Sloan Plumb Wood

SOLICITORS

Legal Update

Contents

SPW SUMMER 2014

Introduction

Welcome to the Summer 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 IP Act

Protections and Provisions under the Intellectual Property Act 2014

The Intellectual Property Act 2014 has now received the Royal Assent and the key provisions can now be confirmed. This Act amends a number of acts including the Copyright, Design & Patents Act 1988, the Patents Act 1977 and the Registered Designs Act 1949. The Act will come into effect later in 2014 and 2015.

The Act was brought about by Viscount Younger who identified 3 principles underpinning the new legislation: the simplification and improvement of design and patent rules; the clarification of the existing legal framework so businesses can fully comprehend how to comply with, and what rights they have protected under, the law; and the presence of an international IP framework..

The Act creates a criminal offence for copying registered designs (if deliberate and in the course of business) which provides greater certainty and protection for investors, and goes a long way to reaching the first goal of improving design and patent rules. The Act also makes a good progression in simplifying current laws. For example, the default owner of a design will now be the designer and not the commissioner of the design which harmonises design law with copyright law. The term 'commonplace' will now also include the EU, i.e. if a design is commonplace in the EU it cannot be considered to be an original design.

A number of provisions within the Act support the second goal of clarifying the existing laws. The Act expands the Patents Opinion Service and also introduces a cheap and non-binding advisory body, the Designs Opinion Service, which will offer advice on design disputes with the purpose to avoid litigation all together. With the intention of alleviating the backlog of patent applications, the Act provides for sharing of information between different international patent offices and the Act also gives the UK powers to implement the Unitary Patent Court Agreement. The Act lays down the legislatives framework for the Unified Patent Court as well.

The third goal of establishing an international IP framework has arguably been achieved by the Act's provisions to allow the UK to become a member of the Hague Agreement. This will allow for filing of a single registered design application which will be applicable for a number of states. This will be a cheaper and simpler option for many businesses.

It is clear that the Act definitely succeeds in at least going some way in satisfying the principles that Viscount Younger stated in 2013. The importance of these changes is obvious when considering the fact that, as stated by Business Secretary Vince Cable, "UK business invests nearly £16 billion in design each year, which represents 1.1% of GDP. The changes in this Act are to help SMEs and innovative businesses get on and grow. By reforming and simplifying IP rules and making them easier to understand, we aim to help businesses protect their innovations more easily".

Employment

"I no longer need to adjust my absence policies for disabled workers - do I?!"
The Griffiths case is not as simple as it would first appear…..

The case of Griffiths v Secretary of State for Work and Pensions UKEAT/0372/13 has just delivered a decision confirming that the employer in that case had not breached its duty to make reasonable adjustments for the claimant's disability.

Briefly, the facts of the case are that the claimant suffered from post traumatic stress disorder and fibromyalgia. She had a high level of absence from work due to these conditions which was acted on by the employer under its absence policy.

Ms Griffiths claimed that the operation of the absence policy was discriminatory because the employer had failed to make the adjustments to the policy that she had requested (which included discounting disability related absence)as such adjustments would have meant that no action would have be taken against her.

The EAT decided that when considering her complaint the correct comparator for Ms Griffiths was a person with the same level of sickness absence who was not disabled. The EAT went on to find that such a person would have been treated in the same way as she was and that the policy had therefore not placed her at a 'substantial disadvantage' as compared to the non-disabled person and the duty to make reasonable adjustments was therefore not triggered. It also found that the adjustments requested were not reasonable.

This decision has triggered a number of reviews and reports of this case claiming that an employer no longer needs to make adjustments to its absence policy for a disabled person. Whilst it is technically a correct report of the facts of that case, it is misleading.

To understand the decision in this case and why it is not necessarily as clear cut as it would appear it is necessary to examine the discrimination provision under the Equality Act 2010 (EqA) in a little more detail.

The case in question was dealing with a claim under section 20 EqA only. It was established that the provision, criterion or practice (PCP) that had put Ms Griffiths at a particular disadvantage was the operation of the attendance policy. This had triggered the employer's duty under section 20 to make reasonable adjustments.

The EAT was not asked to consider whether the policy itself was discriminatory under section 19 (which prohibits Indirect discrimination). The EAT commented that a claim under this section would not have been entertained in any event as the policy clearly indicated that modifications may be made to the policy to accommodate any particular employee with a disability.

The result of the case as we know it would seem reasonable as argued and having identified the correct comparator. However, this decision does not mean the employer can act in future without any consideration of modifying its absence policy when it comes to acting upon it with respect to a disabled employee. The reason for this is section 15 of the EqA.

Section 15 deals with discrimination arising from a disability. This requires a claimant to show 'unfavourable treatment arising from the disability'. This would clearly fit the circumstances of a dismissal or warnings triggered under an absence policy by a disabled person. Furthermore, because the complaint is one of 'unfavourable treatment' and not 'less favourable treatment' it is not necessary under this section to compare the disabled person to someone else who is not disabled but had the same level of absence. Therefore, a claim could still succeed under this section.

Private Nuisance

A private nuisance is caused by a person or persons doing something on their own land, which they are lawfully entitled to do, but which becomes a nuisance when the consequences of their actions extend to the land of the neighbour. A good example of this is creating excessive noise or noxious smells. Whether a particular activity causes a nuisance depends on an assessment of the character of the locality in which the activity is taking place and whether or not that activity is a reasonable use of the occupiers land. This was defined by the Court back in 1879 as what would be a nuisance in Belgrave Square (a highly sought after residential part of London) would not be considered so in Bermondsey (a deprived part of London with a high proportion of slum dwellings and polluting factories).

In a recent case the Court had to decide whether or not a noise nuisance caused by a land owner's motor cross and speedway stadium was an actionable nuisance. The motor cross and speedway stadium owner had been granted planning permission in 1975 to develop a speedway stadium. In 1997 they obtained permission to also use the track for stock car and banger racing and in 2002 they was granted permanent planning permission for an undulating motor cross race track on the field adjoining the stadium.

In 2006, the party who brought the claim alleging nuisance, moved into a house which was approximately 560 metres from the stadium and 860 metres from the motor cross track. They complained that the noise from the stadium and the race track affected the enjoyment of their property and caused a nuisance. They then brought proceedings when that nuisance didn't stop seeking an injunction to prevent the noise nuisance and for damages for loss. The Court found in favour of the homeowners who had brought the complaint and within their Judgment stated the following:

- It was not generally a defence to a claim in nuisance to show that the Claimant had come to the nuisance by moving into the property after the nuisance had started. However the Court stated it could be a defence if that nuisance only arose as a result of the complainant changing the use of the land so that what was previously not a nuisance became one.

- The land owner creating nuisance could rely on its activities as constituting part of the character of the locality but only to the extent that those activities did not cause a nuisance.

- The fact that planning permission had been granted would not deprive another land owner from complaining that the noise being created constituted a nuisance.

- That the existence of planning permission which expressly or authorises the carrying on of activity which does create a nuisance, can be a factor in favour of the Court refusing to grant an injunction but instead compensating a complainant by way of damages.

The outcome therefore was that the Court granted an injunction to restrain activities that emitted more than a specified level of noise (which was set out in the Local Authority Noise Abatement Notices served on the racetrack owners in 2009.)

The lesson therefore to be learned is that any change in the use of the land, will need to take into account whether or not this will create a nuisance, which may be actionable by other land owners.

Alongside our regular newsletter, we also post regular updates on our blog which can be found at www.spw-law.co.uk/blog. We write about lots of different issues which may affect your business and we welcome comments on them.

Also…SPW has taken to Twitter! Follow us @SloanPlumbWood

Property Litigation - When is refusing to consent to an assignment of a lease unreasonable

Most commercial leases contain a provision that the tenant can only assign or sublet their interest in the property with the consent of the Landlord, such consent not to be unreasonably withheld.

Over the years there have been a number of rulings made by the Courts setting out what is and what is not reasonable.

In the recent case of Singh –v- Dhanji the Court of Appeal considered whether or not a landlord had unreasonable refused to consent to the assignment of the lease of a dental practice. Mr Singh who was the landlord had let out the property to Mrs Dhanji in 2000. In July 2007 she wrote to him asking for consent to assign the lease to a proposed purchaser. Mr Singh responded by complaining that there had been various breaches of the lease and that until those were resolved he would not provide his consent. Those breaches were denied by Mrs Dhanji who, in addition, argued that the breaches were so minor that a refusal to consent to the assignment would be unreasonable.

In a 1986 case the Court of Appeal set out a number of principles to be followed when deciding whether or not a refusal to assign was reasonable, namely:

- The purpose of this kind of covenant was to protect the landlord from inheriting either an undesirable tenant or having the property used in an undesirable way.
- The landlord however must base his decision on issues which affect the relationship of landlord and tenant and nothing else.
- The landlord didn't have to prove that the conclusions that had lead him to refusing consent were justified, if they were conclusions which might be reached by a reasonable person facing the same circumstances.
- It may be reasonable for a landlord to refuse consent to an assignment on the grounds that the purposes for which the proposed assignee intends to use the premises, even though the purpose if not forbidden by the lease.
- The landlord need only consider his own interest in most cases, however there may be cases where there is such a difference between the benefit to the landlord and the detriment to the tenant that if the landlord refuses consent that such consent is unreasonable.
- In each case it is question of fact whether or not the landlord had been unreasonable in refusing consent. Furthermore what is reasonable should a given a broad and common sense meaning.

The Court, in this case, decided that the alleged breaches had not been proven by the Landlord and even if proven, they were so minor, that they took the view that the landlord had acted unreasonably. As a result, the Tenant was entitled to damages which amounted to £183,000.

In the circumstances a Landlord faced with this issue needs to consider carefully whether or not consent should be granted, because if they are found to have acted unreasonably, then the consequences could be severe.

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