SIMON BURN
SOLICITORS

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Commercial Law UPDATE

Problems with Insolvent Landlords

It is not only tenants that go broke: increasingly, overstretched landlords are in danger of becoming insolvent.

If you are a commercial tenant and have a rent review coming up, it makes sense to do some research into your landlord's finances and to make sure that you protect your position if necessary.

If you have paid a rent deposit and it is not legally separate from the landlord's other assets, it may be lost if the landlord becomes insolvent. Check your lease. It may be possible to persuade your landlord to refund the deposit or to agree to vary the lease to allow the deposit to be protected.

If the landlord fails to comply with its covenants, it is possible that the breach may be sufficiently serious to allow you to repudiate the lease, should you so wish.

Another common problem arises where the insolvent landlord is itself a tenant and defaults on its covenants with the head landlord. If this results in the forfeiture of the landlord's lease, this could lead to the loss of the right to occupy the premises.

If you have concerns about what your position would be in the event of the insolvency of your landlord, we can advise you and assist in any necessary negotiations.

Bribery Act Guidance Published

The Government has now published final guidance for businesses on complying with the Bribery Act 2010. The implementation of the Act, originally scheduled for April this year, was delayed to allow time for the guidance to be finalised. The Act came into force on 1 July 2011.

Section 7 of the Act makes it an offence for a commercial organisation to fail to prevent bribery. A business can provide a defence by showing that it had in place adequate procedures to prevent bribery from occurring, however, and the guidance details the approach that should be taken when implementing such procedures. The overriding point is that these should be proportionate in view of the likelihood of bribery taking place, which will depend on the size of the business and the countries and markets in which it operates. Although the principles remain similar to those in the draft guidance, published in September 2010, the advice in the final version is more detailed.

Section 14 of the Act provides that where an offence is committed with the consent or connivance of a senior officer of an organisation, that person (as well as the body corporate or

partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.

Under Section 11 of the Act, the maximum penalty for individuals is 10 years' imprisonment or an unlimited fine, or both. The maximum penalty for commercial organisations is an unlimited fine.

The guidance includes case studies to illustrate what approach businesses might take in certain situations. It, together with a 'quick start guide' to the Act, can be found at http://www.justice.gov.uk/guidance/.

New Rules on Privacy and Electronic Communications

The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, which came into force on 26 May 2011, make certain changes to the laws that cover direct marketing by electronic means.

Serious breaches of the rules surrounding the sending of unwanted text messages, emails and marketing telephone calls can now lead to fines of up to £500,000.

The Regulations also amend the rules that apply to websites using cookies and similar technologies to remember a user's preferences. Whereas previously websites were required to provide information about cookies they used and tell visitors to the site how they could 'opt out', the new rules require that websites wanting to use cookies gain the visitor's consent in most cases.

The Information Commissioner's Office (ICO) has enhanced investigative powers that allow it to require telecoms and Internet service providers to cooperate with its investigations of breaches of the Regulations.

The ICO has issued guidance on the changes, which is available at http://www.ico.gov.uk/for_organisations/privacy_and_electronic_communications.aspx.

The guidance states that organisations have 12 months to make sure they comply with the new rules regarding cookies. Although no fines will be issued until May 2012, the ICO anticipates receiving complaints about cookies in the interim period. In this event, it is expected to ask organisations to explain the steps they are taking to ensure that they will be in a position to comply with the Regulations by May 2012. Website owners who cannot demonstrate that they are taking the action necessary may be issued with a warning notice that will be taken into account by the ICO after expiry of the 12-month lead-in period.

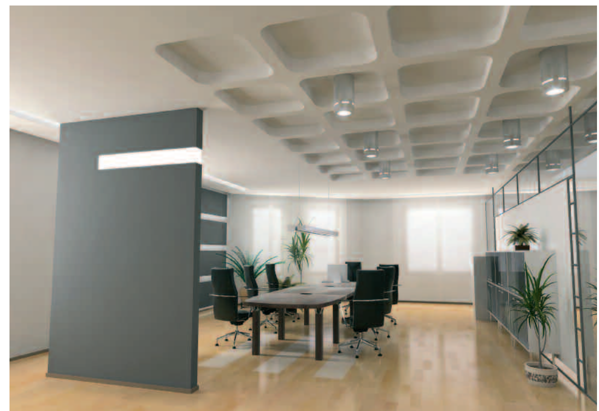
The new Regulations give the ICO real teeth. We can help you make sure your marketing policies comply with all the applicable law.

Get it in Writing!

A recent court case regarding the lease of a property in Manchester illustrates yet again the importance of making sure that any matters under negotiation that are crucial are agreed in writing in terms that are clear and unequivocal.

The problem occurred when a property was 'split' between a man (strictly his company) and his sister-in-law's company as part of the break-up of a family company. The man's company had a 15-year lease over the building and the sister-in-law's company became the landlord. The lease contained a three-month break clause. The upper floors of the building were used as offices and the ground floor for the trading activities of the man's company. He assumed that the lease would remain with his company to be renewed ad infinitum and that the break clause would not be enforced.

All went well until the landlord decided to redevelop the property and gave notice to the tenant company under the break clause that it would require possession of the premises for its own purposes. The tenant opposed the application, claiming that the landlord was 'estopped' (prevented by its earlier representations, on which the tenant had relied to its detriment) from claiming possession. The tenant also claimed that the terms of the transfer of the property should be rectified to make the break clause applicable only to the upper floors of the building.



The court considered that there had been no specific representation made by the landlord regarding the break clause, nor was there any implied representation. The tenant's claims were therefore rejected.

This dispute could have been avoided had the original documentation been appropriately drafted. It is essential to ensure that commercial agreements cover all likely eventualities and that important issues are not left to be dealt with by way of 'understandings'.

For advice on any contractual matter, contact us.

Village Green Status Fails to Prevent Development

When an unpopular development is planned in the countryside, it is often opposed by an attempt to get the land in question designated as a village green. If successful, this will normally prevent the granting of planning permission, because it prevents the owner of the designated land from interfering with the right of the local inhabitants to use it for recreational purposes.

There have been a number of cases in which developments have been prevented by this tactic.

Recently, land in Monmouthshire, which had been sold by the local council to builder Barratt for development as residential housing, was designated as a village green after a local action group made a successful application under the Commons Act 2006.

Barratt challenged this, however. It relied on legislation contained in the Town and Country Planning Act 1990, which allows that land that has been acquired or appropriated by a local authority for 'planning purposes' may be used 'by any person in any manner in accordance with planning permission'.

The court ruled that the latter legislation should prevail over the Commons Act, allowing Barratt to undertake the development.

Critical to the decision was that the registration as a village green occurred after the planning permission for the development had been granted.

Contact us for advice on all planning law matters.

Directors Safe from Competition Law Challenge

Competition law provides stiff penalties for those who transgress. Where the transgressor is a company, the question was recently asked as to whether the company could recover the cost of legal sanctions applied by the court from the directors who made the decisions that led to the company acting illegally.

Supermarket chain Safeway has for some time been seeking to sue ex-directors, in an attempt to recover penalties it paid following prosecution under the Competition Act 1998, on the ground that they were ultimately responsible for the illegal activity.
The Court of Appeal rejected the claim on the legal principle of 'ex turpi causa' – that a wrongdoer cannot benefit from the consequences of their own wrongdoing. The company, in law, had committed the criminal act.

Safeway sought leave to appeal the decision to the Supreme Court, but permission was refused.

The decision means that directors of companies can be increasingly confident that in the event that their company is convicted of a criminal act leading to a fine, they will not be held personally liable for the loss to the company.

This decision should impact favourably on premiums under directors' and officers' liability policies.

No-Shows – ECJ Rules No VAT Due

A recent decision of the European Court of Justice confirms that there is no relationship between a deposit taken for a hotel booking and the supply of a standard-rated service where the deposit is retained because the person making the booking is a 'no-show'.

Accordingly, in such cases there is no need to account for VAT on the deposit.

However, if the deposit is made for a specific room which is therefore kept vacant, the supply remains one on which VAT is due.

Adverse Statements Concerning Former Employees – Claims in Negligence

Whilst employers are no doubt aware of the duty of care owed to employees when providing them with a reference, a recent decision of the High Court makes it clear that an ex-employer who provides false information regarding a former employee, who suffers foreseeable loss as a result, may be liable for damages for negligent misstatement, even where the information is not given in the form of a reference relating to a job application.

A man successfully claimed against his former employer after he lost his new job as a consequence of an email, sent to his new employer, which made fallacious statements about his conduct in his former job. The Court ruled that his former employer owed him a duty of care and was therefore liable for the consequences of its negligent misstatement.

Employers should ensure that employees understand the potential implications of communications concerning former employees.

We can advise you on developing an appropriate policy within your organisation to minimise the risk of claims of this kind.

Signatures of Directors Mean Document Executed

A purchaser that had second thoughts about buying a property from a company and sought to avoid the contract for sale, because the document was neither sealed with the company seal nor signed 'by or on behalf of' the company, was given short shrift by the Court of Appeal.

The Court considered that if the contract defined the 'seller' as the company, it would be absurd not to regard the signatures of the directors at the end of the document as meaning the document was executed by the company.

LLP Case Shows Need for Members' Agreement

Limited liability partnerships (LLPs) are becoming increasingly common. For example, all of the 'Big Four' accounting firms have been LLPs for several years now.

Recently, the acrimonious bust-up of an LLP led to one of the ex-members suing the others for unfair prejudice after he had been locked out of the LLP offices, had his access to the LLP's IT system denied and so on. The claim was brought under Section 994 of the Companies Act 2006.

Section 994 allows the court to remedy prejudice towards a member of a company or LLP who suffers as a result of the mismanagement of the company or LLP. The normal result of such an action, if successful, is to require the remaining shareholder(s) to buy out the interest of the shareholder who has suffered.

The members had failed to create a written members' agreement, which meant that there was no guidance on what they had agreed to do in the event that the LLP was dissolved.
The High Court therefore ruled that default Regulation 7(1) of the Act applied and the outgoing member was entitled to a 1/3rd share in the net assets of the LLP – a proportion corresponding with his investment in it.

The moral of the story is that in any company, partnership, LLP or other business organisation, you should have a clear written agreement as to what will happen in the event that the business ceases or the founders decide to part company with one another. Failing to do so is in all too many cases a false economy. We can advise you on your individual circumstances.

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