Corporate NEWSLETTER

Winter 2016

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PROPERTY LITIGATION LAW

Take Care to Ensure you Disclose Service Charge Disputes When Selling Commercial Property

Joanna Osborne, Partner

In the case of *Greenridge Luton One Ltd and another v Kempton Investments Limited* [2016] EWHC 91 (Ch) (22 January 2016) (BAILLII) the Court held that where a seller represented in replies to Commercial Property Standard Enquiries (CPSEs)* that there were no service charge arrears, when in fact there were arrears and

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Editor's Note

Welcome to the Winter 2016 Edition of our Corporate Newsletter. This latest edition contains a variety of useful articles covering property litigation, corporate & commercial, employment, real estate, and intellectual property law.

We continuously strive to provide the most relevant and latest topics across numerous industries for the respective business unit. If there are any particular areas of interest tha you would like us to consider in the next edition, please do get in touch.

Edwin Coe is pleased to announce that it has been admitted as the newest member of the International Alliance of Law Firms (www.ialawfirms.com), which has 60 member firms in 41 countries. Founded in 1990, the Alliance is a global network of prominent independent law firms covering the world's major commercial centres.

As always, we welcome your comments and feedback.

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also a dispute over the position, the buyer was entitled to have its deposit returned due to an untrue representation made recklessly or fraudulently. The buyer was also entitled to damages for deceit of £395,948.

The seller owned three office buildings, the majority of which were let to one tenant. The day-to-day management of the property was carried out by a managing agent employed by the seller and the managing agent referred certain legal and professional matters to its solicitor.

When the seller decided to sell the property, draft replies to CPSEs were prepared. These only disclosed that the tenant had raised queries which were "mainly historical issues and had recently raised further enquiries".

Subsequently correspondence over the service charge queries progressed, service charge arrears built up and the word "dispute" started to be used.

Sale terms were then agreed with the buyer. As a result of the previously drafted CPSE replies, the buyer's solicitors asked for additional documentation about the service charge position, but this was not provided. Contracts were then exchanged and it was only when the valuer acting for the buyer's lender attended the property that the lender and therefore also the buyer became aware of the service charge dispute.

The Judge held in favour of the buyer even though he accepted that the managing agent honestly did not consider there to be a dispute with the tenant and that the solicitor honestly (if erroneously) believed this too. He held that at the time the CPSEs were provided they were both aware that there were service charge arrears and therefore the representation made in the CPSEs was found to be reckless at least.

The seller argued that a buyer could only be entitled to damages if there was a material difference between the description or value of the property as represented and the actual position that the buyer's damages should be limited to compensation for any material difference. The Judge rejected this and confirmed the case concerned liability for fraud.

It is important that sellers and their advisors ensure that buyers not only are provided with up to date replies to enquiries, but are also kept informed of changes in circumstances that will affect the accuracy of the replies.

* *CPSE stands for Commercial Property Standard Enquiries, being the general pre-contract enquiries used for all commercial property transactions.*

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CORPORATE & COMMERCIAL LAW

Electronic Signatures

Eoin Broderick, Associate

The EU has recently taken steps to develop the legal framework surrounding electronic signatures and online authentication which it hopes will encourage increasing numbers of cross-border online transactions and ensure uniformity of the laws surrounding this area across the EU. The Electronic Identification Regulation will have direct effect from 1 July 2016 and will replace the existing E-Signature Directive.

One key aspect of the new regulation is the introduction of the advanced electronic signature. This form of signature will allow the unique identification and authentication of the signing party and therefore enable a greater degree of verification of the contents of the signed data.

What this is likely to mean in practical terms is that for a document to be signed electronically, the parties will each be required to provide their electronic signature (whether an electronic representation of a signature, a biometric signature like a fingerprint or a signature created by cryptographic means) backed up by a certificate issued by a regulated certification service provider that confirms the identity of the signatory.

Yet, whilst this is likely to increase the number of people willing to trust the integrity of an electronically signed document, there remain some situations in the UK in which a wet-ink signature will still remain the most appropriate.

Electronic Contracts and Deeds

The courts have found recently (in cases such as *Pereira* and *WS Tankship*) that even just by typing your name at the end of an email, you will be considered, in law, to have signed it to the same extent that as if you had signed a hard copy of the same document using a "wet-ink" signature.

However, whilst this is the case for simple contracts, many legal transactions require the execution of a deed in order to be effective. The question is, can a deed be valid if it has been executed electronically?

As set out in the box on the right, *Why use a Deed?*, in order to be valid, a deed must, amongst other things, be in writing and executed validly.

In Writing?

Looking at the first of those two criteria, the Courts have been willing to interpret electronic communications as meeting the requirement for writing in other contexts and so it follows that they would accept it in this context. However, this is a contentious argument and one which has a strong body of support to the contrary. Until this question is examined by the Courts, it will not be possible to conclude which school of thought is correct.

Regardless of this, it is important to consider what type of transaction is being effected by the document. For example, it remains the accepted practice to execute deeds and contracts for the sale of land on paper using "wet-ink" signatures.

It is worth noting that under the Land Registration Act 2002, when effecting certain land transactions (for example, dispositions of registered estates), electronic documents are considered equivalent

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to paper deeds. However, this legislation is in its infancy and is limited to this small number of selected transactions and not generally in place. For land transactions where the legislation does not apply, paper must be used.

Executed Validly?
An instrument is validly executed as a deed by an individual if it is signed by the individual in the presence of a witness who attests the signature. A further requirement is that the individual's signature must form part of the same document as the witness's attestation.

Likewise, for a Company, a deed is validly executed if signed by two of the Company's authorised signatories or by one of the Company's directors in the presence of a witness.

Whilst, as we have established already, the requirement for the individual or director to have signed the document will be met by an electronic signature, the stumbling block is the requirement for it to be attested by a witness on the same document. Likewise, with the option of signature by two authorised signatories, they would have to sign the same electronic document. Given the practicalities involved, this may preclude the use of electronic signature in this context.

The use of electronic signatures in executing a deed has yet to be tested by the court and it remains a real legal grey area. Until this has been resolved, it is currently safer to continue to execute deeds on paper using a traditional "wet-ink" signature.

It remains to be seen what effect the introduction of the Electronic Identification Regulation in July 2016 will have but what is clear is that this is a changing area of law and one really worth paying attention to as it develops.

Execution of Deeds

Why Use a Deed?
English law provides that certain transactions will only be effective if they are implemented by a deed. In some circumstances, for example in relation to a power of attorney, there is a statutory requirement for the document to be executed as a deed. There are also situations where, although a deed is not mandatory, it is often used either as a convention or to secure some benefit through the use of a deed. In corporate transactions, a deed is often used if it is unclear whether valuable consideration is being given or if parties wish to benefit from the longer limitation period that applies to deeds.

What Are the Requirements for a Deed to be Validly Executed by a Company?
There are four key requirements for a valid deed, arising from a combination of common law rules and statutory provisions:

- The deed must be in writing;
- It must be clear from the face of the instrument that it is intended to take effect as a deed;
- The instrument must be validly executed as a deed; and
- It must be delivered.

Execution and delivery are considered further below:

Execution
English company law provides that a document can be executed by a company using any of the following methods:

- Affixing its common seal;
- Signature on behalf of the company by two authorised signatories; or
- Signature on behalf of the company by a director in the presence of a witness

Delivery
Delivery of the deed usually occurs when the parties are ready to complete a document though there is also a rebuttable presumption, under statute, that a deed is delivered at the same time that it is duly signed on behalf of the company. The presumption is often rebutted within the document itself which usually states that it will be delivered once it has been dated at "completion".

by Myri Papantoniou, Senior Associate

The Facts
A company, A, approved the grant of a debenture as security for a loan from a lender, J. The debenture was expressed to be a deed and was executed by A by the signature of the sole director and the company secretary in June 2008. However, the debenture was not dated until three months later by which time the director was no longer a director of A.

J appointed an administrator of A under the terms of the debenture. The administrator sought a declaration regarding the validity of its appointment by J, which depended on whether the debenture had been validly executed.

Decision
The court held that the debenture had been validly executed by A in accordance with company law requirements. It was enough for the debenture to be signed by a person who was a director at the time that he signed in that capacity and it did not matter that the transaction completed at a later date when he was no longer a director.

On the evidence, the court was satisfied that the debenture had been signed while the director was still in office and that a contrary intention regarding delivery had been proved. In this instance, the later delivery of the debenture as a deed did not require any form of execution but merely required board authority, which was provided at A's board meeting in September 2008.

Comment
It is worth bearing in mind that, in this case, there was sufficient evidence to support that the director held such a position at the time he signed the document so challenge from the other side on this point was avoided. It is, therefore, always important to look at the facts of each case and to avoid any doubt it would be preferable to ensure that the signatories remain the same at the time of completion as at signing.

EMPLOYMENT LAW

True or False?
"By Statute, the Ownership of Work Created in the Course of Employment Automatically Vests in the Employer"

Rachel Harrap, Head of Employment

What is meant by work created *"in the course of employment"* and is it the same meaning for patents, copyrights, database rights and designs?

"in the Course of Employment"

The Patents Act 1977 s.39 provides that an invention belongs to the Employer where an invention is made either in the course of the Employee's normal duties or where, although the duties which fall outside normal duties, they have been specifically assigned to the Employee and in either case where an invention might be expected to result.

In all other circumstances, the invention belongs to the Employee. Whilst at first blush this may seem straightforward, this is not always so.

In a leading case of *Harris v Patent* (1985)(RPC19), this law was dissected into its constituent parts by the Court, holding that it must have been reasonably expected that the performance of the duties, that is, either normal duties or those specifically assigned to the Employee, in both cases might result in "an invention" such as the one in fact made although not necessarily that precise invention.

This means that each case turns on what were the Employees "normal" or "specifically assigned" duties. Where there is a detailed written job description and job title, these can become key components in determining the outcome.

Mr. Harris was employed as a Sales Manager at a valve manufacturing business. He was told he was being made redundant. During his notice period he devised an improved version of the Company's valve and applied for a patent. He did not have a written contract of employment to clarify his normal duties and there was no evidence of any specifically assigned duties that might have involved inventing. The Judge found that whilst employed as a Sales Manager, he had not been employed to design and invent as part of his normal duties. Accordingly, the Judge found that s.39(1) did not apply.

The Judge then went on to consider whether s.39(1)(b) applied, which he broke down into two parts:

- was the invention made in the course of the Employee's duties, whether or not these were normal duties; and
- at the time of making the invention, was the Employee under a special obligation to further the interests of the Employer's business.

"...each case turns on what were the Employees "normal" or "specifically assigned" duties. Where there is a detailed written job description and job title, these can become key components in determining the outcome."

Whether a special obligation arises will depend upon the status of the Employee. For example, a distinction can be drawn between a Managing Director or Director who owes fiduciary duties to the company and is under a special obligation to further the interest of his Employer's business, and a Sales Manager like Mr. Harris who is more likely to owe the lesser duty of fidelity on not under the special obligation.

By way of contrast, in the case of *Alexander F. Ritchie v Envireneer (Marine Cranes) Limited*, the Employee was employed as an Engineering Projects Manager. His invention related to lifting equipment. It was found his skills were such that it might reasonably be expected that an invention could result from carrying out his duties in the course of a special assignment.

Patents

Patents give their owner the exclusive right to use and exploit the invention. The Employer will be the owner of inventions made by their Employees made *"in the course of employment"* as set out above.

If more protection is required by the Employer, it should look to import express contractual terms into the employment contract.

An agreement to assign statutory rights in inventions not yet created by Employees is unenforceable. It is therefore important to incorporate a contractual term into the employment contract, with a specific provision for the Employee to enter into a written assignment soon after an invention has been made.

Copyright

Generally the author or creator of the work is the owner of copyright, but not where the author is an Employee and the work is literary, dramatic, musical, artistic or film and unless otherwise agreed, the copyright vests in the Employer where the work is created *"in the course of employment"*.

This does not apply to sound recordings or broadcasts. If the Employer wants to own the copyright in these, an express assignment should be drafted into the employment contract. The provision can include copyrights and future copyrights in work not yet created.

Database Rights

Databases are defined as a *"collection of independent works, data or other materials which are arranged in a systematic way and are individually accessible by electronic or other means"*.

The maker of a database is the owner of the database rights in it and the Employer is regarded as the maker of a database made by an Employee *"in the course of employment"*, subject to any agreement to the contrary.

In the case of *PennWell Publishing UK Limited v Ornstein* (2007) (EWHC1570(QB)) the Judge considered the ownership of contact databases held on an Employer's system where there is no express agreement regulating ownership. He said:

"I am satisfied that where an address list is contained on Outlook or similar programme which is part of the Employer's email system and backed up by the Employer or by arrangement made with the Employer, the database or list of information will belong to the Employer. I do not consider that position will change where the database is accessed not from the Employer's computer but from the Employee's home computer by "dialling up" or otherwise "logging on" to the Employer's email system by some form of remote access."

A modern problem can arise with Employees and databases where an Employee is dismissed and then seeks to use a database of contacts he or she has built up for the purpose of their work using social media e.g. LinkedIn.

Designs

Where an Employee creates a design that qualifies for registration in the course of employment, the Employer is entitled to apply for and subsequently own the UK registered design.

The Employer is also the owner of any UK unregistered design right in designs created by its Employees *"in the course of employment"*.

The statutory test of the meaning *"in the course of employment"* is the same as for copyright.

Trademarks

The Trademarks Act 1994 does not deal expressly with ownership of trademarks as between an Employer and Employee. If an Employer can satisfactorily demonstrate to the Trademarks Registry that a pending application has been wrongfully applied for by an Employee trying to appropriate the

"When preparing employment contracts... ...focus on Job Title and Job Description as useful tools in seeking to establish that inventions or works created by an Employee have been created *'in the course of employment'*."

Employer's brand, then the application would be rejected. In the UK, this is done either on the basis that the application was made in bad faith, or where the Employer has already built up a reputation in the market on the basis of the Employee's prior passing off of rights.

If an application has been granted the Employer or Registrar can apply to have it invalidated, relying on the same grounds.

Contract

Although the Employer has statutory rights, generally speaking it is far more straightforward to enforce contractual rights, so ideally employment contracts will contain specific terms relating to intellectual property rights.

Breaches of the statutory rights or contractual rights normally entitle the owner to bring a claim seeking an injunction to prevent future use and to recover compensation and costs.

Know-How and Confidential Information

There is no statutory protection of Know-How and Confidential Information, so Employers will have to look to contractual rights. These can be implied or express. Employees owe their Employer's implied duties of confidence and fidelity. Employees who are also Directors owe an additional fiduciary duty; that is to act in the Company's best interests. These implied duties are breached where for example:

- an Employee sets up in competition with their Employer having copied and taken with him the Company's database of customers for use after termination;
- a former Director seeks to exploit what was a maturing business opportunity for the Employer.

An Employee is bound not to use or disclose confidential information gained in the course of his employment and during his employment, but after the termination of employment, the implied duty only extends to trade secrets; that is information by its nature highly confidential, such as chemical formulae, designs, secret recipes or special methods of construction.

An Employee is entitled to retain and use information that is part of his own skill and knowledge required and applied during employment and after the employment has ended.

It is therefore advisable to have express contractual terms protecting confidential information supported by post termination restrictive covenants. Post termination restrictive covenants are susceptible to being held unenforceable where they seek to restrict the Employee's activities that go beyond protecting the business's legitimate business interests.

It is also advisable for the contract to include a payment in lieu of notice clause, where the Employer wants to terminate the contract immediately but without causing a breach of the contract. With regard to enforcement of post termination restrictive covenants, if an injunction is required two of the requirements are that there has been no delay by the Employer and that there has been no material breach of the contract by the Employer. This means where there is an immediate termination of the contract by the Employer (save for gross misconduct), and where there is no pay in lieu clause in the contract, there will be a material breach of the employment rendering the post termination restrictive covenants unenforceable.

An Employer can often effectively protect its interests by self-help, by putting an Employee on Garden Leave with no right to contact customers giving it the opportunity to secure customer relationships by replacing them with loyal employees. There needs to be an express clause to cover the right to place an Employee on Garden Leave.

Summary

When preparing employment contracts, consider the following drafting points:

- Focus on Job Title and Job Description as useful tools in seeking to establish that inventions or works created by an Employee have been created *"in the course of employment"*.
- Provide for the assignment and a Power of Attorney in respect of various rights and a provision to disclose any inventions made during the course of employment.
- Include post termination restrictive covenants that should be carefully drafted to be tailored to the legitimate business interests to be protected so that they are not too widely drawn to maintain enforceability.
- Include an express Garden Leave clause.
- Include a Payment in Lieu of Notice clause.

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PROPERTY LAW

Unanimous Pre-Christmas Gift to UK Landlords

Susan Johnson, Senior Associate

In early December 2015, the long-running saga between BNP Paribas (the landlord) and retail giant, Marks & Spencer (the tenant), was decided by the Supreme Court ruling in BNP's favour that a tenant cannot recover rent paid in advance when they exercise a break clause, unless there is an express provision in the lease that clearly allows such a refund.

The Facts

The case concerned Marks & Spencer's (M&S's) exercise of a break clause in the lease of their head office premises in Paddington in London. The lease was for a fixed term with an expiry date of 2 February 2018, with the rent being payable by the tenant on the usual quarter days (25 March, 24 June, 29 September and 25 December). In accordance with the terms of the break clause, M&S validly served a break notice to bring the lease to an end on 24 January 2012 and, also in accordance with the terms of the break clause, M&S subsequently paid the full quarter's rent due on 25 December 2011, despite the lease being due to come to an end one month later on the break date. In addition, M&S paid to BNP a premium of £919,800 as a condition of operating the break clause, again as provided in the lease. After the lease had ended on the break date of 24 January 2012, M&S requested repayment from BNP of the excess rent for the period from 24 January 2012 to 24 March 2012 (totalling £1.1m), even though there was no provision in the lease for such repayment. BNP refused this request.

High Court Decision

M&S subsequently issued proceedings to recover the "overpayment", and the High Court decided in M&S's favour, the judge implying a term into the lease allowing M&S to recover the rent paid in advance for the period beyond the break date. The judge viewed the "overpayment" of £1.1 million rent as a penalty payable by the tenant, which assisted him in implying a term into the lease permitting a refund.

Court of Appeal Decision

However, on appeal to the Court of Appeal, the Court found in BNP's favour, upholding the usual rule that a lease requires an express term stating that a tenant is entitled to a refund of rent paid for any period beyond the break date, and held that, in the absence of such an express term, the Court could not imply it.

Supreme Court Decision

In early December, the Supreme Court unanimously upheld the Court of Appeal's decision and rejected M&S's claim that a term for reimbursement of rent paid for the period after the break date should be implied into commercial leases.

Effect of the Judgment

The effect of this decision is that, in order for a tenant to clawback any rent paid in advance on service of a break notice, there must be clear wording in the lease which states something along the lines of "the landlord will refund to the tenant any rent (and other monies) paid by the tenant attributable to the period after the break date".

When negotiating Heads of Terms for a new lease, it should be made clear to the landlord that if there is to be a tenant break clause in the lease, rent and other monies paid for any period beyond the break date must be reimbursed to the tenant within a specified number of days following the break date.

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INTELLECTUAL PROPERTY LAW

General Data Protection Regulation: Full Harmonisation of EU Data Protection Law?


Nick Phillips, Partner
Charlie White, Associate

The European Commission, Council and Parliament have agreed on a new General Data Protection Regulation with the final texts to be adopted by the European Council and Parliament shortly. The new rules will then become applicable 2 years later and are therefore likely to come into force in 2018.

The precise wording is yet to be released but it is possible to gain insight into some of the key changes by looking at what the Commission has said in its press releases and other documents:

Single Set of Rules

As a "regulation" rather than a "directive" this legislation will become directly enforceable in every member state of the EU without the need for any

national legislation to implement it. The hope is that this will lead to a much more harmonised approach to data protection law across the EU (which is currently implemented quite differently in different member states) and that this will therefore encourage businesses to innovate across the EU with only one set of data protection requirements to deal with.

One Supervisory Authority

The plan is that a data controller will be supervised in respect of data protection activities it carries out across the EU by only one supervisory authority in the country the data controller is based. It has not been confirmed but there are reports that the data controller may be able to choose which supervisory authority supervises it. If that is the case, we envisage many companies from English speaking countries choosing to be supervised by the UK Information Commissioner's Office.

Stronger Enforcement

Data protection authorities will be able to fine companies who breach data protection rules up to 4% of their global annual turnover bringing their powers more into line with competition authorities.

Territorial Scope

Under the new data protection rules, companies based outside of the EEA but offering goods or services on the EU market will have to comply with the same rules as companies established in the EEA. The current rules are slightly ambiguous in such circumstances and rely on the company outside of the EEA using equipment in the EEA for the processing of data for the data protection rules to apply.

Data Protection by Design and by Default

The new rules will push companies towards designing their products and services with data protection in mind and the rules promote the use of anonymisation, pseudonymisation and encryption. This is certainly an area where it will be necessary to drill down into the detailed rules once the final texts are approved to see precisely what is expected of companies in this regard.

Notifications to be Scrapped

The notification regime is to be scrapped. Currently there is a requirement that almost every company that processes data registers with the supervisory authority, provides details of its data processing and pays a fee.

Data Protection Officers (DPO)

Where the core activities of the data controller consist of data processing operations that require regular and systematic monitoring of data subjects, we are likely to see a requirement that a DPO is appointed to assist the data controller with compliance. The DPO will most likely be required to be a person who has expert knowledge of data protection law and regulations.

A "Clarified" Right to be Forgotten

Subject to there being legitimate reasons for the data to be retained, a data subject will have the right to request that data about that data subject is deleted.

Data Portability

The new rules will give individuals a right to request that their data is moved from one service provider to another.

Conclusions

Certainly big changes in data protection are on the way and although the changes won't begin to bite until 2018, businesses should start preparing for the changes that are coming especially given the level of fines that will become available for breaches. It will be of great relief to businesses operating across borders in the EU to know that they will only have to comply with one set of data protection rules and deal with one regulator. However, businesses who collect a lot of personal data will continue to have to contend with the many laws and regulations which are not yet to be harmonised in the same way (e.g. consumer protection regulations).

"It will be of great relief to businesses operating across borders in the EU to know that they will only have to comply with one set of data protection rules and deal with one regulator."

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We hope you find this newsletter useful and interesting, and we would welcome your comments. For further information and additional copies please contact the editor: Russel Shear on t: +44 (0)20 7691 4082 e: russel.shear@edwincoe.com

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