

# For Business



online  
shopping

## Are you an eBay shooting star?

Are individuals unwittingly becoming traders?

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## Liability for employees' actions

Can you be held liable for the wrongdoing of someone else?

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## The cost of litigation

Worried about the cost of pursuing a smaller dispute?

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## Why be so competitive?

Heathrow fined for including a clause restricting parking prices for non-hotel guests.

# Are you an eBay shooting star or actually a trader?

With the increase in sales and market place platforms, are individuals unwittingly becoming traders?

EBay, Etsy and Amazon Marketplace are just a few of the online platforms that individuals can use to sell their unwanted goods or to earn a supplemental income selling arts and crafts that they have made. The problem, particularly with the latter, is that there is the potential that an individual could end up being considered a trader and therefore subject to the Consumer Rights Act 2015.

A recent case that has gone to the European Court of Justice (ECJ) highlights the matters that a court would take into consideration when determining if an individual is in fact a trader for the purposes of consumer rights law.

Ms Kamenova sold a number of watches via a Bulgarian online market place.

When one of her customers returned goods to her on the basis that the watch did not match the description given in the advert, Ms Kamenova refused to take the watch back and provide a refund. The customer claimed that this was in breach of his consumer rights. Ms Kamenova argued that she was not a trader and therefore not subject to the provisions of the Unfair Commercial Practices Directive (Directive).

The ECJ was asked to determine if an individual could be considered a trader and therefore was subject to the provisions of the Directive. As ever, much will depend upon the individual facts, but the ECJ has provided some additional guidance as to whether an individual should be considered a trader:

• Is the sale on the online platform carried out in an organised manner?

- Is the sale intended to generate profit?
- Does the seller have an advantage over the consumer by having technical information and expertise relating to the products which the consumer does not necessarily have?
- Does the seller have a legal status which enables them to engage in commercial activities?
- To what extent is the online sale connected to the seller's commercial or professional activity?
- Is the seller subject to VAT?
- Does the seller, acting on behalf of a particular trader or on their own behalf or through another person acting in their name and on their behalf, receive remuneration or an incentive?
- Does the seller purchase new or second-hand goods to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with their usual commercial or business activity?
- Are the goods for sale all of the same type or value?
- Is the offer to sell concentrated on a small number of goods?

**Vicarious liability is a rule of law under which a person or company may be held liable for the wrongdoing of someone else.**

## Liability for employees' actions

A company can be vicariously liable for an employees' conduct if that conduct occurs in the course of employment.

The Supreme Court held that the conduct of a petrol pump attendant, who left his kiosk and assaulted a customer on the forecourt, was not sufficiently connected to his employment for his employer to be liable.

However, a more recent incident reminds us that each case will depend on careful

consideration of the facts and highlights the dangers of claims being made by employees arising from events that occur outside the workplace and office hours.

A company's Christmas party ended and some employees went back to their hotel for drinks, which were mostly paid for by the company. Following discussions about a new employee's salary, an argument broke out. The Managing Director (MD) became annoyed by this and "summoned" his

# Resolving disputes – the cost of litigation

It is important to recognise that not all of the above need to be present in order for an individual to be considered a trader.

## Why is it important to determine if you are a trader or an individual?

A consumer purchasing from a trader, particularly in an online environment, will benefit from significantly greater protection than if they are simply purchasing from an individual.

If you are concerned that your online sales activity may class you as a trader, contact me to discuss what steps you should take to protect your business.

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Many businesses will not pursue a smaller dispute because they are worried about the total costs. When dealing with smaller disputes, you normally have to be careful that costs do not outweigh the amount in dispute.

However, we're starting to see law firms offering to fix fees at the outset, especially for smaller claims of between £10,000 and £25,000. This means you can enter into the dispute process knowing what it's likely to cost you, what the result could be, and how long it might take.

Resolving a dispute can take considerable time, effort and money that you could better use to operate, manage, or grow your business. Therefore, having a fixed structure could be the answer to effectively managing company debt levels and relationships.

Birkett Long has acted on behalf of individuals, farming partnerships, LLPs and companies in connection with a wide range of disputes.

For claims below £25,000, you can count on us to fix the fee from the outset. We'll take you through the process and tell you about any additional costs that might crop up. If we can help you avoid issuing court proceedings, we will.

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employees, lectured them on how he owned the company, told them that he was in charge and he would do as he pleased. He reminded them that he paid their wages.

One employee suggested it would be better if this new employee was based at a different office. The MD lost his temper and reiterated that he made the decisions. The MD then repeatedly punched the employee who had challenged him, causing injuries which led to brain damage.

The High Court held that the company was not liable for the MD's actions because the events had taken place after the Christmas party had ended, at a different location, and that the drinks had occurred in the context of "entirely voluntary and personal choices".

Even though the conversation veered towards work matters and the drinks had been paid for by the company, these did not provide a sufficient connection to support a finding that the company was vicariously liable for the MD's conduct.

The Court of Appeal overturned the High Court ruling. It held the MD was purporting to act as MD despite the time and place of the incident. He had taken it upon himself to exercise his authority over his subordinate employees when a work decision he had made was challenged. Even if he took off his MD hat when he arrived at the hotel, he donned it again when his managerial decisions were challenged.

This case illustrates that misuse of authority can occur out of hours even

when employees are off-duty. The company was held liable because the MD exercised his authority and as the Court of Appeal said, his dominance meant he was the only real decision-maker.



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# Why be so competitive?

The Competition & Markets Authority (CMA) has recently accepted settlement of fines of £1.6 million from Heathrow, after finding that a lease from the airport to Arora for its Sofitel hotel at Terminal 5, included a clause restricting how Arora could set parking prices for non-hotel guests.

The CMA decided that the pricing restriction prevented Arora from charging non-hotel guests cheaper prices than those offered at other car parks at the airport. This is the first time that the CMA has used its competition enforcement powers in respect of a land agreement restriction. Historically, land agreements were exempt from competition law. Be warned, this has now changed!

Land agreements, for example, leases, sale contracts or agreements for access must comply with competition law. Not all restrictions will break competition law, but if they do, all businesses involved (both landlord and tenant) are at risk. Businesses and their directors could face:

- Fines of up to 10% of worldwide turnover
- Director disqualification for up to 15 years
- Damages claims, damage to reputation and/or the restriction(s) being unenforceable.

Expert legal advice should always be taken, especially if agreements restrict land use or restrict prices that goods or services can be supplied from the land.

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## Having a dispute?

Let us help with our  
fixed fee litigation service

## Contact

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**SOME THINGS NEED TO BE**

# FIXED

