Sloan Plumb Wood

SOLICITORS

Legal Update

Contents

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:

Martin Wood
martin.wood@spw-law.co.uk
Philip Sloan
philip.sloan@spw-law.co.uk
Christina Merrington
christina.merrington@spw-law.co.uk
Emma Hayward
emma.hayward@spw-law.co.uk
Peter Corrigan
peter.corrigan@spw-law.co.uk

Sloan Plumb Wood LLP
Apollo House
Isis Way
Minerva Business Park
Lynch Wood
Peterborough
PE2 6QR

Telephone:
01733 302410

Email:
enquiries@spw-law.co.uk

www.spw-law.co.uk

Property Litigation

Is a tenant, carrying out fitting out works, liable to pay business rates?

Business rates are payable even if a building is vacant unless the building is not capable of "beneficial occupation". The issue in the case of **R3 Products Limited and The Valuation Office**, which was dealt with this year, was whether a tenant who had occupied the premises for the purpose of fitting them out was liable to pay business rates. In the above case, R3 operated a business which required a high voltage electricity supply. This was not already present in the premises and the landlord gave R3 permission to occupy on a rent free basis while they carried out that work. The Valuation Office demanded business rates for the period of the fitting out works and R3 argued that they were incapable of being occupied because they required high voltage cabling and in the circumstances, those fitting out works did not constitute "beneficial occupation". The Court rejected that argument and held that the building was ready for beneficial occupation. The key issue for the Court was whether or not the building was capable for occupation by any tenant, not whether a specific tenant had to carry out essential works in order to be able to use it.

If the Guarantee provisions in a Lease are invalid, does it also release a requirement to obtain the landlord's consent to an Assignment?

The above question arose in a case involving ten hotels owned and operated by subsidiaries of The Hilton Worldwide Group and their landlords. Each of the Leases in respect of those ten hotels were granted in 2002 and they had restrictions preventing the tenants from assigning to another company within the same Group without the consent of the landlord. The consent could be withheld unless the parent company, Hilton, stood as a guarantor of the new tenant.

In 2011, in a case involving The House of Fraser, the Court of Appeal decided that a parent company cannot continue to act as the direct guarantor of a Lease which is assigned from one subsidiary to another. As such, this led to uncertainty as to how a landlord could protect their position, when the tenant wants to enter into a group reorganisation. The hotel owners took the view that because the continuing Guarantee would be void (following the House of Fraser case) the entire clause requiring the landlord's consent was also void. In the circumstances, they assigned the ten Leases to other Hilton Companies without seeking the landlord's permission. The landlord succeeded in persuading the High Court (the matter is subject to Appeal) that this was an Assignment in breach of the Lease. The High Court decided that in order to make commercial sense, while the Guarantee may no longer be enforceable, the requirement for the landlord's consent to be given remained and as such they could impose other reasonable requirements in order to protect their position.

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

Liquidated Damages – New Challenges

In the last 12 months, there have been two significant judgments (one in the Court of Appeal) where liquidated damages provisions have been successfully challenged and held to be unenforceable. Both decisions related to commercial projects and involved substantial sums. In the previous 100 or so years there had only been a handful of reported cases where the Courts were unwilling to enforce the parties agreement in respect of liquidated damages. There appears to be an increasing trend towards challenging liquidated damages provisions on the grounds they are a penalty and an increasing willingness by the Courts to accept such arguments.

The concept of liquidated damages has a long and successful history in English contract law. The general principles can be traced back well beyond the well known modern authority which outlined those principles (Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79). The Courts have recognised the advantages for both parties of agreeing, at the time the contract is made, the sums that would be payable in the event of a breach of contract by one of the parties. Those advantages include certainty, risk management and relatively straightforward practical application. However, there has always be a tension between such commercial advantages and the Courts' underlying reluctance to enforce a provision which amounts to a penalty for breach of contract.

The Courts have had some difficulty in setting out authoritative principles as to which provisions will be considered to be a penalty and which will not. Those difficulties, at a practical level, have recently been illustrated in Makdessi v Cavendish Square Holdings BV [2013] EWCA Civ 1539 which involved the sale of a large advertising and marketing business in the Middle East to part of the WPP Group. The agreement contained provisions which provided for payments to be re-calculated if the seller breached various restrictive covenants. The practical effect of a breach could cost the seller many tens of millions of pounds. At first instance in the Commercial Court the recalculation provisions provided for as liquidated damages were upheld. However, the Court of Appeal came to the opposite view about the liquidated damages provisions and refused to enforce them on the basis that the liquidated damages provisions amounted to an unenforceable penalty.

Following the Cavendish Square judgment the trend toward the courts being prepared to find a commercially negotiated liquidated damages provision unenforceable has again recently been illustrated in the judgment in Unaoil Ltd v Leighton Offshore PTE Ltd [2014] EWHC 2965 (comm). In that case a provision for payment of liquidated damages of $40 million described in the contract as a genuine pre-estimate of loss, on a contract value of $75 million, was accepted by the Court as a genuine pre-estimate at the time the contract was made. However, those liquidated damages became an unenforceable penalty when the Contract was subsequently amended. The Contract Sum was reduced to $55 million which the Court decided made the agreed liquidated damages of $40 million "extravagant and unconscionable with a predominant function of deterrence", the provision was without any commercial justification and therefore unenforceable as a penalty.

The inherent difficulty in drafting liquidated damages provisions and advising with certainty about the future impact of such provisions is easy to understand given such differing views about the same provisions from experienced commercial judges. Those difficulties aside, liquidated damages can be, and are, regularly used across a wide range of contracts such as process plant, building, engineering and even employment contracts. There are a wide range of different breaches of contract for which a liquidated damages clause can be useful and save a great deal of time and money spent assessing damages arising from a breach of contract. These include the common example of liquidated damages for delay as well as other breaches of contract such as non-performance or part achievement of performance specifications.

Given the Court's recent judgments the risk of a liquidated damages provisions now being considered a penalty will need to be considered both when a contract is entered into and also (given the Judgment in Unaoil Ltd v Leighton Offshore) at any time that there is a significant amendment to a contract.

A more detailed commentary on those cases and the issues relating to liquidated damages can be found in Martin Wood's paper "Delay Damages" published by leading legal online resource, Westlaw.

Employment - 'Working 9 to 5' – no longer a way to make a living?!

Christmas is upon us again and usually at this time of year we would write about the perils of the work **Christmas** party, however, this year we have decided to break the mould and write about the new flexible working legislation which has now been bedding in over the last 6 months. Whilst at first it may have been perceived as problematic for small to medium businesses (who can seldom afford to take on extra staff for job shares etc.) the reality is, it was always unlikely to result in a great influx of applications from a diverse range of the workforce. Most of the applications for flexible working are childcare related and this section of the workforce already had the right to make them. However, if you do get an application you must give it proper consideration and apply a proper and fair procedure to reduce the chance of a claim against your company and increase the prospect of defending any claim. Acas has developed a code of practice entitled 'Handling requests to work flexibly in a reasonable manner' together with a supporting guide to assist you through the process. So, still pushing for that **Christmas** theme, we have set out below some practical **festive** style guidance to help you to deal with an application:

Avoid point scoring on a 'technicality'

Rejecting an application on the grounds that the applicant has forgotten to include some required information or not quite followed the procedure to the letter is a high risk strategy. A tribunal will probably not be overly impressed with that kind of attitude from an employer and it could result in a constructive dismissal claim from the employee or a claim under the Equality Act 2010. The better approach would be for the employer to point out what is wrong with the application and give the employee the opportunity to go away and amend it.

Do consider the request

From experience most employers seem to start from the default position of being more concerned that the flexible working pattern requested will not work rather than considering how it could work. Try to avoid falling into this pitfall and investigate how it could work perhaps by preparing an impact assessment which can be discussed with the employee.

If you do conclude that the requested flexible working pattern cannot be approved then try not to simply dismiss the application, consider any alternatives which you may be able to offer and agree with the employee.

Validate your rejection

Many organisations have roles that they immediately consider could not be performed flexibly but often when scrutinised that contention does not stand up.

Rejecting an application seems simple on the face of it in that the employer is required to provide one or more of the prescribed reasons listed in the relevant legislation. However, it is not quite as simple as it seems and employers need to go further to avoid discrimination claims and consider whether that rejection is likely to put a particular group at a disadvantage and if so, whether that disadvantage can be objectively justified. This means an employer's refusal will be judged on whether it is a proportionate means to achieving a legitimate aim and the employer will have to show there was no other less discriminatory way of achieving that aim.

Endeavour to give full and clear reasons for any rejection

An employee who receives a full and clear reasoned decision for their rejection is more likely to remain a fully engaged member of the workforce and less likely to challenge the decision through an alternative means such as a discrimination claim.

Need for consistency

Employers would be well advised to keep records of flexible working requests and decisions made to ensure decisions are made consistently. Where a decision is made that is not consistent with previous decisions the employer should explain the inconsistency. This is particularly important where the inconsistent decision affects a person of a different sex from those who have previously had requests granted or any other prohibited characteristic (such as race, religion or belief or disability) which could in turn found a discrimination claim.

The ACAS Code

Whilst the ACAS code does not specifically apply to flexible working requests it would be relevant if a person felt that they had been discriminated against. Employers should therefore consider whether to invoke the code when dealing with appeals against a decision to reject flexible working where elements of the appeal allege discrimination.

Mediation

What is Mediation?

Mediation is an alternative way of resolving disputes and is encouraged by the Court as it is seen as a more cost effective way of resolving disputes. This has become more prevalent because of the budget cuts imposed on the Court system which means that they are struggling to deal with cases efficiently and there are often substantial delays before a matter can be heard.

Mediation involves the appointment of an independent third party (normally a lawyer but not always so) who, through a series of meetings with the parties and their lawyers, tries to find out why the parties have become involved in a dispute, tries to establish whether or not there is any common ground between them, discusses the options available to them and the various risks and costs associated with those options. They then move on to try and find a way to resolve the matter which avoids that risk and its associated costs.

Mediation, depending on when it is done, will cost less than pursuing a matter through the Court system and will be dealt with more quickly. Mediation can be arranged within weeks of agreeing to mediate while a matter can obviously take between 12-18 months, as a minimum, to go through the court system.

Mediation is confidential on the basis, that it encourages participants to be open with the mediator, which then assist them in trying to find a settlement acceptable to both sides. Furthermore, the parties control the mediation in that there is no obligation to settle and the matter will only be settled when all the parties agree. This contrasts with Court where a settlement will be imposed by a Judge.

Between 70-80% of matters that are referred to mediation settle and they can be used to achieve more creative settlements as a mediator has more flexibility than a Court.

Finally the Court expects parties to explore all and every means available to them to try and achieve settlement, rather than go through the Court system. Mediation is part of that other ways of settling matters which also include attending settlement meetings, arbitration etc. Any party failing to engage in trying to resolve the matter by alternative methods, will be penalised by the Court at the end of the trial. This could mean that a winning party could have their costs reduced or denied in full or where losing can have the amount of costs awarded against them increased.

With Best Wishes
for a
Happy Christmas and a Prosperous New Year

From All at Sloan Plumb Wood LLP

Sloan Plumb Wood
SOLICITORS

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:

Martin Wood
martin.wood@spw-law.co.uk
Philip Sloan
philip.sloan@spw-law.co.uk
Christina Merrington
christina.merrington@spw-law.co.uk
Emma Hayward
emma.hayward@spw-law.co.uk.
Peter Corrigan
peter.corrigan@spw-law.co.uk.

Sloan Plumb Wood LLP
Apollo House
Isis Way
Minerva Business Park
Lynch Wood
Peterborough
PE2 6QR
Telephone:
01733 302410
Email:
enquiries@spw-law.co.uk