

Commercial Thinking

Welcome to the 5th edition of Commercial Thinking. We have selected some of the most topical developments in UK commercial law over the last quarter on which to update you. From case studies to changes in regulation, Commercial Thinking aims to keep you alert of the legal updates that may affect your business.

**Featured article*

The Bribery Act: Now in force

After some delay, the Bribery Act 2010 (the 'Act') finally came into force on **1 July 2011** (see *Commercial Thinking 2010 – 2nd Edition* for our comments on the Act when it was originally enacted).

Now that the Act is in force, companies must ensure that their policies and procedures take into account the effects of the new law.

In recent months both the Government and, by way of guidance to prosecutors, the Serious Fraud Office (the 'SFO'), have published guidance which is intended to address issues, including facilitation payments, corporate hospitality, the application of the Act to foreign companies, and the procedures that companies are expected to put in place to prevent bribery. This update will outline the content of this guidance in relation to these key issues.

The offences

The Act clarifies and defines the offences of giving/offering and/or receiving/requesting a bribe (sections 1 and 2). It also creates two specific offences, the first being bribery of a foreign public official (section 6). Any individual or company with a close connection to the UK is subject to prosecution under sections 1, 2 and 6, no matter where in the world the bribery took place.

This update includes the following topics:

- **Featured article: The Bribery Act: Now in force*
- *1. Blaming the Referee*
- *2. Director Liability: The use of Corporate Directors*
- *3. Contracts: Keeping formalities to a minimum*
- *4. Entire agreement Clauses*
- *5. Contractual advantage from own breach not allowed*
- *6. New EU Directive on combating late payment in commercial transactions*
- *7. Rights of First Refusal*
- *8. Commercial agents' termination compensation – time limitations on claims*
- *9. Other hot topics*



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The second specific offence of failing to prevent bribery only affects commercial organisations (section 7). Any organisation which carries on business in the UK, wherever it is incorporated, is subject to prosecution under section 7 no matter where in the world the bribery took place and no matter whether it was committed by the organisation itself or by a person performing services for the organisation (e.g. an employee or agent). The only defence to such a charge is for a company to show that it had “adequate procedures” in place to prevent bribery.

Adequate procedures

The Government’s guidance addresses the subject of “adequate procedures” by setting out six principles, designed to be flexible to allow for the variety of circumstances in which commercial organisations find themselves. These principles are expressed in general terms and the guidance stresses that the key is for each organisation to identify and manage the specific risk profile that it faces. Organisations will face very different risk profiles depending on the specific factors affecting them. However, the six principles, together with the associated commentary, offer companies a useful starting point for developing appropriate policies and procedures. The six principles are:

- Proportionate procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication
- Monitoring and review.

Corporate hospitality

The guidance provided by each of the Government and the SFO emphasises that sensible and proportionate corporate hospitality/promotional expenditure is perfectly acceptable and can continue. However, exceptionally lavish entertainment or expenditure may result in questions being asked about the intentions behind such expenditure. The key is being able to objectively justify the outlay.

Facilitation payments

The Government and the SFO also appear to be aligned in relation to facilitation payments. Facilitation payments are unofficial payments made to



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public officials in order to secure or expedite the performance of a routine or necessary action (such as “grease” payments to customs officials). Both the Government’s guidance and the SFO’s guidance to prosecutors make it clear that such payments are illegal and must be eradicated. However, the Director of the SFO, Richard Alderman, suggested in a speech to Salans’ clients and guests on 7 April 2011 that the SFO was not expecting an immediate end to such payments. The key for the SFO appears to be that companies commit to eradicating facilitation payments in due course, and that they have put in place sufficiently robust procedures to achieve that goal.

‘Just because a foreign company has a UK subsidiary does not mean, on its own, that the courts will have jurisdiction over the foreign parent, since subsidiaries can be independent of their parent company.’

Implementation of the Act

The Government and the SFO may, however, take divergent approaches to the applicability of section 7 of the Act to foreign companies. The Government’s guidance is that the mere listing of a foreign company on a UK exchange does not mean, on its own, that the UK courts would have jurisdiction over that company (in contrast to the position under the US Foreign Corrupt Practices Act). Equally, the Government considers that just having a UK subsidiary does not mean, on its own, that the courts will have jurisdiction over the foreign parent, since subsidiaries can be independent of their parent company.

The SFO will, however, adopt a broad interpretation of the Act, and that it would be very dangerous for a foreign company to rely on a technical interpretation of the law to try and avoid prosecution. The SFO’s position appears to be that it would be very rare for a foreign company listed in the UK, or having a UK subsidiary, to have no other connection with the UK. The SFO will probe carefully into these cases to find any connection to the UK, since it has made clear its intention to prosecute bribery committed by foreign companies which adversely affects the business interests of “ethical” UK companies. The key question is the economic engagement of the foreign business in the UK.

Notable considerations

The Act is now in force and must be considered carefully by businesses, both in the UK and abroad. The Government’s guidance, while useful, is not an authoritative statement of the law. Ultimately it is the courts which will decide any questions as to the scope of the legislation, and the SFO is keen to bring prosecutions before the courts to test that scope. However, until the courts do rule on the scope of the Act, businesses are left with a



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number of unresolved issues. The only way to deal with these issues is to adopt a robust, pragmatic and thorough approach to anti-bribery compliance which is adapted to the specific needs of the organisation.

The Government's guidance, and its six principles, are a useful starting point. However, these are no replacement for a thorough understanding of the risks facing your particular organisation and the implementation of strong policy and procedures to address those risks.

In this regard, it is important for companies to be rigorous in developing compliance policies and procedures in order to provide a defence to a charge of failing to prevent bribery. Salans has developed an '**Anti-bribery tool-kit**' to help you to minimise risks, and ensure that you are safe, guarded against liability under the Act. Please contact us for further information.

1. Blaming the Referee

Two recent cases demonstrate that providing a reference, or refusing to, can have legal consequences.

The majority of employers recognise that references are a vexed issue, and are well aware of the potential legal consequences associated with providing them, whether they are positive or negative about the employee concerned. These two cases are the latest in a long list of claims relating to references.

Providing a negative reference could amount potentially to negligent misstatement. In the first case, a former employer had made factually incorrect comments in an email to the claimant's new employer that ultimately led to his dismissal. The email was not intended to be a formal reference but the High Court treated it as such. As the comments were incorrect, and the former employer had taken insufficient steps to verify them, it was held accountable for the consequences. The court confirmed that employers:

- have a duty to take reasonable care in preparing references, or similar statements, concerning an employee; and
- if they fail to fulfil this duty, will be liable for any consequential loss suffered by the employee.

If a former employer makes inaccurate statements about an ex-employee to

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a new or potential employer, that employee could also potentially pursue claims for defamation, malicious falsehood and victimisation alongside claims for negligent mis-statement.

In the *Deer v Walford & Anor (2011) UKEAT/0283/10/JOJ*, the Employment Appeal Tribunal considered the potential consequences of refusing to provide a reference. Deer was pursuing sex discrimination proceedings against her former employer, a university college. She asked her former academic supervisor if he would provide a reference to a prospective employer. The supervisor, who had nothing to do with the discrimination claim, declined. Deer claimed that his refusal was due to her discrimination claim and was victimisation. The supervisor denied that his decision was in any way related to the discrimination claim and said he had only vague knowledge of its existence.

The EAT found there was no evidence from which it could be inferred that the supervisor had any particular animosity toward Deer in relation to her claim. The claim was dismissed and Deer was ordered to pay costs.

Although this employee was not successful in her claim, the EAT confirmed that had there been evidence that the refusal to provide the reference had been in response to her claim, this could amount to victimisation. The outcome may have been different if, for example, a college employee involved with the claim had refused to provide a reference and there was evidence connecting that refusal to the claim.

What to do?

Employers often decide either to refuse to provide a reference or to give just a statement of service. However, these options are not always practicable and can also have legal consequences. But there are some simple steps employers can take to minimise the risks associated with references.

Employers should:

- Take a consistent approach to providing references.
- Try to restrict references to confirmation of an employee's role and period of service, where possible.
- If it is necessary to provide more information, give only basic factual information and avoid making assertions which are likely to be disputed by the employee.

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- Ensure there are clear guidelines for managers on both the process for providing references and who is authorised to provide them.
- Avoid recommendations - positive or negative - to a future employer on whether the employee is suitable for employment.
- Consider including disclaimers in references which make clear the limits on the information being provided.

This article was first published in People Management on 23 May 2011.

2. Director Liability: The use of corporate directors

A company can act as a director of an English company (known as a **'corporate director'**). Individuals, who would otherwise be directly appointed as directors, can ring fence their liabilities by acting through a corporate director. The Companies Act 2006 (the **'2006 Act'**) introduced a requirement that at least one director of a company be an individual person. However, any remaining directors can be corporate directors. In *Holland v Revenue and Customs & Anor (2010) UKSC 51* the Supreme Court considered whether the directors of a corporate director could be liable to the underlying company for the actions of that corporate director.

The *Holland* case, decided in February 2011, related to events that occurred before the implementation of the 2006 Act. Following an investigation HMRC had claimed approximately £3.5 million in unpaid tax from a group of related companies. This caused the companies to become insolvent. Each company had the same single corporate director which in turn had two individual directors. The corporate director had allowed distributions totalling £13 million to be made to the shareholders of the group companies when it knew that the HMRC investigation was ongoing.

HMRC claimed that the indirect control exerted by the directors of the corporate director over the group companies was sufficient for them to be deemed to be acting as directors of the group companies even though they had not been formally appointed as such (known as **'de facto'** directors). If this was upheld then the individuals would have been liable for allowing the payment of the distributions by the group companies. It was not claimed that the individuals had acted otherwise than within their capacity and authority as directors of the corporate director.

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The Supreme Court held that the individual directors had acted solely in their capacity as directors of the corporate director. It is a principle of English law that a company is a separate legal entity from its directors. If any liability arose in connection with the payment of the distributions by the group companies then the corporate director was responsible for this, not its own individual directors. The extension of the liability of 'de facto' directors sought by HMRC was a matter for the government to determine, and it had chosen not to do so when implementing the 2006 Act.

The *Holland* case does not provide an absolute protection against liability in these circumstances. The Supreme Court noted that it was necessary to examine the actions of the individual directors before reaching their decision. Had any of these actions been found to have caused the individuals to be deemed 'de facto' directors of the group companies then they could have been held liable for the payment of the distributions. This could occur where the individuals had been involved directly in the management of the group companies.

The decision reached by the Supreme Court in the *Holland* case was not unanimous. There were significant concerns raised that this judgment could enable those acting as directors to avoid or mitigate their liabilities. Two judges believed that the control over the boards of the group companies exercised indirectly by the individual directors, and the fact that they held the companies' only voting shares, was sufficient to deem them to be 'de facto' directors of the group companies. However, these views were not upheld.

Although the separation of the liability of the individual directors from the corporate director in this way may seem artificial, it does uphold a basic principle of English law. The *Holland* case represents the most recent review of the liability of 'de facto' directors.

3. Contracts: Keeping formalities to a minimum

A feature of English contract law is the willingness of the court to recognise the realities of commercial life. These realities often result in contracts, or perhaps alleged contracts, being in anything other than a neat and tidy document which has indisputably been signed by duly authorised persons. The Commercial Court demonstrated this in the case of *Golden Ocean*

Group Limited v Salgaocar Mining Industries Pvt Limited, Mr Anil V. Salgaocar [2011] EWHC 56 (Comm). The dispute related to the chartering of a ship and a guarantee of the charterer's obligations and the court had to consider a range of questions regarding contracts and guarantees which could easily relate to any number of commercial transactions. The court proceedings were brought in order to determine whether the Claimant, Golden Ocean Group, had an arguable case and, if so, that it should be permitted to issue proceedings in the English courts and serve them on the defendants in Goa. The judgment, therefore, is not a decision on the substantive issues in dispute.

'...the court had little difficulty in deciding that the emails which constituted the contract were signed by the electronically printed signature of the person who sent them.'

There had been a series of emails passing between a firm of shipbrokers and Golden Ocean Group on the one hand and between the same firm of shipbrokers and Mr Salgaocar on the other hand. These emails were the process by which Mr Salgaocar negotiated with Golden Ocean Group for the charter of a ship by Golden Ocean Group to a company called Trustworth and with the intention that the obligations of Trustworth would be guaranteed by Salgaocar Mining Industries (SMI). All emails were to and from the shipbrokers. The final emails indicated that all the terms of the charter agreement had been agreed. A formal charter agreement was then drawn up but was never signed.

The court had to decide whether there was an arguable case that a contract for the charter of the ship had been made and that the obligations of the charterer, Trustworth, had been guaranteed by SMI. If there was a guarantee then further questions arose as to whether the requirements of the Statute of Frauds Act 1677 had been complied with. If the requirements had not been complied with, then the guarantee would not be enforceable.

The court had little difficulty in deciding that it was perfectly possible for a written contract for charter to be concluded by way of a sequence of emails in which the proposed terms are set out or referred to and by which outstanding points are negotiated and eventually agreed. In this case the emails did not go between the parties but were to and from the shipbrokers who relayed to each of the parties the messages from the other party. Any given email usually dealt only with the outstanding point or points still under negotiation and did not expressly refer back to all the other terms which had been agreed in earlier emails. The court decided that it was not necessary for each email to refer back to the previously agreed terms and that there need be no limit to the number of emails in the sequence.

An early email recorded that negotiations were proceeding on the basis of the charterers being *“Trustworth fully guaranteed by SMI”*. The court decided that Golden Ocean Group had a “well arguable” claim that the charter and the guarantee were valid contracts. The court did, however, have to consider whether Golden Ocean Group had an arguable case that such guarantee complied with section 4 of the Statute of Frauds. This Statute requires that, to be enforceable, a guarantee must be in writing or that there is some written memorandum or note of the guarantee. In either case, the guarantee or the memorandum or note must be signed by the guarantor or by some other person lawfully authorised by the guarantor. The court decided that Golden Ocean Group did have an arguable case that the email sequence had produced a guarantee which was an agreement in writing. As regards the requirement for signature by or on behalf of the guarantor, the parties to the action agreed that an electronic signature would be sufficient.

The question before the court was whether there had, in fact, been anything which constituted a signature. The judgment includes a very useful review of previously decided cases which give guidance on this question and the court had little difficulty in deciding that the emails which constituted the contract were signed by the electronically printed signature of the person who sent them. Being satisfied that there was an arguable case that the guarantee was in writing and had been signed, the court then had to consider whether the signatures on the emails were by a person “lawfully authorised” by the guarantor, SMI. The emails had been from Mr Salgaocar to the shipbrokers and then from the shipbrokers to representatives of Golden Ocean Group. The court considered a range of background factors including previous transactions conducted by Mr Salgaocar on behalf of SMI and decided that there was an arguable case that Mr Salgaocar had authority to bind SMI. Further, this authority extended to Mr Salgaocar authorising the shipbroker to bind SMI. Even if the shipbroker had not been given actual authority to bind SMI, the court considered that it was arguable that it had apparent authority to do so.

It remains to be seen whether the dispute will result in a court action which will go through to a hearing and judgement. Any such judgment may or may not uphold the “arguable case” but it is instructive to see just how accommodating the court is prepared to be in grappling with what, on the face of it, might appear to be a rather unpromising collection of documents.

4. Entire agreement clauses

Entire agreement clauses continue to generate disputes which, in turn, lead to further judicial re-statements and refinements of previous decisions. They also continue to generate articles such as this.

'Clear words are needed to exclude liability for misrepresentation and the clause in the BSkyB case did not include any such clear wording.'

One of the issues considered by the Court of Appeal in the case of *AXA Sun Life Services plc v Campbell Martin Limited* (and three other actions brought by AXA where common issues arose) [2011] EWCA Civ 133 was the entire agreement clause, standard in AXA's agency appointment agreements, which excluded liability for representations and, in particular, misrepresentations. The defendants alleged that various representations had been made by AXA to each of them before they entered into their agreement, including the representation that they would be able to operate on a multi-tied basis. AXA's standard form of agreement, in fact, appointed them as its tied agent which precluded them from operating on a multi-tied basis.

The dispute, and the decision of the court, was very much based upon the specific wording of the entire agreement clause, the most relevant part of which read as follows: *"this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement"*.

It was accepted by all parties that the clause was effective to exclude collateral warranties, that is, collateral agreements the terms of which were not to be found in the agreements themselves. The argument centred on whether the wording was effective to prevent AXA being liable for alleged misrepresentations.

As may be expected, AXA argued that these words operated to eliminate misrepresentations and/or to exclude liability for misrepresentations, at least as far as concerned misrepresentations as to the terms of the agreements. The court noted, however, that the clause dealt mainly with contractual matters and that there was just this one reference to *"representation"* and no reference to *"misrepresentation"* (as distinct from accurate or true representations). The court further noted that the wording did not, in terms, state that no representations had been made or that no reliance had been placed upon representations (contractual estoppel) or that liability had been

excluded. The clause provided only that any such representations were “superseded”.

The court conducted a review of previously decided cases relating to clauses excluding or purporting to exclude representations or liability for representations. In particular, similar wording to that in the current case was considered in *BSkyB Limited v HP Enterprise Services UK Limited* [2010] EWHC 86 (TCC). In that decision Ramsey J concluded that prior representations were superseded in that they did not become a term of the agreement unless included in the agreement. The wording of the entire agreement clause in that case, however, did not take away a right of the party to whom a representation had been made to rely on that representation when entering into the agreement and to claim on it. Clear words are needed to exclude liability for misrepresentation and the clause in the BSKyB case did not include any such clear wording. In the AXA case, the court arrived at the same decision.

The court considered that to exclude liability for misrepresentation, the clause must state the parties’ agreement that no representations have been made; or that there has been no reliance of any representations; or contain an express exclusion of liability for misrepresentation.

It is worth noting that the allegations of misrepresentation were allegations of negligent misrepresentation. The law does not, in any event, permit exclusion of liability for fraudulent misrepresentation.

5. Contractual advantage from own breach not allowed

In *Extra MSA Services Cobham Ltd v Accor UK Economy Hotels Ltd* [2011] EWHC 775 (CL) the claimant (a developer) made an application for a declaration of the High Court that the right to terminate an agreement for lease to construct a hotel (the defendant/tenant being a hotel chain) was not conditional on the proper performance by the claimant of its obligations under the agreement.

The key provisions of the agreement were that: (i) the developer had to obtain “Requisite Consents” for the development to proceed; (ii) the developer had to use its reasonable endeavours to obtain the Requisite Consents by a specified longstop date; and (iii) a mutual right to terminate

the agreement if the Requisite Consents were not obtained by the specified longstop date.

The developer contended that since the right to terminate under (iii) was not expressed to be conditional on the proper performance of (ii), such conditionality should not be implied and it was therefore entitled to terminate even if it had not properly performed its obligation under (ii). The tenant contended that this would go against the general principle of construction (that stated in *Cheall v A.P.E.X. [1983] AC 180*) that a contract should not be construed so as to permit a party to take advantage of his own wrongdoing unless the contract clearly allows this.

The High Court agreed with the tenant and refused the developer's application. As a result, if it were demonstrated that the developer had failed to use all reasonable endeavours, it could not terminate. This fact will be determined at a later trial as the developer's application specifically determined only the point of law above.

It is common for contracts to allow for parties to get out of them if, through no fault of the parties, it is not possible to satisfy specified pre-conditions. However, this judgement places a rational limit on that common position – a party cannot benefit from its own breach of contract – unless the contract specifically provides otherwise.

6. New EU Directive on combating late payment in commercial transactions

Directive 2011/7/EU entered into force on 16 March 2011 (the '**2011 Directive**'). EU member states have until 16 March 2013 to implement it. The 2011 Directive replaces the Late Payments Directive (2000/35/EC) which was implemented in the UK by the Late Payment of Commercial Debts Regulations 2002. The 2000 Directive has proved inadequate in solving the significant problem of late payments in public-to-business and business-to-business transactions across the EU, which is thought to be responsible for the failure of 25% of small or medium-sized enterprises ('**SME's**'). The 2011 Directive implements tougher measures as summarised below.

In relation to payment periods, it is still possible for parties to specify these



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in contracts, but they must not be “grossly unfair” (see below). Payment periods longer than 60 days are likely to be considered “grossly unfair”. If the contract does not specify any payment period, then a 30-day payment period is implied. This runs from: (i) the date of receipt of the invoice; or (ii) if the date of receipt of the invoice is unclear or the goods and services are received before the invoice, the date of receipt of the goods or services. Where the debtor is a public body, 30 days is the standard payment period and can only be extended up to 60 days if “expressly agreed” and justified in light of the nature or feature of the contract or if the public body is providing health care.

‘The 2011 Directive will help keep SME’s afloat by reducing the business culture of paying late for goods and services.’

In relation to interest, suppliers are entitled to claim interest where payments are not paid within the payment period. The default interest rate is 8% above the European Central Bank base rate. Parties can agree a lower rate, but any lower rate must not fail the “grossly unfair” test. Suppliers are also entitled to claim a minimum fixed sum of 40 Euros compensation for late payment in addition to reasonable recovery costs (e.g. legal costs). Any clause which attempts to exclude interest for late payment or compensation is deemed to be “grossly unfair”.

Where a provision/practice is “grossly unfair”, it is unenforceable. The criteria for considering if a provision/practice is “grossly unfair” include: (i) gross deviation from good commercial practice; (ii) nature of product or service; and (iii) whether the debtor has an objective reason to justify deviation.

It is hoped that, in the difficult economic climate, the 2011 Directive will help keep SME’s afloat by reducing the business culture of paying late for goods and services. However, as member states have two years to implement it, it may not have the desired effect soon enough. Also, how much the late payment culture can be reduced depends on the willingness and inclination of suppliers to invoke the new remedies - businesses may be reluctant to do so for commercial reasons, e.g. losing future custom, and the burden on resources to invoke them.

7. Rights of first refusal

Such rights are not uncommonly provided for in various types of commercial contract, to address new products becoming available, changes in supply arrangements or the procurement process once the contract expires.

The nature of such rights was considered in *AstraZeneca UK Ltd v (1) Albemarle International Corporation (2) Albemarle Corporation* (2011). Albemarle supplied AstraZeneca with 2,6 Di-isopropyl-phenol, which AstraZeneca distilled in its manufacture of propofol, the active ingredient of its anaesthetic, Diprivan. The supply contract provided that, should AstraZeneca cease distillation, it would give Albemarle “the first opportunity and right of first refusal to supply propofol to [AstraZeneca] under mutually acceptable terms and conditions”. In the event, AstraZeneca entered into a contract to obtain propofol from a third party.

AstraZeneca contended that the provision, at most, required it to give Albemarle an opportunity to negotiate with AstraZeneca a contract on mutually acceptable terms. This is a weak obligation, as an “agreement to agree” is not binding. The court, however, found that a first right of refusal, as an “irreducible minimum”, confers on the party to whom it is granted, the right to match the third party offer and be awarded the contract, i.e. to receive a contractual offer containing the essential terms which the party who had granted the right was prepared to accept. This is even though the detailed terms of the contract might require further negotiation and a contract might not necessarily ensue. The party who has granted the right must provide the party to whom it is granted, with details of the third party offer, at the latest, before the third party offer is accepted. Moreover, it must act in good faith and disclose full details of the third party offer to the party entitled to the right of first refusal.

While the court did consider the commercial background to the first right of refusal clause, in particular to the process which AstraZeneca could be expected to follow when tendering for the new contract, the principles are of general application. A party which has granted such a right should bear in mind, when negotiating with the third party, the limitation on accepting third party offers before the right of first refusal is exhausted so as to avoid liability for breach of contract. A party granting such a right should provide for time limits for its exercise, otherwise the delays entailed by any “to-ing

‘The contract should not provide for a first right of refusal if all that is intended is that there should be non-binding, good faith discussions.’



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and fro-ing” between potential counter-parties to the new contract could increase the trouble of negotiations and cause financial difficulties when the deal is needed to continue funding operations. More fundamentally, the contract should not provide for a first right of refusal if all that is intended is that there should be non-binding, good faith discussions.

8. Commercial agents’ termination compensation – effect of future to assign the agency

Under the Commercial Agents (Council Directive) Regulations 1993 (the ‘**Regulations**’), a commercial agent (as defined in the Regulations) is entitled to compensation (or, if so agreed in the agency contract, an indemnity) when the agency ends, save in specified circumstances. The Regulations state that such a claim must be notified to the principal within one year of the end of the agency. In the case of *Barnett Fashion Agency Limited v Nigel Hall Menswear Limited* [2011] EWHC 978 (QB), Barnett Fashion Agency claimed that Nigel Hall Menswear was obliged to pay such compensation.

The background was as follows. Nigel Hall Menswear had appointed David Barnett Associates, a trading partnership between David Barnett and his wife, as commercial agents. After that, David Barnett incorporated Barnett Fashion Agency and then purported to assign the agency contract from David Barnett Associates to Barnett Fashion Agency. He did not, however, adequately notify Nigel Hall Menswear of the assignment and the court found that it was not clear that any assignment had, in fact, been made. In law, while rights of a contract may be assigned, obligations can only be novated, and novation requires the counter party to contract to enter into a novation agreement. Therefore, any claim for compensation would have to have been made by David Barnett Associates, but David Barnett Associates was time-barred from bringing a claim under the Regulations.

The question remains as to whether or not David Barnett Associates or indeed Barnett Fashion Agency would have had more success had they taken legal advice at the various relevant stages of events.

9. Other Hot Topics

No compensation for lost sales of illegal products – The ‘ex turpi causa non oritur actio’ rule means that a right of action does not arise out of an illegal cause. In *Les Laboratoires Servier and another v Apotex Inc and others* [2011] EWHC 730 (Pat), the claimant in a patent infringement case had obtained an interim injunction against the defendant, and had given a cross undertaking to pay the defendant's damages if it transpired that there was no infringement. The claimant's patent was found to be invalid. The defendant claimed damages for lost sales. Those sales, however, included products made in Canada, in infringement of a subsisting Canadian patent. The court found that, under the rule, the defendant was not entitled to compensation for lost sales of products unlawfully made, in circumstances where the defendant knew the material facts (in particular, the existence of the foreign (Canadian) patent and that it could be infringed) and intentionally committed the wrong act (infringement).

Software as goods or services? – This question goes to the root of several issues, including whether the implied terms as to quality under the Sale of Goods Act 1979 apply to supplies of software. For the Act to apply, there must be a transfer of title to goods. In *London Borough of Southwark v IBM UK Limited* [2011] EWHC 549 (TCC), the court has commented that, in principle, a CD containing software can be goods, just as is so with a CD containing a Mumford and Sons album. But if all that the supplier is providing is a licence, there is no transfer of title, and so the Act does not apply. It seems odd that the issue of implied terms hinges, in effect, on how software is supplied.

Liability of software suppliers – The above case concerned a claim by the London Borough of Southwark that IBM was in breach of contract by supplying software that was not fit for purpose or of satisfactory quality. The software supplied by IBM included third party software stated to be supplied subject to a licence by that third party and with no additional warranties by IBM.

Moreover, the contract between IBM and Southwark was held to exclude the implied terms under the Sale of Goods Act 1979 and Southwark was responsible for evaluating the third party software. The court found that this was all reasonable under the Unfair Contract Terms Act 1977. None of Southwark's claims succeeded. Customers should carefully review such issues when entering integration contracts.

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