LexisNexis In-house News Bulletin

Keeping you abreast of the big commercial legal stories that could affect your business.

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August 2016

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Corporate & Commercial

Anti-variation clauses

In the recent case of *MWB Business Exchange Centres v Rock Advertising*, the Court of Appeal considered the validity of a clause that prohibited an oral variation of a licence agreement.

In this case, MWB rented office space to Rock. Rock fell into arrears but MWB orally agreed a new repayment schedule and it is understood that Rock was compliant with this revised schedule.

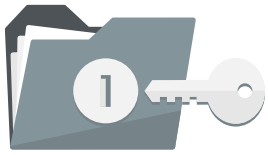
However, MWB then decided to give notice of termination due to late payment and claimed it was not bound by the oral variation as the licence specifically stated that variations had to be in writing and signed by the parties.

Reversing the High Court decision, The Court of Appeal stated that the oral variation was effective and that all terms in documents (including a variation clause) can be amended at a later date if the parties agree.

This decision is consistent with the *Globe Motors Inc. v TRW* case that we reported back in June. We think these are worrying decisions. Whilst it is understood that where the parties jointly agree to change something they should not be stopped from making that change, we believe that the parties should still be required to agree on changes in the way that was contemplated in the original contract.

Is a party bound by terms and conditions they have not received?

This was the question posed in the recent *Barrier v Redhall Marine* case. Redhall's purchase order referred to terms and conditions overleaf although the terms and conditions were not actually printed on the reverse. The High Court concluded that the terms and conditions were incorporated commenting that Barrier was notified of the terms and could have asked for a copy at any time.



Data Security

EU-U.S. Privacy Shield

As reported in previous months, the Safe Harbor scheme that allowed the transfer of personal data to U.S. Safe Harbor registered companies was invalidated in late 2015.

Since then, there has been frantic work to create a replacement scheme, known as the EU-U.S. Privacy Shield. This has been a rocky ride particularly because of concerns that U.S. government authorities are able to access EU personal data. However, the good news is that these issues appear to have been resolved and the EU-U.S. Privacy Shield has now been approved by the European Commission.

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U.S. organisations will be able to seek certification for the scheme from the 1st August. There is, however, a nervousness that the new scheme will be open to another invalidation attack in the European Court of Justice.

Employment

Protected conversations

David Cameron was the big advocate for new rules to allow employers to have frank conversations with employees about their future employment without the fear of repercussions simply because of the conversation itself. This right was implemented into law in 2013 under section 111A of the Employment Rights Act. We'll refer to it here as the "protected conversations statute".

It has now been tested for the first time in court. In the case of *Faithorn Farrell Timms v Bailey,* there had been without prejudice settlement negotiations although the same detail was subsequently included in open correspondence and even in each party's tribunal papers. At a later point, however, the employer argued that the correspondence was inadmissible due to the common law without prejudice principle and by virtue of the protected conversations statute.

On appeal, the EAT determined that although the employer, by its conduct, had waived its right to rely on the without prejudice rule, the protected conversations statute offered broad protection and could be used to stop the content of the offers being revealed and even any information about there being an offer.

It is worth noting that the protected conversations statute only applies to unfair dismissal claims and not discrimination claims.

Immigration Act 2016 – changes to illegal working offences

Rules implemented under the Immigration Act 2016 to crack down on the hiring of illegal workers took effect on the 12th July. The new rules mean that employers will be guilty of an offence if they employ an individual while having "reasonable cause" to believe that their immigration status disqualifies them from working.

Previously it had to be proven that the employer "knowingly" employed people who were not legally entitled to work in the country. Employers convicted of an offence could also face unlimited fines or be jailed for up to five years, compared with two before.

Social Media

A recent decision by the Employment Appeal Tribunal found that the dismissal of an employee for putting comments on Facebook about a colleague was unfair. In this case, Mr. Daly had a disagreement with a manager and posted a "derogatory" comment about the manager on Facebook. Mr. Daly did offer a full apology but was later dismissed for gross misconduct.

Ultimately, the EAT determined that there were flaws in the employer's policies and procedures that rendered Mr. Daly's dismissal unfair and awarded him €5,000. The employer's failure to consider other, more appropriate sanctions at any stage throughout the disciplinary procedure was a flaw that weighed heavily against the employer in the EAT's decision. This decision underlines the importance of having clear employee social media policies.

Post-termination restrictive covenants

The recent case of *Pickwell v Pro-Cam* considered the enforceability of post-termination restrictive covenants. Whilst restrictive covenant cases always rest heavily on the specific facts, this case still offers some useful guidance.

The claimants, Ms. Nicholls and Mr. Pickwell had worked as agronomists with Pro-Cam. They both signed contracts approximately one year before they were qualified that included a 6-month post-termination non-dealing and non-solicitation restriction.

In 2015 they were both tempted away and joined Pro-Cam's competitor, Frontier. The claimants argued that the post-termination restrictions were unenforceable, highlighting the recent similar Bartholomews Agri Food case, whereby restrictions signed when the employee was a trainee were found to be unenforceable. The High Court, however, distinguished that case.

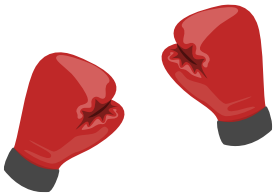
The Bartholomews case had widely drafted non-compete provisions whereas this case only had non-dealing and non-solicitation clauses. The more narrowly drafted clauses coupled with the fact that the claimants had been given access to commercially valuable work, valuable status and training led the Court to determine that the restrictions were reasonable and enforceable.

Intellectual Property

Blocking injunction against ISPs

The Court of Appeal has confirmed in the case of *Cartier International v British Sky Broadcasting* that the High Court was right to extend the granting of blocking injunctions against Internet Service Providers in relation to websites whose operators infringe trade marks. This has been an established practice in relation to copyright and is specifically provided for under the Copyright Designs and Patents Act 1988 but until now there has been uncertainty about whether the same would apply to trade mark infringement.

This is good news for brand owners tackling intellectual property infringements.



Competition

Class actions

The Consumer Rights Act that was implemented on the 1st October 2015 allowed for the possibility of opt-out class actions for private enforcement of competition claims.

On the 21st June this year the United Kingdom Competition Appeal Tribunal published notice of an application to commence a class action. The action is brought by Dorothy Gibson and the National Pensioners Convention to act as the class representative in bringing opt-out collective proceedings against Pride Mobility Products Limited. This action is a follow-on claim for compensation following a 2014 Office of Fair Trading decision that found that Pride and other retailers entered into agreements aimed at prohibiting online advertising for certain models of Pride mobility scooters below Pride's recommended retail prices.

If this action continues, it will be the first competition opt-out class action to be heard by the Competition Appeal Tribunal and will pave the way for similar actions in the future.

Consumer protection: CMA issues interim report on legal services

The Competition and Markets Authority has published its interim report on its market study into legal services. It concludes that competition in legal services for individual and small business customers is not working as well it could. The CMA has found that while there have been some positive developments, up-front information on price and quality is often not available to customers. On the issue of regulation, the CMA is open to the possibility of moving to a new regulatory model, but recognises the risks associated with such a change. Comments on the interim report can be submitted until the 19th August.

The Ministry of Justice has also launched a consultation on proposals to amend the Legal Services Act 2007. This follows a report that the government published on the 30th November 2015 when the government pledged that it would consult on removing barriers to entry for alternative business models in legal services.

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