



UNFAIR TRADING REGULATIONS

Issue 3 2008



The Consumer Protection from Unfair Trading Regulations 2008 are now in force along with new regulations on misleading advertising.

The regulations affect many of our local clients.

Any business which

engages in marketing and advertising, anyone with a team of salesmen who go door to door, or make sales calls, should ensure their teams know the new rules.

The regulations include:

- A general clause: a far reaching general clause defining practices which are unfair and therefore prohibited.
- A ban on misleading practices (actions and omissions) and "aggressive practices" - the two main categories of unfair commercial practices - are defined in detail.
- Safeguards for vulnerable consumers: The regulations contain provisions that aim to prevent exploitation of vulnerable consumers,

for example, when marketing or sales practices are aimed at the very young, disabled or elderly.

There is a list of practices which are now illegal including telling customers the salesman will lose his or her job if they do not make a sale. Breach of the rules is a criminal offence and can lead to jail sentences for those involved. The regulations will also affect practices such as buzz and viral marketing. It must be made clear that a recommendation for a product online, eg: on a social networking website, is made by someone representing the brand concerned, rather than implying a consumer is making an objective recommendation.

The sister regulations issued at the same time update the law on comparative advertising. A new DBERR code on Price Indications has also been issued and all businesses which offer goods on sale or "whilst stocks last" need to take account of the new rules. However, buy one, get one free (BOGOF) has won a reprieve having originally appeared to breach the rules. As long as it is not misleading, BOGOF offers are allowed.

We can advise you on how the regulations affect your business. Please call us for information.

BUYING AND SELLING A BUSINESS

In the current economic climate, mergers, consolidations, takeovers and asset sales - sometimes voluntary and sometimes forced - are common.

The Finance Act 2008 makes some important changes to the law on business sales and provisions of the Companies Act which came into force in April, and those due in October 2008 and 2009, will have an impact in some areas too.

The most important area on which to take early advice is on the tax implications of a business sale as this may affect the basic structure - whether assets or shares are sold. The two methods are very different which is not always appreciated by clients. Where an

individual makes a capital gain on a sale, the new rate for capital gains tax is 18% for many sales of assets. Some individuals however, will only pay 10% (until they have used up their lifetime £1m limit) and where the business is owned by family members, each will have a £1m lifetime limit. It therefore may pay, where possible, to ensure the shares are held by several family members each with a £1m limit to be used in due course on a sale.

Although HMRC lost the "Arctic Systems" case in the House of Lords on taxation of dividends of family owned business (with the effect that profits on the earnings from the business can be divided by way of dividend between shareholders whatever their day to day work done for the business), the law will change in

2009. So now is a good time to engage in business and tax planning to ensure earnings from a business are divided within a most tax efficient but lawful manner.

There will also be new record keeping requirements from 2009, so that family members can prove to HMRC their respective contributions to the business from which they derive dividend income.

We can advise on this as the new rules become clearer. We can also assist in drawing up shareholder and partnership agreements between those who own businesses which are best drawn up before problems arise.

INHERITANCE TAX - SISTERS LOSE TEST CASE

For 30 years, Joyce and Sybil Burden, aged 90 and 82, have been battling to ensure that when one of them dies, the other does not need to sell the home they share in order to pay the inheritance tax (IHT) bill, but without success.

However, when civil partnerships became lawful they thought they might be able to use discrimination legislation to aid their case. Were they not related they could have formed a civil partnership and no IHT would be payable when the first sister dies, but as they are related, they are not permitted to do so. They have, however, now lost their appeal in the European Court of Human Rights (ECHR).

The ECHR held by 15 votes to 2, that the Civil Partnership Act does not breach the prohibition of discrimination under Article 14 by not giving them exemption from IHT. The court said that as a marriage or Civil Partnership Act, union is forbidden to close family members so it was right the sisters were denied the exemption.

The sisters have written to the Chancellor of the Exchequer every year since 1976 asking to be treated as a married couple. Although it is within the Government's power to make an exception, it is unlikely they will choose to do so.

However, there are a number of steps individuals can take to minimise IHT, which in some quarters, has been described as a voluntary tax on those not wise enough to plan to avoid it. For a start, assets given away more than 7 years before someone dies are entirely exempt and many individuals give their assets and houses away to avoid the tax entirely. There are complex rules against "reservation of benefit", but with legal advice, many lawful arrangements which completely avoid the tax are possible.



Secondly, for spouses, there is no IHT until the second spouse dies and even then that spouse has the benefit of both their and their spouse's IHT exemption band.

Thirdly, most of those who die do not pay IHT simply because they are well below the threshold. For 2008-09, this is £312,000. It is only those with assets worth £312,000 or more, who have to pay IHT.

Fourthly, even with recent legal changes it is possible to put some assets in trust to avoid the tax. Many individuals put their life insurance policies into trust for their children which avoid IHT in most cases. In addition, life policies can be taken out and put in trust and the proceeds used to pay the tax. Finally, all the IHT does not have to be paid at once. HMRC allow payments over 10 years.

If you would like advice on reducing the impact of IHT on your estate when you die, please contact us for further information.

COVER PRICING IN THE CONSTRUCTION SECTOR



The Office of Fair Trading issued a statement of objections (the equivalent of issuing a writ/claim) against 112 firms in the construction sector after longstanding investigations and many dawn raids.

The OFT alleges the firms engaged in 'bid rigging activities' including cover pricing. This is when bidders collude with a competitor during a tender process to obtain a price, or prices, which are intended to be too high to win the

contract. The OFT says "The tendering authority, for example a local council or other customer, is not made aware of the contacts between bidders, leaving it with a false impression of the level of competition and this may result in it paying inflated prices".

Also a minority of the construction companies had entered into arrangements by which a successful tenderer would pay an agreed sum of money to the unsuccessful tenderer ('compensation payment'). These were more serious forms of bid rigging usually facilitated by false invoices. A substantial number of projects were involved including tenders for schools, universities and hospitals.

The OFT has also received evidence of cover pricing implicating many more companies on thousands of tender processes, but has focused its investigation on approximately 240 alleged infringements which are being pursued. They raided premises of 57 firms and received 37

leniency applications with over 40 further companies subsequently admitting participation in some bid rigging activities.

Many readers may act as buyers in bodies which could be victims of cover pricing. The OFT says it will be a matter for individual procurers to consider what action, if any, they should take in their own particular circumstances, having taken appropriate legal advice as necessary.

The evidence received by the OFT in the course of its investigation indicates that cover pricing was a "widespread and endemic practice in the construction industry as a whole." The OFT's investigation, whilst maintaining as wide a scope as practically possible, could not pursue every firm against which they had received allegations, or evidence, of cover pricing.

The NHS counter-fraud service is also working with the OFT, to determine if some NHS hospitals paid more than they should for work which was done for them, with a view to making claims. The Government recovered high damages for over charging for drugs in a similar competition investigation through civil legal proceedings claiming damages even before the SFO/OFT investigation in that case was over.

Contact us if you are concerned about any of the practices of your business or those who supply you. You may be able to recover compensation if you are a local authority or other victim of these arrangements. Government auditors are already looking at how much compensation the NHS and other bodies might claim.

legal eye

DIVORCE IN THE NEWS - MILLS V MCCARTNEY

Although most divorces involve much smaller sums of money, the recent judgment in the Heather Mills/ Paul McCartney divorce is of general interest in a number of areas.

This was a case involving a 'short' marriage of four years, but with a child. In general, where marriage is short, the courts look at the assets built up during the marriage rather than applying a straight 50% split of assets as a starting point. This case also involved a marriage where there were enough assets to achieve a clean break, without on-going maintenance for the lower earning spouse, which is not always the case for most divorces.

Ms Mills was awarded a capital sum that would yield her £600,000 a year in income, which was what her needs were determined to be. She received about £24m including properties which was more than the £15m pre-hearing offer, but less than potentially she might have been awarded.

Also of general relevance in short marriages is whether there was a cohabitation period before marriage which increasingly is added on in ascertaining marriage length. Here the court did not accept the parties lived together before the marriage. In short marriages, if this period where they do live together before marriage is taken into consideration, a longer period is considered with implications for asset division.

The court also found there was over spending by the lower earner of the higher earner's money after the separation and £500,000 was taken from the award to compensate the husband for that sum.

The other relevant issue was proof – keeping paperwork. Being able to show how much was spent on what items is very helpful in proving issues in a divorce case. The judgment appeared to show that Ms Mills was unable to prove a number of aspects. Whether she might have done had she not represented herself in person at the trial remains to be seen. Please contact us for information or advice in this area.

DEEDS CAN BE SIGNED BY ONE COMPANY DIRECTOR

Due to parts of the Companies Act 2006 coming into force in April, documents signed as deeds now, in most cases, only have to be signed by one company director.

Documents signed as deeds sometimes include non disclosure agreements or undertakings, Deeds of Variations, powers of attorney and Deeds of Assignment of Intellectual Property Rights. Simple contracts require "consideration" (usually payment but can be "money's worth") to be enforceable.

If there is doubt about whether benefits are passing to the right party, or if there is no consideration, then it is better to sign documents as a deed, state they are a deed and intended to be executed as such, and have a director sign. In most cases however, if there is no doubt about consideration and money is paid for goods or services sold, it would not be necessary to sign a document as a deed. The director who signs as a deed must sign in the presence of a witness.

Some companies will wish to retain two signatories however, as this is useful protection

against fraud. A requirement for two signatures remains acceptable as an internal corporate rule.

Many have internal rules about who can and cannot sign all contracts, although unless the other third party knows there is any restriction, usually the individual who is "held out" by the company as having authority will bind the company. This is even if internally the "rules" said no authority to sign contracts over £20,000. As the supplier or buyer would not be aware of that restriction, the company is still bound.

TOLERATED TRESPASSERS - LAW CHANGE

An amendment to the Housing and Regeneration Bill is likely to see the end of "tolerated trespassers" in property law.

Since 1996, this term has been used to describe tenants whose tenancies are over because of a possession order, but have not yet been evicted and are still paying rent. Often the rent is paid by housing benefit.

The result of the change will be that no tenancy can be ended by the landlord until the tenant is actually evicted by enforcement of a possession order. Those with that status, when the law changes, will have their tenancies reinstated.

Tenancies, both domestic and commercial, can lead to complex legal issues particularly where the tenant does not pay the rent, or otherwise acts in breach of the lease. We can advise on issues arising from your private and commercial lease arrangements.

We often find small businesses entering into long term commercial leases for their business premises without taking legal advice. Often, this is the biggest commercial commitment of their business and legal advice on the lease can ensure problems are avoided later. In addition, any local business which operates as a partnership, even if just with family members or via a limited company, really ought to have a partnership agreement or shareholders' agreement to ensure all those involved know where they stand.

Please contact us if you would like us to draw one up for you.

PRE-CONTRACT NEGOTIATIONS

Where contract terms are unclear, then the surrounding circumstances are relevant in working out the meaning. Frequently therefore, solicitors need to look at contemporaneous emails, notes of meetings and obtain oral evidence from both sides, in cases of doubt.

In a recent case, a property developer was refused the right to use evidence of contract negotiations to change the definition of a term in the contract, even though the evidence was in the developer's favour.

Persimmon Homes was developing flats under contractual arrangements with the owner of the land, Chartbrook. There was a dispute over what a term meant on a schedule to the contract. The high court and court of appeal both agreed that Persimmon might not look at other evidence than the contract.

"[The term] is clear, certain and unambiguous and its arithmetic is straightforward," said Lord Justice Rimer, one of the three judges in the case. "The phrases which are elsewhere defined are accepted as meaning what their definitions provide, and no other

word or phrase is said to bear any meaning other than its ordinary one... I can see no basis for re-writing the agreement as invited by Persimmon," he said.

"I would reject any suggestion that this is a case in which it is legitimate, as part of the construction exercise, to have recourse to the pre-contract negotiations. The basic rule is that they are out of bounds."

This is consistent with long standing English law, but it is useful to have it confirmed. Persimmon argued that under the disputed clause it owed Chartbrook £900,000. Chartbrook's interpretation of the clause, which gave a formula defining how the profits from flat sales were to be divided between the two companies, meant that it was owed £4.6 million. The term was defined in the contract so any dictionary definition was not relevant.

The answer is to ensure contracts are clear and carefully checked before signature. Sometimes it pays to have a lawyer give a final quick check over an agreement even if the business has drawn it up internally.

Although this does not give cohabitants the same rights as those involved in a divorce, it could make it easier for some unmarried couples to claim money from their partner, if there is any property they jointly own, when the relationship breaks down.

The 73 year old man in this test case was ordered to sell his home, which was in joint names with his partner, and divide the proceeds with the partner who had broken up their relationship after 23 years together. Mr Carl Barron was told his former partner was entitled to half the £150,000 property which was in his name, even though she had not paid a penny towards the mortgage. In other words, the fact they had put it into joint names was evidence of intention they would jointly own the property in equal 50% shares, not some other percentage.

Anyone proposing to put a property into joint names can easily have a lawyer draw up a document setting out the percentages they will own, and indeed Land Registry forms now allow those registering properties to indicate what percentage shares are owned.

For more information on this case or other family law related matters, please call us for advice.

RAIDS ON SUPERMARKETS

Some leading supermarkets have been raided by the Office of Fair Trading after a tip off by Wal-Mart/Asda about practices which may breach UK competition law. The raids follow a separate investigation into pricing arrangements for cigarettes sold in supermarkets and came the same week that the Competition Commission issued its report into the sector.

In the supermarket cigarette case, apparently the allegations involve agreements between the manufacturers and supermarkets on a supplier to distributor basis that :-
(a) they would not resell the cigarettes at less than an agreed price or (b) that they would not resell them at more than a percentage of price less than another manufacturer's product.

Instead, supermarkets and any other dealer must be free to set a retail price at any level it chooses. However, maximum resale price maintenance by companies not in a dominant market position is usually lawful. Thus suppliers can encourage prices to stay low in the shops but not get them higher through pricing arrangements with the supplier. The latest raids of supermarkets apparently relate to supermarkets telling suppliers what rivals have quoted (which is very common amongst buyers who seek to play one rival off against another and is not normally unlawful) as well as some cases where suppliers have asked for the information.

Contact us for information on what pricing information may be exchanged and with whom.

COHABITANTS' RIGHTS

The Government this year announced that its proposals to give cohabitants similar rights on divorce to those who are married, has been abandoned.

Although in some cases, cohabitants have been found to be entitled to a share of their partner's assets, the position is by no means straightforward, nor automatic as with married couples. Yet many believe there are "common law marriage" rights under English law, which do not, in fact exist. It is important that our clients do take some advice on their rights before moving in with a partner. It is wise to ensure wills are drawn up, and in some cases, for properties to be owned jointly and the shareholding clearly set out.

For those contemplating marriage, it may be wise to enter into a pre-nuptial agreement. Although they are not legally binding in this country they can sometimes have persuasive force and in the Crossley case saved the higher earner a considerable sum. However in May, one case laid down rules for unmarried couples who have bought a property in joint names.