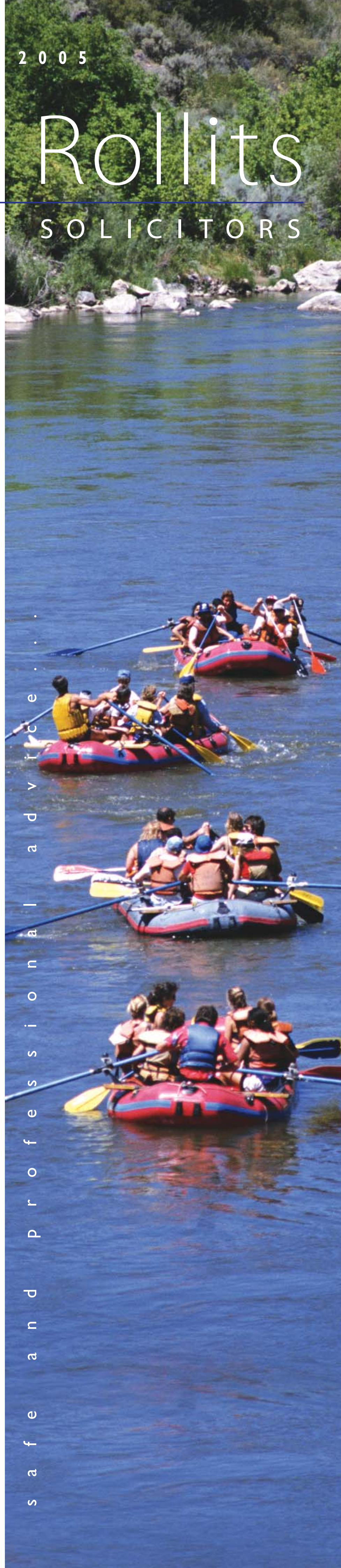
SEPTEMBER 2005

LEGAL ALERT



LITIGATION & DISPUTE RESOLUTION

LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1998 – A RECAP

In November 1998, the Late Payment of Commercial Debts (Interest) Act 1998 ("the Act") was introduced to provide an extra tool in the recovery of outstanding commercial debts and is now fully in force, although not always used by creditors. The Act provides businesses with a statutory right to claim interest from other businesses and public sector organisations arising from the late payment of commercial debts following contracts for the supply of goods or services.

The Act does not apply to consumer credit agreements or contracts intended to operate by way of a charge, mortgage, pledge or other security and it should be noted that there is no obligation upon the creditor to exercise any of the rights provided by the Act.

The Act does provide for the recovery of statutory interest, the right to claim reasonable debt recovery costs and enables parties to challenge contractual terms which attempt to contract out of the Act.

Creditors are entitled to claim statutory interest on commercial debts, such interest being 8% plus a reference rate of interest which is fixed by the Bank of England for a 6 month period, each period running from 1 January to 30 June and 1 July to 31 December. The statutory interest rate for any commercial debt accruing between 1 January 2005 and 30 June 2005 is 12.75%, being 8% plus the fixed reference rate for this period of 4.75%.

Statutory interest accrues from the day upon which the contracted parties agreed payment was due. Should no formal agreement have been made as to when payment was due, the Act provides that interest will accrue 30 days after the supply of goods or services or the day on which the debtor becomes aware of the amount due - which will often take place on receipt of an invoice - whichever is the latter.

Businesses can also claim reasonable debt recovery costs from debtors. The level of compensation recoverable depends upon the size of the debt so £40.00 can be claimed for debts up to £999.99, £70.00 for debts between £1,000.00 to £9,999.99 and £100.00 for any debt of £10,000.00 or more.

The Act also now provides that any contractual term which intends to exclude the right to statutory interest is void unless there is a "substantial contractual remedy" within the contract for non-payment of a debt. A remedy will be deemed "substantial" for the purposes of the Act unless it is insufficient for the purpose of compensating the supplier for late payment and it would be unfair or unreasonable to allow the remedy provided to negate the right to statutory interest that would otherwise exist in relation to the debt. The strengths of the bargaining positions of the parties, whether the term was imposed by one party to the detriment of the other and whether an inducement was offered by one party to agree to the term will all be relevant factors to be considered when deliberating whether it would be fair to allow the contractual term to be enforced.

For further information about this or any other debt recovery matter, please contact Ralph Gilbert on 01482 323239 or email ralph.gilbert@rollits.com

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TRADE MARKS – DISTINCTIVENESS

Nestlé SA, the manufacturers of the popular Kit-Kat chocolate bar have been involved in a long-running piece of litigation with Mars UK Limited concerning Nestlé's attempts to register the trade mark "HAVE A BREAK" in connection with its confectionery products.

The company has, for some time, had a registered trademark for the well known phrase "HAVE A BREAK…HAVE A KIT KAT" but has been seeking separate protection for the first part of that phrase when used alone, by applying for registration of "HAVE A BREAK."

Mars, as one of Nestlé's major competitors, had taken action to oppose the application and the case went to the Court of Appeal, who in turn referred it to the European Court of Justice for guidance on whether the necessary "distinctiveness" for registration of a trade mark could be acquired by a mark's use as part of or together with a larger mark or slogan.

The Advocate-General (A-G) of the European Court of Justice has recently delivered his opinion. He stresses that this opinion is not intended to be a ruling on whether such use makes a mark sufficiently distinctive, but rather it is intended to provide guidance to the national courts to enable them to answer the question themselves.

The A-G concluded that any use which confers distinctive character on a mark can be use "as a trade mark" when considering the suitability of a mark for registration.

He also accepted that the relevant consumers do not necessarily consider the individual elements of a mark, but rather tend to consider a mark as a whole. He therefore said that it was not sufficient to assume that use of a mark as a whole would automatically confer distinctiveness upon a part of that mark.

Rather, a brand owner had to show that the relevant consumers (in this case, buyers of chocolate/confectionery) would recognise that the part of the mark, if used separately from the whole, designated that a product originated from a specific source (in this case, Nestlé, makers of KIT KAT). The A-G concluded that consumers merely "wondering" if this was the case would not suffice.

This guidance from the A-G would seem to be generally beneficial in clarifying the position to brand owners with very distinctive, well known, "multi-component" slogan trade marks. However, whether on the evidence the Court of Appeal will now conclude that the Nestlé's case meets the required standard is by no means certain. They have submitted survey evidence to show that most consumers respond to the words "HAVE A BREAK…" with "…HAVE A KIT-KAT" although as the A-G's opinion has suggested, this is not the same as saying that upon seeing the words "HAVE A BREAK" on a product, a consumer would think that the product must have originated from the makers of KIT KAT.

So it looks as though Nestlé may still have some way to go before they can finally establish their "slogan fragment" as a sufficiently distinctive mark in its own right. This perhaps serves as a useful reminder for ALL brand owners on the importance of getting your marketing and brand identification right, so that in the event of trade mark litigation, where the distinctiveness of a mark is challenged, there will be no difficulty in obtaining plentiful evidence that consumers automatically associate a mark (or part of a mark!) with your company as the source of a particular product.

DISABILITY DISCRIMINATION – ACCESS STATEMENTS

Part III of the Disability Discrimination Act 1995 ("DDA"), which came into force on 1 October 2004, requires providers of goods, services and facilities ("Service Providers") to make reasonable adjustments to the "physical features" of their premises, which might pose a barrier to disabled access.

The new Service Providers duties are similar to those already in force for people selling, letting or managing premises.

Under section 19 of the DDA it is unlawful for a Service Provider to discriminate against a disabled person:

(a) By refusing to provide or deliberately not providing goods, services and facilities ("Services"), which it provides to other members of the public;

(b) By failing to comply with any duty imposed on it by section 21 of the DDA.

Where a physical feature makes it impossible or unreasonably difficult for a disabled person to make use of Services, section 21 of the DDA requires Service Providers to "take such steps as it is reasonable in all the circumstances" to remove or alter those features, or to provide a reasonable alternative method of accessing Services.

The DDA does not define "reasonable adjustments" and as yet, there is little relevant case law to assist Service Providers. But, the Disability Rights Commission's Code of Practice provides a non-exhaustive list of factors, which Service Providers might consider.

One such factor is the extent of the Service Provider's financial (and other) resources. This has already led some commentators in this area to submit that for a large Service Provider, it will be the company's entire profits that will be considered (as opposed to those of the premises under consideration).

CLAIMS - A disabled person who believes a Service Provider has discriminated against him/her can sue for damages in the County Court, which unusually, can award all the remedies available to the Claimant in the High Court.

Service Providers, who discriminate against disabled people, can therefore face unlimited damages and Court Orders requiring the Service Provider to undertake the remedial works needed to meet the requirements of the DDA.

ACCESS AUDIT - Where a case is brought under Part III of the DDA, it is for the Service Provider to prove (on the balance of probabilities) that it did not discriminate against the disabled person.

Unless the Service Provider can provide evidence to show that it complied with its DDA duties, or that it was not reasonable for it to do so, the Court will find in favour of the Claimant.

Service Providers should, as a minimum, undertake an "Access Audit" to ascertain their risk of discriminating against disabled people.

They should also produce an "Access Statement", which provides a description of what has to be done to the design and/or construction of their premises to comply with Part III of the DDA, thus providing evidence of DDA compliance.

INFORMATION

If you have any queries on any commercial disputes please contact:
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David Watson at York on (01904) 625790

The law is stated as at 1 September 2005

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