

Commercial Thinking

A topical selection of UK commercial law developments - 2nd edition.

1. Definitions of “controller” and “processor” - some much needed clarity

Earlier this year, the EU Article 29 Data Protection Working Party (WP) produced an opinion which offered welcomed guidance on the meaning of “controller” and “processor” when applying the Data Protection Directive 95/46/EC.

The distinction between “controller” and “processor” is vital as it determines who shall be responsible for compliance with data protection rules, how data subjects can exercise their rights and which national law applies.

The definitions included within Directive 95/46/EC have been criticised for over simplifying what is in practice an area riddled with complexities. The present operating environment of increased globalisation, advanced IT systems and shifting organisational structures have led to complexities in the way data is processed; as a result, applying the definitions has become increasingly difficult.

Data “controller” is defined as *“the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data...”* The WP opinion offers pragmatic guidance on how to apply the definition in practice. For example, whoever decides on the “purpose” i.e. the “why” element of processing activities is deemed to be the data “controller”. In addition, whoever takes responsibility for making important decisions, such as the length of time data is stored, is deemed to act as a data “controller”. In addressing the issue of “joint controllers” the WP suggests that although

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contractual arrangements are useful in analysing the responsibility of each party, the factual circumstances must also be considered when allocating data protection compliance obligations.

Data “processor” is defined as “*a natural or legal person, public authority, agency or any other body which possesses personal data on behalf of the controller*”. The WP opinion considers the concept of delegation; essentially a data “processor” is acting under the instructions of the data “controller”. If, for example, a data “processor” processes data outside the mandate given by the “controller” they may be deemed a “controller” or “joint controller” within the meaning of the Directive 95/46/EC.

The WP opinion offers some much needed clarity in the practical application of the definitions; usefully, it also offers 26 practical examples with analysis of how the definitions should be applied. Essentially the WP opinion cements the notion that the current definitions should remain in force by shedding *some* light on how the definitions apply to the complexities of data processing today.

2. Data Protection Regulatory Action Policy – carrots and sticks?

The Information Commissioner’s Office (“the ICO”) has recently published its Data Protection Action Policy (“the Policy”) which documents its strategy for enforcement. The Policy describes the ICO’s approach to enforcement as one of “carrots and sticks”; whereby those organisations that comply with the Data Protection Act 1998 (“the DPA”) will have a clear and consistent framework as a reference and those that do not will be faced with tough regulatory action.

Regulatory action is the term used to describe the exercise of the powers available to the ICO, which are designed to bring about compliance with the DPA. The ICO’s aim is to ensure that personal data is properly protected. Regulatory action is likely to be taken where this is at risk because obligations are deliberately or persistently ignored; or examples need to be set or issues need to be clarified. It is also envisaged that this approach will result in the promotion of good practice and give greater credence to the influence which the ICO may exert.

The Policy sets out the forms of regulatory action available to the ICO; these include criminal prosecution, cautions, enforcement notices and monetary penalty notices. The tools available to the ICO are not mutually exclusive and a combination may be used where a situation requires a multi-faceted approach. The ICO also has powers that can be used alongside regulatory action. These are categorised into three areas: (i) information notices (requiring organisations to supply the ICO with specific information contained within the notice - failure to comply will be a criminal offence), (ii) assessment notices (a notice served on government departments and organisations in designated categories which give the ICO the power to conduct a compulsory audit under section 41A of the DPA), and finally search warrants (which grant the ICO powers of entry and inspection upon application to a judge where there are reasonable grounds for suspecting an offence under the DPA).

The Policy states that the ICO will take a selective approach to initiating and pursuing regulatory action. It sets out certain criteria which will be used to guide decisions about priorities. Regulatory action could be initiated by the ICO as well as in response to matters raised with it. It suggests that a more proactive approach is going to be taken in relation to non compliance and proposes to undertake compliance checks with a view to identifying sectors or specific organisations for more focussed activity – with the public sector more likely to receive greater attention.

The Policy gives helpful examples of the types of conduct that are likely (especially after a warning) and unlikely to lead to regulatory action. Examples of the former include (i) collecting and retaining sensitive personal information on a 'just in case basis', (ii) a repeated failure to take adequate security measures and (iii) seriously intrusive marketing.

The ICO now seems far better equipped to deal with non compliance and has a wide range of powers at its disposal.

3. Domain name developments

Domain Name Locking

Nominet, which maintains the registry of .UK domain names, has introduced procedures allowing domain name registrars, which are the bodies which are authorised by Nominet to register domain names for the “registrants”, to suspend the use of domain names by registrants suspected of criminal activity. Following concerns about websites which were involved in selling counterfeit products, Nominet announced an “investigations” lock, to be used by its registrars to lock a domain name account if they suspect that the domain name is being used for a criminal activity. The effect of the lock is to stop the domain name resolving to a web page and emails from being delivered to it; prevent any details of the registration from being changed, including so that the domain name cannot be transferred; set the domain name’s status on WHOIS as “suspended”; and cause the domain name to be cancelled within 90 days unless the lock is removed. This should assist in protecting rights owners from criminal counterfeiters and from those who commit copyright offences.

Bad Faith when Grabbing Domain Names

When .eu top-level domains were introduced, the registration regime (under Commission Regulation (EC) No. 874/2004 of 28 April 2004 (Implementing Regulation)) was designed to counter domain name grabbing during the early phase of registration, by allowing owners of registered trade marks to apply to register their trade marks for a period before general registration began. For such purposes, the domain name had to be the complete registered trade mark, with special characters disregarded. If, however, the domain name was registered in bad faith, or without legitimate interest, then the domain is vulnerable to revocation. The Regulation sets out circumstances where bad faith may be demonstrated.

In the case of *Internetportal und Marketing GmbH v Richard Schlicht*, C-569-08, the claimant had registered as Swedish trade marks what would have been 33 German generic names, made distinctive by the use of special characters, including &R&E&I&F&E&N&. It then registered as domain names those trade marks with special characters excluded, as in, for example, *reifen.eu*. The defendant had registered the Benelux trade mark REIFEN for use in relation to its glass window-cleaning products, and applied to register that mark as a Community Trade Mark.

The defendant challenged the claimant's domain name registration before the Czech Arbitration Court, which transferred it to the defendant, on the basis that the claimant had acted in bad faith in trying to circumvent a technical rule. The defendant challenged this decision in the Austrian courts, which referred to the ECJ certain questions on the meaning of bad faith. The ECJ held that the meaning of bad faith was not confined to the examples contained in the Regulation but that the court should consider all the relevant factors, in particular, including that the intention not to use the trade mark in the market for which protection was sought; the presentation of the trade mark; that the claimant had registered a large number of marks corresponding to generic terms; the timing of the registration – just before the phase in of the .eu domain names; the abusive use of special characters.

This story has a general moral – that in trade mark/domain names disputes the Court will look to the substance of the parties' actions.

4. How effective are your website jurisdiction clauses?

Despite the e-commerce phenomenon there has been relatively little case-law considering the validity of terms and conditions on-line. Perhaps this is why the recent case of *Ryanair Ltd v Billigfluege.de GmbH*¹ heard in the Irish High Court (the Court) has proved to be of such significance.

Billigfluege were accused of 'scraping' information from Ryanair's website to use on its own website, which was in breach of Ryanair's Terms of Use of its website. A copy of the Terms of Use was available by accessing a link located at the bottom of Ryanair's homepage. The Terms included an exclusive jurisdiction clause under which the Irish courts would hear any dispute arising under the agreement. Billigfluege disputed the exclusive jurisdiction and claimed that the offending clause was sitting within Terms of Use that lacked contractual effect as they had not been accepted by Billigfluege. Billigfluege sought to rely on Article 2 of the Brussels Regulation² which provides a defendant should be sued in its own domicile, which in this case would be Germany.

The Court considered whether the online Terms of Use constituted an

¹ [2010] IEHC 47

² Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.

enforceable contract taking into account Article 23 of the Brussels Regulation which states: *“if the parties, one or more of whom is domiciled in a Member State have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise”*.

The Court ruled in favour of Ryanair and held that a legally binding contract was created; the Terms of Use were “fairly brought to the attention of the other party”, clearly visible and not concealed in any way. It followed that the exclusive jurisdiction clause contained within, was also binding. The Court drew reference to an earlier case involving Ryanair³, in which the Court held that if a contract containing a jurisdiction clause is held to be void and unenforceable, the Court will be guided by the jurisdiction agreement contained within the contract in determining issues in relation to jurisdiction. This provides some reassurance to website operators.

The ramifications of this recent Ryanair case are interesting. Although an Irish decision and not binding in England, the legal principles are similar. However, as both Ryanair and Billigfluege were both commercial entities, the Court took their assumed knowledge into consideration, this approach is unlikely to apply in the context of consumers.

This case provides some comfort to website operators using similar hyperlink models to display Terms of Use. Interestingly, the Court did not look for any positive form of agreement by the user of the Terms of Use, for example the ticking of a ‘agree’ box in what is known as a ‘click wrap agreement’. The Court was of the opinion that following traditional contract principles, conduct in the form of making repeated searches in the knowledge of the existence of the Terms of Use bound Billigfluege to such Terms of Use. So, providing website operators make concerted efforts to ensure jurisdiction clauses and indeed Terms of Use are fairly brought to the attention of website users and available throughout the web process it seems enforceability will not be an issue.

³ Ryanair Ltd. V Bravofly and Travel Fusion Ltd. [2009] IEHC 41

5. When use of your own name is not a defence to trade mark infringement

Under section 11(2)(a) of the Trade Marks Act 1994 and article 12(a) of the Community Trade Mark Regulations, a registered UK or Community trade mark (CTM) (as applicable) is not infringed by a person's use of his own name (company, as well as personal names), provided that the use is in accordance with honest practices in industrial or commercial matters. The Court of Appeal, in *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Ltd and others* [2010] EWCA Civ 110, 24 February 2010 found that the defence could apply to a trading name, as well as a formal company name, and also discussed when the honest practices requirement is failed.

This case concerned a dispute over the use of the name Cipriani. The original Hotel Cipriani in Venice, the Locanda Cipriani on Torcello, and the Hotel Villa Cipriani in Asolo, were all established by Signor Giuseppe Cipriani. When Signor Cipriani sold the hotel business, he agreed that the buyer would have exclusive use of the Cipriani name, except that the family could use it for the Locanda Cipriani. The claimant, who had later acquired the business, had registered CIPRIANI as a CTM. The defendants were a company which operated a London restaurant called Cipriani London, the owner of that company - being Giuseppe Cipriani (a descendant of the founder of the original business), and a company which had licensed the Cipriani name to the first defendant. The defendants also used the name in connection with businesses abroad.

The court had to consider the own name defence only as regards the CTM, but the considerations would apply equally to a UK trade mark. It cited two leading cases, in particular. First, *Asprey & Garrard Ltd v WRA (Guns) Ltd* [2001] EWCA Civ 1499, in which the Court of Appeal had decided that merely establishing a company with a name did not amount to the company using an "own name", and also that the defence would not be available to the company's owner (who bore the name), because it was not he who was trading. In the second case, *Premier Luggage & Bags Ltd v Premier Co (UK) Ltd* [2002] EWCA Civ 387, the Court held that the defendant's use of its full name came within the own name defence, but abbreviations or adaptations of that name, that is "Premier", "Premier Luggage" and "Premier Luggage Company", as used by sales staff provided by the defendant's affiliated company, were not within the defence. In the present case, the Court emphasised that the position would be different for

established names, as contrasted with newly adopted names, as the mischief in the latter might not accord with honest practices. The Court proceeded to state that the own name defence could apply to trading names depending on the name in question, the circumstances of its adoption, and whether the use was in accordance with honest practices. It found that the defendant's own name was "Cipriani London", rather than "Cipriani"; accordingly the own name defence could only apply to "Cipriani London". But the Court then found that the defendant's use of "Cipriani London" did not accord with honest practices. The defendant had argued that its use was justified by concurrent user, but the Court rejected this on the facts and found that the defendant had no reputation in the name in the UK. On the basis of various cumulative factors, which added up to unfair competition by the defendant, and because the defendant took no account of the legitimate interests of the claimant as owner of the CTM, the Court found that the defendant's use of "Cipriani" or even "Cipriani London" did not accord with honest practices.

The case also raised issues of passing off, the goodwill of foreign businesses, and bad faith trade mark registrations, but those are another part of the story.

6. Rights in databases – subsistence of copyright or the sui generis database right?

In a recent case, the High Court has considered the issue of which intellectual property rights subsist in the annual fixture lists produced and published for the English and Scottish Premier Leagues and football leagues. The judgment will be significant for any business compiling or exploiting databases.

The English and Scottish Premier Leagues and their licensees claimed the unlicensed use of their fixture lists by the defendants, including Yahoo! UK, a football pools and two betting businesses, infringed the claimants' copyrights and database rights (*Football DataCo Limited and Others v Britten Pools Limited and Others* [2010] EWHC 841 (Ch)).

Under the Copyright, Designs and Patents Act 1988 (as amended), copyright subsists in original literary (and other) works. Literary works were re-defined, under the EC Database Directive, to include databases. To be

original, a database must originate with the author, and not be a mere copy of a pre-existing work. Copyright is infringed by the unauthorised copying, publication and making available (among other things) of the whole or a substantial part of the work.

Under the EC Database Directive, implemented in the UK by the Copyright and Rights in Databases Regulations 1997, the *sui generis* database right subsists in a database if there has been substantial investment in obtaining, verifying or presenting the contents of the database. Several cases have decided that investment in *creating* the contents of the database is not enough. The first owner is the maker of the database, or the person who takes the initiative in obtaining, verifying or presenting the contents of the database and assumes the risk of investing in those acts. Database rights are infringed by the unlicensed extraction or re-utilisation of the whole or substantial parts of the contents of the database, or the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database.

On the facts, the judge concluded that the compilation process for the fixture lists was not mere “sweat of the brow”, but involved very significant labour, judgement and skill in satisfying a multitude of competing requirements. He also found that the effort involved was essentially in the creation of the data.

The judge held that copyright did subsist in the fixture lists. Quoting Laddie, Precott & Vitoria on Copyright, he said that database copyright was restricted to the arrangement or selection of the database contents, so that the skill and labour in gathering or verifying the data were not relevant. He then found that (unlike in the case of the *sui generis* database right), selection decisions taken in the process of creating the database would fall within the restriction. What mattered was that the selection was the author’s own intellectual creation and that the work was quantitatively enough to attract copyright protection.

The judge found that the fixture lists were not protected by database rights because the essential work was in creating the data, with insufficient effort in obtaining, verifying or presenting the data.

7. ASA agree with consumer on brochure price fluctuations

The Advertising Standards Agency (the ASA) has come down on the side of the consumer in its recent decision on the advertising of fluctuating prices. A direct mail brochure company advertised a computer for “£789.00” along with the text “...Check www.dabs.com for latest prices”. Upon visiting the website the complainant discovered the computer was not available for the price advertised.

The direct mail brochure company claimed the computer had been mistakenly advertised exclusive of VAT *and* due to the nature of the ‘live environment’ it operated in, its products were susceptible to price fluctuation. The ASA concurred with the complainant on the basis that consumers expect an advertised price to be correct whilst the advert is in circulation. The ASA criticised the suitability of the brochure as an advertising vehicle to advertise products that fluctuated in price as the brochures were likely to remain in circulation after price variations had occurred.

8. New advertising codes of practice

On the 16 March 2010 the Committee of Advertising Practice (CAP)⁴ and the Broadcast Committee of Advertising Practice (BCAP)⁵ published new advertising codes.

The new codes are as a result of a two year review and public consultation taking into consideration responses from consumers, governmental bodies, charities and industry were taken into consideration. The simultaneous review was the first of its kind since the bodies were established nearly fifty years ago. The intention was to ensure the codes are fit for purpose today and in the future.

The new codes are set to come into effect on 1 September 2010 which allows advertising bodies six months to acclimatise and ensure compliance. The CAP code is intended to provide a foundation for the self-regulation of advertisers. The new BCAP code is particularly pioneering as it creates a

⁴ The body responsible for writing, reviewing and amending advertising codes in relation to non-broadcasted marketing communications

⁵ The body responsible for writing, reviewing and amending advertising codes in relation to broadcasted marketing communications

single code for TV and radio in place of the pre-existing four separate codes. To view the new codes please visit the CAP and BCAP websites.

9. Dishonesty or wishful thinking?

A case which illustrates the effectiveness of “entire agreement” clauses and highlights the distinction between fraudulent misrepresentation and other categories of misrepresentation is *Foodco UK LLP & Others v Henry Boot Developments Limited* [2010] EWHC 358.

The Claim

As with so many legal disputes, this case arises out of commercial disappointment. Perhaps less usual is that the commercial disappointment was felt not only by the claimants but also by the defendant and it is this mutual disappointment which underscored the decision of the court.

The bare facts of the case are relatively straightforward. Henry Boot had, over a period of time, pieced together the development of a service area off the M20 motorway and just a few miles from the Port of Dover. It had grand ambitions for a larger than usual service area and successfully marketed retail units to a number of tenants on the strength of these ambitions. The site opened in January 2008. Henry Boot marketing material had predicted 88,000 visitors per week on opening. In fact, the numbers barely reached one tenth of that. Faced with, in the words of the court, such a commercial disaster, the tenants not unnaturally sought to claim against Henry Boot.

The tenants’ claims varied in some of the details but they all claimed that they had relied upon misrepresentations about the extent and content of the motorway signage relating to the site, the predicted number of visitors and certain of the facilities to be available on the site.

The Terms of the Contract

The agreement for the leases contained a clause which provided, firstly, that the agreement was the “entire agreement” between the parties and, secondly, that the tenants were not entering into it “in reliance” upon any representation or warranty, express or implied, except for the replies given by Henry Boot’s solicitors in response to formal enquiries raised by the tenants’ solicitors.

The court held that this “entire agreement” clause was effective and that it

ruled out any claim by the tenants for misrepresentation except for (a) misrepresentations arising from the replies to enquiries given by Henry Boot's solicitors and (b) fraudulent misrepresentation by Henry Boot.

It is worth noting that the court considered whether the entire agreement clause came within the scope of the Unfair Contract Terms Act 1977 and, if so, whether it satisfied the test of reasonableness. The court held that this Act did apply but that the clause did satisfy the test of reasonableness. There was no substantial imbalance in bargaining power between Henry Boot and the tenants, the tenants had legal advice, the clause was open to negotiation and, importantly, the tenants were entitled to rely upon the replies to enquiries provided by Henry Boot's solicitors. It was, therefore, for the tenants to make the right enquiries and to carry out due diligence if they were not satisfied with the replies.

The Misrepresentations

That representations were made to the tenants was not in doubt. Some may have been misrepresentations although it does appear that the tenants may have been reading more into them than may have been justified. The key representations were contained in a series of three brochures provided by Henry Boot to the prospective tenants over a period of time. It was also claimed that, by providing these brochures and a consultant's report on predicted numbers of visitors, Henry Boot impliedly represented that it had an honest belief and reasonable grounds for believing that the brochures and the consultant's report were reliable and that it had no knowledge that might call the reliability of these items into question.

These brochures described the development as a motorway service area (MSA). The significance of this, both to the tenants and to Henry Boot, was that the planning and highway authorities would permit signage both at the site and on approaching motorways equivalent to that typically associated with an MSA. The positioning and content of this signage was regarded by all parties to be of crucial commercial importance in attracting visitors to the site. The brochures represented that there would be approximately 88,000 visitors to the site per week. Also of commercial importance to all parties, both in terms of attracting visitors and encouraging them to spend more time whilst they were there than might normally be the case, was the expectation that there would be live departure information for cross-channel services. Representations to this effect featured in the brochures.

In the event, the planning authority and the highway authority did not permit the positioning and content of motorway signs that all parties had been assuming and the live information on cross-channel departures did not materialise.

The main question facing the court was whether Henry Boot had made misrepresentations and whether these misrepresentations had been made fraudulently. A fraudulent misrepresentation is one which either is made knowingly or not believing it to be true or is made recklessly, careless as to the truth or falsity of the representation. It is not enough that the misrepresentation may have been made negligently as that does not amount to fraud or dishonesty.

Requirement of Dishonesty for Fraud

The court heard evidence about the state of mind of the various persons representing Henry Boot and considered whether there was any proof of dishonesty. Without proof of dishonesty, the claim for fraudulent misrepresentation would fail. The judge stressed that the mere fact that a person, in this case a representative of Henry Boot, holds a belief that is not based on reasonable grounds is not, in itself, fraud.

The tenants based their case on the claim that Henry Boot did not care whether the representations made were true or false. If such allegations could be proved then Henry Boot would not have had an honest belief in the truth of them. The task of the court was not to establish in absolute terms whether Henry Boot was right or wrong in what it had represented or provided to the tenants but whether it paid any heed to the question. In fact the court found the evidence of the Henry Boot witnesses to be compelling and that there had been no reckless disregard of the truth or falsity of the representations. The tenants' claims, therefore, failed.

Effect of Entire Agreement Clause

In any large and complicated commercial transaction, there will inevitably be a matrix of facts in relation to which different parties will be making their own assumptions and drawing their own conclusions. It is noteworthy that the claims by the tenants were mainly that Henry Boot was making implied representations which were untrue as opposed to express representations. For example, they alleged that by describing the site as an MSA, then Henry Boot implied that it would qualify for signage equivalent to that typically associated with an MSA. It appears that parties, both Henry Boot

and the tenants, may have been guilty of a degree of wishful thinking and arriving at conclusions which were perhaps not justified by the facts. There may or may not have been negligence but that was not the question before the court. The “entire agreement” clause narrowed the issue down to the question of whether or not there had been fraud.

10. Basis of compensation for breach of confidence

Compensation for breach of a duty of confidence can be either an account of profits or damages. In the case of *Vercoe & Ors v Rutland Fund Management Ltd & Ors* [2010] EWHC 424 (Ch), the High Court considered the circumstances in which these alternative remedies would be available.

The claimants had approached the defendants with regard to the acquisition by the defendant of a potential target. The parties entered into a non-disclosure agreement (NDA). The defendants breached the NDA and, without involving the claimants, proceeded to buy the target, which they then floated on AIM, at considerable profit. The Court found that the claimants would have agreed to release the defendants of their duty of confidence for consideration. This being so, any damages award would be equal to the amount of that consideration. The claimants claimed an account of profits, arguing that they were entitled to choose between this and the alternative remedy of damages.

The Court held that the claimants would not be entitled to choose between these remedies, or to an account of profits. The test was whether the claimants’ interests in the defendant adhering to its obligation made it just and equitable that the defendant should retain no benefit from its breach. The judge referred to the wide range of circumstances in which a breach of confidence could arise. An account of profits would be more suitable where there was a breach of fiduciary duty or the obligation of confidence was analogous to intellectual property rights protections. In the current case, the obligation of confidence was more analogous to a restrictive covenant and so the damages would be equivalent to those for a release from such a covenant.

This will have implications for the drafting of, and reliance on, NDAs.

11. New right to request time off for training

From 6 April 2010, employees in all organisations with at least 250 employees have been entitled to request time off work to undertake study or training. This right, which has been inserted in new sections 63D to 63K of the Employment Rights Act 1996, will be extended to cover employees in all businesses from 6 April 2011.

Only employees with at least 26 weeks' continuous service are entitled to make a request for time off and the training must be for the purpose of improving their effectiveness at work and the performance of their employer's business, although it need not lead to a formal qualification. The employer must either approve the request or hold a meeting with the employee to discuss it within 28 days and must then give the employee a written, dated notice of its decision within 14 days of the meeting.

Employers are required to consider all requests seriously. They may only refuse a request if they think that one of a number of specified business reasons apply. This includes the cost burden, inability to reallocate work, effect on ability to meet customer demand or the employer's belief that the training would not improve the employee's effectiveness or the performance of the business.

Remedies and compensation

Employees can bring a Tribunal claim if the employer breaches the new rules, for example, if it refuses an application, in full or in part, for a reason other than one or more of the permissible grounds for refusal or has made its decision on incorrect facts and fails to correct the error on appeal.

Under the new rules, Tribunals can order an employer to pay an award to the employee and/or reconsider the employee's request. The maximum level of compensation is eight weeks' pay – subject to a cap, which is currently £3,040.

Points to consider

- Be aware of potential discrimination claims if a request is refused - anti-discrimination legislation specifically identifies refusal of training as an example of discrimination
- You must not treat a part-time worker or an employee on a fixed-

term contract less favourably than a comparable full-time worker or permanent employee - unless that treatment is justified by objective business grounds

- Consider introducing a written policy setting out how you will approach requests for time off for study or training – this may minimise the risk of employees bringing tribunal claims

12. Contractual Estoppel – you cannot deny the facts

Elsewhere in this edition (“Dishonesty or wishful thinking?”) we have commented on the Foodco case, involving an “entire agreement” clause. Such a clause is one way of limiting the liability of a party to a contract to whatever provisions are agreed and contained in that contract. A similar outcome can be achieved by what is known as “contractual estoppel”. Put simply, a contractual estoppel precludes one party to a contract from challenging or denying what the contract says are the facts of the situation.

A very recent case in point is that of *RZB v RBS (Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc 2010 EWHC 1392)*. The judgment in this case is particularly useful in that it includes a commendably thorough review of several recent and some not so recent cases on the subject.

The facts of *RZB v RBS* related to a syndicated facility agreement arranged by RBS and the negotiations leading up to the participation by RBZ. They are rather complex but the short point was that, prior to RBZ taking a share in the syndication, RBS provided RZB with information which RBZ alleged that it relied upon to its detriment. At the time the information was given they entered into a confidentiality undertaking which included a clause whereby RBZ agreed that RBS did not make any representation or warranty, express or implied or as to, or assume any responsibility for, the accuracy, adequacy, reliability or completeness of the information. Thus, although RBS did, in fact, give information to RBZ and, in the absence of this clause, some of that information may well have amounted to representations, the contractual provision was to the effect that they did not make any representations.

It is clear from the cases on the point that such a clause may give rise to a

contractual estoppel with the result that one party (in this case RBZ) is not allowed to rely on facts or statements which are different to those which the parties have, by contract, agreed shall form the basis of the contract. In other words the parties may agree that representations, for example, have not been made or shall not be relied upon regardless of whether or not that is, in reality, the actual fact of the situation. This principle was clearly expressed by the Court of Appeal in the case *Peekay Intermark v Australia and New Zealand Banking Group* [2006] EWCA Civ 386. The principle was applied in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWCA 1186 where, again, the decision was that Springwell, having agreed by a term in the contract that it was not relying on the bank to advise it nor was it relying upon any representation by the bank, could not challenge that agreement as being the basis of the contract.

In the RBZ case, the court held that the contractual provision did amount to a contractual estoppel. The next question that the court had to consider was whether section 3 of the Misrepresentation Act 1967 applied to it. Section 3 provides that any term of a contract excluding or restricting liability for a misrepresentation made before the contract was made will be ineffective except to the extent that it satisfies the test of reasonableness. Again the judgment contains a thorough review of recent cases including the Springwell case. The judge held that the contractual provisions did not attempt to exclude or restrict any liability of RBS by reason of misrepresentation but were the basis upon which the relevant information had been given by RBS to RBZ. In other words, the information was not to be regarded as a representation upon which RBZ was entitled to rely. Instead the provision defined the relationship between them and the character of the information that passed between them.

It is clear that there remains scope for other outcomes in different circumstances. The wording of any relevant clause will be important and the judge left open the question of whether section 3 would have applied if the contractual estoppel clause had only been in the syndicated facility agreement and, therefore, agreed by RBZ only after any representations had been made. It is significant that all the recent cases referred to were between commercial enterprises which could be expected to know what they were doing when entering into a contract. Also, the decisions in this line of cases cannot easily be reconciled to the much earlier case of *Lowe v Lombank* [1960] 1 WLR 196. That case involved the purchase by a consumer (in the days before people even knew that they were

“consumers”) of a second hand motor car. The small print in the agreement included an acknowledgement by the consumer that she had examined the goods and that they were of merchantable quality, etc and that she had read the whole agreement. In that case the court held that the provisions in the small print were not effective as an estoppel. To an extent, it is perhaps unnecessary to reconcile this to the latest line of cases on contractual estoppel. If *Lowe v Lombank* were to come to the court nowadays, assuming that there were such a provision in the small print in the first place, it would almost certainly be struck down as being contrary to the Unfair Terms in Consumer Contracts Regulations 1999.

13. Personal criminal liability for competition law infringements – still an area of risk

In the last edition of *Commercial Thinking*, we reported on a case in which Safeway was seeking to recover damages from certain directors in respect of their part in an alleged cartel concerning dairy products.

This case opens up the possibility of directors and employees being sued by their own company for infringements of competition law, in addition to those individuals potentially facing enforcement action from the Office of Fair Trading (the OFT).

Anyone thinking that the OFT may be cutting back its enforcement against individuals, following the collapse of the trial of four British Airways executives on criminal charges of infringing competition law, will be enjoying a false sense of security.

It is the case that on 10 May, at the beginning of the trial, the OFT withdrew the proceedings before Southwark Crown Court, after a mass of evidence came to light. Although this led to some criticism concerning the handling of the case, the OFT made it clear at the time that its commitment to investigating and prosecuting those who engage in criminal cartel activity, under the Enterprise Act 2002, was unaffected by the decision to withdraw the proceedings. Indeed, the OFT said that its commitment was underlined by internal training and senior criminal lawyer appointments.

The OFT is known to be investigating a number of cartel cases under its criminal powers of enforcement. The OFT has, for example, announced that it is conducting a criminal investigation into suspected cartel activity in the automotive sector. This investigation is being coordinated with

investigations by a number of competition authorities in other jurisdictions.

The OFT has wide powers of investigation, and it is assisted by a leniency programme which provides favourable treatment to those who come forward with information about cartels. Directors and employees who fix prices dishonestly do so at their peril and the collapse of the BA case does not make detection and enforcement by the OFT any less likely.

14. UK enforcement against international bribery and corruption comes of age with the Bribery Act 2010

In addition to criminal investigations against them by the OFT under the Enterprise Act 2002, directors and employees need to be aware of the new criminal offences introduced by the Bribery Act 2010. This creates offences which can be committed by individuals, as well as by companies. The Bribery Act is expected to come into force later this year, but companies need to put compliance measures in place now, in order to prepare for the coming into force of the new offences.

The Bribery Act makes it an offence for a person or a company to offer, promise or give a financial advantage to another person with the intention of causing that other person to improperly perform, or rewarding that other person for improperly performing, a public or commercial function in any jurisdiction, where there is an expectation that the relevant function is carried out in good faith or where the person performing it is in a position of trust.

The Act also creates a specific offence of directly or indirectly offering, promising or giving a bribe to a foreign public official. To commit this offence a person must intend the bribe to influence the actions of the foreign public official.

On summary conviction, the penalties for these offences include a fine of up to £5,000 and (in the case of individuals) imprisonment for up to 12 months. On conviction on indictment, these penalties increase to an unlimited fine and (in the case of individuals) imprisonment for up to 10 years.

A company or partnership incorporated or operating in the UK may be guilty of any of these offences if a person associated with that organisation takes

the offending action. A person performing any services for an organisation (for example, as employee or agent) may be associated with that organisation. It will be a defence if the commercial organisation can show that it had adequate procedures in place designed to prevent such offences being committed, although there is no current guidance on what may constitute "adequate procedures".

Commercial organisations should update their compliance procedures to reflect the new legislation. Suggested steps include:

- reviewing current business practices and relationships with public bodies;
- implementing a code of conduct and statement of values;
- producing a detailed anti-bribery policy which could include guidance on hospitality, political donations, lobbying and whistleblowing procedures;
- providing employees with access to training and guidance;
- ensuring that effective internal monitoring procedures exist to deter and detect any breaches of the law; and
- including in commercial contracts the standard clauses prohibiting bribery and corruption that are commonly found in public sector contracts.

We have extensive experience of advising on bribery and corruption issues, in particular where clients are establishing and developing their business in emerging markets. While the Bribery Act goes further, in a number of significant areas, than the US Foreign Corrupt Practices Act (FCPA), our experience of FCPA issues is proving to be extremely useful, in addition to our knowledge and understanding of other sources of guidance such as the OECD, in helping companies to assess what might be considered as "adequate procedures" under the UK legislation.

15. Other Hot Topics

Equality Act 2010 and implementation of E-Commerce

Directive 2000/31/EC – The Equality Act 2010 is intended to provide a new legislative framework to protect the rights of individuals and advance equality of opportunity for all whilst delivering a simple, modern and accessible framework of discrimination law. Amongst other things, the Act implements the provisions of the E-Commerce Directive (see Schedule 25) whose purpose is to prohibit discrimination by online providers of goods and services. The implementation of the E-Commerce Directive will affect information service providers established in the UK and importantly the Act applies to anything done by them in providing information services to other EEA states. The ramifications will be interesting; for example, if an online holiday company established in the UK discriminated against a same-sex couple and refused a booking, the complainants could bring an action against the company irrespective of whether the complainant is domiciled in the UK or any other EEA State. The Equality Act 2010 is due to come into force in October 2010, however since the change in government, this date has not been confirmed.

Without prejudice exchanges are inadmissible in

proceedings on settlement agreements – The purpose of without prejudice exchanges, is to enable parties more easily to resolve disputes, by allowing the parties to deal freely with each other without the risk that their communication may be used in court as evidence. In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd and others* [2010] EWCA Civ 79, the Court of Appeal (with Ward LJ dissenting) declined to create an exception to this rule which would have permitted access to background facts, in without prejudice communications, which might be relevant to the construction of a settlement agreement.

Liability cap covers contractual but not statutory interest

– The case of *Marketstudy Insurance Company Limited & Others v Endsleigh Insurance Services Limited* [2010] EWHC 281 (Comm) decided that a contractual limit of liability did not extend to statutory interest awarded on damages, as statutory interest arises as the exercise of the Court's discretion. Suppliers imposing caps on liability under their contracts should make a clear and unambiguous reference to the inclusion of interest in the total liability cap.

Meaning of “perpetual” in a software licence – In the case of BMS Computer Solutions Limited v AB Agri Limited [2010] EWHC 464 (Ch), the Court found that a licence expressed to be “perpetual” was terminable in accordance with the termination provisions of the contract, and this was necessary to lend the contract commercial sense. The judge said that clear words would have required to disapply the termination provisions. This is yet another illustration of the need for careful drafting.

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