

WEBSITE WARNING OF LIBEL LIABILITY

Wright Hassall is warning website owners that they could face the full force of the libel laws unless they police their sites properly.

Laurie Heizler, head of intellectual property, believes there is a common misconception that it is possible to 'get away with it' if something unlawful appears on the web.

But he has warned everyone from internet service providers to bloggers that they could end up in the middle of a libel case if words are not chosen carefully.

Heizler is citing a case involving baby expert Gina Ford and the www.mumsnet.com website. Ford claims that hostile comments on the site about her personally are libellous because they attack her character and reputation.

She has called for the site to be disabled or have significant threads from the chat page removed. But Mumsnet claim that they should not be responsible for

policing material posted on the site.

Heizler, however, believes that Ford could sue for libel if those steps are not taken.

He said: "Plenty of examples exist of damages, awards and financial settlements following internet libels.

"Injunctions can be granted even against anonymous individuals who publish unlawful material and orders can be made by the court to compel the internet service provider to disclose details of the names of individuals.

"It is more difficult to attach liability to an ISP if it can show that it did not know anything about the defamatory material and did not facilitate its posting.

"But it is absolutely crucial that individuals and companies understand that they are not going to get away with libel just because it is on the net.

"The laws surrounding libel and defamation are just as appropriate for the net as they are in print."

Employment law – stay up to date

Enclosed with this edition of NewsBrief you will find an 'at-a-glance' guide to the main elements of current employment legislation.

Our employment team also sends out regular e-bulletins on changes and developments in the law and hosts a number of interactive workshops throughout the year on a range of topics.

If you would like to be added to our e-mailing lists to receive the e-bulletin, invitations to the workshops or for further copies of the enclosed guide, please email your details to caroline.venuto@wrighthassall.co.uk.

Blue Boar hopes to be fit for the Queen

A Rugby company is hoping to carry out work for the Queen after becoming the leading ditching operator in the UK.

Blue Boar Contracts Ltd, which is based at Blue Boar Farm, Dunchurch, has joined forces with royal-warranted land drainage specialists the Fen Ditching Company Ltd from Wisbech.

Blue Boar hopes that the Fen Ditching Company's relationship with the Sandringham Estate will carry on as before to provide ditch and lake clearing services to the Queen. The acquisition was overseen by Wright Hassall.

Ian Woolliscroft, managing director of Blue Boar Contracts, said: "Blue Boar is primarily a dredging and land restoration company and combining the two busi-



■ Mark Lewis, from Wright Hassall (centre), with Simon Potter (left) and Ian Woolliscroft from Rugby-based Blue Boar Contracts who are hoping to be carrying out work for the Queen.

nesses means that the group is now one of the UK's leading dredging and ditching contractors.

"Following our acquisition of the Fen Ditching Company, we are aiming to expand their contracts which currently include working for the local drainage boards in East Anglia as well as clearing the ditches and lakes of the Sandringham Estate.

"We very much hope that the Royal Estate will continue with the appointment regardless of the change of ownership, although this has yet to be confirmed."

Mark Lewis, of Wright Hassall, who acted for Blue Boar in buying the entire share capital of the Fen Ditching Company, wished them every success for the future.

THIS ISSUE

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Caterers could face more than a fine if hygiene standards slip

HERE TO STAY

Once you have a mobile phone mast can you get rid of it?

TRUSTS AND TAX

Inheritance Tax changes to Trusts have been finalised

Blame claim culture is brought to heel

We have become accustomed to hearing about the 'compensation culture' and how Britain is following the US in becoming an ever more litigious society but do the facts match the perception?

This idea, fuelled by the media grew, in part, from the emergence of unregulated claims management companies. To be profitable they needed to ensure that a huge number of claims were processed which inevitably led to trivial, and even fraudulent, claims being made.

Although these companies still exist the major players in that market have disappeared.

Following the demise of the major claims management companies there are signs that the tide is turning against compensation claims.

Figures from the Government's Compensation Recovery Unit show that there was a fall in new claims of almost 11% between 2004/05 and 2005/06.

Further, in the recent case of *Patel v Ali*, Mr Ali admitted that he was to blame for a road accident but was adamant that there were only three people in the other vehicle despite the fact that four people made claims. The Judge decided that all the claims were tainted by fraud and dismissed the entire case.

Finally, the Compensation Act 2006 includes a provision that, when considering a claim, a court may have regard to whether particular steps, which may have been taken to prevent mishaps, might prevent a desirable activity from taking place or might discourage people from organising such activities. One of the most obvious situations where that provision might have effect is in relation to school trips or community events.

Genuine claimants have nothing to fear from the changes but those with less meritorious claims may find the path to compensation much more difficult – which can only be good for society as a whole.

adam.brain@wrighthassall.co.uk

Careful disclosure is absolute necessity

If you are involved in the sale of shares or assets and wish to limit your liability under the warranties given then a number of issues need to be considered.

The case of *Infiniteland Ltd v Artisan Contracting Limited* [2005] EWCA Civ 758 addressed two issues which arise during share and asset sale transactions where parties seek to limit their liability under warranties. First there is the issue of what constitutes disclosure. Secondly, there is the question of whether a buyer can claim for breach of warranty if it knew of the breach before exchange.

Background

The seller of shares or assets limits the warranties it is giving by reference to matters disclosed in the disclosure letter. The agreement will contain a provision to the effect that matters "disclosed", or perhaps "fully and fairly disclosed", qualify the warranties.

The facts

Artisan Contracting Ltd sold a subsidiary to Infiniteland and warranted that, save as set out in the disclosure letter, the warranties were true and accurate. However, prior to the sale, the subsidiary had received a cash injection from its parent, which distorted the profits. The subsidiary went into liquidation and Infiniteland sued the seller for breach of warranty.

The seller argued that the payment from the parent had been disclosed to Infiniteland's accountants, who had carried out due diligence prior to the purchase but had failed to make their client aware of the cash injection. The High Court dismissed Infiniteland's claim on two grounds: their accountants knew that the audited accounts were misleading and, because of this, the buyer was considered to have actual knowledge.

The Court of Appeal

The Court of Appeal had two points of law to consider: first what constitutes good disclosure against a warranty and then, what constitutes the "knowledge" of the buyer in these circumstances. The court examined the actual circumstances of the transaction in question and the wording of the documents. It was stressed that it is up to the buyer to reject a general disclosure against a warranty and demand instead a specific disclosure.

The court dismissed Infiniteland's appeal. It found that the disclosure letter was prepared on the basis that documents and other written material had been provided to the buyer's accountants. It was reasonable to conclude that the accountants should have become aware of the cash injection and therefore there was adequate disclosure.

As the court made its decision on the first issue, that of the buyer's knowledge fell away. However, the court did go on to comment on this. There was a knowledge-saving provision in the agreement under which the buyer's rights and remedies, in respect of any breach of the warranties, were not affected by any investigation made by it or on its behalf into the affairs of the subsidiary (except to the extent that such investigation gave the buyer actual knowledge of the relevant facts or circumstances).

Actual knowledge is the knowledge of the buyer itself and not that of its agents. By contrast, imputed knowledge is that of the agents and the courts only



RICHARD MARTIN
considers the importance of accurate disclosure in light of a recent ruling.

impute the knowledge to the buyer in certain circumstances. The court did not impute the knowledge to the buyer in this case: to impute an agent's knowledge to the buyer, the contract must expressly state that this is the case. A further distinction is that constructive knowledge of the buyer is that which it should have known.

However, the court stopped short of prohibiting a buyer from bringing a claim for breach of warranty where it had knowledge of the breach. Instead it concentrated on how the contract is worded: the contract may state that actual knowledge shall not prevent a claim for breach of warranty by the buyer. However, if a buyer is successful in the courts on such an argument, the damages may be nil: if the buyer is claiming for a breach of warranty of which it was always aware, what has it lost?

Practical considerations for buyers

From the buyer's point of view, the standard by which the fairness of disclosure can be conducted needs to be exacting. The warranties should be limited by reference to matters "fairly disclosed (with sufficient details to identify the nature and scope of the matter disclosed)" as opposed to general disclosures by the seller which should be avoided.

The buyer's advisers should notify all principal points arising from the disclosure exercise to the buyer. Also the buyer should be aware that the courts will take into consideration the extent to which it has relied on expert advisers; the greater the reliance, the greater the assumption that the parties agreed to a lower standard of disclosure.

If the buyer does have knowledge of a breach of warranty before it enters the contract, it should address the issue with a price adjustment or an indemnity from the seller. Otherwise the court may award derisory damages.

Practical considerations for sellers

Conversely, the seller should aim to keep the standard of disclosure merely as matters "disclosed", rather than "fairly disclosed". If a seller leaves disclosure to the last minute a court may find such disclosure was either not fair or did not constitute disclosure at all. Arguably there is no fair disclosure if the buyer's advisers do not have time to recognise the salient points arising from the exercise.

The seller could seek an undertaking or warranty that the buyer and its agents have no actual, constructive or imputed knowledge of any claim. At the very least a seller should seek to include a provision that the buyer cannot sue if it knew of a breach of warranty. If the buyer has sufficient bargaining strength, it may seek to include a clause allowing it to bring a claim for breach of warranty even where it or its advisers knew of the breach. Clearly any seller should resist such a clause. However, as mentioned above, a court may be sympathetic to a seller in these circumstances and take a dim view of an attempt to bring such a claim.

Cherry software improves hospital efficiency

An orthopaedic surgeon, who has written computer software that has helped revolutionise the day-to-day running of hospital theatres, has signed a deal with University Hospitals Coventry and Warwickshire.

Richard Cherry returned to Coventry as a surgeon in 1995, having worked in the city in the early 70s when he was a junior trainee. But over the years he had developed a deep frustration with the computer software used in hospitals and believed it to be a hindrance rather than a help in the organisation of work.

So, together with colleague Andrew Hayes – an information officer with University Hospitals Coventry and Warwickshire – they formed the company Richanha Tec Ltd and devised ‘Galen’ software. The computer tool – named after a Greco Roman physician – has been trialled for free in Rugby Hospital, Walsgrave and the Coventry and Warwickshire over the past two years and has been an outstanding success.

Now a deal has been struck – with the help of Wright Hassall – in order for the software to be used under licence for a further 12 months.



■ Laurie Heizler (right) with Richard Cherry.

Mr Cherry said: “I had financed the free trial myself in order to prove its worth and I think it speaks volumes that the hospital now wants to pay to continue to use it.

“The software works on two levels which is what separates it from all other tools of this kind. It assists in the day-to-day management of patients but also produces reports to aid with the overall, long-term management.

“Historically, the two have been separate and have been mainly ‘non-medical’ reports. ‘Galen’ helps in a myriad of ways – everything from tracking patients and diagnostic details to making sure surgeons can not book leave when they are due in theatre!”

Because of its flexibility, it is believed that the software will save time, money and ultimately provide the most accurate information possible to surgeons and hospital staff.

Laurie Heizler, of Wright Hassall, said: “Once a product has been used on a trial basis it might seem easy to then turn that into a formal contract.

“However, there are still several legalities to put into place and that is where we came in.”

MAST CODE GIVES OPERATORS EDGE

Recent advances in mobile telephone technology have led to a proliferation of masts across the country. The rents paid by mobile telephone operators for these sites are sufficiently attractive to tempt many landowners to consider agreeing to have a mast on their land.

However, some landowners have found that agreeing to have the equipment on their land for a set period of say 10 years, is the easy bit; trying to remove it at the end of the agreed term can be a different matter.

Most landowners would reasonably assume that they would be able to recover possession of the land and, in order to prevent the operator from acquiring security of tenure under the Landlord and Tenant Act 1954, will enter into a lease with the operator which excludes the security of tenure provisions. Unfortunately this is no guarantee that the landowner will be able to have the equipment removed on expiry of the lease.

The amended Telecommunications Act 1984 exists to protect mobile telephone operators, the rationale behind this being that no one should be unreasonably denied access to a telecommunications system. Within the Act, lies the Telecommunications Code which governs telecommunications agreements.

If an agreement in writing (and not necessarily documented by a formal lease or licence agreement) falls within the Code (which, invariably, it

will), statutory powers and rights are conferred upon the operator. Paragraphs 20 and 21 of the Code protect the operator by preventing the removal of the equipment even if the rights of the operator, as tenant or licensee, have come to an end, for example following the expiry of the lease.

The Code sets out a procedure for the removal of the equipment. If a landowner wants an operator to remove equipment from his property, he must serve a notice (which accords with the provisions of the Code). If the operator then serves a counter-notice within 28 days objecting, the only way the landowner can remove it is by obtaining a Court Order.

Court Orders are not granted lightly, and the Court will focus on the principle that no one should unreasonably be denied access to a telecommunications system.

If the landowner wants to have the equipment removed because of redevelopment or change of use, the Court will only make an order for removing the equipment if it is necessary to ensure the development and if the equipment’s removal will not substantially interfere with the services provided by the operator. Otherwise, if the landowner receives sufficient financial compensation, there is very little he can do to get rid of the equipment.

Even if the lease is excluded from the security of tenure provisions of the Landlord and Tenant Act 1954, the Code will apply and, in order to get

the equipment removed, a notice in accordance with the Code will have to be served.

To date there has been no case law relating to a situation where an operator has served a notice and the landowner has applied to the Court for an order for the removal of telecommunications equipment. This is likely to be because either:

(i) the agreements between landowners and operators have not yet expired; or

(ii) in circumstances where agreements have come to an end and landowners have requested the removal of equipment, there has always been a suitable alternative site for the equipment and the operators have taken the commercial decision to move there rather than serve a counter-notice on the landowner.

Obviously with more sites being required, this situation may change and operators may start to invoke the protection given by the Code.

Although landowners may think twice about entering into agreements with operators for fear of having equipment on their land for evermore, most take the view that the substantial fees are worth the risk. Others are of the view that any risk is slight because if operators began to invoke their powers under the Code, it would alienate the very people they need in order to carry on their business effectively.

alexandra.holsgrove@wrightshassall.co.uk

FOOD FOR THOUGHT

Owners of pubs, restaurants, sandwich bars and other premises that prepare and sell food should be aware that falling foul of the Food Safety Act 1990 or the Food Safety (General Food Hygiene) Regulations 1995 could lead to more than a fine.

A recent case involving a pub landlord highlighted how seriously the authorities take repeated contraventions of the food safety regulations. The landlord pleaded guilty to five allegations, all of which related to dirty and poorly maintained premises including toilets. All, bar one, were summary offences (i.e. could be tried in a Magistrates Court) but one offence could have been tried in the Crown Court.

The Council served an improvement notice on the defendant requiring him to take steps to remedy the causes of concern, particularly the toilets, within two months. The defendant only partially complied with the notice.



To make matters worse, he had two previous convictions from six months earlier relating to the same premises under Health and Safety at Work legislation involving a defective hairdryer which posed a risk of electrocution to the public. Again, one of these convictions could have been tried in the Crown Court.

The usual penalty for these offences is a fine (although, in theory, they can attract a prison sen-

tence). But, due to the serious nature of the offences, the Courts imposed a Community Service Order of 80 hours meaning that the defendant will have to do 80 hours of public work for free and report regularly to his probation officer whilst the order is being served. Failure to comply with the order will give the magistrates the option of resentencing, which could mean a prison sentence. He was also asked to pay £500 towards prosecution costs.

Proprietors of businesses facing regulatory prosecutions should bear in mind that whilst they may be able to afford to pay a fine, the magistrates can impose alternative, potentially more serious penalties that can take a proprietor away from their business for a considerable period. For more information, contact David Elliott.

david.elliott@wrighthassall.co.uk

NEWSBRIEF

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TRUST CHANGES FINALISED

The changes announced in this year's Budget to the Inheritance Tax (IHT) treatment of trusts have now been finalised in the Finance Bill after undergoing some modifications.

The reason trusts have always been such a popular tax-planning tool is their ability to provide for children and other potentially vulnerable beneficiaries. Trusts can be set up either during a person's lifetime or under a will. The new rules mean that the majority of trusts will now be subject to the same IHT charging regime under which discretionary trusts have always operated.

Prior to the Budget, the inheritance tax rules distinguished between three types of trusts:

1. IIP Trusts (interest in possession trusts) are trusts where income is payable as of right to one or more persons for life or a specified period of time;
2. A & M Trusts (accumulation and maintenance trusts) are trusts with some fairly tight rules set up for children or grandchildren who had to receive income by the age of 25; and
3. Discretionary Trusts which give a complete discretion as to when and whether income or capital is paid to a beneficiary.

The IHT regime for discretionary trusts provides for a 10 year charge at the maximum rate of 6% and interim exit charges being a proportion of that charge. Lifetime gifts to discretionary trusts attract a 20% IHT charge if the value of the gift exceeds the nil rate band exemption (the NRB) which is currently £285,000; if set up under a will the rate is 40% on the excess above the NRB.

Although there are a few transitional rules applicable to some existing trusts most will be subject to the discretionary trusts' regime. The effects are outlined below.

Lifetime Trusts

IIP Trusts – Trusts set up before 22nd March 2006 are exempt from the changes unless the beneficiary changes after 6th April 2008. There are some exceptions for changes which occur before 6th April 2008 and for IIP Trusts for spouses where the spouse dies after that date.

IIP Trusts set up after 22nd March 2006 will be subject to the discretionary trusts' regime even if the spouse is entitled to the income.

A & M Trusts – The existing A & M Trusts regime will continue to apply to pre Budget Day A & M Trusts until 6th April 2008 at which point the property will become subject to a discretionary trust regime unless, under the terms of trust, the assets go to a beneficiary absolutely at the age of 18 or, with a tax charge of 4.2%, at the age of 25. Therefore it will be necessary to review all such trusts prior to this date.

It is not possible to create new A & M Trusts after Budget Day under the old rules: such trusts will be taxed under the discretionary trust regime and it would be better to have the greater flexibility of a full discretionary trust in the light of this change rather than the somewhat complicated old A & M Trusts rules.

Discretionary Trusts – the existing discretionary trust rules apply to discretionary trusts whether created before or after Budget Day.

Trusts created under a will

IIP Trusts – if death occurred before Budget Day the same rules apply to both IIP Trusts created under a will and to lifetime IIP Trusts. If death occurred after Budget Day, such trusts are now known as Immediate Post-Death Interests (IPDI Trusts), and will be taxed as IIP Trusts under the pre-Budget rules. It is important to understand that such IPDI trusts can only be created under a will and it does not matter whether or not the spouse is the beneficiary.

A & M Trusts – the regime for such trusts no longer exists post Budget Day. A person wanting to make provision for a minor child under a will can either create a "bereaved minor trust" which must provide for capital to be inherited at age 18 or an "18 to 25 trust" providing for capital to be inherited at age 25 but subject to a potential additional IHT charge on inheritance of 4.2%. These rules only apply to trusts set up under wills by parents for a minor child and not by grandparents or other relatives.

Discretionary Trusts – the same rules apply to such trusts set up under wills both pre and post Budget Day.

For full details of these changes visit our website www.wrighthassall.co.uk or contact us via email.

charles.mckenzie@wrighthassall.co.uk

john.rouse@wrighthassall.co.uk