Corporate NEWSLETTER

Summer 2016

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PROPERTY LITIGATION LAW

Landlord Can Accept Keys Without a Surrender of a Lease by Operation of Law

Joanna Osborne, Partner

Where a landlord and tenant want to bring a lease to an end before its contractual end date, they can do so by means of a surrender of the lease.

There can either be an express or an implied surrender of a lease. An express surrender must take place by deed, otherwise it is void. However, a surrender can also be implied from the conduct of the landlord and the tenant. This is called a surrender *"by operation of law"*.

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Editor's Note

Welcome to the Summer 2016 edition of our Corporate Newsletter. This latest edition contains a variety of useful articles covering employment, property litigation, intellectual property and trade mark, real estate, and corporate & commercial 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 that you would like us to consider in the next edition, please do get in touch.

This edition comes to you just after the UK's referendum on whether to stay in the European Union (EU). At this stage, it is too early to know the full effects but we will be sharing with you the legal ramifications as our Brexit journey evolves. Please visit the **Brexit Implications** area within our website for the latest developments. If you do have any concerns in the meantime, please do not hesitate to contact me.

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EdwinCoe LLP

A surrender by operation of law will only take place when the conduct of the landlord and the tenant amounts to an acknowledgement that the tenancy has ended or is inconsistent with the continuation of the tenancy. A surrender by operation of law is based on the doctrine of estoppel, rather than the actual intention of the parties. The conduct must show both a handing back of the property by the tenant and acceptance by the landlord. Mere vacation of the property by the tenant will not suffice. The conduct must be unequivocal.

Tenants will often argue that acceptance of the keys by the landlord amounts to a surrender by operation of law. However, the Court has held previously that accepting the keys to premises will always be equivocal in the absence of any other conduct, because someone has to hold the keys to prevent them being passed backwards and forwards. Recent clarification of this areas has been provided in the case of *Padwick Properties Limited v Punj Lloyd Limited* [2016] EWHC 502 (Ch), in which the Court had to decide whether a lease had been surrendered when the landlord had accepted the return of the keys.

In this case the administrators of the tenant company wrote to the landlord confirming that the tenant had vacated and that the security and safety of the property would revert to the landlord. Then the administrators returned the keys. The landlord did not change the locks, but advertised the property for sale for a short period. There were also security issues which forced the landlord to arrange around the clock security and then the boarding up of the lower floor windows, the changing of some locks and installation of alarms, in order to comply with its insurer's requirements.

However, the landlord's agent also wrote to the administrators rejecting the suggestion that the tenant could bring the lease to an end simply by vacating the property.

The Court held that the lease would have been brought to an end if the landlord had relet or taken back possession of the property, but the following was found to be the case:

- The return of the keys to the landlord was not inconsistent with the continuation of the lease. The landlord had made it clear that the keys were being accepted for security reasons and not by way of surrender.
- The landlord had not changed the locks to exclude the tenant, but to ensure that the property was secure and thereby preserve the value of its own interest.
- Simply marketing the property did not amount to conduct which was inconsistent with the continuation of the lease, nor did it matter that the property had been marketed as being available for sale with *"vacant possession"*. The landlord could have taken possession whenever it wanted, but had chosen not to do so.

Great care therefore needs to be taken by both the landlord and the tenant in a situation where a tenant hands back the keys. The tenant needs to ensure that the landlord unequivocally accepts any surrender, or preferably enters into a deed of surrender. The landlord needs to recognise the risk of surrender by operation of law and make it clear that if it is accepting the keys it is only doing so in order to protect the landlord's interest and that this is consistent with the continuation of the lease.

"Great care therefore needs to be taken by both the landlord and the tenant in a situation where a tenant hands back the keys."

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International Alliance of Law Firms

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If you have questions about how Edwin Coe and the International Alliance of Law Firms can address your global business and legal needs, please contact Russel Shear, Head of Corporate & Commercial at Edwin Coe. Alternatively, please email executivedirector@ialawfirms.com.

INTELLECTUAL PROPERTY LAW

YoYo's Claim Fails – High Court Confirms Principles to be Applied in Domain Name Cases

Eric Ramage, Of Counsel

"The case is a welcome confirmation that domain name disputes decided under Nominet's DRS or UDRP cannot be appealed to the UK Courts."

The High Court has confirmed in [2015] EWHC 3509 (Ch) *Yoyo. Email Limited and Royal Bank of Scotland PLC and Others* that (1) unsuccessful respondents in UDRP or DRS proceedings have no right of appeal to the English Court, and that (2) the mere fact of registering a domain name can constitute an act of passing off.

Background

Domain name disputes are commonly resolved without the parties having to go to Court by using one of the relatively low cost dispute resolution schemes available. Where the dispute concerns a .uk domain name the parties may use the Dispute Resolution Service (DRS) run by the UK's domain name body, Nominet and where the dispute concerns a .com domain name the parties may use the Uniform Dispute Resolution Policy (UDRP) which is offered by a number of providers including the World Intellectual Property Office (WIPO). Variations on the UDRP are available in relation to many other domain names.

The claimaint, YOYO.EMAIL (YoYo) registered various domain names based on trade marks owned by members of the Royal Bank of Scotland group who then filed a successful complaint with WIPO using the UDRP, and recovered the domain names. YoYo brought an action in the English High Court arguing that they should be granted a declaration by the High Court that the UDRP case had been wrongly decided. RBS asked that the action be struck out and counterclaimed for trade mark infringement and passing off, seeking summary judgement on the basis that YoYo had no realistic prospect of success. They argued that the court had no jurisdiction to act as an appeal body from WIPO's Decision, that there is no practical utility in granting the declaration asked for and that in light of established case law YoYo had no reasonably arguable case and no realistic defence to their passing off claim.

YoYo argued that based on the proper construction of the UDRP in accordance with the law of the State of Arizona (where the domain name registrar was based) and an argument that the leading decision was wrong or ought to be distinguished, it did have a realistic prospect of succeeding in its claim and that there were compelling reasons why the case should go to trial.

Passing Off

The law relating to passing off was not in dispute. The claimant in a passing off action must establish (1) relevant goodwill, (2) a misrepresentation (whether or not intentional) which (3) results or is likely to result in damage to that goodwill. YoYo had acknowledged the existence of a relevant

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goodwill and accepted in the course of argument that consumers were misled and damage would follow. The battleground therefore related to whether YoYo had committed an actionable misrepresentation by registering the domain names.

RBS relied on the very well- known Court of Appeal case of *British Telecom v One in a Million* and submitted that simply placing the Domain Names on the register led, by itself, to passing off because it makes a representation that the owner of the names is connected or associated with the registrant of the domain name, which of itself causes damage. They also argued that the registration of the Domain Names was an instrument of fraud. They stressed they were not seeking summary judgment on the basis of use of the Domain Names, by YoYo. The fact of their registration was they said, sufficient.

YoYo not only argued that the decision in *One in a Million* turned on its own specific facts and was of no assistance, but that the *One in a Million* decision concerned a state of affairs which existed many years ago and the internet has developed considerably since then, to an extent that the reasoning of the Court of Appeal in that case was no longer valid. Thirdly they argued that the way in which they intended to use the Domain Names meant that there was no risk of confusion.

These arguments found no favour with His Honour Judge (HHJ) Dight who said that the essential factual elements behind Aldous LJ's decision in *One in a Million* had not altered, nor did he accept that the law had moved on since *One in a Million* was decided in any way relevant to the issues which he had to consider. The reasoning of the Court of Appeal in *One in a Million* has been followed and applied in a number of cases in the intervening years by judges at first instance and in the Court of Appeal.

The Judge therefore accepted the defendants' submission that actionable passing off occurred at the point of registration of the Domain Names. He declined to decide on the question whether the registration of the Domain Names was, by itself, an instrument of fraud, because he felt it was not necessary to do so.

Appeal From UDRP to High Court

The Judge dealt with the question of whether or not YoYo had the right to appeal a UDRP decision to the High Court by reference to two other domain name related decisions, namely *Toth v Emirates* and *Patel v Allos Therapeutics*.

Toth involved a challenge to a decision under Nominet's DRS. It had turned on the proper construction of clause 10(d) of the Nominet DRS Policy and clause 17(c) of the related procedural rules which said that the operation of the DRS will not prevent either the Complainant or the Respondent from submitting the dispute to a court of competent jurisdiction. The corresponding Clause 4(k) of the UDRP (dealt with in *Patel v Allos Therapeutics*) provides that the mandatory requirement to submit to UDRP did not prevent the respondent or the complainant from submitting the dispute to *"a court of competent jurisdiction for independent resolution"*.

In *Toth* the claimant had registered the domain name *"Emirates.co.uk"* about which the airline of that name brought a complaint to Nominet in accordance with the DRS. The complaint was upheld, following which Mr Toth started proceedings in the Patents County Court which were subsequently appealed to the High Court. On appeal, Mann J held (1) that the DRS did not create a cause of action, (2) that the question of whether there had been an abusive registration was for the expert appointed in accordance with the DRS, (3) there was no room for parallel court proceedings on the point and (4) that there was no basis for (or practical utility in) granting a declaration where the DRS left the question of abusive registration to the expert.

In *Patel*, Allos Therapeutics had successfully complained under the UDRP in respect of a disputed domain name which the panel ordered to be transferred to them. Mr Patel (the unsuccessful respondent in the UDRP) commenced proceedings in the Chancery Division which were struck out on the basis that the proceedings disclosed no cause of action and were totally without merit. Referring to clause 4(k) of the UDRP the judge had noted that this clause speaks of *"referring the dispute"* to the court for *"independent resolution"*.

However, her decision had made it clear that an agreement cannot confer a jurisdiction on the Court which it does not otherwise have, and that the claimant must demonstrate some independent right of action. On a UDRP complaint being dismissed the complainant may ask the Court for an order that its trade mark has been infringed, but if, on the other hand, the complaint is upheld, the burden is on the registrant to prove a cause of action giving him an interest in retaining the domain name.

The Judge adopted the reasoning in *Patel* to hold that on a proper construction of the UDRP, clause 4(k) did not give rise to a separate cause of action in favour of the claimant nor did it afford any jurisdiction to the Court to act as an appeal or review body from the Decision. He also said there is no material difference between the wording and proper construction of DRS and the UDRP schemes (at least so far as clauses 10(d) and 4(k) are concerned) and the reasoning of Mann J in *Toth* is compelling and should be applied in this case. Finally, he saw no practical utility in granting declaratory relief because the UDRP had already dealt with the issue, and there was no evidence to suggest any practical utility in granting the declarations. This was a plain and obvious case for striking the Claim out, and had he not done so he would have granted reverse summary judgment, dismissing YoYo's Claim.

Conclusion

The case is a welcome confirmation that domain name disputes decided under Nominet's DRS or UDRP cannot be appealed to the UK Courts. To have decided otherwise would only have served to undermine the usefulness of these well-used and generally well-liked systems which offer, and usually achieve, quick and efficient dispute resolution in domain name cases.

It also serves as a reminder that mere registration of a domain name that includes another party's trade mark, particularly where that mark has a reputation, is likely to amount to passing off. Such claims will be dealt with quickly and relatively cost effectively by the Courts often on a summary basis, if not quite as quickly and as cost effectively as under the UDRP or the DRS.

EMPLOYMENT LAW

Employment Roundup

Rachel Harrap, Head of Employment

The UK employment environment is heavily legislated and there are growing demands on employers to mitigate their risks, alongside engaging their workforce. There are always interesting cases developing in this area, and I have prepared a brief summary of the most pertinent below:

"The higher Tribunal stated that the first question always to be asked is whether the circumstance of the dismissal falls within the ambit of one or more of the articles of the Human Rights Convention."

Can an Employer Investigate an Employee's Emails to Another Work Colleague Without Breaching His Human Right to Privacy?

Yes when the emails have a potential impact on work or deal, at least in part, with work related matters.

An employee was in receipt of malicious emails from fictional email addresses. She was also concerned she was being harassed and stalked by a male work colleague with whom she had had a brief relationship.

The employer investigated and concluded that there were items on the Claimant's i-phone which implicated him and linked him to the anonymous malicious emails. He was dismissed for gross misconduct. He claimed he had been unfairly dismissed. His claim failed.

The Claimant employee argued that the employer had acted in breach of his human right by examining matters related purely or essentially to his private life. This was rejected by the Employment Tribunal. It considered that the right to privacy was not engaged on account that the emails had potential impact on work and dealt, at least in part with work related matters. The Claimant appealed but was unsuccessful. The higher Tribunal stated that the first question always to be asked is whether the circumstance of the dismissal falls within the ambit of one or more of the articles of the Human Rights Convention. Unless they do the rights are not engaged and need not be considered further.

Whilst the human right to privacy does extend to protect private correspondence and communications and potentially emails sent at work, where there is a reasonable expectation of privacy, here the emails had impacted on work related matters and the emails were sent to work addresses of the recipients. The recipient was understandably distressed by the contents which potentially affected her work and management had the right to examine the Claimant's judgment. Accordingly the right to privacy had not been engaged and therefore was not relevant.

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Repudiatory Breach By an Employer

Does an Employee's Willingness to Negotiate a Termination Package Prevent a Claim of Constructive Dismissal?

In the recent case of *Gibbs v Leeds United Football club*, the Claimant was the assistant manager at Leeds United and the manager he worked with was sacked. The Claimant was asked if he was interested in becoming head coach but he declined. He expected to be dismissed although he was asked to continue in his role whilst discussions were held about a consensual departure.

The Claimant was not expected to work with the new manager. He was excluded from any meaningful parts in the training of the first team which was part of his normal duties and he was not invited to pre-session training. Instead he was told by email that he was to have no contact with the first team and he would work with the Youth Academy. He resigned in response.

The High Court held that it was not a breach of contract on his part to initiate a discussion about consensual termination. The fact that he had said that he was prepared to leave if suitable terms were agreed was beside the point. He had remained ready and willing to fulfil his duties. The email was repudiatory since it led to a plain loss of status and he had resigned in response to that and therefore was entitled to succeed in his claim for notice pay.

Warranty Claims

Interpretation of Contractual Limitation Period for Notifying Warranty Claims Following the Sale of a Business

In *Nobahar-Cookson and Othrs .v. The Hut Group Limited* a court of appeal considered whether a buyer's warranty claim under a share purchase agreement was time barred by a contractual limitation period for notifying claims which required the buyer to serve notice of the claim within *"20 business days of becoming aware of the matter"*. The Court of Appeal had to determine whether the phrase *"becoming aware of the matter"* meant:

(a) aware of the facts giving rise to the claim (even if unaware that those facts did give rise to a claim); or

(b) aware that there might be a claim under the warranty; or

(c) aware of the claim, in the sense of an awareness that there was a proper basis for the claim.

It was common ground that the appeal should be allowed if the Court preferred either of the first two possible constructions. The Court unanimously dismissed the appeal concluding that the ambiguities in the provision should be resolved by adopting the narrowest possible interpretation and that construction (c) should be preferred accordingly.

Can Raising Written Concerns With an Employee on Sick Leave be a Repudiatory Breach of the Contract by the Employer and Can It Constitute Disability Related Harassment?

In another recent case, it was held that writing to an employer while she was on sick leave for work related stress to raise concerns with her performance at work that were not serious or urgent put the employer in repudiatory breach of the implied term of mutual trust and confidence and the employee could claim to have been constructively dismissed. However, on the face of this case the employer's action did not amount to an act of disability related harassment as the employee could not show that the conduct related to her disability or that it had the purpose or affect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

TUPE Service Provision Change

Will TUPE Apply in a Change of Service Provision Where Not All Activities are Transferred

In a recent case it has been held that there is no requirement for the whole of the service to transfer in order for the service change provisions of TUPE to apply. Accordingly it is possible for there to be a TUPE transfer where only part of the service being carried out by the transferor is subsequently performed by the transferee.

The fact that the TUPE regulations make express provision for business transfers in circumstances where only part of an undertaking is transferred but there is no such provision in respect of the transfer services does not militate against that interpretation and the lack of such express wording does not mean that a service provision change cannot take place in the event of a part transfer of a service or activity. Unlike the business transfer provisions the service provision change provisions are domestic provisions which do not depend on a finding that there was a transfer of a discreet economic entity with functional autonomy.

Case law has established that a straight forward and common sense reading of the service provision change provisions is required and there is nothing to be implied that the relevant activities constitute all activities carried out by the outgoing contractor.

PROPERTY LAW

Leases – Assignments to Guarantors are Void

Susan Johnson, Senior Associate

The High Court has recently held that under the Landlord and Tenant (Covenants) Act 1995 (the Act) a tenant may not assign its lease to its guarantor.

Background

The Act, which significantly changed the law regarding landlord and tenant liability following an assignment of a tenancy, came into force on 1 January 1996 and was designed to address the issue of the continuation of liability of parties to a lease long after they have disposed of their interest in the property to which that lease related.

Briefly, the Act provides that where a tenant assigns a new lease (i.e. granted after 1 January 1996):

- the benefit and burden of the covenants in the lease pass to the assignee;
- the outgoing tenant is released from future liability under the tenant's covenants; and
- where the assigning tenant is released from a tenant covenant by virtue of the Act, as from that release, any guarantor of the tenant is released to the same extent.

The Act also contains a wide anti-avoidance provision at s25(1) which renders void any arrangement relating to a tenancy that would have the effect of excluding, modifying or otherwise frustrating the operation of the Act.

"The Act also contains a wide anti-avoidance provision at s25(1) which renders void any arrangement relating to a tenancy that would have the effect of excluding, modifying or otherwise frustrating the operation of the Act."

A 2011 Court of Appeal decision (*K/S Victoria Street v House of Fraser*) clarified a number of issues under the Act, but during that case Lord Neuberger suggested the anti-avoidance provisions in the Act would make an assignment of a lease to a tenant's guarantor void, saying, *"the whole thrust of s24(2), indeed of the 1995 Act itself, is that a person should not remain liable under a tenancy after the tenant whose liability he has associated with has been released from his liability"*, and it *"would also appear to mean that the lease could not be assigned to the guarantor even where both tenant and guarantor wanted it"*. This was said obiter by Lord Neuberger and did not form part of the court's decision on the case, but the property industry has been waiting to see if the courts would follow Lord Neuberger's suggested approach to this issue, or take another view.

The Facts

The obiter commentary from Lord Neuberger has been applied in a recent High Court case, *EMI Group Ltd v O&H Q1 Limited* 2016.

HMV UK Limited (HMV) occupied premises in Worcester under a *"new"* lease and EMI Group Limited (EMI) guaranteed HMV's liability under the lease under a deed of guarantee.

HMV subsequently went into administration in November 2014 and the landlord, O&H Q1 Limited (OH) granted to HMV a licence to assign the lease to EMI. The licence contained standard covenants in favour of OH by EMI as an assignee, namely to perform and observe the tenant's covenants in the lease for the remainder of the term. The assignment of the lease was subsequently completed, making EMI the new tenant.

A month after completion of the assignment, a letter was sent by EMI's solicitors to OH's solicitors stating that, although the assignment to EMI was valid, the tenant's covenants in the lease could not be enforced against EMI based on Lord Neubergers obiter comments in the K/S Victoria case that the anti-avoidance provisions of the Act would make an assignment of a lease to a tenant's guarantor void. EMI sought a declaration that, although the lease vested in it as a matter of law, the tenant's convents were void and unenforceable against it.

Decision

The Court held that a tenant may not assign its lease to its guarantor and any arrangement to do so will be void under s25(1) as it will frustrate the purpose of the Act.

The purpose of the Act is to ensure that there is no re-assumption or renewal of liabilities by either the tenant or the guarantor. This means that where a tenant and tenant's guarantor are equally liable for the tenant's covenants in the tenancy, the guarantor cannot reassume those same liabilities by the tenant assigning the lease to the guarantor. In this case, at the very same moment that EMI, as guarantor, was released, it became bound as the new tenant. Therefore, in practical terms there was no release because EMI reassumed the liabilities as assignee. This frustrates the operation of s24(2) of the Act and so the assignment was void under s25(1).

As the assignment was void:

- it did not take effect to vest the lease in EMI;
- the lease remained vested in HMV; and
- EMI remained bound as guarantor.

Further Thoughts

The judge in the EMI case observed that *"the fact that such a conclusion is unattractively limiting and commercially unrealistic is neither here nor there"*. The decision is likely to be unpopular, particularly with arm's length independently advised businesses wishing to assign leases between group companies.

"The Court held that a tenant may not assign its lease to its guarantor and any arrangement to do so will be void under s25(1) as it will frustrate the purpose of the Act."

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CORPORATE & COMMERCIAL LAW

The End of the Annual Return

Eoin Broderick, Associate

From 30 June 2016, the requirement for a company to file an annual return at Companies House was replaced with a requirement to file a confirmation statement at least once a year.

This statement will confirm that all of the information held by Companies House about the company is correct and up to date. The idea is that this will stop needless repetition of information already provided to Companies House.

For most companies, the date they will be required to file their first confirmation statement will be either the first anniversary of their incorporation (if incorporated in the last 12 months) or the anniversary of the date of their last annual return. However, unlike annual returns, there will be no fixed filing date for a confirmation statement. They can be made at any time throughout the year but no longer than 12 months may elapse between confirmation statements. Every time a confirmation statement has been made, the 12 month clock will re-set.

"The confirmation statement will need to be filed within 14 days of its due date (i.e. the end of the 12 month period), unlike the current 28 day period for an annual return."

The confirmation statement will need to be filed within 14 days of its due date (i.e. the end of the 12 month period), unlike the current 28 day period for an annual return. As with the present regime, reminder letters will be sent out by Companies House.

If any changes occur during the year, for example to your registered office, directors or share capital, then you will be able to file an additional confirmation notice alongside notices of the changes and confirm your record at Companies House is correct. You can file as many confirmation statements as required during the year but you will only be charged once each year. The charges will be the same as for the current annual return: £40 if filed on paper and £13 if filed online.

There are also a number of other changes to be made aware of that came into effect from 30 June 2016:

- Companies will be required to file their Person of Significant Control (PSC) information with Companies House for the first time. Once this information has been filed at Companies House, it will be on public record. For most companies, this information will form part of their first confirmation statement and so in some cases will not be filed for almost 12 months.

  Companies will be able to choose to file their confirmation statement early and in doing so, their PSC information would become publicly available at that point. Any companies registered after 30 June 2016 will have to provide their PSC information as part of the incorporation process.

- Companies will also have the option to keep any or all of their statutory registers at Companies House, including:
  - Members
  - Directors
  - Secretaries
  - Directors' residential addresses
  - Personal of Significant Control.

  However, if the company elects to do so, all of the information contained within them will be readily available to the public, including residential addresses and dates of birth.

- Any filing to be made at Companies House including a statement of capital will include the new simplified statement of capital. This no longer separates the share capital out in amounts paid on each share but instead will simply state the total aggregate amount unpaid on shares. It is felt that this figure will be more useful for shareholders and creditors as it indicates the amount of money still due to the company.

We are still waiting for final details of the confirmation statement regime from Companies House and will provide an update once they have been confirmed.

"If the company elects to do so, all of the information contained within [their statutory registers] will be readily available to the public, including residential addresses and dates of birth."

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Brexit Implications

To view our response to the outcome of the UK Brexit Referendum, please visit our website - Brexit Implications

We will be publishing legal commentary as our journey evolves.

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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