SIMON BURN SOLICITORS

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Commercial Law UPDATE

EU'd Better Get Ready

One of the lesser-known consequences of Brexit is that a European Commission decision made some time ago means that after 29 March 2019, UK companies that do not have a place of business in the EU will no longer be able to acquire or renew .eu domain names.

More than 300,000 .eu domains are registered to UK companies. If yours is one of them, you should consider the implications of the decision carefully.

Fines and Bans for Price-Fixing

The potential cost of anti-competitive behaviour has been writ large in two recent decisions.

In one, nine members of a Japanese cartel which organised a price-fixing ring regarding the supply of capacitors found themselves facing fines totalling 254 million Euros after a 14-year collusion. Capacitors store electrical charge and are widely used in the electronics industry to 'smooth' the delivery of current to devices or to deliver the stored charge when needed.

In the second instance, a group of estate agents who had agreed to fix commissions charged to clients at a minimum rate of 1.5 per cent were given fines exceeding £300,000 and also faced bans from acting as company directors.

Competition law is very strict in the EU, and transgressions are harshly dealt with when discovered. It is often thought that local 'understandings' are not covered by competition law, but this is not the case.

If your business is threatened by the activities of a cartel or you have been invited to join in a price-fixing agreement, contact us for advice.

One Reasonable Condition is Sufficient for Landlord

When a tenant wishes to assign a lease, it is usual for the landlord's consent to be required, and that consent can be withheld if there are sufficiently good grounds for so doing.

In a recent case, a landlord was asked by a tenant to agree to the assignment of leases on flats in London's Docklands. The landlord imposed several conditions on the assignments.

The conditions were that the tenant should cover the landlord's legal fees for the assignment and the cost of carrying out inspections of the flats, and that the landlord should be provided with a bank reference to give comfort as regards the financial capabilities of the new tenants.

The tenant went to court arguing that the conditions were unreasonably excessive. The lower court agreed that the legal fees requested were extreme and held that the landlord's refusal to grant consent to assign was therefore unreasonable. The landlord appealed the decision.

The Court of Appeal took the view that the conditions were 'freestanding'. Just because one of the conditions was not reasonable did not mean that the others were 'infected'. Each stood alone and the tenant's failure to meet the reasonable conditions was sufficient reason for the landlord to decline to assign the leases.

The decision will come as a relief to landlords who seek to impose multiple conditions on the assignment of leases.

Faulty Electrics Necessitate Lease Interpretation

Many commercial leases provide that the formal document represents the entirety of the agreement, superseding any prior agreements that may have been reached. An important Court of Appeal ruling has, however, made clear that such clauses do not preclude the implication of such additional provisions as are needed to make the lease 'make sense' in business terms.

The case concerned a lease of café premises. Amongst other flaws, it made no provision in respect of where responsibility lay for ensuring the safety of the property's electrical wiring. It did, however, provide that the lease represented the entire agreement and that the tenant could place no reliance on any statement or representation made by the landlord prior to the document being executed.

After a number of incidents caused by faulty wiring, including a small fire, the tenant accused the landlord of a repudiatory breach of the lease. She closed the café and quit the premises before suing the landlord in respect of her business losses. Her claim was upheld by a judge, who awarded her £22,750 in damages.

In dismissing the landlord's appeal against that ruling, the Court noted that, in failing to place responsibility for electrical safety on either party, the lease contained a plain and obvious gap. Notwithstanding the entire agreement clause, it was therefore necessary to plug that gap by implying a term into the lease in order to achieve practical coherence and business efficacy.

Taking into account the factual background to the case and the wording of the lease, the Court found that the relevant burden fell upon the landlord. A covenant was implied into the lease that required the landlord to ensure the safety of electrical installations on the premises and to provide a certificate to that effect.

The absence of such a clause is regrettable, but it would be rare for a tenant to be responsible for such items as the electrical safety of the building they rent.

We can advise you on any dispute relating to a lease or on property matters generally.

Son's Casual Employment Proves Expensive for Dad

One area in which problems may not be anticipated is when a family member's status as a 'genuine' employee is disputed by HM Revenue and Customs (HMRC).

For any expenditure to be deductible for tax purposes, it must be 'wholly and exclusively' made for business purposes. In the case of a claim by an employee for a deduction, such expenditure must also be made 'necessarily'.

In a recent case, HMRC took a taxpayer to task over payments to his son, who was a university student. Specifically, HMRC claimed that £7,400 paid to him was not 'incurred wholly and exclusively for the purpose of the Appellant's trade and deductible against his self-employment income'.

When an HMRC enquiry was opened into deductions totalling more than £23,000 in the taxpayer's accounts, he was eventually able to satisfy them with regard to all the sums claimed except those payments made to his son. In point was the fact that the taxpayer did not actually record the 'wages' paid. HMRC took as their starting point the fact that the taxpayer was unable to prove that the payments had been made at all.

The taxpayer made protests, but the way his evidence was given probably did not help his case. The First-tier Tribunal concluded that the absence of evidence that the payments had been made on the basis of time records or some other methodology made it impossible to conclude that they were made wholly for business purposes. They were not, therefore, 'directly and solely referable' to the carrying on of the taxpayer's trade.

Casual arrangements such as these are fraught with potential problems. Not only can tax issues arise, but there may also be questions over failure to pay National Insurance Contributions or the National Minimum Wage, make pension contributions, hold appropriate insurance and so on. We can help you make sure you get it right first time.

Staircase Tax Reforms on the Way

Following a well-publicised Supreme Court decision that offices that spread over two floors of a building should be assessed for business rates purposes as if they are different properties unless both are accessible without going onto other property, there is to be a change to the applicable law. In many let premises (such as most office blocks), access between floors is only possible via a common area, which has led to the phrase 'staircase tax' coming into use.

Draft legislation now exists to correct the anomaly.

Agency Law Gives No Recourse to Dumped Software Reseller

Under law which originated in the EU, agents of firms have considerable protection if their agency is terminated, and can normally be compensated. This reflects the commercial reality that agents frequently make a considerable investment in time and money in promoting the products for which they act as agents.

Recently, a case came to the Court of Appeal regarding the termination of an agency under which a company supplied licences to its customers to use software which was owned by another company. When the company that owned the software found that its agent had set up a similar deal with a competitor, it terminated the agency agreement and the agent claimed compensation.

The legislation which protects agents in such circumstances (the Commercial Agents (Council Directive) Regulations 1993) relates to the supply of 'goods' and the argument put forward by the software company was that software is not goods and in any event a licensing agreement was different from one which involves a physical transfer of goods or title to them, so there was no actual 'sale' of goods.

The Court agreed that electronically supplied software was not goods and that, as drafted, the Regulations did not offer the agent any right of recourse. Since software was not deemed to be goods, the Court did not have to consider the second argument that there was no sale.

This decision has significant implications for owners and resellers of software. However, it also highlights how the law has failed to keep up with changes in commercial reality. It remains to be seen if and when a review of the law in this area will take place, but one does seem to be overdue.

Words, Not Intention, Determine Meaning of Contract

When disputes arise over the meaning of a contract, it is usual for the court to look first at what the wording of the contract means and then at the commercial logic of that wording.

In a recent case, the dispute essentially turned on whether two transactions for the sale of assets between a company in administration and two other companies that took place within ten days of each other should be regarded as a single agreement or not, given that the two companies which purchased the assets were owned separately by former directors of the company in administration.

Under the first transaction, certain intellectual property (IP) rights belonging to the vendor company were sold to one of the companies, which then licensed them to the other.

The second company's agreement to purchase assets from the vendor company was a quadripartite agreement including the vendor, its administrators, and the first purchaser company as well as itself.

The two purchaser companies had a confidentiality agreement between them that allowed either party to give notice to the other if there was a breach of the confidentiality agreement.

When the second company was subsequently being sold, the licensing agreement was disclosed and the first purchaser company claimed that this was a breach of the confidentiality agreement. This in turn led to a dispute over precisely which IP assets the vendor company had transferred to which company.

The second company argued that, in the circumstances, it made commercial sense for the two sales contracts to be read together as one. The first company claimed that each contract had to be read on its own merits.

In the Court of Appeal's view, the fact that the two contracts were clearly separate – having been entered into ten days apart – meant that each had to be considered independently.

The larger point is that a well-written contract should not leave matters of significance unclear: what each side is bargaining for should leave no room for dispute. If the result of failure to draft the contract well is a bad bargain, that will not be sufficient ground for the court to substitute a more commercial view based on what should have been agreed.

For advice on any contract or other commercial law matter, contact us.

Software Licences – Watch the Termination Clause

One aspect of intellectual property (IP) rights that is often not given much thought, but which can be extremely important indeed, is what happens when a licence to use comes to an end.

Much computer technology is supplied by licence (it is quite rare for the software to actually be 'sold' to an end user) and because such technology is often critically important in business, contracts for the use of software or other IP need to be considered with extreme care.

Recently, a motor dealership found itself locked out of its own database following a dispute with its software provider.

The 20-branch dealership depended completely on a business software package, and was in the process of switching to alternative software. As is normal for data transfer and so on, it continued to require access to the original package during the transitional period.

The software provider argued that an amendment to its licensing agreement with the dealership meant that it was tied in to its package for a further five years. When the dealership stopped paying, the provider locked it out of the system.

The dealership launched proceedings, seeking rectification of the agreement on the basis that the apparent five-year obligation to continue using the package amounted to a unilateral mistake. It argued that being locked out of the database was causing irreparable and ongoing harm to its business and sought an injunction requiring the provider to unlock the software until the trial of the action.

The High Court acknowledged that the dealership had raised a serious issue to be tried. However, in refusing to grant the injunction sought, it found that the dealership had failed to establish that damages would be an inadequate remedy for any harm caused to its business.

The software provider had made an open offer to unlock the system in return for payment of sums it claimed it was owed. Its position was that it had accepted the dealership's repudiation of the agreement, which had thus come to an end. In those circumstances, the Court accepted that it would be wrong to reinstate a one-sided version of the agreement by requiring the provider to give free access to its software. The balance of convenience therefore fell in favour of maintaining the status quo.

So, in order to unlock the system, the dealership must pay the software provider, and then sue to recover the cost of gaining access to its data if it chooses.

One of the most important aspects of any contract negotiation is to ensure clarity as to what happens when the contract ends. We will give you expert advice in any contractual negotiations to ensure your exposure to commercial risk is minimised.

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