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WELCOME TO THE WINTER 2021 EDITION OF

Motor Matters

IN THIS ISSUE

What will a move to the agency model mean for motor retail?

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The franchise model has long been established within the motor retail industry. Though the dealer is linked to the manufacturer in terms of branding, know-how and regional exclusivity, it sells cars as a separate business, buying vehicles from the manufacturer and selling them on to customers itself.

At its simplest, its profits on the sales side of the business derive from the mark-up it charges customers over the price it pays the manufacturer. A familiar set up to all.

But recently there has been a move towards a very different business model (partly driven by electric vehicles), and as it gains traction, dealers will have to adapt quickly. This is the agency model. The dealer operates more fully as a representative of the manufacturer. Its showrooms will still function as a physical touchpoint with the customers, but it is essentially the manufacturer's touchpoint, not the dealer's. The dealer will not own stock, and it will conclude contracts with customers on behalf of the manufacturer. The contract for sale will be between the manufacturer and the end customer. The dealer will earn a commission on the sales it makes, but if it is a genuine agency (rather than some sort of hybrid) the dealer/agent will have no control over prices and discounts.

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From a legal perspective the two are very different beasts and governed by different legislation. This will impact on the running of dealership businesses. There is legislation in place to prevent a manufacturer from exerting too much control over its franchisee dealers. Admittedly the block exemption rules for vertical agreements allow practices which would otherwise be seen as anti-competitive.

Nevertheless, a manufacturer cannot (for example) set minimum prices for its franchise dealers, which would be a hardcore breach of anti-competition law. An agent, however, is essentially a mouthpiece for the manufacturer. The manufacturer is therefore free to dictate the end prices which customers will pay; after all, it is the manufacturer which is ultimately contracting with the retail customer.

The manufacturer is also much more likely to exert control over its distributors' practices, even more than it does to protect its brand under the franchise model. An agent will use the manufacturer's terms of sale, not its own. Customer bartering and showroom discounts may become a thing of the past.

> *…the manufacturer potentially benefits from lower costs, better returns on sales and better value for the customer.*

Why are manufacturers keen on the move to agency? On the face of it, one might question the appeal of a model in which the manufacturer maintains the burden of the inventory, and cannot offload this risk to its distributors. But agency is seen as the best approach to enable effective omni-channel retailing. Meanwhile, the payback for additional risk tends to be a bigger margin. With agency, the manufacturer will retain all of the margin for sales to customers, and the commission it pays its dealer agent may be lower than the margin earned by a franchised dealer. So the manufacturer potentially benefits from lower costs, better returns on sales and better value for the customer.

Equally important will be the appeal of more directly and completely owning and controlling customer data. Manufacturers will no longer be one step removed from much of the information received from customers. Properly managed, in a data-driven world, this will be an even more valuable asset. Customers will more likely make even more decisions about vehicle choices online, and with more sophisticated "virtual" showrooms likely on manufacturer-controlled websites, manufacturers will quickly get greater insight about customer choices which can be influential on product decisions. Of course the dealer showrooms will still be an integral part of the customer experience. For example, no amount of online interaction will replace physical viewings and test drives.

> *…the prospect of a more consistent pricing strategy and less risk will be attractive, particularly as… profit margins on new car sales have been trending downward for years.*

Will the agency model benefit dealers? Dealers will likely still keep a central position in the sales process – including vehicle handover – and the prospect of a more consistent pricing strategy and less risk will be attractive, particularly as (prior to the recent extraordinary situation arising from semi-conductor shortages, for example) profit margins on new car sales have been trending downward for years. Certainly, dealers should be able to protect their sales margins in a commission-based system, and we expect that manufacturers will remain heavily reliant on them. Of course, the extent to which a switch to agency impacts on a dealer's aftersales business will be critical too – with dealers having a model where they are successfully selling service plans (as well as extras such as paint protection) at the handover.

Whatever happens, we expect that dealers will keep a central position in automotive sales. As agency models develop, dealers will need to adapt so that their expertise in the manufacturers' products will be paramount. Providing they can embrace the cultural shift that this may entail, we believe that the future is still promising for dealerships.

‘Fire and rehire’? How to change terms and conditions in employment contracts

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An employer may look to change the terms of their employees’ contracts for a number of reasons but what process should they follow?

This article looks at when, why and how an employer may change the terms and conditions within an employment contract and the possible consequences of doing so.

The practise of ‘firing and rehiring’ employees in order to achieve a change in terms and conditions, usually to the employees’ detriment, has featured prominently in the news recently with companies such as British Gas and British Airways in dispute with their workforce over proposed contractual changes. In response to concerns raised in Parliament, Acas has published new guidance for employers explaining how to make changes to employment contracts in order to avoid having to fire and rehire staff.

> *A change in working location or introduction of flexible or hybrid working may impact upon employees’ differently.*

When and why?

There are several reasons why an employer may look to amend the terms of a contract. Changes may be beneficial (such as an increase in pay or introduction of new or enhanced benefits), detrimental or neutral in their impact. A change in working location or introduction of flexible or hybrid working may impact upon employees’ differently.

In the motor sector, employees’ pay entitlement may change at regular intervals when manufacturers’ commission structures are varied and employment contracts need to allow the employer to make these alterations. If not, the employer may be at risk of a breach of contract claim.

> *Important considerations for an employer will be the number of employees affected by a proposed change, whether an established consultation procedure exists, and whether they recognise a trade union.*

How?

Ideally, employment contracts should give an employer flexibility to vary terms. However, employers should take care in relying upon generalised flexibility clauses as these are unlikely to be enforceable, particularly where employees may suffer a detriment as a result.

Important considerations for an employer will be the number of employees affected by a proposed change, whether an established consultation procedure exists, and whether they recognise a trade union.

What can an employer do if the employment contract does not expressly allow to make changes?

1. Explain the proposed changes with a view to seeking the employees' agreement. Where the changes are beneficial, employees are unlikely to object so the process should be relatively straightforward. Where the changes are detrimental, obtaining agreement may be more difficult.

2. Impose the changes unilaterally. As the employer will be in breach of the original contract if it imposes changes without agreement, the employees can respond by:

    a. acquiescing by continuing to perform their contract. By impliedly agreeing to the change, they will lose the right to claim breach of contract; however, in practice, courts are usually reluctant to find implied consent unless the change has immediate practical effect

    b. working under protest. In this instance, an employee may continue to work whilst bringing claiming breach of contract (or unlawful deduction from wages where pay has been reduced), thereby making it clear to the employer that they do not accept the change

    c. resigning and claiming constructive dismissal if the change amounts to a repudiatory breach of contract. This depends upon the effect of the breach but financial changes are more likely to fall within this category

    d. refusing to work. Where day-to-day working arrangements are impacted, an employee could refuse to work. If the employer dismisses them, they may be able to claim unfair dismissal (and wrongful dismissal if notice is not given).

3. Terminate and re-engage. This is commonly known as 'firing and rehiring' as the employer will terminate the original contract and offer employment under new terms. Assuming the required amount of notice is given, the employer will not be in breach of contract but may have to defend an unfair dismissal even where the new contract is accepted.

"Where the changes are beneficial, employees are unlikely to object so the process should be relatively straightforward. Where the changes are detrimental, obtaining agreement may be more difficult.

In its new guidance, Acas warns that this is an extreme course of action that can damage the employment relationship and risk reputational damage. If the proposal relates to 20 or more employees, the employer must comply with specific collective consultation obligations under section 188 Trade Union and Labour Relations (Consolidation) Act 1992 or face a claim from each employee for their failure to inform and consult.

Since variations to employment contracts are inevitable, employers can take practical steps to permit such changes in certain circumstances. Although, in practice, it is best to consult with employees to seek their consent to any variation, they are not likely to agree to detrimental changes. Therefore you may need to use other incentives and/or follow a different procedure in order to achieve the desired outcome.

"In its new guidance, Acas warns that [firing and rehiring] is an extreme course of action that can damage the employment relationship and risk reputational damage.

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Who's in the driver's seat? Liability in automated vehicles

With more than 90% of car accidents being caused by human error, there is a rationale that shifting to the world of automated vehicles that require little to no human control and have the ability to respond to objects and events will significantly reduce the all-around risk and the number of road traffic accidents. However, as we know, when you "solve" one issue you can sometimes create another one – and here the issue is liability.

Currently, all drivers have a duty to take reasonable care to avoid injury to other road users or damage to property... is it fair that the victim claims compensation under the current regime when the vehicle owner is not actually driving the vehicle?

There are five recognised levels of autonomy, ranging from level one (no automation) to level five (full automation), with many cars today already having features that allow a degree of automation, such as auto-park, anti-lock braking and adaptive cruise control. The Law Commission, who review and recommend changes to the laws in England and Wales, are currently undertaking a detailed review of what legal and regulatory changes are required to support the reality of automated vehicles (AV) in the UK.

Currently, all drivers have a duty to take reasonable care to avoid injury to other road users or damage to property. Where this duty is breached and damage is caused, the victim may be able to claim compensation from the driver through the driver's personal car insurance. The issue arises when an AV is involved in an accident – is it fair that the victim claims compensation under the current regime when the vehicle owner is not actually driving the vehicle?

...many manufacturers, such as Mercedes Benz and Volvo have already accepted liabilities in certain cases.

Here, it will be possible to argue that the manufacturer should be liable, for example, if the accident was due to failures in the AV. In fact, many manufacturers, such as Mercedes Benz and Volvo have already accepted liabilities in certain cases. The Automated and Electric Vehicles Act 2018 (AEVA) extended compulsory vehicle insurance to cover AVs driving in automated mode. Therefore, insurers will have to deal with all civil liability claims, even when the vehicle is in automated mode. Where an AV is not covered by insurance, the liability falls on the vehicle owner.

> *If an accident were to occur, the user-in-charge would not be criminally prosecuted. Instead, the liability would fall on the Automated Driving System Entity (ADS) who would be legally responsible for the AV.*

Most importantly, this law allows an insurer to recover its costs from the liable party, such as the manufacturer. Though this may in theory lead to manufacturers increasing a vehicle's purchase price to cover the cost of risk they are taking on, given that AVs are supposed to be safer than conventional vehicles and therefore the risk of accidents are significantly lower, manufacturers should only have to make a modest price increase to accommodate this risk.

Under the AEVA, insurers will also be able to exclude or limit their liability for damage where there is a failure to install safety-critical software updates or prohibited alterations are made to the software. However, despite the AEVA, there are still situations where it is vague as to who exactly is in the 'driver's seat' and therefore liable. For example, AVs that are level three (conditional autonomy) on the autonomy scale assume control, in certain circumstances, of all safety-critical functions and nearly all aspects of driving. Although the driver is not required to monitor the situation, they must be on hand to intervene if necessary. Who is liable when the driver fails to or is unable to intervene and an accident occurs?

The Law Commission is exploring the idea of a 'user-in-charge' to tackle such situations. When the AV is driving itself, the person in the driver's seat will be considered as a user-in-charge and not a driver. The user-in-charge would be able to do activities that drivers are forbidden from doing so, such as watching a film or using their phone. If an accident were to occur, the user-in-charge would not be criminally prosecuted. Instead, the liability would fall on the Automated Driving System Entity (ADS) who would be legally responsible for the AV. The ADS could be the vehicle manufacturer, the software developer or a partnership between the two. This clearly demonstrates an intention to replace criminal offences with regulatory offences, holding the manufacturers accountable instead of the individual 'driving'.

With the Law Commission set to release its full findings "in the last quarter of 2021" (and still awaited as at publication), it will be interesting to see its plans on how the current transport regime will be revolutionised!

Staff retention – top tips

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Whilst the good news for the UK economy is more than two million fewer people are now predicted to be unemployed as a result of the pandemic than originally forecast.

Unfortunately, we are instead experiencing 'The Great Resignation', which has spread from the US, across continental Europe and hit the UK. We can see this first hand in the motor trade and elsewhere: worsening skills shortages (already a major issue for motor dealers with the industry's transition to EV technology), wage inflation and jobseekers spoilt for choice – all part of the 'jobs revolution' and a huge shift in power from the business to the worker. So, following the old adage that "prevention is better than cure", here are Birketts' HR and Employment Teams' top tips for employee retention.

> *...worsening skills shortages... wage inflation and jobseekers spoilt for choice – all part of the 'jobs revolution' and a huge shift in power from the business to the worker.*

- Progression and development – clear, defined routes and supportive and skilled Learning and Development teams and team leaders.
- Regular mentoring/feedback and positive reinforcement.
- Culture – including working collaboratively.
- Flexible benefits package, buy/sell holiday, healthcare benefits, enhanced maternity packages and shared parental leave policies.
- Forums to 'listen' to employees – data gathering/feedback/intranet pages.
- Flexibility – how do employees want to work? Can it work for your business?
- Playing to strengths – the make-up of a team can be vastly different in terms of character and specialist skill set – even amongst those with the same job title. Don't recruit carbon copies.
- Enhancing the skills of those that are happy in their 'job' but do not want progression – what could this look like?
- Reward for length of service.
- Ensuring competitive base salary and reward-based systems if required.
- Profit share.
- Diversity – having a "safe and free place" for LGBTQ+ and minority groups with a spokesperson to lead activities to promote understanding and friendships will boost client morale and increase client base.
- Job sharing – can be successful in teams that struggle to recruit full-time candidates and offer an opportunity to tap into a large market.
- Social events and fun activities.

> *If you need help putting these into practice to win the 'battle for talent', please get in touch!*

If you need help putting these into practice to win the 'battle for talent', please get in touch!

Rise of the 'greener' property lease

Our final topic we've labelled as the rise of the 'greener' property lease. We have noticed a distinct shift in attitude from clients about this topic in recent months, so it's worth exploring a little bit further about why it's topical and what 'green' really means in a property leasing context.

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So why bother? I'm going to pick three main reasons, although there are undoubtedly others. Interestingly, only one of them has anything specifically to do with legal stuff.

"New commercial lettings are already subject to the E standard, but the rules won't kick in for existing tenancies until April 2023.

1. Minimum Energy Efficiency Standards (MEES)

First up is MEES, or the Minimum Energy Efficiency Standards. These are now legally embedded into new leases and require a landlord to only let property which has a minimum EPC rating of E (subject to some limited exceptions).

New commercial lettings are already subject to the E standard, but the rules won't kick in for existing tenancies until April 2023. However, there are lots of existing leases which will still be in place in April 2023 which don't address MEES issues adequately (or at all) – issues like who is going to do the work, how they will get access to do it and who pays for the improvements.

The Government has been running (and intends to run during the course of 2022) even more consultations about trying to raise the compliance bar even higher, and rightly so (as Greta would argue). We've got to do a lot better if we have global ambitions to achieve net zero carbon emissions.

"Following a recent funding competition, the Government has now given a number of local authorities £100,000 of 'start up' funding to develop effective enforcement processes...

The ambition is to get commercial properties three steps up the ladder to a B by the end of the decade (to C by 2027 and to B by 2030). At the same time, the Government has handed local authorities (who have to police compliance and who still haven't actually dished out any fines) the carrot to improve enforcement. Following a recent funding competition, the Government has now given a number of local authorities £100,000 of 'start up' funding to develop effective enforcement processes (initially for breaches of the almost identical rules applying to residential lettings). I've long suspected they'll allow authorities to retain fine monies, so this could fairly quickly become a source of additional income for hard-pressed local authority budgets.

2. Environmental, Social and Governance (ESG)

This isn't just about COP26 and protesters gluing themselves to the M25, this is about popular momentum starting to drive the agenda to live and work in a more sustainable way.

Now we move on to ESG. This isn't just about COP26 and protesters gluing themselves to the M25, this is about popular momentum starting to drive the agenda to live and work in a more sustainable way. Just ask any of your Gen Z employees (those under 24) and they'll tell you that working for a business that operates in an ethical and sustainable way is one of their top influencing factors in picking a workplace.

If you don't want those protesters gluing themselves to your building then you need to pay attention to public perception. The UK Green Building Council (UKGBC) forecasts around 40% of all greenhouse gas emissions emanate from the use and occupation of buildings.

For owners and operators of buildings there is an increased need to demonstrate their green credentials to investors. Grosvenor Estates is a good example of this: a commercial developer and institutional landlord committed to introducing 'green terms' into all of its new leases.

There's also demand from tenants; after all, the buildings you occupy are a significant factor in your business' contribution to generating greenhouse gases, so some see this as a more manageable area in which to reduce their carbon footprint.

Finally, regulatory pressures are now being brought to bear. Guidance has recently been issued to occupational pension funds on how they need to consider the environmental profile of their investment activities. The Government is also consulting on ways to force banks into greener lending, by requiring them to demonstrate that their loan books have an average EPC C rating on them.

Finally, local authorities are also proactively moving to regulate future development by imposing specific environmental targets in new developments. As this becomes increasingly embedded in planning policy, designing and delivering greener buildings becomes unavoidable.

A recent analysis of Grade A office rents in London suggested a 14% rent premium for top-rated buildings compared to ones which were simply rated as 'good'.

3. Making your building more (or less) valuable?

Recent research carried out by a number of the major surveying practices is increasingly coming to the conclusion that buildings with a higher environmental performance rating are attracting a premium with occupiers. A recent analysis of Grade A office rents in London suggested a 14% rent premium for top-rated buildings compared to ones which were simply rated as 'good'. The converse is equally true – prospective tenants and buyers will actively discount the price of underperforming properties as they factor in the costs of both operating and upgrading sub-par buildings.

What's not to like?

The newest kid on the block is the WELL Building Standard (WELL). A second version of WELL was launched last year.

JLL concluded that the combination of rental premiums, reduction in yield (helped by lower void costs), and lower interest costs lead to a more positive cash flow and increase in return for greener buildings.

Like many new things, greener property leases still come with their drawbacks…

1. First of all is trying to work out which standard you want/need to be aiming for. There are a lot of them, and I only mention three below that relate to the running of buildings. If we're talking about stuff in the buildings, how it's operated and so on, we would have a screenful of acronyms – it's bewildering, and likely to be a moving target as it's notoriously difficult to get consensus on these things.

   Building Research Establishment's Environmental Assessment Method (BREEAM) is probably the best known, and is certainly the longest-established standard which is widely used (with variations) on a global basis. Leadership in Energy and Environmental Design (LEED) is also mentioned in the same breath, although its origins are more in the American market.

   The newest kid on the block is the WELL Building Standard (WELL). A second version of WELL was launched last year. This takes a slightly different approach from BREEAM in that it is people-centric rather than an absolute measure of building performance. In fact, it's possible to apply for ratings under both schemes. Whilst WELL still has a focus on environmental performance and the general 'greenness' of the building it is primarily about making it a 'nice' place to work, and protecting and enhancing the well-being of the building's users. If the research is right that people want to come to the workplace because there's a purpose to it, then improving the facilities to make it a more attractive place to spend time seems like the way to go.

2. Not everyone will buy in just because you want to build something green. I wanted to try and find something closer to home, and a site at Hills Road in Cambridge happened to catch my eye. The developer is promoting this as the first building in Cambridge designed to achieve both the BREEAM Outstanding and WELL Platinum ratings. Unfortunately it's been unanimously refused at planning committee (despite a recommendation for approval), with one councillor describing the scheme as 'thoroughly unpleasant and ill thought-through'. Perhaps the 200-space car park didn't meet with their approval, but the design plans on the website are for something rather less radical than some green buildings that I've seen.

3. Finally – cost. No surprise that if you want a more environmentally-friendly building, it will almost certainly cost you more to build/convert it. A 2020 JLL report calculated that on average a BREEAM Outstanding rating will cost you a little under 10% more to achieve than a 'very good' one. So you need to be in it for the long haul; JLL concluded that the combination of rental premiums, reduction in yield (helped by lower void costs), and lower interest costs lead to a more positive cash flow and increase in return for greener buildings.

Next steps

“…think about what data you’ll need, how you’ll get it (and from who) and what will you do with that data once you’ve got it.

“…not everyone starts with a blank canvas, indeed as the UKGBC says, the majority of the buildings that will be standing in 2050 have already been built.

Assuming you are persuaded greener clauses are coming one way or another, what should your next steps be? There’s a couple of key themes this article boils down to.

- Collect and manage data – in the immortal management mantra, you can’t manage what you don’t measure. So think about what data you’ll need, how you’ll get it (and from who) and what will you do with that data once you’ve got it. Collecting monthly electricity data is a burden, will you need that information to actually do something useful with it or could you make do with something less?
- Collaboration – this is a biggie. Sustainability in commercial buildings needs to be seen as a two-way street. Where it’s a multi-let arrangement, landlords have some ability to drive the agenda, ultimately through the service charge (if it allows them to), but where it’s single occupancy the landlord will need to work more closely with the tenant to get their objectives aligned.
- Retrofitting – not everyone starts with a blank canvas, indeed as the UKGBC says, the majority of the buildings that will be standing in 2050 have already been built. Where you’re doing works to existing stock it’s worth thinking about the who, when and how much questions. In many instances the EPC rating of a building can be improved very simply (and fairly cheaply) by replacing old lighting systems with LEDs and putting thermostatic heating controls onto existing radiator systems. In practice, unless you are an owner-occupier, that involves cooperation and a pragmatic approach to cost. If you are a tenant with a short-term lease then you will be reluctant to pay for improvements that you won’t get to see the benefits of. Conversely, as an incoming tenant you will probably be prepared to pay a bit more to occupy buildings with lower operating costs.