E-Newsletter

February 2011

Ortolan Legal Ltd

Your latest commercial legal update from Ortolan Legal, the virtual in-house law firm

Our newsletter this month reviews a number of recently decided cases which are all very relevant to businesses large and small. We also continue our occasional look at some of the landmark legal cases in English law whose impact is still being felt today.

Forming Contracts By EMail

Court of Appeal holds that parties were bound by an email contract

It is well established that certain pre-requisites must be present in order to form a valid, binding contract. This includes offer, acceptance, consideration, capacity, intention and certainty of terms. It is also clear that a binding contract can be formed verbally or, more commonly, in writing. The Court of Appeal, however, in the case of Nicholas Prestige Homes v Neal has confirmed that a contract can be formed by an exchange of emails. Interestingly in reaching its decision, the Court of Appeal reached a different decision to the appellate court which heard Grant v Bragg in 2009. In that case, the Court of Appeal overturned the High Court decision which stated that a contract could be formed by an exchange of emails. The High Court judge had decided that, since a contract did not need to be signed, it could be formed by email. Although both cases may turn on their facts, extreme caution should be exercised when exchanging emails which contain contractual terms.

Redundancy

Offering alternative employment

The law is clear that an employer must use objective criteria when deciding who to select for redundancy. However, many employers were confused about how to determine which employee should be offered alternative employment, if vacancies existed elsewhere in the company. In the case of Morgan v Welsh Rugby Union, the Employment Appeal Tribunal decided that an employer is not bound to use objective criteria when offering alternative employment and can decide the matter on the grounds of who is best for the job. This is the case, even where the decision is based on subjective criteria. Mr Morgan had argued that his redundancy was an unfair dismissal as his experience and qualifications were better than those of the successful candidate. It is noteworthy that the case has not affected other general legal principles and the selection process needs to be fair and reasonable. More importantly, the case has not altered the principle that redundant employees on maternity and adoption leave must be offered any suitable vacancy first.

Unfair Contract Terms

Court of Appeal rules on industry standard terms

In another Court of Appeal case, the Court had to consider the use of industry standard exclusion clauses prepared by the British International Freight Association ("BIFA"). Under the Unfair Contract Terms Act 1977, where a seller contracts with a consumer or using the seller's standard terms of business, any exclusion clause is only enforceable to the extent that it is reasonable. The two BIFA clauses in question prevented set-off and required that all claims were made within a 9 month period. In Rohlig (UK) Limited v Rock Unique Limited, the Court of Appeal found that both clauses were reasonable and therefore enforceable. The case follows the decision in Granville Oil & Chemicals Ltd v Davies Turner & Co Limited, where the appellate court held that the time bar clause was reasonable. The Court specifically mentioned that respective size of organisations and resultant inequality of bargaining power might not render a clause unreasonable. Despite the decision, however, it is clear that all exclusion clauses must be drafted with care in order to ensure enforceability.

Key Cases in English Law

Hedley Byrne v Heller

As part of our newsletter, we are running a series of short articles covering some of the key cases in British Law. The first case was Donoghue –v- Stevenson, which dealt with the tort of negligence. Some forty years later, the courts refined this tort, in the case of Hedley Byrne v Heller. In Hedley Byrne, the House of Lords expanded the concept of "duty of care" into the professional advice arena. Prior to the 1964 case, the law had only really applied to manufacturers. However Hedley Byrne showed that the law applied to any person who gave advice in the course of their job. In this respect, the House of Lords decided that a bank owed a duty of care in tort when giving information to a third party. The case established a three tier test: did the professional have special knowledge; did the professional know or ought to have known that the claimant would rely on the statement; and did the claimant rely on the statement and was that reliance reasonable. Although the 1990 case of Caparo v Dickman has refined this test, Hedley Byrne is still referred to in many cases and remains the major case on liability for negligent mis-statements.

About Ortolan Legal

Ortolan Legal is a radically different law firm providing pragmatic and commercially focussed legal advice. We are all experienced in-house lawyers, based remotely so overheads are kept to a minimum. Our pricing structure is entirely flexible; we will adopt your preferred structure and simply ask to earn a fair margin for our work. We don't charge administrative costs. Dealing with ad hoc work or retainer work, we can assist where there is no in-house legal function and also provide holiday cover or supplement existing in-house legal teams. Our work covers non-contentious company commercial and employment law, contracts, tendering, purchase, supply, distribution, franchising agreements and pre-litigation reviews. We also provide general 'Legal Health Checks' and a 'Legal Hotline' offering legal support for a set number of hours each month.

If you require any advice in connection with the content of this bulletin, or on any other issues, please contact Claudia Gerrard on 0844 5611 638 or e-mail her at cgerrard@ortolangroup.com

Our series of seminars continues in 2011 with planning in progress for two more in the Midlands and the North-West as well as a further seminar in London. If you would like to register for any of these, please e mail cwarburton@ortolangroup.com to reserve a place.