HILL DICKINSON

spring/summer 2010

# contentious business update

Banking focus

## Office of Fair Trading -v- Abbey National & Ors [2009] UKSC 6 [2009] EWHC 919 (Comm).

The Supreme Court has ruled that bank charges levied on personal current account customers in respect of unauthorised overdrafts constitute part of the price of the banking services provided within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 reg.6(2)(b) and the Office of Fair Trading was not entitled under the regulations to assess the fairness of these charges in relation to the services supplied.

Abbey National, Barclays Bank Plc, Clydesdale Bank Plc, HBOS Plc, HSBC Plc, Lloyds TSB Bank Plc, Nationwide Building Society and Royal Bank of Scotland appealed against the decision of the Court of Appeal that the Office of Fair Trading (OFT) was entitled to assess the fairness of certain bank charges, namely unpaid item charges, paid item charges, overdraft excess charges and guaranteed paid item charges.

The OFT wished to investigate the fairness of the relevant charges under the Unfair Terms in Consumer Contracts Regulations 1999, which applied to UK law the EU Council Directive 93/13 of April 5, 1993. The

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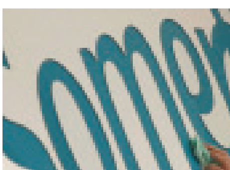

Supermarket sweep

Page 3

Contracts focus

Page 5

Question and answer with Jeremy Reilly

Page 10

# Welcome

Welcome to this the inaugural edition of contentious business update from Hill Dickinson.

This coincides with Hill Dickinson's 200th anniversary, a key milestone for any business. The aim of this newsletter is to provide an informative, readily understandable summary of recent legal developments that impact on your organisation.

In our first edition we explore recent cases in employment, contract, tenancy and copyright law. In addition, Jeremy Reilly, head of insolvency at Hill Dickinson, answers questions on current issues his clients are facing and Ralph Bullivant, head of property litigation, reviews a recent high profile tenancy case of his.

We do hope that you find business law of interest and helpful to you. If you have any enquiries or feedback on this newsletter, please don't hesitate to contact our editor, Andrew Bogle, at andrew.bogle@hilldickinson.com.

## Stop press...

We are proud to announce Hill Dickinson was awarded 'National law firm of the year' at the prestigious Legal Business Awards in February. Our thanks go to our clients for their continued support as we continue to strive to develop our business for the benefit of our clients.

# Contents


Banking focus 1
Tenancy focus 3
Contract focus 5
Employment focus 8
Insolvency focus 10
Intellectual property focus 11
Procedural focus 12
Negligence focus 12


# Letters to the editors

We would welcome any comments readers may have on the articles in this newsletter, or on any related topic, and would be happy to publish suitable commentary in a subsequent edition. Please contact the editors, whose details are on the back page.

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continued from page 1

banks argued that such an investigation would be prevented by Reg.6(2) of the regulations. Reg 6 reads:

"Assessment of unfair terms
6. (1) ...the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate:
(a) to the definition of the main subject matter of the contract, or
(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

The Court of Appeal had held that the relevant charges were ancillary in nature and not part of the core bargain between bank and customer. The Supreme Court said that there was no basis on which the court could decide that some services were more essential to a contract than others. That included the services offered to current account customers. Reg.6(2)(b) contained no indication that only an 'essential' price or remuneration was relevant. Although not every term that was linked to monetary consideration would fall within Reg.6(2)(b), the relevant terms and charges did fall squarely within it.

The Court of Appeal had gone too far in interpreting the language of the directive and the regulations, so as to seek to adopt a principle that freedom of contract should prevail where there had been meaningful negotiation between supplier and customer. The directive and regulations applied only to terms which had not been individually negotiated. Bank charges levied on personal current account customers in respect of unauthorised overdrafts constituted part of the price or remuneration for the banking services provided and, if the terms giving rise to the charges were in plain intelligible language, no assessment under the 1999 Regulations of the fairness of those terms could relate to their adequacy as against the services supplied.

Lady Hale of Richmond, one of the Supreme Court judges, said: "The banks may not be the most popular institutions in the country at present, but that does not mean that their methods of charging for retail banking services are necessarily unfair when reviewed as a whole." The banks' appeal was therefore allowed.

Customers hoping for refunds on overdraft charges are therefore left disappointed. About one million people had filed legal claims for refunds.

The issue on appeal was limited. The court was not considering whether the system of charging personal current account customers adopted by United Kingdom banks was fair. It would remain theoretically possible for the OFT to seek to assess the fairness of the charges according to other criteria but it has apparently decided against this course.

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# Supermarket sweep

Ralph Bullivant, head of property litigation, reviews a recent case where the court was, somewhat unusually, faced with problems resulting from the administration of a landlord rather than a tenant. Ralph acted for the tenant in this case.

Administration has been one of the big news stories of the past year. The retail sector has been hit particularly hard, with a large number of casualties on the high street ranging from major household names such as Woolworths through to smaller local operators.

## The moratorium

The particular feature of the administration procedure which can cause the most difficulties for those parties who have a business relationship with the insolvent company is the moratorium which applies whilst the company is in administration. The intention of the moratorium is to give the company a breathing space, ideally in the hope that this will enable the company to be rescued, or at least to secure a better outcome for the creditors of the insolvent company. The moratorium arises by virtue of paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 (inserted by The Enterprise Act 2002), which provides:

"(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except -

(a) with the consent of the administrator; or

(b) with the permission of the court"

Schedule B1 contains similar restrictions on enforcing security against the company, repossessing goods under hire purchase agreements and forfeiting leases by peaceable re-entry.

The administrator is unlikely to consent in most situations, and if an application is made to court then the court will have to carry out the balancing exercise enunciated by the Court of Appeal in the re Atlantic Computer Systems plc case in 1992, weighing up the prejudice to the claimant if he is not allowed to pursue the insolvent company against the potential prejudice to the objectives of the administration if the claimant is allowed to proceed.

## The *Somerfield* case

The problems facing landlords, who will experience difficulties in obtaining payment of rents and in forfeiting leases where tenants have entered into administration, have been well documented.

A much less common scenario, however, is that of a tenant experiencing difficulties because of their landlord going into administration, but that is exactly what the court was faced with in the recently decided case of Somerfield Stores Limited -v- Spring (Sutton Coldfield) Limited, a case in which Hill Dickinson acted for the tenant.

Put simply, the case concerned a lease renewal. The tenant, Somerfield, wished to renew the lease of its successful trading store in Sutton Coldfield pursuant to the statutory rights of renewal available to business tenants under Part II of the Landlord and Tenant Act 1954 ("the 1954 Act"). Somerfield had accordingly served a notice under section 26 of the 1954 Act requesting a new tenancy.

The landlord, on the other hand, wished to redevelop the property and had served a hostile counter-notice to Somerfield's section 26 notice, objecting to the renewal of the lease on the grounds of the proposed redevelopment of the property, being a potentially valid reason for refusing renewal.

Somerfield then made application to the court for a new tenancy and directions were ordered for the landlord's objection to a new lease to be dealt with as a preliminary issue.

But the landlord, Spring (Sutton Coldfield) Limited, was a subsidiary of Castlemore Securities Limited. When Castlemore became one of the most high profile casualties of the credit crunch, Spring joined Castlemore and three other subsidiary companies in entering into administration on 27 February 2009, to be followed shortly after by a further eleven subsidiaries.

Had the landlord been solvent, the tenant would pursue lease renewal

proceedings through the courts and the landlord would, as part of those proceedings, have to prove its intention to redevelop in order to resist the tenant's application. Somerfield's problem in this case was that lease renewal proceedings are still proceedings, requiring the consent of the administrator or leave of the court before they could be pursued.

The administrators refused consent. They knew that the financial status of the landlord meant that they could not hope to persuade a court that they had a genuine intention to redevelop the property. But if they could use the moratorium to delay that particular battle until perhaps six or even twelve months later then circumstances might have changed.

The evidence before the court suggested that a viable development scheme, which could only be achieved if Somerfield's request for a new lease was successfully opposed, could have increased the value of the property from around £4 million to more than £6 million.

## The decision

The case was heard before His Honour Judge Purle QC in the Birmingham District Registry of the High Court on Friday 12 June 2009, and the learned judge duly granted leave for Somerfield to pursue their lease renewal proceedings against their landlord.

In reaching his decision, the judge carried out the balancing exercise required by the Atlantic Computer Systems plc case but considered that the prejudice to the tenant outweighed the prejudice to the landlord and its creditors. The judge said he viewed the tenant's rights under the 1954 Act as "the equivalent of a proprietary right", which could be overreached to achieve the objective of administration, but not simply to improve the position of a secured creditor. He concluded:

"The claimant [Somerfield] is presently in a state of continuing uncertainty in relation to a store that it wishes to refurbish. It is wrong for that uncertainty to continue … It would be wrong of this court to improve the position of the defendant or the bank to the prejudice of the claimant, which has a right to have its proceedings heard without undue delay."

The judge also took into account the fact that the purpose of the administration was only really to benefit the landlord's bank.

Finally the judge observed that, even if the landlord was not able to prove an intention to redevelop on the matter coming before the court, it is quite possible that the court would grant the tenant either a short tenancy or a tenancy containing a break clause.

## Significance

The decision is interesting for several reasons.

As already mentioned, it concerned unusual (although by no means unique) circumstances where the landlord rather than the tenant was in administration.

The case is also a rare example of a party benefitting from another's insolvency. Had the landlord remained solvent, it may well have been able to demonstrate sufficient intention to develop in order to defeat the tenant's application for a new tenancy. But, having entered into administration, the landlord suddenly became unable to prove any such intention and the moratorium became its only chance of frustrating the tenant.

The case is also of interest for clarifying the circumstances which the court needs to take into account in order to carry out the necessary balancing exercise in the context of lease renewal proceedings.

But, and perhaps most significantly, it shows that the courts will not automatically allow an administrator to rely on the moratorium, particularly in circumstances where it is apparent that the insolvent company cannot ultimately be saved and the administration is unlikely to benefit the creditors as a whole.

## But...

The decision is to be welcomed by tenants, who now have a useful precedent for the proposition that leave should generally be given to pursue lease renewal proceedings against landlords in administration.

But, in any area of law where the decision turns on the facts and circumstances of each individual case, another court faced with different circumstances may reach a different outcome when the balancing exercise is applied, particularly if the administrators could convince the court that the delay would assist in the rescue of the insolvent company, thereby saving jobs and ensuring a better deal for creditors as a whole.

## A final word

This decision does not guarantee that the tenant will succeed, it simply allows the tenant to pursue the proceedings. The tenant will still need to argue at those proceedings as to why it should be granted the new lease requested and it will still be available to the landlord to sort itself out in the meantime and try to prove in those proceedings that it now has the requisite intention to redevelop. It remains to be seen, however, how a landlord will be able to do that whilst it is in administration.

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# STOP PRESS

## Administration – good news for landlords

In the December 2009 case of Goldacre (Offices) Ltd -v- Nortel Networks Ltd (in administration), another decision by his Honour Judge Purle QC, the High Court has confirmed that *full* rent is payable as an administration expense (i.e. before paying preferential and other creditors) if the administrators cause the insolvent company to use premises for the benefit of creditors.

## Internet Broadcasting Corporation Limited & NETTV Hedge Funds Limited -v- NAR LLC [2009] EWHC 844 (Ch)

### Exclusion clauses and deliberate breaches of contract

In a significant development, the English High Court has refused to uphold an exclusion clause where the party seeking to rely on the exclusion clause had deliberately refused to perform the contract. The exclusion clause provided that "neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage". When the defendant wrongfully purported to terminate the agreement, the claimant successfully sued for loss of profits. The court said that although there is no rule of law that an exclusion clause cannot apply to a deliberate repudiatory breach of contract, there is a strong presumption to that effect, which has to be rebutted on the evidence. The exclusion clause contained no clear statement that deliberate wrongdoing was intended to be covered.

## Chartbrook Ltd -v- Persimmon Homes Ltd & Ors [2009] UKHL 38

### Pre-contract communications not to be used to interpret a contract

The House of Lords (now the Supreme Court) has reaffirmed that an objective approach must be taken when interpreting contractual terms. Where it is clear that something has gone wrong with the language of a contract, the court will construe it in accordance with what a reasonable person would have understood the parties to have meant, taking into account the relevant background. The court also saw no clearly established case for revisiting the rule in Prenn -v- Simmonds (1971) 1 WLR 1381 that pre-contractual negotiations are inadmissible for the purpose of construing the meaning of a contract.

## Tekdata Interconnections Ltd. -v- Amphenol Ltd. [2009] EWCA Civ. 1209

The Court of Appeal has addressed the recurring problem of how to resolve the battle of the forms. The court reinforces the approach based on a traditional offer and acceptance analysis to determine which of the parties' terms and conditions apply.

The seller appealed against a decision that the parties' dealings were on the buyer's terms. The parties were part of a chain of suppliers to Rolls Royce. Rolls Royce bought engine control systems for installation in its aero engines from Goodrich. Goodrich bought cable cable harnesses and other items from the buyer who in turn acquired connectors from the seller. The parties had been doing business for over 20 years. Goodrich required the buyer to purchase the connectors from the seller to a specification and at a price determined by Goodrich. The seller similarly had a long-term contract with Goodrich pursuant to which it agreed to supply connectors to the buyer at the price fixed by Goodrich.

The buyer sent purchase orders to the seller containing the buyer's terms and conditions. The seller sent an acknowledgment stating that its own terms and conditions applied. Adopting an orthodox approach, an offer to buy on the purchaser's terms followed by an acknowledgement on the seller's terms and delivery would normally result in a contract on the seller's terms.

However, the judge at first instance held that the buyer's terms applied because he found that this was always the parties' intention. The judge based his conclusion on the fact that the connectors were sophisticated items which were to be fitted into aero engine control systems; that delivery times and quality control were important and on the pre-existing agreement between the seller and Goodrich, which committed the seller to supply on terms which largely corresponded to those of the buyer.

The judge apparently concluded that the statement at the foot of the seller's acknowledgment stating that its terms were to apply was to be ignored. The Court of Appeal confirmed that the traditional offer and acceptance analysis must be adopted unless the documents between the parties and their conduct showed that their common intention was that some other terms were intended to prevail. This was not the case here.

The fact that delivery times and quality control were essential was true in many commercial relationships. There was no precise matching between the terms of the agreement between the seller and Goodrich and the buyer's terms. The traditional analysis led to the conclusion that the terms of the seller's acknowledgment would be the contractual terms and the judge should have held that the seller's terms and conditions applied.

## Durham Tees Valley Airport -v- bmi baby [2010] EWCA Civ485

The budget carrier bmi baby was brought down to earth by the 4 May Court of Appeal decision in favour of Durham Tees Valley Airport [DTVA], part of the Peel Airports Group. The Hill Dickinson team headed by Geraldine Ryan worked closely with the client's in-house lawyers to achieve a successful outcome.

The airline entered into an agreement with DTVA in 2004 under which it was to base two planes at the airport for ten years. Only two years into the contract, however, bmi baby withdrew both aircraft unilaterally and re-deployed them at other UK airports, stopping all services without warning and without agreeing the cancellation terms.

DTVA issued proceedings claiming lost income for the remaining eight years of the contract. The judge at first instance, Mr Justice Davis, expressed sympathy for the airport's position but ruled against it on the basis that the contract was too uncertain to enable him to award damages in DTVA's favour. In doing so he was influenced by the absence of detailed provisions setting out numbers of flights and destinations.

He recognised, however, the importance of the issues and allowed permission to appeal. All three appeal judges found in favour of DTVA. Giving the lead judgment Patten LJ said:

"It was necessary for the court to determine whether the number of flights undertaken during any given period amounted to operating the aircraft, the contract contains sufficient terms to allow that to be done.

The question for the judge faced with an allegation of breach of contract would be whether BMIB was, in a real and genuine sense, flying its aircraft.

Token flights or a complete absence of any flights (which is this case) clearly would not amount to operating the aircraft. Subject to this, the question of how many times and to where are matters for the airline's discretion".

The extent of any damages awarded will be substantial. If the parties cannot agree a figure it will be necessary to go back to court again to determine just what the extent of the loss suffered was. Patten LJ provided guidance regarding the framework to be adopted in determining how any future award should be calculated. Essentially this would be how its agreement with DTVA would have been performed if bmi baby had not attempted to walk away from the contract:

"The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in its own interest having regard to the relevant factors prevailing at the time.

The court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are assumed to have acted in good faith although with their own commercial interest very much in mind".

Following the decision Geraldine Ryan commented:

"This ruling will have a significant impact on commercial contracts in the future, particularly in the aviation industry. The Court of Appeal has made it clear that bmi baby had a long-term obligation to operate from DTVA and just because the contract did not spell out precisely how it will conduct its operations on a daily basis, that was no reason to render the contract void.

Furthermore, in looking at damages, the Court of Appeal has ruled that bmi baby could not operate in a way that was uncommercial merely to spite DTVA. The ruling is crucial as airports have to be able to rely on the enforceability of their contracts at a time when the airport industry (in common with all industry sectors) is under increasing pressure".

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## Whittle Movers Ltd. -v- Hollywood Express Ltd. (2009 EWCA Civ. 1189)

The Court of Appeal decided that the judge at first instance was wrong in finding an interim contract where the parties were negotiating a long-term contract and had begun to perform the services in the meantime. He should have found that there was no contract but that instead a restitutionary claim could be argued with an inquiry as to unjust enrichment.

Hollywood was a subsidiary of a cinema group and undertook distribution and warehousing services which it sub-contracted. Hollywood invited new tenders for the distribution sub-contract and Whittle was the successful tenderer. The tender process was 'subject to contract' and contemplated the execution of a formal long-term contract. Before a draft contract was even finalised, Whittle began performing the distribution services. Whittle's invoices reflected the prices negotiated for a five-and-a-half year contract. No formal contract was ever executed.

After some 15 months of trading Hollywood gave notice to terminate what it said was an interim agreement based on the contract with the previous sub-contractor, which could be terminated on six months' notice. Whittle contended that by conduct the parties had actually entered into the long-term contract. Hollywood asserted that by conduct the parties had entered into an interim contract terminable on six months' notice.

The court at first instance found that no long-term contract had been entered into, and that the parties had by conduct concluded an interim contract terminable on six months notice. He judge decided that the prices negotiated for the long-term contract applied.

Whittle appealed and submitted that there was a long-term contract; alternatively that no contract had been concluded at all, in which case Whittle was entitled to a restitutionary remedy in that Hollywood had been unjustly enriched by paying (lower) prices applicable to a long-term contract.

The Court of Appeal confirmed the finding that no long-term contract had been made.

There was neither complete agreement on important terms nor any indication that negotiations were no longer 'subject to contract'.

However, the judge was wrong to conclude that an interim contract arose from the parties' conduct. While parties were negotiating it was highly unlikely that by conduct they would achieve an interim contract containing terms still the subject of negotiation.

Even an analysis on the basis that Hollywood agreed to pay a reasonable remuneration to the supplier was doubtful if important terms such as those relating to standard of performance were still under negotiation. In such cases the proper answer was a finding that there was no contract but that a restitutionary remedy should be adopted where one party had been unjustly enriched. The court should not strain to find a contract because a restitutionary remedy could solve most problems.

It was arguable that Hollywood had been unjustly enriched if Whittle received less than a reasonable price for the services supplied. The court ordered an enquiry as to whether Hollywood had been unjustly enriched.

## Claramoda Ltd. -v- Zoomphase Ltd. (T/a Jenny Packham) [2009] EWHC 2857 (Comm)

**'Washing up' by a commercial agent is sufficient to prolong contract period.**

For the purposes of the Commercial Agents (Council Directive) Regulations 1993, an agency contract between a clothing manufacturer and its agent had not terminated when the agent ceased to negotiate sales. The agency contract had effectively continued during the period the agent carried out other types of commercial activity

The court had to decide the effective termination date of an agency contract and in consequence whether the agent had given notice of its intention to pursue its claim within 12 months of that date, as required under the regulations.

Zoomphase manufactured women's clothing and, from 1998, had sold one of its ranges through Claramoda, acting as exclusive agent. In December 2005, following a conversation between the parties, the agent understood that it was very likely that the spring/summer 2007 season would be the last as Zoomphase's agent. The main collection for that season was sold until the end of October 2006 but there was further commercial activity between the parties until the second week in January 2007. After 23 January 2007, Zoomphase informed its customers by letter that its collections would be represented in-house from the autumn/winter season 2007/2008 onwards.

On 27 November 2007, the agent gave the manufacturer written notice that it intended to bring a claim for compensation under the Commercial Agents (Council Directive) Regulations 1993 reg.17 following termination of the agreement. The agent submitted that although its primary agency duties might have concluded at the end of the selling season in October 2006, it had secondary duties which had continued until the start of the following season and so its claim was made within the 12 months from the date of termination. The manufacturer argued that Claramoda's authority as agent had terminated when the main collection orders had been finalised on or before 31 October 2006 and so the claim was time-barred.

The court found that the date by which the agent's selling authority had been implicitly withdrawn was a date after 31 October 2006. However there had been continuing commercial activity, demonstrating an authority to negotiate sales, after that date. While reg.2(1) defined the role of a commercial agent by reference to a continuing authority to negotiate, the agency contract did not necessarily terminate when the agent ceased to negotiate sales.

During November 2006, Claramoda had been involved in dealing with customers' concerns about their orders and confirming discrepancies in the paperwork. That activity was of the same nature as had taken place during the spring/summer 2006 season. The effective termination date was in mid-January 2007, shortly before the trade began preparations for the new season and shortly before Zoomphase's letter to its customers. The agent's notice in the letter of 27 November 2007 had therefore been given in time.

# Important new employment laws

## New Equality Act

The Equality Act has received Royal Assent and is to come into effect from October 2010. The Act refers to the "protected characteristics" of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It contains harmonised definitions of direct discrimination, indirect discrimination and harassment.

### Disability discrimination

The Act prohibits indirect discrimination on the grounds of disability. The test for establishing whether an individual has a disability is broader and no longer refers to the capacities that must be affected (for example mobility, manual dexterity, physical coordination, memory or ability to concentrate). The Act clarifies protection against discrimination by association with an individual who has one of the protected characteristics, for example in relation to a mother who cares for her disabled child.

### Equal pay

Regulations may be made requiring private sector employers with at least 250 employees to publish information about pay differences between male and female employees.

### Age discrimination

The Act outlaws age discrimination by service providers. The Act provides powers to extend age discrimination protection outside the workplace.

### Employment tribunals

The Act provides for changes to the way that individual claims are enforced, and gives to employment tribunals wider powers to make recommendations for the collective benefit of employees.

## Rolls Royce -v- Unite [2009] EWCA Civ 387

**Length of service in a redundancy selection is a legitimate factor if it can be objectively justified.**

The Court of Appeal has ruled that the use of length of service in a redundancy selection matrix was lawful. The court found that, whilst a length of service criterion can constitute indirect discrimination, it will not breach the Employment Equality (Age) Regulations 2006 provided it can be objectively justified. Although the length of service criterion was indirectly discriminatory on younger employees it was, when viewed objectively, a proportionate means of achieving a legitimate aim and therefore justified.

The legitimate aim was the reward of loyalty and the overall desirability of achieving a stable workforce. Proportionality had been demonstrated because length of service was only one of the selection criteria and it was consistent with the overarching concept of fairness. In addition, the use of length of service as a criterion amounted to a 'benefit' and therefore fell within the exemption provided under the regulations for certain benefits based on length of service.

## Stuart Peters Ltd -v- E L Bell [2009] LTL 30/7/2009 Court of Appeal

**Entitlement to compensation**

The principle established in Norton Tool Co Ltd-v-Tewson [1973] 1 WLR 45, namely that if an employee was dismissed without notice and without pay in lieu he would be entitled to compensation equal to his net pay for that period of notice without deduction for earnings he had received from alternative employment, does not apply to cases of constructive dismissal.

## SCA Packaging Limited -v- Boyle [2009] UKHL 37

**A lower test for disability**

The House of Lords has held that where an impairment 'could well' have a substantial adverse effect on an employee's ability to carry out normal day-to-day activities, were it not for the fact that measures were being taken to treat or control it, impairment could constitute a disability, attracting the protection of the Disability Discrimination Act 1995. Previously, employees were required to pass the more difficult test of showing that it was 'more probable than not' that they would suffer such a substantial effect, were it not for any treatment they may be receiving.

Mrs Boyle had a history of problems with hoarseness caused by vocal nodules. She had been instructed by her medical advisers to adhere to a strict regime which included moving away from background noise, avoiding passive smoking etc. Mrs Boyle's employer decided to remove a partition separating her work space from a larger, noisier area. She complained, with the support of her ear, nose and throat surgeon, that the increased noise levels would adversely affect her health. The company declined to change its decision.

The House of Lords agreed that Mrs Boyle's condition constituted a 'disability' for the purposes of the DDA and stated that, in addressing the degree of likelihood required under the DDA, the tribunal should have asked whether the substantial adverse effect 'could well happen', were it not for the treatment Mrs Boyle was undergoing.

Since the House of Lords has broadened this definition to include any situation where an employee can demonstrate that his or her condition 'could well' have a substantial effect, were it not for the fact that he or she was taking measures to control it, claimants will in the future, more easily be able to show that they have a disability.

## Ammah -v- Kuehne & Nagel Logistics Limited [2009]

**Duty to warn of obvious risks**

The Court of Appeal has re-stated that the obligation imposed on employers to devise a safe system of work for their employees includes a duty to warn them against risks, even those that might be considered obvious, particularly to an experienced employee. The court has however acknowledged that some risks are so obvious that warnings are not required but without giving additional guidance.

Commentators have suggested that it may be useful to draw a distinction between activities which fall squarely within the scope of the employee's job and those which fall outside. The employer's duty is to give instructions in respect of all activities falling within the employee's scope of work.

## Pereda -v- Madrid Movilidad (ECJ) Case C-277/08

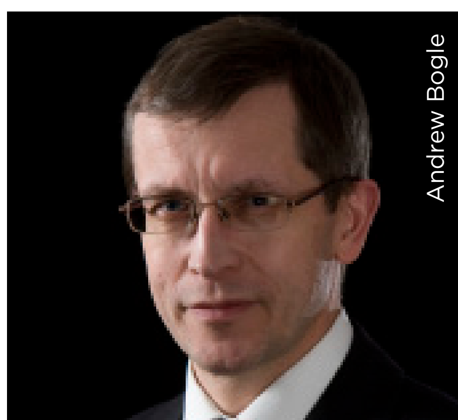
**Holiday and sick leave overlaps**

Mr Pereda was employed in Spain as a truck driver. He was due to take annual leave from 16 July to 14 August. However, following an accident he was on sick leave from 3 July to 13 August. Mr Pereda asked his employer to allow him an alternative period of leave but this was refused.

The ECJ decided that where a worker cannot take previously arranged annual leave because of illness, the worker should be able to take that lost leave at another time. The decision applies only to the four weeks' annual leave required under the Working Time Directive and not to any additional holiday entitlement beyond this entitlement.

# Question and answer

Jeremy Reilly, head of insolvency, answers newsletter editor Andrew Bogle's questions.




## Jez, how do you find being an insolvency practitioner helps you in your work?

Having taken the JEB exams I have learned a lot about how an IP (insolvency practitioner) approaches any job and the issues an IP faces. Whilst I never take appointments, having qualified and obtained my licence, this hopefully helps me to see the way an IP approaches a problem, including the wider issues, not just the legal aspects.

## Do you find that you are doing a lot of a particular type of work currently?

There is currently a wide variety. There is a steady stream of property-related work. Because of the difficulty in funding, we are seeing a lot of pre-pack administrations and much less trading administrations. We are dealing with a lot more corporate rather than personal insolvencies.

## What do you think the year ahead has in store?

It's likely to be tough for the economy but with a slow improvement. The picture is different in different sectors. The main issues are unemployment, although that is likely to plateau out and the effect of public spending cuts and tax rises. I think we've seen the worst of the problems in the banking sector but the banks and other lenders continue to be cautious.

## What are the main issues which your clients are facing?

The main issues are obtaining funding and extending existing funding. Cash flow is a major problem. Pressure is likely to grow for some businesses, facing tax rises and increased pressure from creditors.

## Hard times then, but are there also opportunities for clients?

There are for those with cash. Now is a good time to buy. The property market is slowly picking up and there is the opportunity to pick up assets at reduced values. There will be some good businesses which will go under because of cash flow difficulties, presenting opportunities pre or post insolvency. Undoubtedly there will be consolidation in certain sectors.

## What would aid recovery?

The banks getting funding right. Now they are risk averse which is understandable. At some point they need to be more willing to lend.

## Finally, what does the next season have in store for West Ham?

The main aim will be to avoid another relegation battle. I would quite happily settle for mid-table mediocrity and a nice cup of tea. Hopefully with some stability in the boardroom now, next season will be less nail-biting than this one proved to be!

## L'Oreal SA and others -v- Bellure NV and others (Case C-487/07) Times 29.6.09 (ECJ)

### Imitation products

Bellure used similar packaging and bottles for its imitation fragrances to L'Oreal's luxury brands. While there was no confusion between the two parties' products, this use by Bellure was held by the European Court to amount to trade mark infringement because Bellure was taking an unfair advantage of the reputation that L'Oreal had built up in its trade marked packaging and bottles.

The judgment also affects producers and advertisers of imitation products who seek to use the Comparative Advertising Directive to defend trade mark infringement claims where they have published advertisements comparing imitation products with well-known brands. Bellure referred to its products alongside L'Oreal's product names. The European Court said that a statement comparing a replica of another product bearing a well known trade mark constituted unlawful comparative advertising which could be prevented by the proprietor of the well known mark. Article 5(2) of Directive 89/104 meant that the taking of unfair advantage of the distinctive character or the repute of a mark did not require that there be a likelihood of confusion or of detriment to the repute of the mark or to its proprietor.

The advantage arising from the use by a third party of a sign similar to a mark with a reputation was taken unfairly by that third party where it sought to ride on the coat-tails of the mark with a reputation and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the well known mark.

## L'Oreal SA -v- eBay [2009] EWHC 1094 (Ch)

## Interflora -v- M&S [2009] EWHC 1095 (Ch)

### Sponsored website links

Two cases heard recently by the High Court have resulted in referrals to the European Court of Justice (ECJ) on the question of whether use of a registered trade mark in an internet Adword or sponsored link constitutes infringement of that registered mark by any of the parties involved.

The first of these also raises issues relating to L'Oreal's attempts to prevent the sale of counterfeit and grey market perfumes and cosmetics via eBay. The cases in France and Belgium have been decided in favour of eBay, the case in Germany was decided in favour of L'Oreal and the outcome of the Spanish case is awaited.

In Interflora -v- M&S the English High Court refused to grant Interflora an interim injunction against Marks and Spencer and others to stop them from using the term 'Interflora' and close misspellings as a sponsored Google Adword search term.

## Patchett -v- Swimming Pool & Allied Trades Association Ltd [2009] EWCA Civ 717

### Misrepresentation on website

A trade body for swimming pool installers escaped liability for a misrepresentation on its website that wrongly suggested that a company employed by the claimants was a member that had been vetted as being creditworthy. The court accepted that there was "a sufficient relationship between SPATA and the claimants, as typical examples of those who would be expected to use the website to identify a SPATA member to install a pool, to satisfy both the test of proximity ... and the further test that it would be fair just and reasonable to impose a duty upon SPATA that it should take reasonable care to ensure that the representations it was making were true." However the site's warning to visitors to make further enquiries led a majority of the Court of Appeal to find that the assumption of a duty of care towards website visitors had been excluded.

## Actavis UK Ltd -v- Novartis AG [2] [2009] EWHC 41 (Ch)

### Obviousness in patents

The courts have recently clarified the test for when an invention is 'obvious', so that a patent awarded to protect it can be revoked. If a patent has been awarded for an invention that is 'obvious', it can be revoked because it lacks an inventive step. The test is whether an unimaginative but skilled person, with common general knowledge in this area, would think it was obvious. Common general knowledge is knowledge generally known by that skilled person, that they would automatically accept as reliable.

In Actavis, the court considered whether this included what is known as "secondary common general knowledge", that is, information that would not necessarily be to the forefront of their mind, but that they would routinely obtain or be provided with to tackle the problem - for example, review articles.

The court said that common general knowledge could extend beyond general information which the skilled person would know as a matter of course or could find in leading textbooks, such as information in review articles, but that the information: had to be "regarded as highly probable to be reliable"; would certainly be found by the skilled person doing his job properly, as part of his normal approach to the task of identifying sources of information to use as a starting point; and had to inform and guide the skilled person's approach to the problem from the outset. The more that a "diligent search" was necessary, following leads and cross-references, the less likely that the information was common general knowledge.

## Edwards Lifesciences AG -v- Cook Biotech Inc [2008] EWHC 1900 (Pat)

### Patent priority dates

The English Patents Court has handed down a significant judgment that determines the priority date that should be given to a patent. This is important because it determines the relevant prior art that can be deployed against the patent. The court, interpreting Article 4 of the Paris Convention (Stockholm revision), held that a person who files a patent application can enjoy priority only where either he had filed the earlier patent application (from which priority is claimed) or he was the successor in title to the person who had. Where a person subsequently acquired title to the invention they did not acquire the right to enjoy priority, as they were not entitled to claim priority when the later application was made.

## Jurado Hermanos SL -v- OHIM Case T-410/07 12 May 2009

### Trade marks - rights of licensee

The European Court of First Instance held that an exclusive licensee of a trade mark did not have any right to apply to restore a lapsed trade mark unless the licensee had obtained the trade mark owner's express authorisation to request renewal of the Community Trade Mark's registration.

Procedural focus

**Without prejudice communications remain inadmissible**

### Ofulue -v- Bossert [2009] 2 WLR 749

The House of Lords has reinforced the principle of inadmissibility of 'without prejudice' communications. Two successive actions were brought between the owners and occupiers of a property. The House of Lords refused to allow that a without prejudice offer to purchase the property, as evidence of acknowledgment of title made in the earlier proceedings, be produced in subsequent proceedings relating to the same property.

Negligence focus

**Abraham v (1) G Ireson & Son (Properties) Ltd (2) Stanley Reynolds (t/a Reynolds & Spademan [2009] LTL 6/8/2009**

Although a former employee's exposure to asbestos was light and intermittent, the overwhelming likelihood was that it had caused his mesothelioma. However, the exposure was not negligent as it was unlikely that during the periods of his employment, his employers would have believed, on reading the relevant literature available at the time, that he was or might be exposed to the risk of an asbestos-related injury. The employers had no special degree of knowledge or personal experience which would or should have alerted them to the potential risk.

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