Commercial Litigation

Commercial Litigation Newsletter:

Our monthly updates on what matters to you

Edition 1 2017

Welcome to this the first edition of 2017 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…

Business 0: Bank 1

LIBOR is the rate that various of the world's leading banks charge each other for short term loans – an inter-bank lending rate – and is considered to be one of the most crucial interest rates in finance. On the back of the rate stand trillions of pounds of loans and financial contracts.

When the LIBOR scandal broke in early 2012, an international investigation into the LIBOR revealed a widespread plot by multiple banks -notably Deutsche Bank, Barclays, UBS, Rabobank, and the Royal Bank of Scotland -to manipulate these interest rates for profit starting as far back as 2003.

The end of 2016 saw judgment being given in the first major case relating to the manipulation of the LIBOR to reach trial here.

Property Alliance Group Ltd v The Royal Bank of Scotland plc concerned four interest rate derivative products (Swaps) that The Royal Bank of Scotland plc (RBS) sold to Property Alliance Group Ltd (PAG), a property investment and development business, between 2004 and 2008. PAG claimed that RBS had mis-sold the Swaps, breached implied terms by transferring PAG to the management of its Global Restructuring Group and made misrepresentations relating to RBS' alleged participation in, and knowledge of, the manipulation of LIBOR.

Reading the lengthy judgment of some 137 pages shows how the Judge, Asplin J, gave detailed consideration to the evidence of all the witnesses. In such complex claims it is clear the specific facts of the case and analyses of who said what when and how was it understood by each are crucial to the outcome.

All PAG's multi-million pound claims were dismissed but the decision is a good indicator of how we might expect the Courts to deal with similar allegations of misconduct, looking at claims that representations made were false and if so, were they made fraudulently.

Taking on any large institution let alone a major bank is a daunting prospect but that should not put you off looking to identify whether you have a claim worth pursuing. Our commercial litigation team will be pleased to assist so do get in touch if we can help.

When is a contract not a contract?

The familiar cry *'…but I haven't got a contract'* is one most every solicitor would put in their top 5 list of common legal misconceptions.

What such cry usually means is the terms of an agreement have not been written down and signed and as a result someone hopes to wriggle out of their obligations. In fact there is no legal magic in either writing or signatures. Both are simply weighty evidence that can be called upon in the event of dispute as to terms and, absent one party proving they signed under duress, probably determinative.

Very commonly parties do not have a neat document to rely upon of course. That may make life more difficult when things have gone wrong and you look to sue but is rarely fatal.

A legally binding contract (and one you can successfully sue on) is created where:

- An offer has been accepted.
- The parties reach agreement on all the contractual terms which they regard, or the law requires, as essential.
- The parties intend to create legal relations.
- There is consideration i.e. money or money's worth has changed hands.

The test to identify whether agreement has been reached on all essential terms is whether an honest and reasonable businessman would have concluded from the

parties' communications and conduct that they had agreed all the terms they considered to be a precondition to creating legal relations.

There have been a number of important decisions on the formation of legally binding contracts over the years. November 2016 brought the latest from the Court of Appeal. The outcome of that appeal was in this instance, or for the party suing anyway, fatal.

In **Wells v Devani** the facts were all important. It concerned a situation where an estate agent found a buyer for 7 flats but following completion of the purchase, the seller refused to pay the agent's commission. The Court had to decide whether a legally binding contract had been created.

Mr Wells lived in Andorra but had developed a block of 14 flats in Hackney. With 7 unsold he mentioned his selling problem to his neighbour who told him he knew of a property investment company in London that might be interested in buying the remaining flats. His neighbour contacted the company and also a Mr Devani. In fact Mr Devani was an estate agent, not an investor. He and Mr Wells spoke by telephone and Mr Devani gave Mr Wells his contact details and Mr Wells faxed Mr Devani details of the development.

Mr Devani quickly found a buyer for all of the flats for £2.1m, which offer Mr Wells accepted. Only after the offer was accepted did Mr Devani send his terms as required under the Estate Agents Act 1979. When he claimed his 2% commission Mr Wells refused to pay. Mr Devani sued.

The main issue of fact in the case initially was whether, in the course of the telephone call, Mr Devani told Mr Wells that he was an estate agent and that his commission for the transaction would be 2% plus VAT, or whether he did not say that he was an estate agent and gave the impression that he was an investor.

The judge concluded Mr Devani considered himself an agent rather than a buyer, looking to a commission from Mr Wells as the source of his profit, and said nothing to suggest he was a buyer. The critical question was whether in the conversation Mr Wells and Mr Devani reached an agreement that was a legally binding contract.

The judge held they did but he accepted the parties did not discuss or agree on the trigger event that would entitle Mr Devani to be paid commission (e.g. on exchange of contracts) and held that, in the absence of express agreement on such an issue, the law will imply the minimum term necessary to give business efficacy to the parties' intentions. Mr Wells therefore had to pay.

Mr Wells appealed against this. The Court of Appeal decided (2 to 1) that *failure to agree the event triggering commission made the contract incomplete and moreover, terms cannot be implied into an incomplete contract*. Mr Devani was therefore due nothing.

Lessons to be learned from this decision would appear to be

- *Any 'gap' needing to be filled can only be done by interpreting what the parties said and did*
- *The trigger event for commission in an estate agency contract (and arguably any commission based contract) is an essential term*
- *Decisions on contract formation are rather subjective*
- *Sometimes the cry '…but I haven't got a contract' is not misconceived at all!*

By contrast, a differently constituted Court of Appeal 2016 in **Hughes v Pendragon** held that a claimant made a valid contract with a car dealer to buy a limited edition Porsche, and a collateral contract that the claimant would be the first in the queue if Porsche supplied a vehicle to the dealer. The fact that there was no vehicle, no price and no delivery date when these contracts were made was not fatal to their existence. Under the Sale of Goods Act 1979, the goods can be future goods and the price need not be fixed by the contract, but may be left to be determined in various ways. And if the delivery date is not fixed, the seller must deliver goods within a reasonable time.

For advice on whether you have or are bound by a contract, or better still for advice before you try to create one, our commercial litigation team is always on hand.

Claims' update and fee increases

The Ministry of Justice publishes quarterly civil court statistics. Those for the post-Brexit EU referendum vote quarter (July to September 2016) are now out. The bulletin provides statistics on the County Court civil (non-family) cases that took place during that period, and the judicial review cases processed by the Administrative Court for the first three quarters of 2016. Key findings include:

- 86% of all claims were money claims, of which 386,735 were claims for specified amounts of money and up 35% from the same quarter last year. The vast majority of these claims were issued at the County Court Business Centre (CCBC) in Northampton, which has responsibility for issuing specified money claims filed online.

- The increase in specified money claims is said to have contributed to a 24% increase in the number of claims issued on the same quarter last year (494,148 claims in total) and a 32% increase in the number of judgments made on the same period last year (282,944 judgments), of which 85% were default judgments.
- There was an average of 54.5 weeks between a fast and multi-track claim being issued and going to trial, an increase of 14% on the same quarter in 2015.
- 72,572 warrants were issued in this period, representing a 21% increase on the same quarter last year.
- 19,950 enforcement orders were made in this quarter, a decrease of 27% in comparison to the same period last year.
- There were 1,702 insolvency petitions, a 67% decrease on the same quarter last year.
- In the first three quarters of 2016 of the 3,281 applications lodged at the Administrative Court more than half related to civil immigration and asylum.

Just under half of the issued defended claims (17,166) went to the small claims track. This track is generally for cases with a claim value of up to £10,000. Very commonly, as costs are not awarded to the winner nor payable by the loser, parties in small claims cases have no legal representation. The increase in the numbers of those without such legal representation, called litigants in person, is publicly acknowledged as putting a huge strain on resources. This is simply because cases take much longer to run without legal representation and cost the state much more.

Interestingly the powers that be have just announced changes to the Court fees payable to issue small claims. From March 2017 they will be as follows where the claim

- Does not exceed £300, the fee will decrease from £35 to £25.
- Exceeds £300 but does not exceed £500, the fee will increase from £50 to £55.
- Exceeds £500 but does not exceed £1,000, the fee will increase from £70 to £80.
- Exceeds £1,000 but does not exceed £1,500, the fee will increase from £80 to £115.
- Exceeds £1,500 but does not exceed £3,000, the fee will increase from £115 to £170.
- Exceeds £3,000, the fee is £335.

The availability of refunds has also been removed for these types of cases where they have been settled or discontinued.

These increases may not seem much in and of themselves but together with the massive fee rises reported on last year, will all add up.

Of course the cheaper option for all would be to avoid litigation altogether. We all know however that disputes cannot always be avoided. If you would like to discuss all your options for dispute resolution, whatever your business or situation may be, we look forward to hearing from you.

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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