to give up their rights, an application under Section 84 of the Law of Property Act 1925 may be made to the Lands Chamber of the Upper Tribunal (UT) for the covenant to be removed or modified.

This can be granted on the following grounds (in simplified terms):

- Where the covenant is obsolete or where a reasonable use of the land concerned would be impeded unless the covenant is removed or modified;
- Where those adults that benefit from the covenant agree to its removal or modification;
- Where the removal or modification of the covenant will not cause a detriment to those who benefit from it;
- Where the UT is satisfied that the covenant does not provide any practical benefits of substantial value or advantage to those entitled to benefit from it; or
- Where it is contrary to the public interest for the covenant to remain and money will provide adequate compensation for those persons who will suffer from its discharge.

In practice, the UT will make its decision on an application to vary a covenant based on the specific facts of the case – there is relatively little in case law by way of guidelines. It is therefore important for those seeking the removal or modification of a covenant that the best possible case is made at the outset in order to persuade the UT that the arguments for the variation or removal are compelling.

Our experts in property law will be pleased to help you negotiate the removal or modification of covenants or, where this is not successful, to make the best possible case in an application to the UT.

Supreme Court Upholds Reality Principle in Property Valuation

Property valuations can be a live issue for many reasons, not just on sale. Differences of opinion on the value put on property when businesses are being broken up are common, insurers are known to contest claims if a property is wrongly valued, and a revaluation can prop up a sagging balance sheet. However, on a day-to-day basis, one of the most common issues surrounding the value of property is the tax bill it carries in the form of business rates.

So it was when a dispute over the value of a property for business rates purposes went all the way to the Supreme Court. The dispute was based on the appropriate value to place on a building which, at the time of its rateable value assessment, was still in the course of redevelopment and could not be occupied.

In such cases, should it be valued as it is, or as it 'should be'? The Supreme Court put it thus – 'Does a commercial building which is in the course of redevelopment have to be valued for the purposes of rating as if it were still a useable office?'.

When the rateable value was being assessed in January 2012, the premises were vacant and could not be occupied as the renovations still required to make them fit for occupation were extensive. The owner's agent suggested to the local valuation officer (LVO) that the rateable value should therefore be reduced from £102,000 to £1. The LVO refused, citing legislation which required the LVO to assume a property is in 'reasonable repair' for valuation purposes. The Valuation Tribunal sided with the property owner, holding that the condition of the building precluded the conclusion that it was in reasonable repair.

The Court gave weight to the 'reality principle', which establishes that 'the property must be valued as it exists at the relevant date'. Accordingly, the presumption that it was in reasonable repair could not stand.

The decision overturned an earlier ruling by the Court of Appeal which had cast doubt on the applicability of the reality principle. It will come as a considerable relief to developers who are refurbishing properties.

For advice on the conduct of any dispute with the local planning or valuation authorities, contact us.

Majority Shareholder Ordered to Buy Out Shares

When relations between the owner-managers of companies break down, the nature of the relationship can sometimes cause an escalation of the disagreements and a hardening of positions. Such appears to have been the case in a recent dispute between the owners of a company that makes military figures.

The company was operated as a quasi-partnership and when the owners fell out, the couple who controlled the majority of the shares removed the minority (49 per cent) shareholder from the board and refused to supply him with any information about the company's finances or let him have any control over its operation.

The minority shareholder went to court claiming that the conduct of the majority shareholders was 'oppressive' on him as a minority shareholder. He had obtained his shares when the then managing director had become ill, after which he ran the company single-handed for nearly a decade. He claimed he had then been excluded from the business, when the wife of the former managing director took over its running and brought in various family members as employees.

The High Court's solution was to order the majority shareholders to buy the minority shareholder's shares for £309,000.

If you are a minority shareholder in a company and it is being run in a way that is seriously prejudicial to your interests, you may be able to obtain redress. Contact us for advice.

Claim Granted Even Though No Remediation Required

The quality of work done by contractors is a common source of dispute. Sometimes, the standard is such that remedial work is required and legal action can be commenced to recover the cost of the necessary work. But what is the position when the work is substandard, but not so poor that remediation is required?

A recent case involving a road repair contractor offers valuable pointers if you find yourself in this position. The council that contracted out the work claimed that there were various defects, including a failure to apply road surfacing to the specified thickness. As this did not require remedial work to be done, the council took the step of suing the contractor for the saving it had made in doing a lesser amount of work than that for which it had contracted, or alternatively the proportion of the contract price that related to the work underperformed.

The Technology and Construction Court was happy that a claim could be made on either basis.

It remains to be seen how far this reasoning might apply in other cases in which the work done by a contractor is only partially performed, but there is certainly the potential to use the argument when the circumstances warrant.

It Is Not the Law's Role to Improve Bad Bargains

A decision of the Supreme Court confirms that sale contracts must be strictly interpreted and that it is no part of the law's function to help either buyer or seller to escape the consequences of a bad bargain.

One motor insurer had bought the entire share capital of another company. The share purchase agreement incorporated a clause that required the seller to indemnify the buyer against any losses arising from complaints or claims of mis-selling of insurance products that were registered with the then Financial Services Authority (FSA), or other public authority, and which related to the period prior to completion of the purchase.

Shortly after the sale went through, the buyer was informed of many instances in which the company's telephone sales personnel had misled customers. The FSA was informed by both companies of the claims and the buyer sought to rely on the indemnity clause to recover losses arising from those events from the seller.

The buyer's claim was upheld by the High Court, but that ruling was subsequently overturned by the Court of Appeal on the basis that the indemnity was confined to losses arising from claims or complaints made to public authorities. Because the seller and the company had voluntarily informed the FSA, the clause did not apply.

In dismissing the buyer's challenge to that decision, the Supreme Court found that the seller's interpretation of the clause reflected the objective meaning of the contractual language used and was consistent with business common sense. The share purchase agreement may have been a bad bargain from the buyer's point of view but it was not the role of the courts to improve on the deal that was actually struck.

In the context of company takeovers, the exact meaning of any warranties in the contract for sale and their enforceability need to be carefully considered. Contact us for advice.

When Refusing to Do Wrong Can Still Mean Trouble

Breaches of competition law can lead to fearsome penalties and the law itself is very strict. In a recent case, a company that was invited to discussions on joining in cartel activity (which is illegal) and attended them, but refused to engage in the cartel, has been fined by the Competition and Markets Authority (CMA).

The company attended a meeting and provided pricing information to the other attendees. Three companies went ahead and, following the uncovering of the cartel and a CMA investigation, were fined more than £2.6 million for offences such as bid rigging and 'market sharing'. The investigation started when a fourth company, which had joined the cartel, subsequently 'blew the whistle' and then cooperated with the CMA to gather the necessary evidence for the prosecution.

The company that blew the whistle received immunity from prosecution.

However, the company that attended discussions but refused to participate in the cartel activity was nonetheless fined £130,000 for unlawfully providing commercially sensitive pricing information to the cartel companies.

If you are asked to share commercially sensitive information with a competitor, alarm bells should ring immediately. To make sure your business activities do not land you in hot water with the CMA or any other government body, ask our advice.

Commercial Court Imposes Prison Sentences on Uncooperative Directors

The Commercial Court does not take defiance of its orders lightly and has a panoply of powers to enforce obedience. In one case that proved the point, the Court ordered sequestration of an overseas company's assets and imposed prison sentences on five members of its senior management.

In the context of proceedings to enforce an arbitration award worth over $4 million, the Court had issued a worldwide freezing injunction against the company and its bosses. However, the order, which also required full disclosure of the company's assets, had been wilfully disobeyed and the

company had continued to trade as if nothing had happened. It had done nothing to 'purge its contempt', despite having been afforded an opportunity to do so.

Although there was no evidence that the company had any assets within England and Wales, the Court found that the issue of a writ of sequestration would bring pressure to bear and would not be futile. Five of the company's directors or de facto directors, three of them members of the same family, were also sentenced to terms of imprisonment of varying lengths for their contempt of court.

Defiance of court orders can prove costly in more ways than one. We can advise you on dealing with uncooperative debtors.

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