SIMON BURN SOLICITORS

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Commercial Law UPDATE

New Rules for Websites?

Businesses that have websites may need to think again about the contact information they provide for users, following a shock ruling of the European Court of Justice (ECJ).

In the course of a case brought by a German consumer group against a German insurance company, which failed to give one of its customers an effective way to communicate with it, the ECJ issued a ruling that appears to increase the minimum amount of contact information that must be displayed on all business websites. The Court ordered the insurer to make sure its telephone number appeared on its website and that an online contact form was responded to within 60 minutes.

Prior to the ruling, it appeared that a company's website need only include its address and a contact email address. It would now seem that the requirement to provide a means for consumers to communicate effectively with the operator of the website has more far-reaching implications.

The European E-Commerce Directive requires firms to make the following permanently available on their websites:

- The name of the service provider;

- The address of the service provider's establishment; and

- Details, including the email address, which allow the service provider to be contacted rapidly and communicated with in a direct and effective manner.

It may be thought that the requirement to allow direct and effective communication just means that any communications sent using a web-based response form must be answered within a reasonable period of time. However, the ECJ has made it clear that such a facility must be in addition to an email address, which in effect appears to make a phone number or fax number essential. This is because whilst the objective of having an effective means of communication may be served in normal circumstances via email, the ECJ envisages cases in which the consumer may not have access to email.

The rules apply to most commercial websites.

Providing a prompt response to a communication is just good customer care but the new requirements regarding websites will clearly pose challenges for some organisations.

Discrimination by Association

The Employment Tribunal (ET) has held that the Disability Discrimination Act 1995 (DDA) can be interpreted as providing protection to a non-disabled employee who is treated less favourably because of their caring responsibility for someone else with a disability (*Coleman v Attridge Law*). The EU Equal Treatment Framework Directive requires member states to have in place laws that protect against discrimination by association.

Whilst the wording of the DDA does not make this clear, the ET decided that it should be read as providing protection to a person who is 'associated with' a disabled person, not just one who is disabled.

Landlord Not Entitled to Hope Value

The House of Lords has denied an appeal against a well reported ruling in which landlords were denied the right to claim an element of 'hope value' when their tenants bought out their leaseholds under the right to buy legislation.

Strictly, the judgment is not all good news for tenants. The Lords did rule that hope value is not payable in claims for the freehold under the Leasehold Reform Act 1967 or in lease extension claims or for participating tenants under the Leasehold Reform, Housing and Urban Development Act 1993.

However, the Lords also decided that hope value is to be taken into account in the valuation in so far as it is attributable to the possibility of non-participating tenants seeking new leases on their own flats. A non-participating tenant is a tenant who is not part of a collective scheme for obtaining enfranchisement of a leasehold (i.e. where the tenants of a block of flats decide collectively to purchase the freehold).

The argument turned on how the 'marriage value' (the amount by which the freehold value of the property after purchase by the tenant exceeds the landlord's value of the property as an investment property plus the tenant's value of his or her lease) should be dealt with. The problem, as identified by the Law Lords, is that there are three distinct elements in the valuation of the freehold interest of premises which are subject to a long lease: the right to receive the ground rent, the right to vacant possession at the term of the lease and the option, or at least the potential, to deal early with the tenant and thus release the marriage value which will be realised at the term before the term arrives. It is the third element which is known colloquially as the hope value. This value can differ considerably from the common concept of open market value, yet none of the statutory provisions that were in issue in this case refers to hope value.

It remains to be seen to what extent the hope value relating to the renewals of leases by non-participating tenants will be taken into account.

Lords Provide Rent Review Relief for Landlords

Landlords will breathe a sigh of relief following the recent reversal of the decision in the much reported case of *Scottish and Newcastle plc v Raguz*. It dealt with the requirement on landlords to serve notices on each outstanding payment date during the rent review process in order to have the right to collect the increased rent payable.

The decision that this is not required not only reduces the administrative burden on landlords, but also removes the risk that they may suffer loss through a relatively trivial administrative oversight.

Time to Rethink D&O?

Many companies are unaware of or have considered and rejected the idea of director and officer (D&O) insurance, but past experience indicates that along with liquidity problems, companies and their directors face a heightened risk of litigation during economic downturns.

The usual purpose of D&O insurance is to cover the threat to directors and senior managers that their personal assets will be at risk in the event of litigation. Normally, the company will write a policy to indemnify its officers, and D&O insurance is normally written as an 'add on', to cover risks not dealt with by the company's policy, or as 'top-up' cover to it.

There are types of activity that significantly increase the risk to directors. For example, raising capital by way of share issue or by the issue of public debt is particularly risky. Actions by employees and shareholders are also a risk in some circumstances. The Companies Act 2006 has posed additional obligations on company directors as well.

In the present environment, it is likely that investors, creditors, employees and customers will be quick to act when they see things going wrong. Now is a good time to undertake a comprehensive review of your existing D&O insurance coverage, to review the precise terms attaching to any commercial finance or debenture agreements and to consider the protection offered by your contract of service.

When Pressure Doesn't Pay

It is often thought that anything goes when negotiating contracts or varying them, but the court will not enforce a contract that has been entered into under economic duress. Economic duress occurs when there is illegitimate compulsion, the practical effect of which is to deny one party to the contract any practical choice and where it is a significant cause of their entering into the contract.

Recently, a case was heard in which the argument of economic duress was made to the court by motor manufacturers, which used a firm to make plastic units for a van. When they wished to restyle the van, the manufacturer of the units was unable to make them to the new design, so was given six months' notice of termination of its contract.

The supplier of the units then demanded compensation for termination and a price increase for the units supplied in the final period of the contract, threatening to cease supply if these demands were not met. The effect of a cessation of supply would have been to stop the van manufacturers' production lines, which would have had severe economic effects. They therefore accepted the demands, but went to court to seek repayment of the excess sums demanded plus interest.

The court accepted the argument that economic duress was applied,

rendering the contracts void. It awarded compensation to the motor manufacturers.

The courts are inclined to come down hard on those who use economic blackmail. If you are faced with unreasonable demands by someone who thinks they have you 'over a barrel', contact us for advice.

New Disclosure Rules

The Companies (Trading Disclosures) Regulations 2008 came into force on 1 October 2008, making many changes to the requirements as to where and when company trading names, names of directors etc. need to be shown. The Statutory Instrument implementing the changes is both short and straightforward. It can be found at http://www.opsi.gov.uk/si/si2008/uksi_20080495_en_1.

In particular, Section 6 is important. It specifies that every company shall disclose its registered name on:

- business letters, notices and other official publications;
- bills of exchange, promissory notes, endorsements and order forms;
- cheques purporting to be signed by or on behalf of the company;
- orders for money, goods or services purporting to be signed by or on behalf of the company;
- invoices and other demands for payment, receipts and letters of credit;
- applications for licences to carry on a trade or activity; and
- all other forms of its business correspondence and documentation.

In addition, it requires that every company shall disclose its registered name on its website.

Contact us if you require advice on compliance with any aspect of company law.

IR35 Case Lost on Substitution Principle

IR35 dictates the circumstances in which services supplied by a 'one man band' company are to be treated as supplied by the person directly, rather than through the company. It allows HM Revenue and Customs to regard a person who trades through the medium of a company as the employee of the businesses which employ his company. It is therefore unpopular, particularly in the IT industry where the use of one man band companies is commonplace.

The practical effect of IR35 is to increase the tax burden of the company, mainly due to the imposition of National Insurance costs, which would otherwise not be chargeable.

Recently, an IT contractor lost his claim that IR35 did not apply to his company, which supplied services through a third party and an agency to the end user. The telling point appears to have been that the contractor who was to perform the work was named specifically and could not, without prior agreement, provide a substitute to do the work if he did not.

ICO Guidance on Transfer of Employee Information

When the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) came into force, they established a new duty on the transferor – when there is a relevant transfer of a business, a part of a business or a service provision change – to supply specific information about the transferring employees to the new employer by providing what is termed 'employee liability information'.

This information consists of:

- the identity and age of the employees who will transfer;

- information contained in the employees' statements of employment particulars, such as written statement of pay, hours of work, holiday entitlement etc.;

- information about any relevant collective agreements;

- details of any disciplinary action taken against an employee in the last two years;

- details of any grievance action raised by an employee in the last two years;

- details of any legal action brought against the employer by an employee in the last two years; and

- information about any potential legal action.

The information must be given at least two weeks before the completion of the transfer, unless this is not reasonably practicable. If the transferor fails to provide the required information, the transferee can bring a claim for compensation in the Employment Tribunal and is entitled to a minimum of £500 from the transferor for each employee for whom information was not provided.

The Data Protection Act 1998 allows the disclosure of this information because it is required by law. The Information Commissioner's Office (ICO) has published guidance to help organisations comply with their data protection obligations when passing on this information. This includes recommended good practice for carrying out this duty under the TUPE Regulations, advice on requests for information over and above what is required by law and how employment records should be dealt with on the transfer of a business.

A copy of the guidance can be downloaded from the ICO website at http://www.ico.gov.uk/.

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