SIMON BURN SOLICITORS

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Commercial Law UPDATE

'Passing Off' Tests

When another firm uses a trading style that you think is a copy of yours, you might consider that an action for 'passing off' is appropriate.

Passing off occurs when a business represents itself in a way that causes buyers to confuse it with another business and therefore damages that other business. Claims are usually in respect of lost profits on sales.

A recent case, in which a skincare manufacturer failed in its action for passing off against a very small business that manufactured nail care products, shows the sort of considerations the court will take into account when making its judgment.

The following factors were considered relevant:

- The small size of the defendant firm's customer base and the limits on its reputation and goodwill, evidenced by the fact that most of its customers dealt with the directors personally;
- The lack of evidence that the publicity in the press received by the defendant had had an impact on the claimant's business;
- The fact that the two companies operate in different areas of the beauty industry;
- The lack of evidence that the defendant's mark would confuse members of the buying public generally;
- The absence of 'side-by-side' display of the two companies' products, which might increase the probability of confusion; and
- The existence of evidence that customers understood that the two businesses were unconnected.

In order to be successful in an action for passing off, it is necessary to show that confusion in the mind of a buyer is a likely outcome. It is also necessary in any action for damages to be able to quantify the resulting loss. In this case, as in many similar instances, a better solution could probably have been achieved by negotiation.

Temporary Occupation Justifies Multiple Rate Relief Claim

A vacant commercial property qualifies for 100 per cent rate relief for the first three months after it becomes empty (six months if it is an industrial property). Once it has been occupied for six weeks, the clock is 're-set', so that if it again falls vacant, another three- or six-month rates holiday can take place.

In a recent case, wholesaler Makro surrendered to the group's property company the lease of premises in Coventry, which were empty for a period and so qualified for the exemption from rates. Makro subsequently made minimal use of the premises under licence for a period of three months before vacating them again. A further six-month period of rate relief was then sought.

The council sought to deny relief from rates on the premises. When the matter reached the High Court, the claim for rate relief was upheld.

The legislation applicable to the granting of rate relief for vacant commercial premises is clearly written, and although the position had evidently been engineered to take advantage of the rate relief available, that was not in point.

The potential commercial implications of this decision are obvious for landlords with vacant premises and tenants seeking premises on a temporary basis.

Contact us for advice on any matter relating to commercial property.

Confidential Document Leak Lands Executive in Court

An executive has been found in breach of his contract of employment with his former employer after he leaked a confidential report during a luncheon appointment with a business contact.

Shortly after leaving his senior position to take up a new post with a rival company, he disclosed the confidential document to a business contact who was connected with his new employer.

When the leak was discovered by his former employer, it commenced court proceedings against him.

In the High Court, Judge Reid ruled that the disclosure of the document amounted to a breach of both the defendant's contract of service and the duty of confidence he owed to his former employer.

The executive had denied having a copy of the document, which contained sensitive pricing and strategy information, or disclosing it to his business contact. However, the judge said that parts of his evidence were 'singularly unconvincing' and 'did not ring true'. He instead preferred the evidence of the business contact, who had supported the former employer's case in court.

The judge found that the business contact must have seen the document before publishing an online article, which referred to its contents, soon after his luncheon meeting with the defendant. Consequently, the balance of probability lay very firmly in favour of the business contact's assertion that the source of the information revealed in the article was the document which had been disclosed to him.

The executive was ruled to be in breach of his employment contract and the terms of the compromise agreement he had reached with his former employer when he left the company.

The Court issued an injunction against the executive, which will be the subject of further argument, as will the level of damages to be paid.

The fact that a person has ceased to be employed by a business does not release them from all obligations to their former employer, especially as regards divulging trade and business confidences.

Unreasonable Delay Breaks Contract

In troubled times, a purchase 'off plan' can be risky, as a recent case that arose after a contractor went into administration illustrates.

In 2007, a developer contracted with a number of people to sell flats that it was building in Birmingham. The flats were due to be completed by the end of April 2009. The prospective buyers paid deposits in the usual way. However, in 2008 the contractor retained by the developer went into administration and work on the development ceased.

Work recommenced later, but the necessary ground works and other enabling works were not completed until April 2010, by which time the prospective purchasers had already notified the developer of their intention to withdraw from their purchases. The development was eventually finished in April 2011.

The developer refused to refund the deposits and served notices to complete their purchases on the putative buyers.

The matter reached court, where the decision turned on whether or not the prospective purchasers were entitled to treat their contracts as having been repudiated by the developer, allowing them to reclaim their deposits.

The claim that the contracts were repudiated was based on the implied term that the flats would be ready for occupation within a reasonable time and the express term in

the contracts requiring the developer to use 'all due diligence' to arrange the completion of the flats.

The court decided that the time taken to complete the work was not reasonable. The failure to progress was the fault of the developer, which had procrastinated over recommencing the work when the original contractor went into administration. This was a breach of the requirement to use all due diligence to complete the project.

For most contracts, time is not 'of the essence' unless specifically stated to be so. However, this does not mean that an unreasonable delay in completion of a contract will not be regarded as breaching it.

Contact us for advice on the law relating to building and development.

Buyer Not Bound by Uncorroborated Verbal Agreement

Yet another case involving a dispute over a verbal agreement was decided recently.

It involved a company that was the owner of three properties, which it intended to sell at auction. It had made an agreement with a man that he would buy the properties at an agreed price if they did not reach the reserve. The man paid deposits on each property to secure the agreement.

When the properties did not reach their reserve prices, the company that owned them became contractually bound to sell them and the man became legally obliged to purchase them. The company then served the prospective buyer with notices to complete on the three properties. However, the company also claimed that there had been an oral agreement between the man and a director of the company to increase the price paid by £10,000 per property. The prospective purchaser denied that any change to the purchase price had been agreed.

The prospective purchaser refused to complete at the 'revised' prices and the company claimed that his deposits should be forfeited. The dispute went to court.

The court ruled that the deposits should be returned. The company that owned the properties had breached the contracts and the notices to complete were invalid since they specified a price which was not that agreed under the contracts.

This decision was upheld by the Court of Appeal.

The courts receive a regular stream of cases brought because the participants in contracts failed to agree essential details in writing.

How Much Better Are Best Endeavours Than Reasonable Endeavours?

Clauses requiring a party to a contract to use 'reasonable endeavours' or 'best endeavours' in its performance are common, and while 'best' clearly implies something beyond 'reasonable', the lack of clarity in these terms has been the source of many legal disputes.

Recently, budget airline Jet2 and the operators of Blackpool Airport found themselves in the Court of Appeal over the meaning of a 'best endeavours' clause.

The economics of low-cost airlines such as Jet2 demand that they keep their planes in the air as much of the time as possible, which in turn means that flights are often scheduled for departure and landing early in the morning or late at night.

Jet2 arranged for flight operations to be conducted at Blackpool outside the airport's normal operating hours and this continued for four years. In time, the airport realised that it was operating at a loss with regard to these. In 2010, it informed Jet2 that it would no longer accept flight operations outside its usual hours.

The two parties had entered into a 15-year agreement, which included the obligation that the airport should use 'best endeavours' to promote the services of Jet2 from the airport. It was silent about permitted hours of operation. The issue was whether or not this meant that the airport was required to operate at a loss in order to fulfil the 'best endeavours' clause.

The Court ruled that even though the effect of the agreement was to create a trading loss for the airport, the best

endeavours clause required it to provide the out-of-hours service that Jet2 demanded. If the clause had been for the use of 'reasonable endeavours', the decision would almost certainly have gone the other way.

We can advise you on all contractual matters.

New Minimum Wage Rates

Employers are reminded that, in accordance with the recommendations of the Low Pay Commission, the adult hourly rate of the National Minimum Wage increased from £6.08 to £6.19 on 1 October 2012.

However, the development rate (which covers workers aged 18-20 years) remains at £4.98 and the rate for workers aged 16 and 17 stays at £3.68.

The apprentice rate, for apprentices under 19 or those aged 19 or over and in the first year of their apprenticeship, increased from £2.60 to £2.65 per hour.

Also from 1 October 2012, the accommodation offset increased from £4.73 per day to £4.82.

Assignment of Lease Alone Not a TUPE Transfer

The Employment Appeal Tribunal (EAT) has ruled *(Lom Management Ltd. v Sweeney)* that although the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) may apply when the lease of a commercial property has been assigned, this will only be the case if, on the facts, a business has also been transferred which is intrinsically linked to the property and satisfies the definition of 'economic entity' within the meaning of TUPE Regulation 3(2) – i.e. 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

Joanne Sweeney's father was the tenant of MacConnell's Bar in Glasgow, which was owned by a brewery. Miss Sweeney was a student who also worked part-time for her parents as a duty manager. In December 2010, the lease of the premises was assigned, with the consent of the landlord, to Lom Management Ltd. Miss Sweeney was away on holiday when this occurred. On her return, she found that she no longer had a job at the pub.

Miss Sweeney brought a claim for unfair dismissal on the ground that she had been dismissed by reason of a business transfer to which TUPE applied. The Employment Tribunal (ET) found that it was a 'classic transfer of undertakings situation' and upheld her claim.

Lom Management Ltd. appealed against the ET's decision on the ground that the burden of proof that TUPE applies is on the claimant and Miss Sweeney had not provided any evidence in support of her claim.

The EAT agreed. The fact that a lease is assigned from one person to another does not, of itself, show that TUPE applies. The ET had erred in law because it had failed to ask whether an economic entity existed prior to the assignment of the lease and whether or not that economic entity had transferred in whole or in part to the new tenant. Miss Sweeney had failed to discharge the burden of proof that TUPE applied in her case and the appeal was therefore upheld.

When a business or a part of a business changes hands, employment issues can become complex and it is important to take advice early on to avoid the pitfalls. We can guide you through the process in order to ensure compliance with the applicable employment law.

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