Gardner Leader
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Commercial Litigation Newsletter:

Our monthly updates on what matters to you

Edition 3 2016

Welcome to the latest edition in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do please let us know…

A taxing time

Much media attention was recently devoted to the upcoming increase in stamp duty land tax (SDLT) for second homes and buy-to-let property effective from 1 April. In contrast rather less attention was paid to the Government's announced plans to overhaul the rates for SDLT charged on commercial properties.

These changes overhaul the old regime whereby SDLT was determined by a rate that applied to the whole transaction value. From 17 March 2016, SDLT is calculated on levy rates that apply to the consideration value over different tax bands.

The SDLT rate is now 0% for the portion of the transaction value up to £150,000, 2% between £150,001 and £250,000, and 5% above £250,000.

In effect it means that buyers of commercial property worth up to £1.05 million will pay *less* in stamp duty than if they were subject to the flat 4% rate that previously applied to all properties over £500,000.

Good news it seems for small businesses. It is said these changes may benefit around 90% of small businesses who naturally operate within those margins, whilst raising £500 million a year due to the increase in tax on higher value properties.

It remains to be seen however whether the new SDLT rates unduly trouble the top end of the market, either by delaying transactions in the immediate future or in the long term by stymieing growth.

We are not expecting this to generate any litigation in and of itself, but if now is a good time to consider buying or indeed selling commercial property, or if you need any advice relating to your business, our commercial team will be very happy to help you, so do let us know.

Commercial Litigation

Directors beware…

Even though The Bribery Act 2010 came into force on 1 July 2011 there have yet to be many convictions secured. However, recent cases may suggest that the Serious Fraud Office have got their act together and it is likely that many more prosecutions will follow.

Popular myths, such as those which suggest that the SFO will only be interested in cases involving household name corporations where the "bribe" exceeds £1million, are exactly that. The recent convictions of both the Directors and of the Company itself in *R v Smith and Ouzman Limited* illustrate the point.

In those offences the payments to corrupt officials of two foreign governments in the case amounted to just slightly more than £400,000.00. This in turn resulted in prison sentences of 3 years (immediate custody) and 18 months (suspended) respectively for the two directors concerned. Financial penalties of £2.2million were imposed on the Company.

Ironically, the sentencing judge made no order for compensation to the people of Kenya and Mauritania (the losers in the case), as attempts to liaise with the governments of those countries had not provided satisfactory evidence that any compensation ordered would be received by the right party!

The case of course provides a timely reminder to directors and business proprietors generally to check that they have "adequate procedures" in place to prevent bribery. Ask yourself *will these be sufficient to avoid your organisation falling foul of section 7 of the Act? What is the level of your risk assessment and how recently were your processes reviewed?*

A comprehensive overhaul of contracts of employment, contracts for services, arrangements with agents and consultants as well as scrutiny both of your own and others trading terms and conditions may be required to ensure that the SFO do not come knocking on your door.

Some guidance for commercial organisations can be found at https://www.gov.uk/government/publications/bribery-act-2010-guidance but anyone seeking bespoke advice should contact any one of our commercial team here.

Should matters go horribly wrong and you are on the receiving end of a visit from the SFO, then do contact our criminal law specialist solicitor Stephen Bennett without delay.

When to draw the Company Lien

Fallouts and disputes. They happen day in, day out. In smaller owner-managed businesses, when shareholders fall out and are in dispute a key objective is often to retrieve shares at the earliest opportunity. Such retrieval will prevent the other shareholder being paid for work they have not done, and is important where managing owners are traditionally paid via small salaries but high dividends.

Where such a business has no suitable shareholders' agreement forcing the shareholder to give up their shares, often the business may feel compelled to make a financially attractive offer to entice share sale. Against the background of the fallout and dispute this can add insult to injury, especially if that shareholder owes the company money. It is in that albeit perhaps limited instance that there may yet be an alternate.

Many companies' articles of association contain a little known and often overlooked option: the company lien over shares. Exercising that lien means that if the shareholder owes money to the company, the company may be entitled to seize those shares, sell them on and use the money to discharge the debt (accounting for any surplus, if appropriate).

Any use of the lien is an action of the company. The directors must be very careful to ensure that they use it in the company's best interests, and not just their own, and it must not be used oppressively or to unfairly prejudice the shareholder against whom it is being exercised or this could give rise to a claim.

So how do you safeguard against any allegation of misuse of the lien? There are a number of steps you can take, which are

- Give the shareholder the opportunity to repay the money owed. Do it formally in writing with a warning that the lien may be used if monies are not repaid
- Use the lien only for monies clearly due and payable from the shareholder. This could be loans, previously overpaid dividends, money unpaid for shares or monies which have been misappropriated
- Do not use a company lien where the monies relate to a claim for breach of duty which the company may have against the director (unless this is already the subject of a court order)
- Keep a clear record and evidence the money due
- Sell the seized shares on the open market to an unconnected third party or, if sold internally do so for a value assessed by an independent third party, such as an accountant or valuer
- Do not take shares and sell them back to yourself at a reduced price

Not all companies have this lien and in some cases it may be restricted to any amount unpaid on the shares. However, many do have this right, although it may be buried in documentation.

The use of a company lien (or the threat) can be a very effective extra-judicial way of breaking a deadlocked dispute. Do please use with care however and following advice so as to avoid unwittingly creating bigger problems than you resolve!

In the last edition of our newsletter we looked matter of trade marks, and why they matter.

In this second part of our consideration, we look at what happens if it all goes horribly wrong.

Part 2 – defending your business

As we considered previously, all businesses, your businesses, have a brand. This is made up of the business name and logo, operating style, marketing genre and goodwill creating a unique proposition and reputation. In short, everything you have worked so hard to achieve.

Your brand is supported by your trade marks: product names, words, symbols, logos, shapes, numbers and so on, all used to identify and distinguish your goods and/or services from a competitor's good and/or services.

If you took the time and trouble to protect your trade marks by law, you have the right to the exclusive use of that name in relation to the goods and/or services of interest. But what if **you** don't and someone else has?

Brand problems: suppose you have launched Brand X. All is going well, business is growing maybe even booming and then BANG! Seemingly out of nowhere you receive a 'cease and desist' letter. The letter states that you are infringing someone else's registered rights and orders you to stop using that name in connection with the goods and/or services you offer.

What do you do? What can you do? What will become of your business? Could this ruin you?

No Defence: it is a cold hard fact that your own failure to protect your trade marks can break your business. Having a company name registered at Companies House or owning a domain name is generally **no** defence to someone suing for trade mark infringement. In fact, in the majority of countries the person who registers a trade mark first is in a much more powerful position than the person who uses a trade mark first.

You have the opportunity to protect your trade marks before someone else does. One has to ask why not do something that gives you the security of knowing you are not infringing a third party's rights and it gives you the right to the exclusive use of that name in relation to your industry interests?

As we said before, we recognise this is a specialist area, and we work with a local trade mark attorney to ensure our clients have the specialist advice they need. Our specialist has 25 years' experience in private practice and in-house legal departments. We can arrange a free consultation for you if you would like any help in protecting your rights. You have nothing to lose but your brand…

We hope you have enjoyed reading this newsletter. We really would like to hear from you with any feedback, comments, suggestions and of course if we can assist on any specific issue you have, just give us a call.

At Gardner Leader we understand you need a law firm which you can trust, which understands your priorities and delivers practical, exceptional value legal solutions. We will work closely with you to ensure that we can deliver the results you need. Legal situations can be stressful, but we are committed to giving you peace of mind with the reassurance that your case will be handled sensitively and professionally by our legal experts.

We also hold Market Place seminars, so named because it is in the market place that we come together to do business and, before Gardner Leader came to Maidenhead, the name also reflected the main office location of the practice.

If you would like to be added to the invite list for the upcoming seminars this year, do let us know. We look forward to seeing you soon.

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