SIMON BURN
SOLICITORS

Summer 2010

Commercial Law UPDATE

Over-Optimism Not Grounds for Claim

The developer of the M20 services in Kent was recently successful in court in resisting a claim for damages from the tenants of the service area, who were dissatisfied because representations made to them regarding visitor numbers and the facilities of the site were not realised, causing them commercial losses.

The main cause of the tenants' dissatisfaction was that visitor numbers, estimated in an independent report commissioned by the developer to be between 11,000 and 12,000 a day on average, were in reality only about a tenth of the number anticipated.

In addition, the developer's sales literature had envisaged having screens showing Channel Tunnel and port departure information. Lastly, the tenants claimed that the signage from the motorway was not of the expected standard. The former was later found to be impractical for technical reasons (despite being an idea which had attracted the support of the Port of Dover and Eurotunnel) and the latter was not under the control of the developer. The developer could not therefore be held to account for either of these issues.

When the lease documentation was examined, the court found that the developer had restricted its liability to any representation made by its solicitors in reply to questions.

The decision as to whether the shortfall in visitor numbers could lead to a claim therefore turned on whether the representations were made fraudulently to induce the tenants into executing their leases. The court sympathised with the tenants, but there was no ground for believing that they were: indeed, the developer had also suffered a large loss because of its reliance on the over-optimistic forecasts.

If you intend to lease premises where footfall is crucial, it makes sense to negotiate an appropriate clause in the lease agreement, so that the rental paid will be less if expectations are not met. We can assist you in negotiating a lease which protects your position if things do not turn out as expected.

Bribery Act Becomes Law

Bribery and corruption are rife in many countries. For example, IKEA recently ceased its expansion in Russia because of difficulties in obtaining permissions to build stores without being willing to engage in corrupt practices. In some countries, 'sweeteners' for deals are a necessity or near-necessity.

However, UK businesses that engage in bribery to obtain business now face stiff penalties if they are caught. The Bribery Act 2010 received Royal Assent on 8 April 2010. It is an offence under the Act to bribe another person or to allow oneself to be bribed, and specifically it is an offence to bribe foreign public officials. These offences are punishable by an unlimited fine and/or a prison sentence of up to 10 years. The Act also makes failing to prevent bribery an offence punishable by an unlimited fine.

The Act is being introduced in stages during the year and represents a serious risk to business people who use corrupt practices.

If you are concerned by the issues raised by the Bribery Act, contact us for advice.

Fines for Breaches of Environmental Law

The Court of Appeal has ruled in a case which establishes an important precedent for the setting of fines for breaches of environmental law.

Thames Water had appealed against a fine of £125,000 for a mistake which had led to pollution of the river Wandle. It claimed that the fine was excessive. The law in such cases makes the offence one of 'strict liability' – a conviction follows if the offence occurs. There is no defence.

On appeal, the Court set out fourteen factors which should be taken into account when determining the appropriate fine in such cases.

The most important of these are:

- The size of the fine depends on the facts of the case;
- The purpose of deterrence dictates that the fine should always exceed any expense avoided by the commission of a breach of the law;
- Mitigating factors would include a good past record of compliance, a timely admission of guilt and a good response after the event;
- Various factors would aggravate the seriousness of the offence, such as the noxiousness of the pollutant, the time the effects persisted, whether the health of people or animals was affected and so on; and
- It would be an aggravating factor if the company fell short of its duty, showed a poor attitude to compliance or response to the event and failed to heed advice, etc.

Taking into account Thames Water's previous good record, the Court reduced the fine to £50,000.

Environmental law in the UK is strict and the penalties for non-compliance can be severe. Taking liberties with the law can prove very expensive. We can advise on all aspects of environmental law.

VAT and Excise Penalties – The New Regime

A new regime for VAT and Excise penalties commenced on 1 April 2010. It provides that the penalties levied for under-payments of VAT and Excise Duty will depend on both the reason for the wrongdoing and whether the disclosure was unprompted or prompted.

Where there is a 'reasonable excuse', no penalty will be levied. Needless to say, the criteria which allow such a claim to be made are strict and are likely to include only events which are 'exceptional and beyond the individual's control'.

In other cases, the penalties (in terms of the percentage of tax underpaid – these must be paid in addition to the tax due) sought will be as below.

Reason for Wrongdoing	Disclosure	Minimum penalty	Maximum penalty
Careless	Unprompted	10 per cent	30 per cent
Careless	Prompted	20 per cent	30 per cent
Deliberate	Unprompted	20 per cent	70 per cent
Deliberate	Prompted	35 per cent	70 per cent
Deliberate & Concealed	Unprompted	30 per cent	100 per cent
Deliberate & Concealed	Prompted	50 per cent	100 per cent

New Company Name Check Facility

On 28 April, Companies House introduced a new 'Company Name Availability Search' as part of its WebCHeck service, which will return the 'same as' matches as defined in the Companies Act 2006. This will allow those wanting to set up companies to ascertain straight away whether the company name they are considering using is likely to be available. If so, don't forget to check that the appropriate Internet domain name is also available!

The new facility can be found at http://www.companieshouse.gov.uk/about/miscellaneous/nameAvailability.shtml.

Court Decides on Contract Terms

Starting work before the details of the contract have been agreed can be risky, because it could end up with the court having to decide if a contract exists and, if so, on what terms.

A recent case, which involved a dispute over the supply and installation of packaging equipment under a contract worth more than £1.6 million, was argued all the way to the Supreme Court. The supplier and the customer had agreed a letter of intent, which stated that the final terms were to be specified in a subsequent final contract. The draft final contract was produced and points of it were negotiated between the two parties, but it was not executed. It ended up with the supplier and the customer disputing whether or not there was a contract and, if so, the basis of the agreement.

In such cases, the court has to make a decision based on an examination of the facts before it. In this case, the Supreme Court considered that it was unrealistic to consider that the parties had not intended to create contractual relations and that the agreement was as per the terms of the draft final contract.

The Supreme Court is not the best place to decide the details of a

contract. It is a far better option to make sure that proper contractual relations are agreed earlier, rather than later, in the business relationship.

Contact us for advice on any aspect of contract law.

HMRC – A Case for a Disaster Recovery Plan?

The powers of HM Revenue and Customs (HMRC) are considerable, as a recent case makes clear.
It involved a company that HMRC suspected of Excise Duty evasion.
A raid on its premises was undertaken and HMRC officers found quantities of alcohol for which there appeared to be no records of purchase. The officers seized the goods as well as computers and papers belonging to the company and also private papers. HMRC held the computers and the papers for a week.

The company went to court, alleging that the seizure was unreasonable and that the length of time HMRC retained the computers and other material was excessive. The court gave the claim short shrift, agreeing with HMRC's contentions that:

- it was reasonable to assume that the private papers may contain relevant information about the business;
- the return of the private papers had been prioritised;
- the claim that the computers should not have been seized was unreasonable; and
- given the volume of papers etc. seized, retention for a week was not unreasonable.

A seizure such as this, or a natural disaster such as a flood, can prove catastrophic for many businesses and having a disaster plan in place is a wise precaution. We can assist you with minimising legal risks.

Copyright Case Highlights Need for Care

Breach of copyright on the Internet is relatively common, but it is still a breach of the law and one for which ignorance is no defence. Copyright is an absolute right, which arises automatically. Nothing has to be done to obtain it: it arises as soon as the material is created. So, anything you read or watch is the copyright of the creator (or someone to whom they have assigned it) and cannot be used without permission.

A recent case shows how easy it is to breach copyright, even if it is unintended. It involved an Internet-based news indexing system, which allowed members to find reports on films (primarily) through a system based on the use of Internet discussion groups. Members were easily able to find reports on films and similar items and to download them.

The problem was that the system also enabled members to search for copies of particular films and download them by directing members to locations on the Internet where these were available. It also provided the technology by which the files could be downloaded. This breached the copyright of the owners of the films.

The High Court concluded that the system must have given members the impression that the provider had implied authority to allow users to copy films and the provider had therefore 'procured and engaged in a common design' to infringe the film owners' copyright.

If you reproduce material created by others without first obtaining permission or making a licensing agreement, you could be heading for trouble. Contact us for advice.

Village Green Decision Supplies Blueprint for Stymieing Development

Most people – and certainly those who have been involved in an opposed planning application – know what a NIMBY is but, following a case heard in the Supreme Court, we may now see the rise of NOOViGs (not on our village greens). The reason for this was the victory of a group of residents in Redcar, who wished to oppose a proposal to develop land which included part of what had been a golf course.

They did so by applying for the land in question to be registered as a village green under a procedure set out in the Commons Act 2006. This allows land to be registered as a village green if 'a significant number of the inhabitants of any locality, or any neighbourhood within a locality, have indulged as of right in lawful sports or pastimes on the land for a period of 20 years'.

The land was used by members of the public for recreation. If whilst out walking they encountered golfers in the course of play, it was common practice for them to wait until play was finished or until the golfers signalled for them to pass.

The original planning application was approved by the inspector, largely because he recognised the superior right of golf club members to use the land compared with the general public. This meant that the general public had not used that part of the land 'as of right'.

However, the Supreme Court took a different view, ruling that the legislation was concerned with the nature of the use of the land and it was not necessary to examine whether the users of the land believed they had the right to use it as they did. What mattered was whether a significant number of members of the public had openly used the land for recreational purposes without any formal agreement for its use and without the landowner taking steps to assert its right to prevent it.

Applying that test, the deference showed to the golfers was a matter of normal civility and did not indicate that the non-golfing users of the land were not using it as of right.

The decision is likely to be used as a blueprint for arguments against developments elsewhere as NOOViGs seek to use the Act to prevent unpopular development projects. Registration of land as a village green will act, in effect, as a permanent block on development.

We can advise on all planning law matters.

SIMON BURN
SOLICITORS

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.