

BUYER BEWARE FOR GOODS ON HP



When someone unknowingly sells something that they do not own, they can be liable to the real owner of the item sold. The liability is not criminal (there is no criminal intent), but is based on the civil law of tort.

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It is therefore especially important for dealers in second-hand goods, particularly valuable ones such as motor vehicles, to make sure they own them before they sell them. Attempts to sell to dealers motor vehicles which are still the subject of HP agreements are very common. However, there are specialist databases, listing motor vehicles and motor bikes that are the subject of HP agreements, which can be searched by dealers.

A recent case concerned a dealer who had acquired in good faith three motor bikes that were still on HP, having checked the relevant database as is normal trade practice. The original purchaser of the motor bikes had

defaulted on the HP agreements but the HP company that was the legal owner of the motor bikes had not subscribed to the database, so the bikes were not flagged as being subject to HP agreements.

The HP company sought to repossess the motor bikes and discovered that its customer had sold them to the dealer. It claimed it was entitled to recover them. The dealer argued that having followed standard trade practice by checking the database, the finance company could not claim that the dealer had failed to acquire better title to the motor bikes than the HP debtor (from whom the HP company had the right of recovery).

The court ruled that the dealer had not acquired title to the motor bikes. There was no requirement for the HP company to register with the database. Accordingly, the company was entitled to recover the motor bikes.

This case serves as a cautionary tale for traders in second-hand assets of all kinds.

IR35 Case Lost on Substitution Principle

IR35 dictates the circumstances in which services supplied by a 'one man band' company are to be treated as supplied by the person directly, rather than through the company. It allows HM Revenue and Customs to regard a person who trades through the medium of a company as the employee of the businesses which employ his company. It is therefore unpopular, particularly in the IT industry where the use of one man band companies is commonplace.

The practical effect of IR35 is to increase the tax burden of the company, mainly due to the imposition of National Insurance costs, which would otherwise not be chargeable.

In a recent case, an IT contractor lost his claim that IR35 did not apply to his company, which supplied services through a third party and an agency to the end user. The telling point appears to have been that the contractor who was to perform the work was named specifically and could not, without prior agreement, provide a substitute to do the work if he did not.

WHEN PRESSURE DOESN'T PAY

It is often thought that anything goes when negotiating contracts or varying them, but the court will not enforce a contract that has been entered into under economic duress. Economic duress occurs when there is illegitimate compulsion, the practical effect of which is to deny one party to the contract any practical choice and where it is a significant cause of their entering into the contract.

Recently, a case was heard in which the argument of economic duress was made to the court by motor manufacturers, which used a firm to make plastic units for a van. When they wished to restyle the van, the manufacturer of the units was unable to make them to the new design, so was given six months' notice of termination of its contract.

The supplier of the units then demanded compensation for termination and a price increase for the units

supplied in the final period of the contract, threatening to cease supply if these demands were not met. The effect of a cessation of supply would have been to stop the van manufacturers' production lines, which would have had severe economic effects. They therefore accepted the demands, but went to court to seek repayment of the excess sums demanded plus interest.

The court accepted the argument that economic duress was applied, rendering the contracts void. It awarded compensation to the motor manufacturers.

Says **Graham Nunn**, "The courts are inclined to come down hard on those who use economic blackmail. If you are faced with unreasonable demands by someone who thinks they have you 'over a barrel', contact us for advice."



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REDUNDANCY—SUITABLE ALTERNATIVE EMPLOYMENT

"This case illustrates that the manner in which the redundancy process is conducted is important."

COLIN ADAMSON



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In the current economic climate, employers may face the need to reduce staffing levels. If you are making employees redundant, one of the requirements is that you must follow a fair redundancy dismissal procedure and keep the individuals affected, and possibly their representatives, informed throughout the restructuring process.

Sometimes, it is possible to avoid redundancy dismissals by offering employees suitable alternative work within the organisation. Indeed, if a suitable alternative post is available and the employer does not offer it to an employee selected for redundancy, the redundancy dismissal may well be unfair dismissal, in which case the employee is entitled to claim compensation.

For an offer of suitable alternative work to be valid, it must be offered to the employee before the expiry of their current contract. The offer should show in what way the new job is different from the employee's existing position and the job must start either as soon as the old contract of employment ends or within four weeks of it ending. Whether or not the job is suitable will depend on a number of factors including the job status, the remuneration level, where the employee is to work, the working environment and the hours of work.

If the employer and the employee reach agreement that the job is not suitable after all, the employee can still claim a Statutory Redundancy Payment (SRP). However, if the employer believes that the alternative job offered is clearly suitable and the employee unreasonably refuses to accept it, he or she will not be paid a SRP. Employers should take care in such circumstances however. The decision as to whether or not an employee's refusal of suitable alternative employment is reasonable is a subjective one.

In Commission for Healthcare Audit and Inspection v Ward, Ms Ward was offered a new post during a restructuring exercise. She had already survived an earlier reorganisation. This and the way the offer was communicated to her left her disillusioned with the process. She didn't think the new post was suitable and refused to take up the offer. The Commission considered that her refusal was unreasonable and that she was not therefore entitled to a SRP.

Ms Ward brought a claim to the Employment Tribunal (ET), which judged that although there was a material difference between the old and the new posts, on balance the new job was suitable, though clearly not ideal. However, in its view the fact that the suitability of the new job is marginal may affect whether or not it is reasonable for the employee to refuse it, as can the circumstances surrounding the offer and the relationship of the parties concerned. The circumstances in this case were such that the ET found that Ms Ward had not acted unreasonably in refusing the new role and she was therefore entitled to a SRP.

The Employment Appeal Tribunal upheld the ET's decision. The ET was entitled to consider the degree of suitability of the alternative role when deciding whether Ms Ward's refusal was reasonable. Following earlier case law, Ms Ward's actions must be looked at in relation to the way the facts appeared, or ought reasonably to have appeared, to her at the time she made her decision. It is possible for an employee to reasonably refuse an objectively suitable offer based on their own perceptions. It is for the ET to reach a judgment based on the individual facts of the case.

Says Colin Adamson, "This case illustrates that the manner in which the redundancy process is conducted is important. Whether or not an employee's refusal to accept suitable alternative employment is reasonable is a subjective judgment and so the way they are treated is key. To avoid problems, take advice before you take any action if you face having to make staff redundant."

CAN'T GET PAID BY A? TRY B!

“One of the less well-known ways in which a business or person who is owed money by someone who fails to pay can obtain payment is by the use of a Third Party Debt Order (TPDO).”

ANTHONY WOODING



pay can obtain payment is by the use of a Third Party Debt Order (TPDO). In essence, this is a court order which requires someone (B) who owes money to another (A) to pay you instead, when A owes a debt to you. Usually, B is a bank or building society.

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A TPDO can be applied for at any time after you have obtained judgment against A in court. An order will not be made unless A has failed to pay the amount of the judgment when it was due or has failed to pay one or more of the instalments due under the terms of the judgment.

The application for a TPDO is examined by the court and, if granted, you and B will be sent a notice. A week later, the notice is sent to A. This stops A from being able to circumvent the order by moving cash out of an account before the order is put into effect.

Once notice of the order has been served on B, it serves to freeze money held on A's account on the day the notice is received by B. So, for example, if the order is received by B on Tuesday, money paid into the account on Wednesday will not be frozen. This makes the planning of the timing of service important.

In Brief - Similar Company Names

On 1 October 2008, new rules relating to the registration of company names came into force. These will allow companies to object more easily to the registration of a company name which could be confused with theirs. The new rules can be found on the website of the UK Intellectual Property Office at

<http://www.ipo.gov.uk/cna/cna-factsheet.htm>

Contact **Graham Nunn** for advice on and assistance in protecting your intellectual property assets. grn@kerseys-law.co.uk



At a later date, a hearing is held to confirm that the money frozen is to be paid to you.

If B is not a bank or a building society, they must let you and the court know within seven days if they claim not to owe A any money or to owe less than the sum claimed. If you wish to dispute this, you must file your written evidence with the court not less than 3 days before the hearing.

If B is a bank or building society, it will supply information regarding the accounts held by A and will confirm that the sum it holds on A's account is sufficient to pay the sum due or advise the balance if not. It will also advise if it is entitled to retain any sum to offset A's liabilities to B.

A can file an objection to the order not less than 3 days before the hearing is due to take place. The objection must be in writing and A must send you a copy. The judge will hear A's objections at the hearing. If A is an individual, rather than a business, and can prove that he and his family are suffering hardship in not being able to meet day to day living expenses as a result of an amount or amounts being frozen, then a hardship payment order may be made which will 'unfreeze' some of the frozen money. Where A is a business, it must prove that real prejudice would be suffered by not having access to the money.

TPDOs will not normally be issued where A has become insolvent.

If you are having trouble collecting debts due to you, we may be able to help. Contact **Anthony Wooding** for advice.

AGE DISCRIMINATION AND SELECTION FOR REDUNDANCY

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relating to redundancy, entered into with the trade union, amounted to unlawful indirect age discrimination against younger employees under the Employment Equality (Age) Regulations 2006. The outcome of this case will be important for all employers considering making redundancies.

There were no issues of fact to be determined and the case was heard in the High Court at the request of both parties. It concerned two collective agreements, regarding redeployment and redundancy, which provided for an 'assessment matrix' for use when selecting employees for redundancy. This was designed to enable the company and its employees to be able to restructure 'flexibly and peaceably'. There were five measured criteria for which points were awarded, one of which was length of continuous service. Those with the fewest points would be selected for redundancy.

The High Court ruled that the length of service criterion adopted did discriminate against younger employees but it could be objectively justified as a proportionate means of achieving a legitimate business aim – i.e. that if a redundancy exercise were necessary, it would be carried

In *Rolls Royce plc v Unite the Union*, *Rolls Royce* contended that the length of service criterion in collective agreements

out 'peaceably' and in a way that was perceived as fair. The scheme was therefore covered by Regulation 3(1) of the Employment Equality (Age) Regulations. The Court was of the view that 'the criterion of length of service respects the loyalty and experience of the older workforce and protects the older employees from being put onto the labour market at a time when they are particularly likely to find alternative employment hard to find'.

In addition, the Court ruled that giving points for long service as one part of a redundancy selection matrix conferred a benefit on the employee concerned as it might lead to the retention of employment which would otherwise be lost. As such, it was probable that this would be regarded as reasonably fulfilling a business need within Regulation 32(2), which simply requires the employer to justify the impact of an age related award made only to employees whose length of service exceeds five years.

Says **Colin Adamson**, "This decision clarifies the position regarding the use of length of service when selecting employees for redundancy. Adopting a scheme where length of service is just one of a number of criteria used to arrive at a fair selection process is likely to enable the employer to defend an age discrimination claim. However, a scheme based solely on 'last in, first out' is unlikely to be justifiable."

However, the judge gave *Rolls-Royce* permission to appeal his ruling on the ground that it was 'clearly an important point for both parties'.

New Disclosure Rules

The Companies (Trading Disclosures) Regulations 2008 came into force on 1 October 2008, making many changes to the requirements as to where and when company trading names, names of directors etc. need to be shown. The Statutory Instrument implementing the changes is both short and straightforward. It can be found at http://www.opsi.gov.uk/si/si2008/uksi_20080495_en_1

In particular, Section 6 is important. It specifies that every company shall disclose its registered name on:

- business letters, notices and other official publications;
- bills of exchange, promissory notes, endorsements and order forms;
- cheques purporting to be signed by or on behalf of the company;
- orders for money, goods or services purporting to be signed by or on behalf of the company;
- invoices and other demands for payment, receipts and letters of credit;
- applications for licences to carry on a trade or activity; and
- all other forms of its business correspondence and documentation.

In addition, it requires that every company shall disclose its registered name on its website.

If you require advice on compliance with any aspect of company law, contact **Graham Nunn**.