

This newsletter is provided to clients as a way of expressing thanks for your patronage and to provide added value to our relationship. Issued four times a year, the newsletter will attempt to bring various recent legal developments to your attention. Hopefully some of these brief articles are useful to read. They may save you and your business money, time and frustration in terms of avoiding unnecessary litigation, assuring you are complying with governmental rules and regulations or these articles may be useful to you in other ways.

Partnership Agreements: Restrictive Covenant Not to Compete- Duty to Act in Good Faith

Ms. B was a vet who joined a partnership. After a maternity leave, the other vets found her proposal to work part-time intolerable. The issue was not resolved so B took the position that her partners had repudiated the partnership agreement and she sued for breach of contract. Her partners alleged that B breached the contract by setting up a competing vet clinic. The trial judge awarded B damages exceeding \$ 77,000.

The partners appealed and won on the basis that partners owe each other a duty of the utmost good faith. The court felt that B chose to consider the partnership agreement at an end to avoid the restrictive covenant clause in the partnership agreement. This clause prevented her from competing against her former partners and she could not get around this restrictive covenant by doing what she did; *Brew v. Rozano Holdings Ltd.*, [2006] B.C.J. No. 1655, B.C.C.A.

Exception or Exculpatory Provisions in Contracts

The purpose of exception or exculpatory provisions in contracts is to re-allocate risk of loss between the parties to the contract. For example,

express wording can be included in a contract which protects a vendor of merchandise from liability to the purchaser for damages which are due to the delivery of defective merchandise. The re-allocation is usually reflected in a lower contract price. The purchaser accepts the risks associated with defects in the product. So long as the purchaser is aware of this re-allocation of risk and is willing to bear the risk, there is no problem. Unwanted concerns arise however, in circumstances where the purchaser is not aware of the shift in risk or of its effects and ultimately finds out he or she is barred from suing for defects in the products purchased.

Punitive Damages in Lawsuits

Punitive or exemplary damages are awarded in lawsuits above what will barely compensate the plaintiff for his property loss where the defendant's actions constitute malicious, wanton or reprehensible conduct.

Earlier this year, an insurance company was found liable for \$ 350,000 in punitive damages based on its bad conduct. Businesses are advised that, in all their dealings with suppliers, employers, agents and others, to conduct themselves in good faith. This means avoiding high-handed, malicious, arbitrary or reprehensible misconduct

Law Newsletter...continued

that departs to a marked degree from ordinary standards of behaviour. This will reduce the possibility of punitive damages being awarded by the courts against businesses.

This cautionary note is of particular significance these days since plaintiffs have included large claims for punitive damages in their lawsuits since 1996. At that time, Pilot Insurance was first hit with a jury award of \$ 1 million in punitive damages for its bad conduct; *Whiten v. Pilot Insurance*.

Advice Column – Business Names

One of my clients wants to start a new retail business and has her heart set on a particular name for the business. A business names search in the provincial database disclosed that there are two Ontario businesses already using the name. In fact, one of the registrations was filed just last year. Due to the possibility of confusion between businesses where their lines of business are in the same industry, it is essential to either select a different name, buy out the registered name or attempt to obtain the consent of the prior registrants in writing based on different service offerings.

There is a wrinkle in cases where the business will be carried on in other jurisdictions. My client for instance, wants to sell her products right across Canada on the Internet. This means that it would be advisable to check for business names registered for use in the other provinces before embarking on a national sales program. Since name

selection can hold up your business having your lawyer search and register your business name. This is particularly plans, it is best to select a few names and rank them in order of preference before helpful when incorporating a new company where additional rules apply when selecting a corporate name.

Contact Information

If you have any questions or comments regarding this newsletter, please contact Peter Reiss at (905) 713-3074 or at law@p-reiss.com.

The material contained in this newsletter is intended to provide information and opinions to clients as a general information service and to bring issues to their attention. It is not intended to provide legal advice. Nor is the accuracy of any information to be relied upon by anyone. Clients are advised to engage counsel to seek legal advice which will depend in each case, upon the specific circumstances of the matter.