SQUIRE SANDERS

COMMERCIAL NEWSLETTER

April 2012

Welcome to the latest Birmingham Commercial Newsletter, which we hope that you find interesting. The Review provides a brief and informal insight into some of the most recent commercial developments.

If you have any comments, feedback or would like more information about any of the articles then please contact Vicky, Caroline or Stuart, whose details are below.

Data Protection: Penalty Increase Looming

Data protection and security issues are about to be pushed much higher up the priority list of businesses across Europe and beyond. The European Commission's proposal for a replacement of the existing Data Protection Directive was released in January 2012. Some of the key proposals are set out below.

The most significant change is a huge increase in the potential penalties for breach of data protection requirements. For the most serious intentional or negligent breaches, penalties of up to €1 million or up to 2% of the global annual turnover of a company are contemplated.

Other proposed changes include, for the first time, placing some direct responsibility for data protection compliance on data processors, mandatory breach notification within 24 hours for all but small organisations, and a requirement on every organisation with 250 or more employees to appoint a data protection officer.

The widely discussed (and controversial) topic of the "right to be forgotten", has also been proposed. This new right would allow individuals to require an organisation holding its personal data to erase all traces of it. Quite apart from the potential implementation costs involved, many argue that this right would unduly threaten freedom of speech on the internet.

Significantly, this replacement of the Directive is in the form of a Regulation, which will have direct effect without the need for implementing legislation by Member States. The objective is for a more harmonised European framework on data protection to be achieved. This also means that the Regulation will come into force more quickly and that individual Member States will not have the flexibility to make changes in their implementing legislation.

Unreasonably withheld consent - that is the question?

The High Court recently considered this question in the case of Porton Capital Technology Funds and others v 3M UK Holding Ltd and 3M Company [2011] EWHC 2895.

In this case, the High Court had to decide whether it was reasonable for the former shareholders of Acolyte Biomedica Limited, which was purchased by 3M, to withhold their consent to 3M's request to terminate a product line. As is typical in many contracts, the share purchase agreement expressly stated that the right to withhold consent "should not be unreasonably withheld".

The termination of the product line was of particular relevance as the purchase price of the business was subject to a further earn-out payment based on 2009's net sales. Interestingly, the product line that 3M wished to terminate was the only commercial product of the Acolyte business. So, by terminating the product line, the former shareholders were deprived of any further earn-out payment based on net sales.

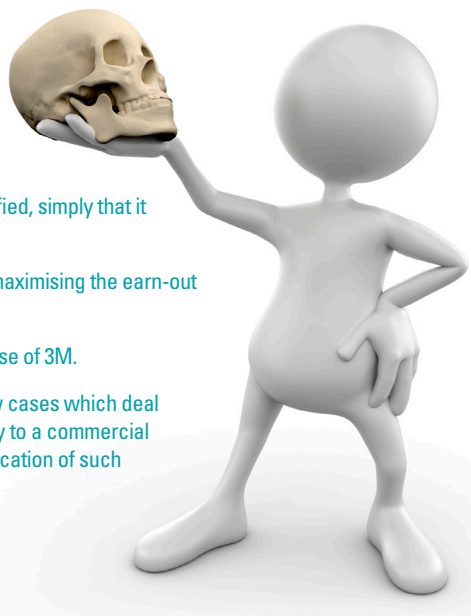
3M requested consent to cease selling the product line in June and August of 2008, but consent was declined on both occasions. However, in December 2008, 3M stopped selling the product line and consequently net sales in 2009 were zero.

The vendors argued that 3M was in breach of contract but 3M argued that the vendors had acted unreasonably in withholding consent.

The judge held that the vendors had acted reasonably, taking into account the following principles:

- the burden was on 3M to show that the vendors' refusal to consent was unreasonable;
- the vendors did not have to show that their refusal was right or justified, simply that it was reasonable in the circumstances;
- the vendors were entitled to take account of their own interests in maximising the earn-out payment in determining what was reasonable; and
- the vendors were not required to balance their interests against those of 3M.

This case is of particular interest as, perhaps surprisingly, there are few cases which deal with whether or not consent has been unreasonably withheld by a party to a commercial contract. The judgment provides useful guidance on the practical application of such wording.



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WATCH LIST FOR 2012

Now for a bit of crystal ball gazing…the European Commission has published a list of some of the issues it intends to look at and/or legislate on in 2012. Some of the areas of commercial interest include:

- a Consumer Agenda, expected in the second quarter of 2012, setting out a strategic vision for consumer policy;
- a review of the current Product Safety Directive with the aim of providing businesses with more clarity, less compliance cost and a level playing field;
- a directive to improve the accessibility of goods and services for the elderly and the disabled;
- a framework for mutual recognition of electronic identification, authorisation and signatures;
- a communication on cloud computing, addressing the legal aspects of data protection and retention; applicable law; liability and consumer protection; issues of interoperability; standardisation and the portability of data and applications;
- providing an alternative dispute resolution mechanism for business to business disputes.

We will keep you updated as further detail emerges from the EC.

Popportunity knocks for creative businesses

Have you noticed the increase in retail stores that are there one minute and gone the next? Well from new businesses dipping their toe in the water, to established brands creating a PR buzz, many businesses are making use of temporary or "pop-up" shops or spaces to strengthen their brand presence.

Pop-up shops are retail spaces that can be occupied on a short-term basis – typically for a few weeks but occasionally for as little as a single day. Since the hard times have hit, businesses are increasingly looking for ways to stand out from their competitors, and pop-up shops can be a cost-effective means of achieving this. Seasonal lettings are well known but brands such as Hamleys have used pop-ups to increase their footprint on the High Street, or Gap utilising a pop-up shop in New York for one of its on-line only brands, or trialling Banana Republic in Birmingham.

From a tenant's perspective, a pop-up tenancy will typically be at a lower rent and offer more flexible terms than a long lease. They offer an opportunity to test different spaces; new or different locations; new markets or new merchandise, without long-term commitment and overheads. Marketing for pop-ups may also be achieved quickly and cheaply with the use of social networking sites to create the buzz of the arrival of the pop-up.

Landlords will benefit, receiving rent, insurance and service charge for that period. Landlords also benefit from empty property business rate relief on their property for 3 months following the occupation (increasing to six months for industrial or warehouse buildings) provided that the temporary occupation lasts at least six weeks.

Pop-ups can, however, have their downsides, and businesses should consider carefully whether any additional overheads associated with a temporary occupation will fit in with its cash flow projections. Not every retailer (particularly those who are already present in multiple locations) has encountered successful outcomes. Landlords should ensure that the occupier must vacate the premises at the end of the occupation and that the occupier does not acquire statutory rights to remain in occupation. Nonetheless, pop-ups represent a real opportunity for commerce, and so the presence of temporary shops on the High Street may not be as fleeting as it initially seems.

Image Rights: Rooney 1, Management 0

The Court of Appeal has upheld a judgment from the High Court in which an image rights agreement between Wayne Rooney and his former management company was deemed unenforceable due to it being an unreasonable restraint of trade.

The High Court had previously held that the agreement, which was entered into in January 2003, imposed "substantial restraints upon Mr Rooney's freedom to exploit his earning ability over a very long period of time on terms which were not commonplace in the market". The Court determined that the management company could not rely on the agreement to recover any amounts which would have fallen due under the agreement, nor could it sue for damages for breach of contract when Rooney terminated the agreement in late 2009.

The management company appealed to the Court of Appeal on a number of points, the main one being that the conclusion of the agreement being unenforceable was wrong as a matter of law because Rooney's trade was as a footballer and the image rights agreement was only a means of obtaining extra income and not his trade per se.

The appeal judge rejected both arguments stating that the public policy element behind the restraint of trade doctrine was concerned with the manner in which a person could properly realise their potential for the economic benefit of society generally.

What happens after the fat lady sings?

The importance of ensuring that each party's post termination obligations are dealt with carefully during contract negotiations has been emphasised by the recent decision of AstraZeneca UK Ltd v International Business Machines Corporation [2011] EWHC 306 (TCC).

In this case, the Technology and Construction Court reviewed the meaning of the relevant termination assistance and exit obligations and whether they had been met in the context of a complex IT outsourcing agreement. The outsourcing agreement was particularly significant as it governed the provision by IBM of IT infrastructure services to AstraZeneca's global business.

The parties disagreed about the scope of IBM's obligations following termination, including how much IBM should be paid for providing those services and the extent of IBM's obligation to provide shared infrastructure.

In respect of IBM's obligation to provide "shared infrastructure", IBM contended that the obligation was only intended to cover servers and software used by IBM for more than one customer. IBM claimed that the obligation was never intended to include the infrastructure at IBM's data centres in the form of equipment, systems and facilities.

However, Justice Ramsey disagreed with IBM and took a broad view of what the parties had intended to be covered by shared infrastructure at the time they entered the agreement. In particular, he stated that no proper distinction could be drawn between: (i) the services provided in the form of operating system hosting and online storage on the one hand; and (ii) the services provided in terms of data centre facilities on the other hand. Justice Ramsey concluded that shared infrastructure did in fact have the broader meaning and included the infrastructure at the data centres in the form of equipment, systems and facilities.

A further question that the court had to consider was whether IBM's obligations to provide termination assistance at a fixed fee (which had been left blank) was conditional on two matters; (i) on IBM being provided with an IT transfer plan by AstraZeneca; and (ii) on the parties agreeing the duration of the exit period. Justice Ramsey decided that, even though AstraZeneca had not provided an IT transfer plan and the exit period had not been determined, the provision of the services was not conditional on the parties having agreed the plan and period. Furthermore, the fact that no fixed fee had been included did not mean IBM had no obligation to provide the services, as Justice Ramsey decided that it was clearly intended that the fixed fee would be determined on agreement of both the IT transfer plan and the actual length of the exit period.

The case emphasises the importance of carefully considering exit provisions at the outset. Failure to do so can lead to considerable uncertainty, costs and potential litigation, particularly as the exit obligations come into play at the end of a relationship which, in a large number of cases, may be acrimonious.

Cashing in on the Olympics

With the Olympics now just a shot put throw away, it is perhaps time for a reminder of the very strict legislation that has been implemented relating to any advertising activities involving the use of Olympic symbols and/or references to the 2012 London Olympic Games. Trading activities taking place in or around Olympic venues will also be heavily regulated. The aim of the legislation is to promote the "clean venues" principle and to protect Olympic sponsors who have spent several million pounds to get the exclusive right to associate their brand and business with the Olympics.

Any attempt of association with the Games (except where you are an authorised sponsor) could result in hefty fines and possible personal sanctions against directors of offending companies. Therefore we recommend that any marketing campaigns that could involve any such association be subject to legal clearance.

TEAM NEWS

We thought that we should introduce you to Simon Carrington, the newest member of our team...and so in his own words...

Without wanting to sound too much like Michael Aspel on an episode of "This Is Your Life", as the "newbie", after qualifying into the commercial, IT and IP team, the team thought it would be a good idea if I introduced myself. You may recognise me from the "Movember" pictures last year (I'm in the middle of the front row)!

I'm a local lad from Sutton Coldfield, just a few miles north of Birmingham and I joined the firm as a trainee in September 2009.

Whilst I'm a keen sports fan, rugby being most favoured, (although if I'm bored, with really nothing else to do, I can be persuaded to go down to Villa Park and cheer on the football "softies"), my main passion in life is the outdoors. I am a very keen climber, hill walker, kayaker – anything which involves me being away from my desk and out in the countryside. I have a mini library of books on Mt Everest, K2, the Eiger, etc (self confessed geek) and was all ready to climb Mont Blanc last summer before I injured my knee chasing the egg. I am also currently half way through climbing all 600 metre plus mountains in Wales but this is an ongoing project as there are 158 of them! After that it is onto the Wainwrights in the Lakes and then the Munros in Scotland.

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