



Charlatans, Rogues and Thieves?

Election commentary? 80's pop or just a desperate reference to a 70's hit? I suspect we have all at one time or another been subjected to an over garrulous salesperson and possibly even victims of over-promising and under-delivering. Election commentary it is then.

The question is one of accountability - to what extent is a business liable for the promises of its salespeople and can a business realistically protect itself?

In recent years, legislation has come into force both in Europe and the UK, which protects the consumer from unethical practices. Guidance from Europe has led to the implementation of the Unfair Trading Regulations 2008. This legislation provides a general prohibition on traders treating consumers unfairly. It also requires businesses not to mislead consumers through acts or omissions, or subject them to aggressive commercial practices.

An example of a misleading omission would be where a trader sells a satellite television package to a consumer, falsely saying that the package includes sports channels, which are in fact only available at an additional subscription cost. The trader will have provided false information about the contents of the package and therefore about the main characteristics of the product. As this practice is likely to cause the typical consumer to take a different decision about the package, it will breach the Regulations. Similarly, selective quoting of theatre or restaurant reviews could amount to a misleading omission.

The Regulations are enforced by the Office of Fair Trading (OFT) and breaches may result in fines of up to £5,000 or imprisonment for up to 2 years and penalties may, in certain circumstances, be imposed upon a Company Director or manager. Effective training and monitoring of sales teams is therefore paramount – perhaps the same might be applied to the political machines currently being rolled out across the country or do I just sound a tad cynical?

Businesses often seek to avoid liability for sales puffs, pitches or promises through the use of 'Entire Agreement' clauses within their terms of business. The purpose of such a clause is, broadly speaking, to prevent the party relying on it from being liable for any statements or representations other than those expressly set out in the agreement. Often seen as 'boilerplate' (standard type provisions common to most contracts) and overlooked they regularly give rise to litigation.

Such clauses should not however been seen as 'one size fits all' as the context may have a considerable impact upon the likeliness of the clause being successfully relied upon.

Particular care should be taken when dealing with consumers as the OFT takes the view that such clauses may limit a seller's obligation to respect commitments given by its salespeople. They believe that consumers tend to rely on what is said to them and that suppliers should honour those representations.

In September 2009 the OFT published guidance on Unfair Terms in Consumer Contracts and set out various examples. For instance, a clause reading:

'The Seller's employees or agents are not authorised to make any representations concerning the windows unless confirmed by the Seller in writing. In entering into the Contract the Customer acknowledges that it does not rely on, and waives any claim for breach of any such representations which are not so confirmed,'

was subsequently deleted.

It would be nice to think that our political representatives, of whatever party, might be equally accountable.



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