BusinessUpdate

WALL JAMES CHAPPELL SOLICITORS

November 2009

COMMERCIAL

Inside this issue:

Commercial
1 Implied terms
1 Exclusion clauses
Commercial Property
2 Energy performance certificates
3 New asbestos regulations
Corporate
4 Buying and selling a business
4 New directors' duties

Commercial

Can I have that in writing please!

The Court of Appeal has held that a 30 year supply arrangement was not grounds for implying a contract between the parties where they had deliberately not entered into an express contract in order to preserve maximum flexibility in their trading arrangements. ***Philip Chapman*** *explains how this could have far reaching consequences for many businesses.*

Baird Textile Holdings Ltd (Baird) had supplied garments to Marks & Spencer plc (M&S) for 30 years. Without warning, M&S terminated all supply arrangements between them with effect from the end of the then current production season. No express contract had ever been concluded between the parties. Baird claimed that M&S could not terminate the supply arrangement without giving reasonable notice which, Baird argued, was three years. The claim was based on a breach of an implied contract which required M&S to acquire garments in quantities and at prices which in all circumstances were reasonable.

In their decision the Court pointed out that the obligations arising from the alleged implied contract were "insufficiently certain to be contractually enforceable. There was also an absence of clear evidence of an intention to create legal relations".

It is therefore important to recognise the benefits of setting out the express terms in your contractual arrangements. Express terms are, unsurprisingly, those terms that have been expressly stated by the parties, either in writing or orally. An express term of a contract must be distinguished from a representation which is a statement of opinion, which does not become a contractual term.

Implied terms are terms that have not been expressly agreed by the parties but still apply. This may be because the parties have agreed to document in writing certain key clauses leaving others open to interpretation, or because the parties have not considered that a particular situation would come to pass. A court will imply a term into a contract in a number of ways including usage or custom, previous course of dealings, the intention of the parties and terms implied by law.

As the above court decision has shown, it is generally best to cover your back by negotiating clear contractual arrangements to avoid losing out in the long run.

Contact Philip Chapman
p.chapman@wjclaw.co.uk

Are you really protected by your exclusion clauses?

Exclusion clauses are a common feature of contracts today and may take a number of different forms. The most common are those which seek to exclude liability for breach of contract or which seek to limit liability to a specific sum. ***Philip Chapman*** *considers the use of exclusion clauses and whether businesses need to amend their exclusion clauses in light of the recent decision of the High Court which held that an exclusion clause does not apply to deliberate personal repudiatory breach of contract.*

A repudiatory breach of contract is a breach of contract by one party that is severe enough to allow the other party to treat the contract as terminated, for

example due to a breach of a condition often resulting in the defaulting party having to pay damages.

In the recent case of *Internet Broadcasting Corporation Ltd (t/a NetTV) and NetTV Hedge Funds Ltd (formerly MARHedge TV Ltd) v MAR LLC (t/a MARHedge) [2009] EWHC 844* the High Court held that there was a rebuttable presumption that an exclusion clause should not apply to a deliberate personal repudiatory breach of contract. Since it is unlikely that a deliberate repudiatory breach would be insurable, "very clear and strong drafting would be required to persuade a court that the parties intended an exclusion clause to cover a deliberate personal repudiatory breach of contract".

Exclusion clauses perform a number of useful functions. Firstly, they allocate the responsibility for risk under a contract. Courts will often consider which party could most sensibly be expected to insure against the relevant risk. Secondly, exclusion clauses can help reduce litigation costs by clarifying the areas of responsibility of the parties. Thirdly, they can be used in standard form contracts to reduce costs of negotiations and drafting.

Importantly, exclusion clauses are sometimes used as a tool for the more powerful party to exclude liability towards the weaker party. It is for this reason that the law has evolved to help plug this gap. Exclusion clauses are therefore controlled primarily by the Unfair Contract Terms Act 1977 (UCTA).

In light of the above High Court decision it is therefore not only important that exclusion clauses be properly incorporated into the contract and cover the loss which has arisen, but there should also be no other rule of law which would invalidate the exclusion clause.

Contact Philip Chapman
(p.chapman@wjclaw.co.uk)

Commercial Property

Energy Performance – A hot topic!

Energy performance has become a hot topic for businesses in recent years and Energy Performance Certificates are just one of many requirements imposed on commercial clients. ***Ruth Latham*** *sets out the key issues and how best to stay ahead of the game.*

Under Regulation 5 of the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 the seller or landlord of commercial property is to make available free of charge to a prospective buyer or tenant a valid Energy Performance Certificate (EPC). Since the 4th January 2009 it must be available to a prospective buyer or tenant at the earliest opportunity and in any event when written information about the building is first provided following a request for information from a prospective purchaser or tenant and when the building is viewed. "It must be obtained before a contract for sale or let is entered into".

It is the action of selling, letting or construction that triggers the requirement for an EPC. Therefore, if you own a property that is currently let out the tenant does not require an EPC until you decide to sell or the tenant decides to assign or sublet their interest.

There are a few cases where an EPC is not required, for example, if the building is only a shell; If it cannot be connected to any services so that energy is not being used so that it will not constitute a building within the meaning of the regulations; If the property is a small, stand alone, non-residential building of less than 15 metres square; If it is a temporary building with a planned user time of less than two years; If it constitutes non-residential agricultural buildings with low energy demand; If it is a site which is to be demolished or required for redevelopment where all appropriate permissions and plans are in place.

In addition, on a renewal Lease to an existing tenant, if the tenant was in occupation before the 1st October 2008 then an EPC is not needed.

The EPC Certificate is valid for a period of ten years. If you are a landlord of a multi let building it may be worth while considering whether the costs of obtaining an EPC can be included within the service charge provision. On new leases of multi let units it is advisable for there to be a clear provision in the service charge provisions which would enable the recovery of the costs towards an EPC. If a landlord followed the recommendations in the report the lease would need to be considered to determine whether the cost of this could also be recouped under the service charge provision. From a tenant's point of view it is likely that they would resist this as it is likely to constitute an improvement rather than falling within the remit of the usual repairing obligations.

Trading Standard Officers are responsible for enforcing the regulations. The penalty for failing to make available to a prospective buyer or tenant of commercial premises is fixed at 12.5% of the rateable value of the building with a default penalty of £750 where that formula cannot be applied. The range of

penalties under this formula is limited to "a minimum penalty of £500 and a maximum penalty of £5,000". It is the seller or landlord who will be liable for the payment of the penalty.

On the sale or the letting of your commercial premises we can arrange to obtain an EPC on your behalf through our internet search provider TM Property Searches.

Contact Ruth Latham
(r.latham@wjclaw.co.uk)

Duty to manage your asbestos…

***Ruth Latham** explains the central issues raised by the latest Asbestos Regulations for owners or tenants of commercial premises. Regulation 4 of the Control of Asbestos Regulations 2006 which came into force on the 13th November 2006 sets out the duty to manage Asbestos in Commercial Properties. This legislation affects all non-domestic premises including factories, offices, shops and warehouses. It also includes common areas of both commercial premises and domestic premises, for example, staircases and corridors in a block of flats.*

"The duty to comply with the Regulations is placed on the Duty Holder". This is the person that has clear responsibility for the maintenance and repair of the premises. This responsibility is usually set out under the terms of a Tenancy Agreement. Generally, in premises which are not let, it is the owner of the building who is the Duty Holder. If premises are let as a whole it is usually, unless it states to the contrary in the Lease, the tenant's responsibility to comply with the legislation. In an Industrial Estate it may be that the tenants of each Unit are responsible for their specific Unit whilst the owner is responsible for the Common Parts although the costs of complying with this legislation can usually be recouped under the service charge provisions.

Regulation 4 of the Control of Asbestos Regulations 2006 requires the Duty Holder to:-

1. Take reasonable steps to find out if there are materials containing asbestos and if so its amount, where it is and what condition it is in.

2. Presume materials contain asbestos unless there is strong evidence that they do not.

3. Make and keep up to date records of the location and condition of the asbestos containing materials or materials which are presumed to contain asbestos.

4. Assess the risk of anyone being exposed to fibres from the materials identified.

5. Prepare a plan that sets out in detail how the risks from these materials will be managed.

6. Take the necessary steps to put the plan into action.

7. Periodically review and monitor the plan and the arrangements to act on it so that the plan remains relevant and up to date.

8. Provide information on the location and condition of the materials to anyone who is liable to work on or disturb them.

If no maintenance work is planned or if the premises are very small an owner or tenant may decide to carry out its own inspection. However, it is advisable for a survey to be carried out by a specialist asbestos surveyor.

A management plan must be made available not only to employees, tenants, occupiers and contractors but also to potential purchaser's valuers, surveyors and the emergency services.

The Regulations are enforced by Health and Safety Inspectors who conduct spot checks to ensure that a management plan is in place. Failure to comply with the regulations is a criminal offence with a maximum penalty of an unlimited fine and imprisonment for up to two years.

When you come to sell or lease your commercial premises your buyer or tenant will want to check that you have been complying with the Asbestos Regulations 2006 and will ask for a copy of the most recent survey or assessment carried out together with a copy of the written plan and any other records prepared for managing asbestos at the premises.

Contact Ruth Latham
(r.latham@wjclaw.co.uk)

Corporate

Buying or selling a business - Warranties and Disclosure.

***Philip Chapman** explains the value of warranties when buying or selling a business and the importance of limiting the possibility of a breach arising and risk of the liability falling on you.*

Negotiations of warranties are often the most important part of the sale process. Warranties are a series of statements of fact and opinion about the company. "Their job is to flush out issues that are crucial to the buyer". Broadly speaking there are two types: warranties that require you to provide specific documents about the business and statements about the current state of the business (eg a warranty that there is no litigation). Without warranties, a buyer would have little protection from matters he knew nothing about, meaning the principle of 'buyer beware' would then apply.

The 'disclosure letter' is also a crucial part of the sale process. This is a letter from the seller to the buyer, disclosing anything that is inconsistent with the warranties. If, having warranted that the company was not involved in any litigation a claim was subsequently received, this would have to be disclosed in the letter.

If a warranty is breached (ie the statement is false), and the breach has not been detailed in the disclosure letter, the buyer has some protection in that he can bring a claim for breach of contract against the seller. Providing a matter has been fairly disclosed, it can't later form the basis of a warranty claim.

It is possible to restrict liability for breach of warranty but this has to be by negotiation with the buyer. Exposure can be limited by introducing a minimum level for liability or even an overall cap on the seller's liability. Limits may also be imposed on the time frame in which a claim can be brought and credit can be given for third party claims (eg if the buyer is able to recover from his insurers or another third party, rather than from the seller).

The disclosure letter is a crucial document in protecting sellers from warranty claims and it needs to be prepared in conjunction with a meticulous review of the warranties. It is a negotiated document, meaning the purchaser can request more information if he feels it is necessary. There will also be a statement in the sale agreement that the disclosures are true, fair and accurate. For more information contact **Philip Chapman.**

An important time to consider your directors' duties

The effects of the new Companies Act 2006 (the Act) are far reaching and will influence the way companies are run and the conduct of directors.

The Act finally came into force in October of this year and for the first time there is codification of directors' duties. The codification aims to clarify what is expected of directors, especially the question of in whose interests companies should be run. For example, in regard to conflicts of interest arrangements between the director and his/her company must be declared rather than approved by either the board or the members in a general meeting.

Directors now have a duty to promote the success of their companies and to preserve, protect and grow their investments for the benefit of the company's shareholders. It is therefore recommended that directors draw up a business plan to anticipate what lies ahead, particularly during harsh economic times.

It is a challenging period to be a director. For further information on the new Act and directors' duties contact **Philip Chapman**.

Contact us:
Tel: (01384) 371 622
15-23 Hagley Road, Stourbridge, West Midlands, DY8 1QW

Company and Commercial
Philip Chapman
p.chapman@wjclaw.co.uk

Commercial Property
Ruth Latham
r.latham@wjclaw.co.uk

Commercial
John Cockling
j.cockling@wjclaw.co.uk

This update is intended only to provide a summary of the law and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. If you would like specific advice please contact a member of the team.