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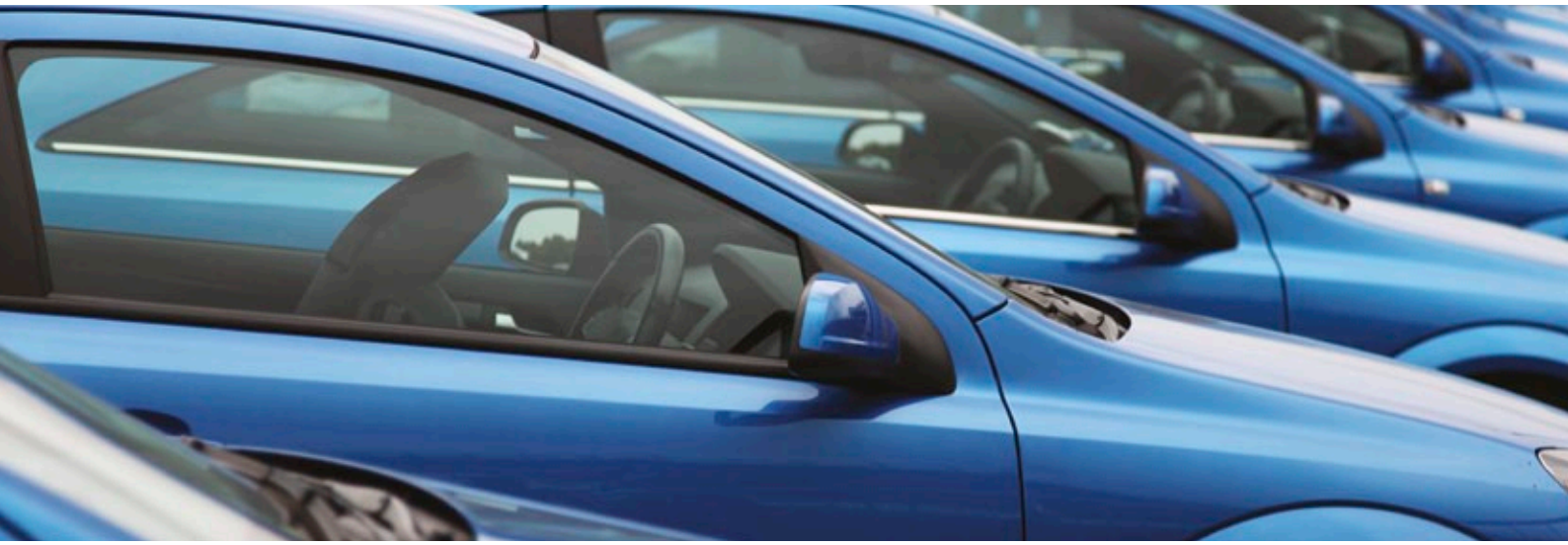
March 2013

Motor Focus



Rollits creates new Motor Sector Team

Rollits has been representing clients engaged in the Motor Industry for many years. We act and have acted for businesses involved in all areas of the sector, from vehicle and component manufacturers to retailers (including online traders).

Our work has involved non contentious Employment and Commercial Contracts, Property and Intellectual Property matters to contentious work involving Product Liability, Sale of Goods and Consumer disputes about everything from cars to caravans, lorries and buses, to brakes and fuel. We have also many years' experience of defending Motor Sector businesses facing investigation and criminal prosecution by the regulatory authorities. Recognising that our lawyers possessed substantial and specific experience of the Motor Sector, we have put together a team to assist our Motor Industry clients with the legal issues affecting them. This newsletter is the first of what we intend will be a regular series of publications to keep you up to date with legal matters of interest to the Motor Sector. We hope you find it informative and helpful.

George Coyle

See back cover for Motor Sector Team contact details

Visit our new website

Technology and design move at a fast pace, and our website had become rather dated. We felt it was time to refresh the design of the site and to make some key improvements to explain more fully who we are and what we have to offer.

The new site design provides visitors with improvements in navigation, appearance and accessibility. Additions include a dedicated section for our sector specialisms and a directory of all of our people.

Please do go online at **www.rollits.com** and have a look at it and give us your feedback. We hope you find it useful.

Also in this issue

Employee or Self-Employed?
Actions speak louder than words!

The case of *Autoclenz Limited v Belcher* demonstrates how important it is to ensure the correct relationship between an employer and a worker or employee is reflected in the contract as the Courts will always look at what the actual position is and at times, disregard the contract.

In summary, this case dealt with 20 claimants who worked as car valeters for Autoclenz on a piecework basis. They all bought their own materials and uniforms from Autoclenz, paying for their own insurance and paying tax and National Insurance as self-employed contractors.

Autoclenz subsequently required the valeters to sign self-employed contracts containing a substitution clause, allowing them to engage others to work on their behalf, and a 'right to refuse work' clause. The contract expressly stated that the relationship between the parties was that of client and independent contractor. However Autoclenz expected that a valeter not coming into work should give adequate notice of his absence. It was also accepted in evidence during the first instance hearing that the valeters were ignorant of their right to engage substitutes and that none had ever done so.

The valeters sought a declaration that, notwithstanding the terms of their contract, they were in fact employees of Autoclenz and were consequently entitled to various employment rights. In the alternative, it was argued that they were at the very least "workers", who were entitled to claim for unpaid wages, holiday pay, or failure to be paid the national minimum wage. A worker is, broadly speaking, someone who undertakes personally to do or perform work or services, but is not a client or customer.

Autoclenz said that they were not employees and pointed to the contractual relationship which they had in place. However, it was concluded that the employment tribunal was entitled to decide that the documents did not reflect the true agreement between the parties and that all of the valeters were both employees and workers and had all of the associated rights.

Ed Jenneson

Business rates
Intermittent occupation

Full business rates are normally payable on empty commercial premises. There is an initial grace period (3 months for office/retail and 6 months for industrial/ warehousing), but after that time full rates have to be paid.

Did you know that it is possible to get successive grace periods if there is an intervening period of "rateable occupation" of at least 6 weeks, with only minimal "rateable occupation" being required for this to work?

In a recent case, the High Court decided that the storage of palettes of documents on 0.2% of warehouse floor space was sufficient, even though the remaining 99.8% was empty.

In another case, the mere placing of 12 small Wi-Fi transmitters on window ledges in an otherwise vacant block, with an obligation for there to be monthly visits to relocate, maintain and change the transmitters, was held to be sufficient.

Whilst it should not be forgotten that rates still have to be paid during the period of "intermittent occupation", this can be used as an easy way to trigger successive grace periods (of 3 or 6 months) and save a lot of money!

David Hextall

Timing and limitation

Claims under Hire Purchase Agreements

In the recent case of *BMW Financial Services (GB) Limited v Hart*, the Court of Appeal has reached a decision which clarifies when the limitation period will start to run in claims when a finance provider is seeking to recover an unpaid balance under a Hire Purchase Agreement.

BMW had entered into a Hire Purchase Agreement with Mr Hart which was not regulated by the Consumer Credit Act 1974. Mr Hart defaulted under the Agreement in July and August 1999 and BMW accepted his repudiation by way of a letter dated 26 August 1999. BMW made various demands for payment of the balance due under the Agreement but did not issue proceedings until 26 August 2005. Mr Hart did not respond to the claim and BMW managed to obtain a default judgment. However, the Court later ordered that judgment should be set aside, finding that the 6 year limitation period began to run in July 1999, when Mr Hart failed to pay the monthly instalment, and therefore BMW were out of time to make a claim.

On appeal to the Court of Appeal, BMW had the decision reversed and the Court found that the claim had not been brought out of time. The Agreement stated that the hire purchase balance became due upon termination and, further, had the Agreement been regulated by the Consumer Credit Act, termination would have been subject to BMW serving the appropriate form of notice. With that in mind, the Court of Appeal determined that BMW could not conceivably have made a claim for the unpaid balance until it had given notice of termination or accepted Mr Hart's repudiation of the Agreement. Mr Hart's failure to pay the instalment in July 1999 did not, of itself, bring forward the obligation to pay the whole amount due under the Agreement. As such, the limitation period did not begin to run until 26 August 1999, when BMW accepted Mr Hart's repudiation of the Agreement and terminated it.

This is a helpful ruling for lenders and finance providers and serves as a reminder of the importance of the notice period in credit agreements, potentially whether these are regulated by the Consumer Credit Act or not. It is a sensible decision which demonstrates that lenders and finance providers may, in certain circumstances, have more time than they think to bring claims for the unpaid balance under a Hire Purchase Agreement.

Rebecca Latus

PPI Appeal withdrawn

In a development which will be good news for those involved in the selling of Payment Protection Insurance, the Supreme Court has recently approved a Consent Order withdrawing an appeal of the Court of Appeal's decision in the case of *Harrison & Harrison v Black Horse Limited*.

The Harrison case deals with the failure by a lender to disclose to customers that it would receive commission for selling them Payment Protection Insurance, and whether this amounts to unfairness within the provisions of the Consumer Credit Act. The Court of Appeal had come down in favour of the lender, stating that although the level of commission which the lender received from the sale of the PPI was very substantial, this did not give rise to a conflict of interest and the size alone of the undisclosed commission was not sufficient to constitute unfairness.

The purchasers of the PPI had appealed the decision to the Supreme Court and various other key cases had been stayed pending an outcome of that litigation. Happily for lenders and brokers, that Appeal has now been withdrawn, meaning that the decisions of both the Court of Appeal and the High Court will remain binding on the lower Courts. Crucially, if a seller of PPI has failed to disclose the existence and/or the amount of any commission, this will not serve so as to create an unfair relationship within the meaning of the Consumer Credit Act. Further, purchasers of PPI will have difficulties in arguing that Payment Protection Insurance was expensive or overly costly, as the Court of Appeal determined that a broker is not under any obligation to advise a purchaser of PPI that the same cover could have been obtained more cheaply elsewhere

Rebecca Latus

How important is your consumer credit licence?

From Spring 2013 the Office of Fair Trading ("OFT") will have new powers to suspend a company's consumer credit licence with immediate effect.

The impact of the new power is significant as any company served with a notice of suspension will be required to cease all aspects of its business covered by its consumer credit licence immediately. If a company served with a notice of suspension continues with any consumer credit activities it will be doing so without a licence and will be subject to criminal prosecution. This will have a devastating impact on companies such as those within the motor trade industry who depend on having a Consumer Credit licence in order to offer finance brokerage services to their customers.

Thankfully for the holders of licences, the test that the OFT must satisfy before issuing a notice of suspension is strict. It must appear to be urgently necessary to suspend the licence for the protection of consumers.

Draft guidance considering the power has been published on the OFT's website. The view of the OFT is that there must be an imminent risk of physical, economic, or other harm from which it is necessary to protect consumers.

The issue of what constitutes "harm" will be explored over time; however, early indications are that it covers businesses that have or are engaging in business practices that are deceitful, oppressive or otherwise unfair or improper. Repeated breaches of consumer protection laws are relevant here. The guidelines contain a case study focusing on such repeated breaches.

So what should your company do to avoid the scrutiny of the OFT? Focus on the adverts published by your company.

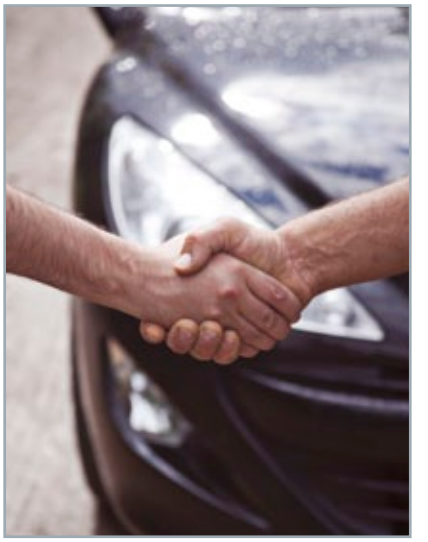
Adverts are the subject of extensive and detailed regulation. Local Authority Trading Standards Departments are ever vigilant in respect of adverts that may fall foul of trading laws. Most serious are adverts containing misleading claims or statements that are likely to deceive consumers. Adverts that seek to hide information are equally serious together with aggressive advertising practices.

It seems that it is often tempting to make exaggerated claims in order to draw in customers; however, without the ability to back up the offers or claims made by adverts, your company could soon run into trouble. An issue often examined by the OFT and Trading Standards is "bait and switch" selling in the motor trade. The practice of advertising a cheap deal on a vehicle with the intention of drumming up interest then switching potential customers to another vehicle with an explanation that the advertised vehicle is not available or needs to be ordered is a serious offence which can land a company in hot water, not only in relation to the criminal implications, but also, from Spring 2013, in relation to whether its licence is suspended.

Jennifer Sewell

The Office of Fair Trading 2012/13 used car check list

Perhaps the two most important pieces of legislation which impact upon car dealers are the Sale of Goods Act and the Consumer Protection from Unfair Trading Regulations. The Office of Fair Trading has provided the following check list which it describes as a "Quick Guide to Practical Steps" that car dealers should take to ensure compliance with the law.



1. Before you offer a car for sale you should take all reasonable steps to check its history.

2. Before putting a vehicle up for sale you should take all reasonable steps to make sure the mileage is accurate. You should also inform your customers about mileage discrepancies.

3. Avoid the use of disclaimers that mislead customers about their legal rights e.g. "Sold as Seen", "Trade Sale Only", "No Refund" or "Un-roadworthy".

4. Have procedures in place for checking the condition of the vehicle you intend to sell to ensure it is roadworthy.

5. Avoid displaying a vehicle for sale before you have completed your pre sale history and mileage checks.

6. Make sure you give your customer the information they need to make an informed decision before a sale is made.

7. If a customer wants the vehicle for a particular purpose for which you think it is unsuitable make this clear in writing. Perhaps on the Sale Receipt (to protect yourself against future claims).

8. Make sure you have an accessible and user friendly after sales procedure to ensure that all customer enquiries and complaints are dealt with in an honest, fair, reasonable and professional way.

9. If a vehicle you sell is not of "satisfactory quality" the customer is legally entitled to a number of possible remedies, which may include a full refund or repair or replacement vehicle.

10. According to The Sale and Supply of Goods to Consumers Regulation 2002, if you give a guarantee, you should remember it is legally binding on you. The guarantee must be written in ink, be clear and easy to understand, make it clear it does not affect the customer's statutory rights. The customer to read and include the guarantor's name and address.

Much of this will be self evident to those involved in selling cars. Perhaps most controversial is the fact that generally speaking the old adage "Buyer Beware" no longer applies. If a car dealer knows something about a vehicle which would influence a customer's decision whether or not to buy he is under a duty to disclose that information to the customer.

George Coyle

Its justice Jim but not as we know it!

Defending yourself against allegations brought by the Trading Standards Department or other regulatory authorities has never been cheap however, successful Defendants did at least generally have the comfort of being awarded a "Defendant's Costs Order" which meant that they could recover, at least, the majority of their costs from "central funds" (i.e. the Government). There was an obvious fairness to that system. If the Government (in the guise of one of its regulatory authorities such as the Trading Standards Department) brought all its resources to bear in prosecuting you then, at least, when you won, the Government had to compensate you for the costs it forced you to incur in defending yourself.

As from October 2012, however, that situation has now changed, dramatically (if quietly and somewhat "under the radar"). As a result of the costs in Criminal Cases (General) Amendment Regulations 2012 the Court will no longer be able to make an award in respect of legal costs incurred by companies in successfully defending a prosecution brought in either the Magistrates Court or the Crown Court it. A successful defendant company (depending on the scale of the prosecution) as a result may be left thousands of pounds out of pocket.

There is an obvious unfairness to this new system but then again what is a little unfairness between the State and its citizens when costs need to be cut? One would have thought that if the Government was concerned as to the costs incurred by its regulatory authorities in respect of failed prosecutions that it would have taken steps to get those regulatory authorities to smarten up their act and only prosecute where there was a real need to do so and where they had a "nailed on" case.

What is "sauce for the goose", is not, unfortunately, "sauce for the gander" because whilst a defendant company

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Meet the Motor Sector Team

George Coyle
Partner
Regulatory/Commercial Litigation
Direct dial +44 (0)1482 337351
Email george.coyle@rollits.com

David Hextall
Partner
Property
Direct dial +44 (0)1482 337254
Email david.hextall@rollits.com

Donna Ingleby
Partner
Employment
Direct dial +44 (0)1482 337314
Email donna.ingleby@rollits.com

Ed Jenneson
Associate
Employment
Direct dial +44 (0)482 337341
Email ed.jenneson@rollits.com

Rebecca Latus
Senior Solicitor
Regulatory/Commercial Litigation
Direct dial +44 (0)1482 337356
Email rebecca.latus@rollits.com

Jennifer Sewell
Senior Solicitor
Regulatory/Commercial Litigation
Direct dial +44 (0)1482 337368
Email jennifer.sewell@rollits.com

Its justice Jim but not as we know it!

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will not recover its legal costs if it is successful if it is convicted it remains highly likely to be ordered to pay (on a commercial basis) the costs incurred not only by the prosecution lawyers but also the regulatory authority bringing the prosecution.

To misquote Dr McCoy (from Star Trek), "*Its justice Jim but not as we know it!*"

Private individuals do not get off lightly either. In cases where Legal Aid is available to all individuals (such as most Crown Court cases) the Court no longer has the power to award successful Defendants and Appellants any legal costs. Similarly in cases where Legal Aid may not be available to all individuals (such as cases in the Magistrates Court) whilst the Court may still award successful Defendants and Appellants their legal costs incurred the Lord Chancellor now has power to impose rates at which any such award must be calculated.

This is nothing other than an exercise in Government cuts. In our view it will lead to more prosecutions because whilst it was the Government (via Central Funds) which paid the successful defendants legal costs we doubt very much that any prosecutor liked to lose and have Central Funds regularly paying out for their failed prosecutions . The absence of such a risk will we fear further encourage over -zealous prosecutors.

George Coyle

Information

If you have any queries on any issues raised in this newsletter, or any motor related matters in general please contact George Coyle on (01482) 337351.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 22 February 2013.

Hull Office
Wilberforce Court, High Street,
Hull HU1 1YJ
Tel +44 (0)1482 323239

York Office
Rowntree Wharf, Navigation Road,
York YO1 9WE
Tel +44 (0)1904 625790

www.rollits.com

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A list of members' names is available for inspection at our offices. We use the term 'partner' to denote members of Rollits LLP.