Retail*law*

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Pinsent Masons

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Outsourcing in the retail sector

Research by Pinsent Masons and the British Retail Consortium has found that the retail sector has successfully embraced outsourcing. The results identified that an overwhelming 88 per cent of companies currently outsourcing stated that it has been successful.

The research was unveiled at a BRC policy lunch held in September. Clive Seddon, head of our Outsourcing, Technology and Commercial team and Peter Swann, IT director at WH Smith, presented the findings and their experiences of outsourcing with representatives from the retail sector.

> There is a need for outsourcing to be seen as a long term solution and some extremely strong partnerships have been forged between retailer and service provider.

The audience discussion echoed our research findings, indicating that despite high profile arrangements which have not met expectations, such as Sainsbury and Accenture, tactical outsourcing can have a positive impact on retail strategy.

Choosing the right function to outsource

The survey, found that 70 per cent of respondents are outsourcing an element of their operations, with warehousing and IT being the most likely functions to be outsourced. Our research indicates that this is likely to increase and of the 30 per cent not currently outsourcing, more than half have said they are actively considering it.

Not just about cost savings

Respondents said that outsourcing is about more than just saving money. Only 30 per cent believed outsourcing will reduce their costs, the same proportion as those who believe it will not. However, the ability to achieve significant cost savings through off-shoring was a key theme and it was agreed that geography should not be a barrier for the delivery of certain services,

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Welcome

"Outsourcing can make retailers more competitive, but it is about more than just saving money. It requires serious effort and retailers must be clear from the outset about their aims and objectives." These were the words of Kevin Hawkins, Director General of the British Retail Consortium, commenting on the first ever Pinsent Masons' survey conducted with the British Retail Consortium over the summer – more about this on this page. Our work with the British Retail Consortium is extremely important to the firm's retail team and allows us to keep abreast of industry issues. We hope that this gives us a greater insight into your business, enabling us to offer practical, proactive and commercial advice.

As ever, if you need a sounding board for any of the issues covered in Retail*law*, please get in touch with your usual Pinsent Masons adviser or contact me directly.

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although for some retailers such a cultural shift may be a step too far.

88 per cent of those companies that currently outsource stated that it has been successful.

Long-term solution

The research showed there is a need for outsourcing to be seen as a long-term solution and some strong partnerships have been forged between retailer and service provider. Peter Swann identified the cultural fit as vitally important saying: "There are some very good providers, but I have come to the conclusion we could not work with them because the relationship would not fit."

Kevin Hawkins, BRC Director General believes: "The research shows it is clear that retailers are not afraid to outsource business activities to external experts so they can focus on their core business."

Preparation

Peter Swann believes that adequate preparation is essential, as well as being clear about what you want to get from outsourcing. According to Peter "Accenture are very good at negotiating. They are good at getting what they want from an outsource relationship and putting in place their preferred structures."

Clive Seddon added, "Outsourcing has become integral for most businesses, not only in cutting costs but for introducing company-wide efficiencies and the retail sector is no different. The survey indicates that retailers are cautious in using outsourcing and prefer a commodity sourcing model which shows a much clearer return on investment. Management boards need to regularly review processes to determine what operational processes can be handled in-house and which ones are more efficiently run by third parties."

Copies of our research report and a Guide to Outsourcing are available from Vincent Gray.
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The dragon wears Prada!

It appears that everyone wants a piece of China. Two-thirds of the world's 50 leading retailers are now firmly encamped in the land of the dragon. Guy Lougher from Pinsent Masons' China team looks at some recent research carried out by Pinsent Masons, which has revealed that more than seven out of ten UK businesses plan to invest in China within five years.

Previously many foreign retailers had little choice but to set up operations under a joint venture banner. Tesco made its first foray into China with its 50 per cent stake in the Ting Hsin hypermarket chain for £140m in July 2004, but there were geographic restrictions on where they could operate. However since China's accession to the World Trade Organisation in December 2001, it has become easier for foreigners to do business in China with a gradual liberalisation of market access for overseas businesses. Another advantage foreign retailers have is trust, given that Chinese shoppers often encounter shoddy goods and believe that international retailers represent higher quality.

Opportunities for foreign investors have improved significantly.

Companies wanting to do business in China, whether mass market retailers like B&Q or luxury goods companies such as Prada and Bulgari, now have a number of commercial options open to them - from establishing joint ventures to setting up wholly-owned foreign enterprises (WOFE). Many of the geographical restrictions have also been lifted and investor confidence should be further boosted by China's new Company Law which came into force on 1 January 2006.

B&Q success

B&Q, the world's third largest home improvement business, has been trading in China since 1999 and has 15 stores in cities including Shanghai, Shenzhen, Guangzhou and Beijing. It estimates that one-tenth of China's 400m households have 'western' levels of disposable income. That number is increasing rapidly and foreign rivals include IKEA and Germany's Obi.

Red tape still deters some businesses

Despite the giant strides that China has made towards a free-market economy, red tape and bureaucracy remain prevalent. Any business setting up in China will be subject to stringent regulations. Another key factor is that the Renminbi, the Chinese currency, is not freely convertible and all foreign exchange is subject to approval by the State Administration of Foreign Exchange.

China's business environment is clearly different from other countries, including its trade laws, investment approval procedures, import-export administration and taxation. Its huge size and regional variations mean retailers struggle to establish a national infrastructure, with even the biggest retailers remaining in thrall to regional manufacturers. Retail is still dominated by domestic operators but the opportunities for foreign investors have improved significantly. However any retailer looking to invest in China should always seek specific advice on the issues from advisers familiar with doing business in the region.

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Intellectual Property

Perspiration or inspiration? Tales from the world of fashion retail

Many readers will be aware of River Island's much publicised spat with Debenhams over the alleged copying by Debenhams of one of River Island's bags. Another example is Monsoon's similarly well publicised legal swipe against Primark. Martyn Hann examines the issue of design infringement.

The Pinsent Masons' Intellectual Property Team recently issued proceedings on behalf of Jane Norman for design right infringement against Select. Why do I mention this? Because the lawyers acting for River Island are also acting for Select. In fashion, it is often the case that a company might be the complainant one week and the defendant the next! Infringement of design rights in the fashion industry is not as straightforward as it may seem. Even in cases where copying seems irrefutable the claimant must show that they own the rights to the relevant design. In practical terms, this means establishing that only its employees (or consultants who assigned rights to the claimant) were engaged in creating the design from start to finish, and the claimant needs to provide signed and dated copies of the design drawings to prove this.

"There is nothing new under the sun"

This old Roman proverb proves how a striking design can be a modern interpretation of a retro style, even something as distinctive as a pattern, could be based on some earlier design. This is not to say that the claimant's designer copied something else; it simply reflects the fact that designers are frequently inspired by what they see around them. However, this is of course no comfort to the claimant when the defendant lawyers ask them to state how their design is original.

Having said this, deliberate infringement does occur and often blatantly. However, even where there is deliberate copying you can expect the more sophisticated copier not to make an exact, literal copy. They usually create an article which captures the look and feel of the original, but without a distinctive element of the original design.

Although copying in the fashion industry is commonplace, establishing that it has taken place is difficult. If you think your product has been copied consider the following:

- Did my design team (and only my design team) design the original article? Where did they get the idea from? Were they 'inspired' by another design?
- Can they prove that they designed the article? Can they produce the original design drawing signed and dated, and the preparatory drawings and sketches?

Catching the culprits

It can be difficult to catch those who copy designs, but firstly you must show that you own the original design in question. Make sure you give your design team a clear policy and record all stages of the design process. If you do this, and then aggressively (and successfully) pursue infringers, they will start looking for easier targets.

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DTI and OFT revise guidance for on-line sellers

Struan Robertson looks at guidelines from the Department of Trade and Industry and the Office of Fair Trading on distance selling.

The guidelines are designed to help retailers make sense of the Consumer Protection (Distance Selling) Regulations of 2000 and draw to a close the joint consultation process launched by both organisations over a year ago.

The regulations are created to protect consumers from some of the pitfalls of shopping from a distance and developments include a mandatory return and refund right as goods are bought unseen.

Pinsent Masons' e-commerce specialist Gavin McGinty comments "The guidance should be very helpful for retailers. It explains how the OFT will see things when reviewing business terms and conditions. Some retailers still don't realise that they have to refund the buyer's money even if the goods haven't been returned."

Retailers wanting to find out more about on-line selling regulations may be interested in our free OUT-LAW breakfast briefings. Visit the OUT-LAW website at **www.out-law.com** or call Luisa Deas on **0141 249 5413**

Age Regulations – the biggest change to discrimination law in 30 years

Everyone has an age and with the retail industry employing around 11 per cent of the total UK workforce, it follows that the Employment Equality (Age) Regulations 2006 will have a significant impact on the sector, says Helen Farr.

Retail employment has grown by 141,000 over the last five years and everyone could be a potential litigant. The Regulations, which came into force on 1 October 2006, are more wide-ranging than the statutory provisions relating to other forms of discrimination, so retailers need to ensure that their policies comply with the new rules.

The regulations prohibit direct and indirect age discrimination but allow employees to justify any discriminatory treatment if they can establish that it pursues a legitimate aim and is proportionate. All aspects of the employment relationship will be affected including recruitment, terms and conditions, promotions, transfers, dismissals, training and, critically, retirement.

Key aspects of the Regulations include:

- Length of service-related benefits will be permissible, although where such service exceeds 5 years it must reasonably appear to the employer that the length of service requirement fulfils a business need.
- Age and length of service are currently used to calculate redundancy pay. Despite previously stating that age related multipliers would be abandoned, the Government has decided to retain them in the statutory redundancy payment scheme because it has taken the view that the multipliers can be justified in this scheme.
- Employees over the age of 65 will however be entitled for the first time to statutory redundancy payments.
- Enhanced redundancy payments will be lawful if they are calculated using the same methodology as the statutory scheme.
- Compulsory retirement ages below 65 will be unlawful, unless using a lower retirement age can be objectively justified

(which will be difficult to prove). Retirement ages of 65 or over are not unlawful for now, although the Government has said it will review this in five years.
- Although the upper age limit of 65 for claiming unfair dismissal is removed, dismissal for retirement at or above this age will be automatically fair, provided that a specified procedure is followed. The employer must give at least six months notice of the planned retirement date and inform the employee of their right to request working beyond this date. Requests must be considered in good faith under a prescribed procedure. While the procedure offers employers protection against unfair dismissal liabilities, the downside is that failure to comply makes the dismissals automatically unfair and tribunals can increase compensation by up to 50 per cent. Procedural compliance is critical.
- The default retirement age of 65 applies only to employees. Partnerships (eg. accountants) can only compulsorily retire partners if they can objectively justify such a decision.

All employers in the retail sector should be familiar with the regulations and review their policies and procedures in order to avoid costly litigation.

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Deals round up

Sweaty Betty advised on secondary buy-out

In October we acted for the founders of Sweaty Betty, Simon and Tamara Hill-Norton, in connection with their secondary buy-out and the subsequent development capital investment by Wittington Investments Limited.

Sweaty Betty is a niche active wear chain, selling women's clothing, footwear and exercise accessories. The first store in Notting Hill was followed by several others in London and one concession in Selfridges. They now have 20 stores and concessions across the UK.

Risk Capital Partners advised on investment double

We advised specialist private equity restaurant and retail investor, Risk Capital Partners, on back-to-back investments as it expands its portfolio of interests.

The private equity fund, whose chairman is entrepreneur Luke Johnson, bought London's best known patisserie chain, Patisserie Valerie, with a view to taking the business nationwide. At the same time it has taken a large minority stake in Seafood Holdings, a leading independent fresh fish and seafood distributor serving the catering trade.

Patisserie Valerie began life in Soho 80 years ago, growing steadily and today it owns eight sites in central London. Last year the company unveiled its flagship branch at Spitalfields and the company has projected revenues of £8 million.

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