Commercial Law UPDATE

Loss of Light – Demolition Ordered

Loss of light can be a major irritation and the law provides two remedies where it occurs. The usual remedy is for the developer of the structure responsible for the loss of light to make a payment to the person whose property's light is impaired. The other, less commonly used, remedy is for an injunction to be granted which prevents the loss of light. This remedy is clearly highly disruptive to a development and is rarely used, unless by way of the prohibition of a development which has not already taken place.

An injunction can order the removal of the cause of the loss of light in certain circumstances, however. Normally, an injunction will only be granted where:

- the injury to the rights of the adjoining property is not small;
- the value of the injury to the rights is difficult to estimate in money or compensate for by the payment of money; and
- the granting of an injunction would not be oppressive.

However, the court's reluctance to use injunctive relief should not be relied upon by developers, as a recent case shows.

The case was not a straightforward application for injunctive relief against a developer, but was brought by the developer of an office block to confirm the legal position with regard to a challenge for 'taking the light' of an adjacent property.

The developer of the office block built it in the knowledge that the owner of the adjacent property (a Grade II listed Victorian building) had threatened legal proceedings with regard to the top two floors of the office block. By the time the dispute reached court, the office block had already been built and part of the building which was the subject of the dispute had already been let.

The completion of the construction and letting by the developer proved to be a dangerous strategy, because the court considered that the criteria for granting injunctive relief were met. Instead of ordering the developer to pay a sum in compensation, the court ordered the demolition of the top two floors of the building, which the developer estimated would cost between £1 million and £2.5 million. The developer had budgeted £200,000 for settling the 'loss of light' claim.

An appeal seems more than likely.

The case is particularly worrisome for developers who do not make sure any such issues are dealt with before construction is finished. The order by the court that the top two floors of the building should be demolished will clearly have a much greater financial effect on the developer than an order not to build them in the first place would have had. It might have been thought that, faced with the fait accompli of the building, the court would have considered a payment in compensation to be more appropriate than injunctive relief, but the judge decided otherwise.

We can advise you on all aspects of property law.

Undervalue Leaves Valuers in Firing Line

A builder who entered the 'buy to let' market after acting on a negligent valuation has been awarded more than £70,000 by the court.

He intended to buy a property to let it out and engaged a firm of surveyors to value the property and to advise on the expected open-market rental. The valuation provided was £353,000 and the expected open-market rental was estimated to be £2,000 per calendar month.

The builder bought the property but then found that the expected rental was not achievable. As he would not have bought the flat based on a reasonably accurate estimate of the rental value, he sued the valuers for compensation.

The court found that the highest non-negligent rental valuation would have been £1,350 per calendar month, a rental which would not cover the mortgage interest on the purchase. The valuation of £2,000 was well outside the acceptable margin of error for such valuations.

Damages were awarded to the builder for the negligent valuation and to compensate him for the fact that he could not let the flat for a rental which would give him sufficient income to cover his basic outgoings on the property.

Damages were assessed for the period between 2002 and 2006 at £72,000.

If your buy to let dream has turned into a nightmare because of grossly overstated valuations given to you by a professional valuer, you may be able to claim compensation.

Income Splitting – Another HMRC Attack

A case involving a 'multiple shares' company, in which different classes of shares were created, with different rights and varying dividends paid to the shareholders over time, illustrates the approach HM Revenue and Customs (HMRC) take to such schemes.

A husband and wife had set up the share structure when they bought a business, each of them investing half the money required. The agreement was that in return for her investment the wife would receive far fewer 'A' shares than her husband (who had day-to-day control over the business) and not be in a position of responsibility in the company. However, she stood to receive far larger dividends than he did, because she was also issued with 'B' shares which could (and in the event did) receive dividends in their own right. The position was complicated by the fact that the dividends were paid to her on the understanding that she would pay them across to her husband. The dividends she passed across were used to repay loans (for which they

were both jointly liable) taken out to purchase the business.

HMRC argued that the arrangement was 'income splitting' and the effect was to set up a 'settlement' for the wife. Accordingly, various Income Tax assessments were raised to assess the wife's income as if it were her husband's.

The court's decision upheld HMRC's argument, but only in part, the judge ruling that there was nothing gratuitous in the issue of the 'B' shares on the basis that the wife's investment warranted more than they were worth in return.

As a result, the net gain to HMRC is about £6,000 in extra tax – considerably less than originally sought.

The case does show, however, that HMRC will seek to apply legislation relating to settlements if they suspect income splitting, and illustrates the wisdom of making sure that where various classes of shares are created, this is done with the benefit of expert advice.

HMRC have recently announced their intention to appeal against the court's decision.

We can advise on all aspects of corporate share structure and shareholders' agreements.

The Equality Act 2010 – Online Starter Guide

The Equality and Human Rights Commission (EHRC) has published an online starter guide on obligations under the Equality Act 2010, for use by those in the private, public and voluntary sectors. The core provisions of the Act came into force on 1 October 2010.

The guide has nine 'bite-sized' training modules which concentrate on essential features of the new legislation for employers and for service providers. It is available on the EHRC website at http://www.equalityhumanrights.com.

Court Upholds Genuine Pre-estimate of Loss

When a contract contains a 'penalty clause' for breach of the contract, the clause will not be enforceable if it is punitive, rather than a genuine attempt to compensate the other party based on an estimate of the loss they would incur as a result of the breach of the contract.

Accordingly, where such a clause is invoked, the party in breach of the contract often attempts to avoid liability by claiming that the clause represents a penalty, rather than a pre-estimate of loss.

A penalty clause is not unenforceable, however, just because the actual loss suffered may be less than the damages payable under the clause, provided that at the time the contract was entered into the damages for breach of contract specified in the contract sought to be reasonable compensation for the loss suffered.

In a recent case involving a breach of contract connected with the building of a super yacht, the court heard a claim that a clause which required forfeiture of 20 per cent of the contract price, if the buyer breached the contract, should be enforced.

The buyer argued that it was a penalty clause because a similar contract had been undertaken by the same shipyard with a 10 per cent forfeiture clause.

The shipyard argued successfully that the figure of 20 per cent was a genuine pre-estimate of loss. It pointed out that any sum it received in excess of that sum would be refunded immediately under the contract and that it would take a long time – years, possibly – to quantify the losses precisely.

The court agreed that the clause struck a fair balance between the two parties, both of which had enjoyed the benefit of expert representation when negotiating the contract and had entered into it freely.

First Service Ruled In

Taking care over the service of documents is important, if only to prevent an unnecessary appearance in court to determine whether or not a document was properly served.

Recently, a construction dispute was dealt with by an arbitrator. In order to express dissatisfaction with the arbitrator's decision, the dissatisfied party had to serve a notice to this effect within four weeks of the decision. Failure to do so would mean the arbitrator's decision would be binding on both parties.

One party was dissatisfied and sent a notice on the 28th day to the other party's solicitors, who forwarded it on to their client. The question arose as to whether the service was valid, as the contract contained a provision that a notice had to be served 'at the last address notified by the recipient for receiving communications'. In view of the doubt this created, the notice was also served (after the four-week deadline) directly on the other party to the dispute. It took a court appearance to determine if the solicitors' office was 'the last address notified by the recipient for receiving communications'. Fortunately for the dissenting party, the court decided that the service to the solicitors was 'good service', so the issue of whether the subsequent (late) notice should be accepted did not have to be argued.

The moral of the story is to take care when serving notices – and not to leave everything until the last minute.

For advice on all aspects of commercial property law, contact us.

HMRC Toughen Stance on Companies in Difficulty

All the positive publicity generated about 'time to pay' agreements has increasingly been shown to be misplaced as new research shows that HM Revenue and Customs (HMRC) are now leading the way in bringing insolvency proceedings.

The research shows that in 2009/2010 more than 58 per cent of winding-up proceedings against companies were started by HMRC. Furthermore, HMRC's rate of rejection for time to pay agreement applications has doubled in the last year.

Change of Circumstances Creates Misrepresentation

For a statement to be deceitful, it must be a statement claimed to be fact when the person making it does not believe it to be true (or has no belief either way as to its veracity) or is reckless as to its truth or falsity.

For a deceitful statement to give rise to a successful claim for damages, it is also necessary that the person to whom it is made relies on it and by virtue of relying on it suffers a detriment.

Recently, a case was brought for damages based in deceit when the statements made had originally not been untrue, but became so because circumstances changed before the relevant transaction was completed.

The court ruled that, in such situations, there is a duty to inform the other party of the change in circumstances and failing to do so had created a fraudulent misrepresentation.

Recent decisions have emphasised the need for parties to contracts to inform the other side of relevant changes in circumstances. Merely acting in accordance with the facts as they were at the beginning may well not be enough to meet your obligations under a contract. For advice on all contractual matters, contact us.

First Impressions Matter

A recent trade mark case confirms that first impressions matter. It dealt with a dispute over a trade mark application made by a firm which had a similar name to another and which was in a similar line of business. The application was opposed by the other firm, which was the proprietor of existing trade marks.

According to the High Court, the risk of 'initial interest confusion' would lead to infringement of the trade mark, despite the fact that a more studied review would enable a person to distinguish between the two firms and their products so that, by the time any purchase was made, there would no longer be confusion in the mind of the purchaser.

The Court refused to accept the application by the firm seeking to register similar trade marks, in spite of the argument that the trade marks were based on the nickname of the firm's proprietor.

The 'it's my name' defence is a surprisingly weak one and this case reinforces the point that before setting up a business under a specific name, it is sensible to check out, at an early stage, the position regarding trade marks you may want to register.

123 PROMENADE, CHELTENHAM, GLOUCESTER, GL50 1NW
TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888 DX 7404 CHELTENHAM

43 TEMPLE ROW, BIRMINGHAM, B2 5LS
TELEPHONE: +44 (0)121 371 0301 FAX +44 (0)121 371 0302

E-MAIL: SIMON.BURN@SIMONBURN.COM

PRINCIPAL: SIMON L. BURN LLB. THIS FIRM IS REGULATED BY THE SOLICITORS REGULATION AUTHORITY.

The information contained in this newsletter is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances, please contact us.