



OUT OF COURT



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ARE YOUR EMAILS PRIVATE

In a commercial dispute, the parties to litigation are ordered by the court to disclose to their opponent all relevant documentation regarding their dispute. This does not just include correspondence passing from one party to the other but can also include internal communications such as emails that relate to the subject matter of the dispute. Save in respect of very large claims, there has been a tendency for the parties not to press each other for disclosure of electronic documents. This is in large part down to costs, however recent mercantile court recommendations indicate that the courts are no longer going to be prepared to allow this issue to be glossed over.

The court rules require each party to disclose documents on which it relies, which adversely affect its case or which support or adversely affect another party's case. However, this duty is qualified by the requirement that the search must only be reasonable having regard to the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval and the significance of any document likely to be found. The court rules expressly provide that the duty of disclosure of documents includes disclosure of electronic documents. Given that it is now common place for communications to take place between businesses and internally by email, it is not surprising that the courts now have a particular focus on this. There

has recently been a push in the training of judges on "E disclosure".

His Honour Judge Simon Brown QC, a designated Mercantile Judge at the Birmingham Civil Justice Centre, recently spoke to an audience invited by the Law Society on the topic of E-disclosure and it is clear that the court's focus on this topic is gathering pace. We are also aware that there is a draft questionnaire on E-disclosure that is currently being considered for implementation by the courts. It is intended that the parties to litigation will be required to complete this questionnaire prior to the first court hearing in order that the court may consider appropriate directions for E-disclosure. This may include orders requiring copies of a party's computer hard disks or server being taken and searches being carried out on this under particular

search criteria relevant to the claim.

Therefore, if you have emailed a colleague setting out your concerns in relation to a matter, be aware that if this proceeds to litigation, your email may be scrutinised in detail by your opponent's barrister at trial.

Particular types of internal communications are exempt from disclosure and we can advise you in relation to this. However, for the time being, be careful of what you write to your colleagues in internal emails and if a dispute proceeds to litigation, be prepared for the cost and invasion of privacy that is likely to be imposed by the courts by way of orders for E-disclosure.

For more information on this article please contact Andrew Adams, Partner on: T: +44 (0)870 761387, E: andrew.adams@martineau-uk.com





RECOVERY OF WASTED **MANAGEMENT COSTS**

Before getting involved in a legal dispute parties often overlook how expensive the case might be. They will expect to pay professional fees to their lawyers and other advisers. However, they may not consider their own internal management costs.

Management costs of dealing with a dispute can be significant. Questions parties will want to know include can these costs be recovered, and if so, how can their recovery be maximised?

For some time, the courts have recognised the right of a party to receive compensation for the cost of wasted management time incurred as a result of a breach of contract by another party. However recoveries have been limited by the fact that frequently these are evidential difficulties in proving that managers have been diverted from their normal profit making duties by the need to deal with the breach.

The main difficulty lies with the fact that accurate contemporaneous records are rarely kept and therefore the computation of



loss of time invariably involves a significant element of guesswork.

In the past, the lack of contemporaneous evidence has resulted in claims for wasted management time being rejected. More recently, however, the courts have allowed recovery of losses on the basis of work carried out retrospectively to prepare schedules setting out the time spent by management dealing with a claim using various documents and records. However the level of these damages can be reduced if the court feels that this method of calculation of loss involves a level of inaccuracy which will result in a discount being applied.

It is important to remember that the burden of proof for proving loss of management time rests with the claimant. It therefore remains best practice to keep detailed contemporaneous records of management time spent in dealing with claims. This should include a brief description of the

actual work done and the time engaged. It is also important to be able to demonstrate to the court that the work undertaken was a direct result of the breach of contract and is not work which would have been required to fulfil the contract in any event.

Finally, the fact that management has had to carry out additional work as a result of the breach may mean the business has suffered other losses. This may be because other unrelated profitable projects have not been pursued. It could also be the case that the business has had to pay consultants to carry out the tasks management would have carried out if they were not responding to the breach. In either case, records should be kept if these costs are to be recovered.

For more information on this article please contact Tim Speed, Associate on: T: +44 (0)870 763 1334, E: tim.speed@martineau-uk.com.





CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE

Fines and Punishment

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 6 April 2008.

Existing health and safety law allows organisations to face an unlimited fine and remedial orders for causing a workplace death. Existing criminal law allows for individuals considered responsible for manslaughter to face prison. Working alongside existing law, the new offence of corporate manslaughter introduced by the Act provides a different approach to hold organisations accountable for causing an individual's death at work:

Publicity Orders

The new offence gives the courts the power to sentence an organisation with Publicity order.



The Publicity order will require the organisation to publicise in a variety of media:

- the fact that it has been convicted the
- particulars of the offence;
- amount of any fine;
- the terms of any Remedial Order;

Failure to do so can also result in an unlimited fine being imposed.

Fines

Current recommendations are that the starting point for fines for this offence should be 5% of average turnover (not profit) over the previous 3 years.

Depending on any aggravating or mitigating features of the offence the fine can be raised to 10% or reduced to a minimum of 2.5% of turnover in each individual case.

The offence introduced by the Act is clearly designed to penalise corporate offenders for the worst instances of management failure causing death. It complements the existing health and safety and criminal law under which organisations may still be prosecuted as an alternative to, or in addition to, the new offence.

For more information on this article please contact Nicola Cardenas-Blanco, Solicitor on T: +44 (0)870 763 1328 or E: nicola.cardenas-blanco@martineau-uk.com



DO YOU HAVE A **SECRET AGENT**

Businesses commonly appoint third parties to assist in selling their products. They may not be thought of as agents, however, whether they be labelled "sales consultants" or other similar title, it is likely that the business relationship will be governed by Commercial Agents (Council Directive) Regulations 1993 that imposes certain financial liabilities upon the principal business that may not have been contemplated.

The Regulations impose a wide range of duties on businesses that appoint 'commercial agents'. This term is interpreted widely and can include intermediaries that have minimal involvement in negotiating contracts but that have contributed in some way to the goodwill in the principal's business for example by introducing customers.

Perhaps the most significant obligation imposed by the Regulations is the obligation on the principal to provide a payment to the commercial agent when the relationship comes to an end (unless this is as a result of a fundamental breach of contract). It is not possible to agree that this obligation does not apply. In calculating the extent of the payment, the parties can agree to adopt either an 'indemnity' or 'compensation' basis. If the contract fails to address this issue then the compensation basis will apply. The indemnity basis caps payments at one year's gross average commission. Until recently the approach to calculating payments on the compensation basis was to adopt the French approach of using two

years gross average commission as a starting point. However, in a recent case, the House of Lords has rejected this approach. The approach taken in this case was to look at the 'value' of the agency relationship as at the date the relationship was terminated. It is very difficult to assess the value of the agency relationship without the assistance of an expert forensic accountant. This causes a particular problem where the parties are attempting to settle a dispute on the level of payment due at minimal cost.

We consider disputes of this nature regularly and are very successful in obtaining commercial settlements. Furthermore, we have strong relationships with expert forensic accountants who would be willing to offer initial commercial advice on the valuation of the agency relationship to assist in this regard. If you would like us to review your current contracts or advise on whether you may have unknowingly appointed a commercial agent we would welcome this opportunity.

**For more information on this article please contact Andrew Adams, on:
T: +44 (0)870 763 1342 or
E: andrew.adams@martineau-uk.com.**

The articles in this brief contain summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

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To receive future copies of this publication via email please contact Emma Rawlinson on
E: emma.rawlinson@martineau-uk.com
or T: 0870 763 1464.

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