Guarantee Value Overturns CVA

Two landlords who stood to lose the benefit of a guarantee for their rent if a Corporate Voluntary Arrangement (CVA) went ahead were successful in opposing the CVA after the court agreed that the CVA as proposed was 'unfairly prejudicial' to them as defined by Section 6 of the Insolvency Act 1986.

Although the CVA was claimed to have offered the landlords 100 per cent of the sum they would have received had the insolvent company surrendered the leases, they produced evidence that the actual amount they stood to receive under the CVA was a mere third of that sum.

With the current degree of uncertainty in the commercial property market, a guarantee of rent is a valuable thing to have. The court ruled that it was unfair to require the landlords to give up their guarantees, even if there was a payment made in consideration for so doing.

The case will be greeted with relief by landlords. It follows a similar ruling in 2007.

Smell-Alikes Cannot Say What They Smell Like!

The Court of Appeal has issued its ruling in an interesting intellectual property (IP) case, involving copycat scents, which follows recent European rulings.

The case was brought by l'Oréal and other makers of luxury perfumes. They took exception to a business publishing a table showing its own brands and which luxury brands they resembled. Although the packaging of the 'smell-alikes' was also similar, the Court considered that this was unlikely to mislead the public so did not infringe the manufacturers' trade marks.

However, the use of the perfume makers' trade marks for marketing purposes to identify which 'own brands' had a similar fragrance was a breach of the IP of the claimants.

The 'smell-alikes' can continue to be sold but their manufacturers cannot say what fragrances their products are supposed to imitate.

OFCOM Proposals to Get Tough Over Copyright Violations

OFCOM has consulted on a draft initial obligations code of practice designed to prevent online copyright infringement. The code, entitled 'Online Infringement of Copyright and the Digital Economy Act 2010' will:

- enable those whose copyright has been violated to require Internet Service Providers (ISPs) to notify their subscribers if the Internet Protocol addresses associated with them are reported by copyright owners as being used to infringe copyright;
- require ISPs to keep track of the number of reports about each subscriber; and
- require ISPs to compile, on an anonymous basis, a list of those who are reported on above a threshold to be set in the initial obligations code.

The copyright owner will be able to apply for a court order to obtain personal details so that they can take action against those included on the list. It is proposed that the person whose copyright is infringed will have to pay 75 per cent of the cost of notifying the online infringer and the ISP will have to pay 25 per cent.

The draft code of practice can be found at http://www.ofcom.org.uk/consult/condocs/copyright-infringement/condoc.pdf.

The Digital Economy Act increases the maximum penalty for online copyright infringement to £50,000.

Company Director Faces Massive Confiscation Order

A director of a Staffordshire refrigeration company was recently jailed for 44 months after pleading guilty to charges of false accounting, fraud and theft.

The man had been perpetrating a fraud against the company he worked for, which involved falsifying rental agreements, disposing of the company's assets and misappropriating funds. The fraud was eventually detected and the director was charged after the company had failed.

He had used the proceeds of the fraud to buy a villa in Marbella, Mercedes cars, a 47-foot yacht and a luxury home in Derbyshire.

However, the court also handed down a confiscation order of £919,482.

The courts are increasingly exercising the powers given them by the Proceeds of Crime Act 2002 to confiscate assets of criminals and to use the seized assets to compensate their victims.

If you have been the victim of commercial fraud and the perpetrator has assets, establishing your losses may lead to your receiving compensation.

Insubstantial Non-Compliance Cannot Block Contract

A sale and leaseback agreement between a property owner and a developer was the subject of a recent court case. The decision turned on whether it was reasonable to refuse to comply with the agreement if vacant possession of a very small portion of the property could not be given.

In the case in point, the developer had entered into an agreement with the property owner under which the developer acquired an option to buy a freehold development of more than 80,000 square feet. If the option was exercised, the developer was required simultaneously to grant a leaseback of part of the development to the owner. For reasons which are unclear, a very small part (180 square feet) of the development which it was anticipated was to be made available with vacant possession was not and therefore could not form part of the leaseback. An adjacent area of similar size with vacant possession was offered instead.

The owner refused to complete the sale when the developer sought to exercise the option, arguing that vacant possession of the premises as per the original plan was an essential term of the agreement between them. Since the developer's proposal breached that essential term, the owner was not required to sell. The developer went to court to obtain an order for specific performance – a remedy which requires a party to a contract to perform its obligations under it.

The court looked at the agreement and concluded that the area which did not benefit from vacant possession was insignificant and did not prevent the substance of the bargain from being fulfilled: the property owner was quite capable of being compensated financially for the small extent to which the developer did not comply with the agreement.

Contract law provides a number of remedies for people who have made contracts which have been broken: we can advise you on the best approach to take if you have suffered a breach of contract or if you need to break one.

Does an Option Pass With the Lease?

In 2000, a landlord entered into a lease with its tenant and also gave the tenant an option to buy the freehold of the let property. The option agreement expired at the end of October 2004.

The tenant was a restaurateur whose business was not successful. It therefore surrendered its lease to the landlord in October 2000. It had previously assigned the option to purchase the freehold of the restaurant to another company, which subsequently took a lease over the building.

On 29 October 2004, the new tenant attempted to exercise the option to buy the premises. The owner of the building opposed this, claiming that the option could not be assigned separately from the lease.
The court examined the option agreement. This referred to the 'purchaser' and had nothing in it to indicate that it was in any way connected with the lease, it having been concluded in entirely separate documentation. There was, therefore, no reason to conclude that the option could not be transferred to the new tenant by the old one.

The landlord also attempted to have the notice of exercise of the option served by the new tenant ruled to be invalid because the option agreement specified that a deposit of £10,000 was to accompany the notice. No deposit was sent. The option, the landlord argued, had therefore lapsed. However, the court ruled that the notice was clearly intended to create contractual relations and the option contract had within it sufficient remedies for

non-compliance. The breach of contract created by the failure to enclose the deposit was not therefore fundamental – to be so, the option contract should have been specific on the point.

We can advise you on any commercial property issue.

Depression and the Disability Discrimination Act

Whether or not someone with a mental impairment is protected by the Disability Discrimination Act 1995 (DDA) depends on whether the illness has a substantial, adverse and long-term effect on the individual's ability to carry out normal day-to-day activities and on whether or not the condition is likely to recur.

A recent case has clarified the approach to be taken in determining whether a mental condition is a disability under the DDA (*J v DLA Piper UK LLP*).

A lawyer, referred to as 'J', claimed that in 2008 DLA Piper withdrew its offer of a job after she disclosed to its Human Resources Department that she had a history of depression. DLA Piper claimed that the job offer was withdrawn because of a freeze on recruitment.

On a preliminary issue, the Employment Tribunal (ET) was not convinced that J had suffered from clinical depression in the past and found that she did not have a disability for the purposes of the DDA at the time in question. On appeal, however, the Employment Appeal Tribunal (EAT) ruled that the ET was wrong in failing to take into account the evidence of J's GP regarding her mental condition and its decision that her past depression did not amount to an impairment was perverse. This was material because it affected any decision as to whether she had a disability that was likely to recur without the necessary treatment.

In the EAT's view, in cases where there is a dispute about the existence of an impairment, there are two questions for the ET to answer:

1. Does the claimant have a mental or physical impairment? and
2. Does this have an adverse effect on that person's ability to carry out normal day-to-day activities?

Whilst it is good practice in every case for the ET to state separately its conclusions regarding each – and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it – in reaching its conclusions, the ET should not proceed by 'rigid consecutive stages'. It makes sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

The case was therefore remitted to be heard by a fresh ET.

From 1 October 2010, the Equality Act 2010 replaces nine major pieces of discrimination legislation and other ancillary measures that have been introduced over the last forty years to protect people from unfairness and discrimination on grounds of disability, age, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These are now called 'protected characteristics'.
The Arbitration, Conciliation and Advisory Service has useful guidance for employers on the changes introduced by the Act, which can be found at http://www.acas.org.uk.

We can advise you how to make sure your procedures minimise the risk of a claim.

FTSE 350 Directors to Face Annual Re-election

In an attempt to further improve corporate governance, the Financial Reporting Council has introduced changes to the UK Corporate Governance Code. These include a clearer statement of the board's responsibilities regarding risk, a greater emphasis on the importance of getting the right balance of skills and experience on the board, and a recommendation that all directors of FTSE 350 companies should be required to stand for re-election every year.

The ability of shareholders to challenge, at every Annual General Meeting, the reappointment of directors seen as underperforming will send shivers down the spines of many City board members.

We can advise you on all aspects of corporate governance and the law relating to business ethics.

Search Engine Provider Not Liable for Trade Mark Use

Using a trade mark as a 'keyword' to aid searches using a search engine which then displays advertisements featuring other brands does not breach the rights of the trade mark owner.

In the view of the European Court of Justice, use of the trade mark in such circumstances does not constitute 'use' within the meaning of the word in European law.

However, the Court ruled that the owner of such a trade mark is allowed to prevent another business from advertising goods or services identical to those covered by the trade mark if the origin of the goods is not clear.

The case centred on the use of keywords corresponding to Louis Vuitton's trade marks in order to guide users of the Google search engine to websites not owned by the company or its authorised distributors and to display advertisements ('sponsored links') triggered by use of the keywords.

The crucial part of the Court's decision was the ruling that the use as a keyword of a 'sign identical with a trade mark' and the organisation of advertisements displayed on the search page as a result of that keyword did not constitute use of the sign by the search engine provider where the search engine provider played no part in the creation of the keyword.

Where an advertiser creates keywords and stores them in such a way that the search engine provider has no knowledge of their use, the search engine provider is not liable for any misuse unless it becomes aware of this and then fails to take prompt action to prevent it.

We can help you ensure any website you operate complies with the applicable law.

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