



CONFIDENTIAL INFORMATION

Issue 4 2008



Your business' trade secrets are a valuable resource protected by law.

Where employees resign and set up in competition, sometimes they can be restricted both by terms in their employment contracts and the law of confidentiality. It is wise to ensure employment contracts contain appropriate but enforceable restrictive covenants and clear confidentiality clauses.

Over the summer, the bank UBS won a court order restraining former employees from poaching more staff from UBS for their new company, Vestra Wealth. If you find staff are plotting a new company before they leave yours, then action may be possible against them before further damage is done.

Many such cases are discovered by checking emails, which is lawful where the business does have a written email/internet policy which

clearly states that the employer has the right to read such emails. It is worth ensuring you have such a policy drawn up by solicitors which is consistent with the Data Protection Act 1998 and guidance issued by the Information Commissioner under the Act.

In another high profile privacy/confidentiality case, the High Court has awarded substantial damages to Mr Max Mosley for breach of his privacy rights under the Human Rights Act 1998. It is wise for commercial clients to seek legal advice from us before recording any supplier or customer without their permission, as the legislation in this field can be complex.

Finally, anyone considering disclosing an invention or discussing a proposal or corporate buy-out or new investment round with potential suppliers or investors, should ensure that a non-disclosure agreement (NDA) is drawn up in advance.

Contact us for NDAs, advice on employee issues and terms for email/internet policies and employment contracts.

EQUALITY UNDER THE LAW

Employment law is a minefield for employers and the law is continuously being amended, making it difficult to keep abreast of the changes. There have been a number of recent changes in the area of equality and the law.

A new Equality Bill will ensure Government bodies avoid sex discrimination. The bill will:

- impose an additional duty on public bodies to ban discrimination on grounds of age, sexual orientation or religion
- require public bodies to use their £160bn purchasing power to award more contracts to companies with a good equality record;
- allow companies to recruit more women, or people from ethnic minorities, by favouring them in job interviews over equally qualified white men;

- require public bodies to publish information showing the gender pay gap.

The bill had originally been intended to apply to the private sector too, but this was changed. However, it will ensure that private companies supplying the 100,000 public sector bodies in the UK will need to show good equality records. Now is a good time to tighten up practices.

In addition, in July, the court held that local authorities must immediately honour equal pay awards made by employment tribunals to benefit women paid much less than male local authority workers. Authorities wanted to phase in the awards.

In a separate development, the European Court of Justice has ruled in a landmark case that the mother of a disabled child was

subject to disability discrimination through association with her disabled son. The lady concerned wanted time off to care for her son and used disability discrimination legislation despite not being disabled herself. The ECJ said she was entitled to do so. The interesting point is that the case applies to people discriminated against because of association and could cover age discrimination cases as well.

The EU has also proposed a new directive which relates to non-discrimination in relation to access to supply of goods and services, education, plus social services such as healthcare and social security.

Please contact us for a full update of your employment procedures, contracts and policies.

INTELLECTUAL PROPERTY RISKS

Many businesses do not properly protect their intellectual property rights.

Disputes over ownership of rights are particularly common where a contract omits mention of IP rights at all.

It is worth including in conditions of purchase, a clause that a buyer will own all IP rights as, in practice, many buyers will simply use their purchase order form and documentation when they purchase all manner of IP protected items such as advertising services, brochure development, course materials and website design and software.

The points below show some common intellectual property rights errors:

- Failing to set out in contracts, consultancy agreements, terms of sale and purchase whether seller or buyer will own intellectual property rights
- Assuming the buyer will own rights automatically when the

Copyright, Designs and Patents Act 1988 says the converse - all buyers obtain by default, unless a contract says otherwise, is a right to use the commissioned works/rights

- Limiting licences to one corporate entity when several within a group need rights to use the works
- Disclosure of inventions before they are patented by over enthusiastic scientists and inventors
- Failure to have non-disclosure and confidentiality agreements signed to protect rights
- Infringement of rights by picking names similar to trademarks of others or breach of patent through failure to check registrations
- Letting rights lapse through failure to pay renewal fees or failure to apply for rights
- Losing the chance to obtain emergency interim relief by delay

RECOVERING DAMAGES

This summer, the House of Lords in a leading case, examined what losses can be claimed when a contract is breached.

In *Transfield Shipping v Mercator Shipping*, it held that it would be wrong to hold someone liable for risks which those entering into contracts in their particular market would not reasonably be considered to have undertaken.

Charterers of ships in this case were held not liable for a shipowner's loss of profits on a subsequent fixture resulting from the late redelivery of the vessel. That damage was too remote and could not be foreseen.

The usual rule remains - foreseeability - was it foreseeable that a particular loss would arise from a breach of contract or was the loss suffered too remote to have been considered.

However, most contracts also contain limitations of liability clauses which affect what can be claimed. The court said "It seems to be logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken.....It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market would not reasonably be considered to have undertaken. The view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price paid. Anyone asked to assume a large and unpredictable risk will require some premium in exchange."

In practice, those negotiating commercial contracts should ensure that unusual risks are dealt with in the contract expressly. Analyse how the contract might go wrong and what the losses might be and then address them in the agreement by a clear provision.

Always consider the following when supplying goods and services:

- that liability for indirect and consequential loss is excluded
- that all liability is limited or capped at a reasonable sum ideally linked to the supplier's insurance cover
- never exclude liability for death or personal injury caused by negligence or fraudulent misrepresentation as this is void under the law
- be careful of amending exclusion and limitation clauses without legal advice as the entire clause could be rendered void and unenforceable under unfair terms law if too narrowly drafted.

Now may be a good time to have us check and revise your standard contract terms in the light of recent changes in the law.

SCREEN SCRAPING



IT lawyers are often asked by clients setting up new internet businesses about the extent to which they can gather data from other websites, such as details of the best prices available for flights for example, and use that data on their own new site.

The rules are complex and sometimes intellectual property rights are breached but case law is rare.

However, in Germany, and therefore not a precedent in the UK, Ryanair won a case last July against a tour company which had screen scraped its website without consent. Hamburg Regional Court granted it an injunction against Vtours. The data in a screen scrape is taken from a site without permission and used to fill in forms and harvest results and is often used in the travel and | personal finance sectors. Ryanair has another case pending in Dublin.

In August, Ryanair escalated the dispute in the UK by stating it would not honour tickets passengers had purchased from third party web sites that had screen scraped the Ryanair site. If you want any assistance on how to ensure your website and internet practices are lawful, contact us for information.

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PASSING OFF



Not all businesses choose to register their trademarks with the Intellectual Property Office. Although registration with the IPO is a wise move and relatively cheap, even

those without a registered trademark may be able to sue for what is known as 'passing off' - where another business appears to be like theirs, often in terms of logo or name used, look and style.

In addition, the Consumer Protection from Unfair Terms Regulations 2008 and Business Protection from Misleading Marketing Regulations 2008, introduced earlier this year, made important changes in this area.

The regulations prohibit a misleading action which "concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor". This could mean that a criminal offence is committed for breach of trademark and passing off. However, the initial remedy would be a complaint to a body such as the Advertising Standards Authority in most cases and, only if that failed, might trading standards officers refer the matter for a criminal prosecution.

Can you use this against your competitors who are trading unfairly? Unfortunately for some, competitors are not given actionable rights under the regulations to enforce them, although the Law Commission is looking into whether the law might be changed to that effect and a private criminal prosecution may be possible. However, legal action for passing off is possible against a competitor who is trading unfairly in this way.

In addition, the regulations ban thirty one practices, No.13 of which is "promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not". This again amounts to criminalisation of passing off and breach of trademark. Contact us for information if you believe you may have a case.

The regulations also prohibit misleading advertising including misleading people as to the commercial origin of a product. Some people use a competitor's name in an advertisement to compare their products with those of the competitor. Under article 4, comparative advertising which is misleading is banned where it does not meet the requirements of regulation 4.

These new regulations replace the Control of Misleading Advertising Regulations 1988, which contained similar provisions.

COMMERCIAL AGENTS

In a recent case, Groupe Danone, the courts looked at commercial agents.

Agents are paid commission for finding customers, but the contract of sale is between the supplier (known as the agent's 'principal') and the ultimate customer. This is different from a distributor which buys goods and resells them.

In the EU, commercial agents, but not distributors, are given special legal protection by the EU agency directive. Before appointing an agent it is wise to take legal advice on the implications, as a large lump sum may need to be paid to agents before their contract is terminated, because of the provisions of the agency directive.

In the 14 years since the directive came into force in the UK, there have been several significant cases on assessing this compensation.

Last year the House of Lords in Howard Hallam v Lonsdale, held that the relevant factors include what the earnings prospects of the agency were and what people would have been willing to pay for similar businesses at the time. In that case, the agent had sought £20,000 compensation but was only awarded £5,000 and the courts put paid to the idea that agents would always be entitled to two years' commission as a lump sum.

Agents are only protected by the directive if they have continuing authority to negotiate. Most agents are not allowed to depart from the principal's standard contract terms and prices but, notwithstanding that fact, the courts have consistently held they are still protected.

In the Groupe Danone case this summer, the European Court examined entitlement to commission for agents under the directive and held that even though the directive provides

that 'exclusive' agents are entitled to commission on all orders from their territory, where the purchases were made from a central buying office outside that area, the agent was not entitled to commission. In practice, had the contract dealt with the issue then the dispute would not have arisen.

More and more companies are using group purchasing and buying arrangements to purchase products so commercial agents and their principals would be wise to ensure they address this issue in their agreements.

Now may be a good time to revise your commercial agency contracts. We can advise on the best clauses to include to reflect these case law changes, as well as help you as a principal or agent if claims are made.

DATA PROTECTION REPORT



The Information Commissioner, Richard Thomas, has published his annual report 2007/08 and, at the same time, objected to a proposed government run database which would hold the telephone and internet communications of the entire UK population.

The UK has more surveillance than most countries in the world and has more CCTV cameras per head than any other country on the planet. Commenting on speculation that the government is considering the development of such a database, Richard Thomas said that it would be “a step too far for the British way of life”.

Mr Thomas said: “I am absolutely clear that the targeted, and duly authorised, interception of the communications of suspects can be invaluable in the fight against terrorism and other serious crime. But there needs to be the fullest public debate about the justification for, and implications of, a specially-created database – potentially accessible to a wide range of law enforcement authorities – holding details of everyone’s telephone and internet communications. Do we really want the police, security services and other organs of the state to have access to more and more aspects of our private lives?”

Speculation that the Home Office is considering collecting this information from phone companies and internet service providers has been reinforced by the government’s Draft Legislative Programme

which, referring to a proposed Communications Data Bill, talks about “modifying procedures for acquiring communications data”.

Richard Thomas believes that there has not been sufficient parliamentary or public debate on proposals to collect more and more personal information without proper justification, citing the expansion of the DNA database and the centralised collection and retention of data from Automatic Number Plate Recognition (ANPR) cameras as two recent examples.

The Information Commissioner’s Office also served enforcement notices against HMRC and MoD following high profile data breaches. The notices require both departments to provide progress reports documenting in detail how the recommendations have been, or are being, implemented to improve Data Protection compliance. Failure to comply with an Enforcement Notice is a criminal offence.

The Information Commissioner’s annual report showed that the ICO received 24,851 enquiries and complaints concerning personal information in 2007/8. The ICO has prosecuted 11 individuals and organisations in the last 12 months.

The ICO received 2,646 freedom of information complaints over the last year and closed 2,658. Three hundred and ninety-five formal Decision Notices were issued and, of these, 30% ruled in favour of the complainant while 25% upheld public authorities’ original decisions. In 45% of cases, the ICO upheld some elements of the complaint in favour of the complainant and agreed with the public authority on others. Further information is at www.ico.gov.uk.

Does your business properly comply with the Data Protection Act 1998? We can lead you through the minefield of rules, regulations and guidance to ensure you do not commit criminal offences under the Act.

Please call us now for further information.

PERSONAL INJURY CLAIMS

This summer, the family of a former engineer received £228,000 in compensation when their father died from an asbestos related disease.

The man from Warrington, was exposed to asbestos whilst working in a number of power stations for British Energy Generation, the former nationalised Central Electricity Generating Board.

The man died 3 days after diagnosis but damages will be paid to his family. The man worked as a mechanical engineer for the company for more than 40 years and was exposed to asbestos in the late 1950s and 1960s. He was diagnosed with the disease in September 2005.

If you are injured in an accident you may be able to claim compensation.

Please contact us for further information.

