



Sloan Plumb Wood

SOLICITORS

Legal Update

Contents

- *Update on Property Litigation*
 - *Automatic Pension Enrolment*
 - *Lush –v- Amazon.co.uk – Trademark Infringement*
 - *Copyright Collecting Societies Review: Have copyright laws become archaic in this digital age?*
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Introduction

Welcome to the Spring edition of the Sloan Plumb Wood LLP legal update.



If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

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Update on Property Litigation

Changing the terms of a Lease can inadvertently release the Guarantor

In most commercial leases a guarantor is required. However if the Lease is altered, and the guarantor not consulted, then they can be released from their obligations under the terms of the guarantee.

In a recent Court of Appeal case a guarantee was signed by a related business of the tenant. The tenant went into liquidation, owing £280,000 in rent to the landlord. The landlord, under the terms of the guarantee approached the guarantor and requested payment. The guarantor argued that it had been released from its liability as it had not consented to an earlier licence for alterations to the property, granted to the tenant by the landlord. The alteration involved part of the property being structurally altered which increased the tenant's obligations to the landlord and therefore, increased the guarantor's obligations. The Court was of the view that the licence had a clear potential to increase the obligations to the guarantor in the event of the tenant's default and as the guarantor had not consented to this they were discharged. The important lesson is to ensure, that where there is any alteration being made to the Lease, that a guarantor should be joined into the documents.

Residential Landlords – Protecting your Property from Fraudsters

There is an increase in fraudsters, who having taken out a tenancy of a property, transfer the property into their own name, with the intent of selling it or placing a charge on it, by impersonating the owner which includes presenting forged documents. It is particularly prevalent where the property is mortgage free or where the owner lives elsewhere, in particular abroad.

Therefore, where the property is let or tenanted or where it may have been left empty for a period of time, you can take a simple step, which should prevent this happening. If the property is registered you are required to provide, to the Land Registry, an address for service. If you do not contact the Land Registry then they will assume that the address for service is the property address. On the Land Registry's website (www.landregistry.gov.uk) is a form (COG1) and guidance notes where you can provide them with up to 3 addresses for service. You need to attach a recent passport size photo and provide evidence of identity (either a copy of the photo page of your current passport or of your photo card driving licence). We would recommend that the addresses you provide should be your current home address, current home email address and a work email address. This will mean that if any application is made in respect of the property such as to an application to transfer ownership or register a charge you will be notified and therefore can take steps to prevent it.

Liquidated Damages Article Published

SPW's Construction and Engineering partner, Martin Wood, has published an article on Liquidated damages. Liquidated damages are defined as "a fixed or determined sum agreed by the parties to a contract to be payable on breach by one of the parties".

The article can be found here: <http://www.spw-law.co.uk/legal-articles.html>

Automatic Pension Enrolment

What is auto-enrolment?

- From a date after October 2012, employers will be required to automatically enrol eligible “jobholders” in a pension scheme. A “jobholder” will include permanent, fixed-term and temporary employees, as well as agency workers.
- An employer can use an occupational or personal pension scheme if it meets statutory quality requirements. Otherwise the employer will have to enrol jobholders in the National Employment Savings Trust (NEST), a central defined contribution scheme to be set up by the government.
- A defined contribution scheme (also known as a money purchase scheme) is a pension scheme in which an employer and employee pay fixed contributions. The employee receives a pension or annuity at retirement, the size of which depends on the contributions paid and the investment return on those contributions over the member’s working life.
- Employees may opt-out of either scheme, but only once they have been automatically enrolled.
- Employers must pay a minimum level of pension contributions for each employee.
- The requirement to automatically enrol eligible jobholders will be phased in over five-and-a-half years from October 2012, with larger businesses required to comply first.
- Employers will be required to automatically re-enrol eligible jobholders every three years after they first become subject to the statutory employer duties.

No exemption for smaller businesses

Small businesses will not be exempted from the auto-enrolment requirements as this would be estimated to exclude 1.3 million employees from the reforms and create substantial enforcement problems. On 1 October 2012, regulations came into force extending the implementation period for businesses with fewer than 50 employees. Small employers will therefore not be subject to auto-enrolment until June 2015 at the earliest.

Changes to NEST

- The annual contribution limit (set at £4,400 in 2012/13) will be removed once the five-and-a-half year staging period has been completed.
- The ban of transfers into and out of NEST should be reviewed in 2017. NEST should be able to receive and make transfer payments once auto-enrolment is established.

What is the income threshold at which individuals are auto-enrolled?

- Jobholders will only be automatically enrolled once they reach the income tax threshold (£8,105 in 2012/13 and £9,440 in 2013/14).
- Contributions will be based on earnings between the National Insurance lower earnings limit (£5,564 in 2012/13 and £5,668 in 2013/14) and the upper earnings limit (£42,475 in 2012/13 and £41,450 in 2013/14). Employees who have been automatically enrolled will continue to pay contributions until their earnings drop below the income tax threshold (unless they opt out).
- Any employees with earnings between these thresholds will be able to opt in and receive an employer contribution.

What are the age limits for automatic pension enrolment?

The age band for eligibility is between 22 and the state pension age. Retaining the state pension age as the upper age limit gives people access to pension saving during their normal working lives and avoids automatically enrolling people for whom saving is no longer the right option.

Automatic Pension Enrolment ... continued

Three-month waiting period before an employee is automatically enrolled

An employer can use a three-month waiting period to avoid automatically enrolling employees who leave employment soon after joining (for example, seasonal or temporary workers). This will also allow employers to align enrolment dates with their own payroll systems and also probationary periods (if they are set at three months).

What if I already have entrenched pension terms in employment contracts, can I simply change this to mirror my new statutory obligation?

It is possible to change an employee's contract to remove entrenched pension terms i.e. reduce a fixed percentage contribution, but it is not without risk. It will involve a period of consultation from 30/45 days (depending on the number of employees involved) and may also involve a parallel pension consultation for 60 days.

If the employees agree, the employment contracts can simply be changed by consent. However, if the employees do not agree to the change, and the business has a genuine business reason for making the change, the employees may have to be dismissed and immediately re-engaged on the new terms. This is the part of the process that carries the risk. If the employees with sufficient qualifying service refuse re-engagement on the new terms, they may choose to bring a claim of unfair dismissal against the business.

High Court Decides *Cosmetic Warriors (Lush) v Amazon.co.uk* case for trademark infringement

Cosmetic Warriors Limited and Lush Limited -v- Amazon.co.uk Limited and Amazon EU SARL – Trademark Infringement

On 10 February 2014 the High Court handed down Judgment in the *Lush –v- Amazon* trade mark infringement case.

Lush are a well known high street manufacturer and supplier of cosmetics under the Lush brand and is particularly well known for soaps and bath products, particularly a product known as the "Bath Bomb". The Defendants, who probably need no explanation, are an online shopping group. The Claimants are the registered proprietor and licensees of a European community-wide trade mark for LUSH registered in respect of cosmetics and toiletries and it is this trademark that is the subject of this litigation.

Even though it was not possible to buy Lush products from Amazon, Amazon had bid on certain keywords, including Lush through the Google AdWords scheme.

CATEGORY 1

If a member of the public typed 'Lush' into the Google search engine, Amazon advertisements as sponsored links would appear stating, for example, '*Lush soap at Amazon.co.uk...Low prices on Lush soap...Free UK delivery on Amazon orders*'. If the consumer then clicked on that link, he or she was taken to Amazon.co.uk and given equivalent products to look at. There was no message within the advertisement or the site itself that Lush products were not available from Amazon. The Court held that this category of adverts infringed the LUSH trade mark.

High Court Decides Cosmetic Warriors (Lush) v Amazon.co.uk case for trademark infringement - continued...

The Court held “...the average consumer, seeing the ad... would expect to find Lush soap available on the Amazon site and would expect to find a competitive price”. The Court also stated that it would not expect Amazon to be advertising Lush soap if it was not in fact available for purchase.

CATEGORY 2

These are advertisements which, again, are presented following a consumer using the Google search facility, but did not show Lush in the actual returned advertisement or sponsored link. The example given to the Court was a consumer searching for “Lush cosmetics bath bomb” and returning the advertisement “*bomb bath at Amazon.co.uk...Low prices on bomb bath... Free UK delivery*”. Again, if the consumer clicked on the link, he or she would be taken to the Amazon UK website and given the opportunity to browse or purchase other similar products, including those of a direct competitor. Again, there was no message or disclaimer to the effect that it was not the Lush Cosmetics bath bomb.

Again, this was a sponsored link and returned as a result of Google AdWords. The Court found that this class of advertisements did not infringe the LUSH trade mark.

The Court held that the average consumer would expect an advert for Lush to contain a reference to the LUSH trade mark. It also held that the average consumer could not reasonably fail to appreciate that the Amazon advert was just another advert for the sale of often similar products to those as requested by the consumer.

CATEGORY 3

This category dealt with the way that Amazon’s own website search facility worked. For example, if a consumer was searching the amazon.co.uk website for the word ‘Lush’ in the “beauty” or “health” departments, the first thing to happen after the letters ‘L’ and ‘U’ were typed, was that a drop-down menu appeared and the consumer was offered various options to click, for example, ‘Lush bath bombs’ or ‘Lush Cosmetics’. This was partly as a result of the way in which the Amazon software worked. If a customer had searched the word ‘Lush’ and then ended up buying for example Bomb Cosmetics products, the next time a person searched the word ‘Lush’ on Amazon, it would give Bomb Cosmetics as a suggestion. The consumer could then click on one of the options and a new page would appear. The page would offer similar products to those available from Lush, again without any other reference to the fact that these were not Lush items or that they were not available on the amazon.co.uk website.

The Court held here that there was some similarity between this and the first category of infringements. There was no indication that Lush products were not available on the Amazon site, but the consumer was being offered the express opportunity, as an auto-prompt selected by Amazon, to pick various Lush products. The Court found that this category of advertisements were in fact infringements.

CONCLUSION

This case is helpful as another example of Google AdWords to go alongside the *Marks and Spencers –v- Google France* cases. It is important to note that if you are using a competitor’s marks as Google AdWords, or using them to return searches via a search facility on your own website, there is a very real risk that you could be infringing that trade mark.

Copyright Collecting Societies Review: Have copyright laws become archaic in this digital age?

Introduction

Knowing whether your business is abiding by copyright law is becoming increasingly complex. For example, it is generally the case that if you play music in any setting outside the domestic home you, or your business, will need a licence. Licences must also be obtained if your company ever copies any published material, whether found digitally or not. If your company prints articles from newspapers online and circulates them internally, again, a licence will be needed. These are just a few examples, so it is clear to see why many businesses can be caught out.

Who administers licences?

There are 12 copyright collecting societies in the UK, for example, the *PRS for Music* and the *Publishers' Licensing Agency*, which can administer licences for a fee. This money is then distributed to the owners of the copyrighted material.

Review

These societies are now undergoing an independent review by Walter Merricks CBE, through the British Copyright Council. With current internet realities in mind, the review is asking for opinions from various industries on how well the current system is working and what changes, if any, are desirable. Merricks is also investigating how businesses perceive the transparency and accountability of the copyright collecting societies.

Merricks has emphasised the effect that the internet has had on copyright matters, so it can be assumed that any conclusions will have this digital age at its core.

Conclusions

Current copyright laws were not made with the digital age in mind. Now it is becoming increasingly possible to violate the copyright laws without intending, or realising, that one is doing so. The review of the copyright collecting societies is a satisfactory start to considering copyright law as a whole, and businesses should be alert to the findings of this review and how it may affect their current treatment of copyright material.

But businesses should also consider the possibility that more drastic changes to the law will be made in the future. Parliament recently passed the Defamation Act 2013, which can be praised for ensuring that digital age problems such as libellous social networking posts and 'tweets' will now be dealt with under an act with these trends in mind, and not under laws such as Reynolds privilege which has responsible journalism at its core as opposed to short, spontaneous online posts of opinion. It is not out of the question that Parliament will introduce something similar for copyright law, which is likely to be welcomed by businesses nationwide.

To be part of this investigation and offer your views, please visit: <http://www.independentcodereview.org.uk/call-evidence/>.



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