

Commercial Thinking

A topical selection of UK commercial law developments.

1. Updated model clauses for data transfers to non-EU Countries

In a Commission Decision dated 5 February 2010, the European Commission has adopted a new set of standard contractual clauses for the transfer of personal data to data processors located outside of the EEA, with a view to replacing its 2001 Commission Decision.

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data, requires that Member States shall provide that the transfer to a third country of personal data for processing may only take place if the third country in question ensures an adequate level of protection. In the UK, this is enshrined in the Data Protection Act 1998, as the eighth data protection principle.

The use of the EU's model clauses are just one of several possibilities for the lawful transfer of personal data outside the EEA. Whilst not compulsory, their use will make certain that compliance has been achieved, though no changes to the clauses may be made.

The updated version is intended to address the changing landscape of data-processing activities and, in particular, the outsourcing of processing activities to sub-processors, subject to certain conditions.

The new model clauses will come into effect from 15 May 2010. Any contracts entered into before this date pursuant to the 2001 Decision shall remain in force and effect as long as the processing arrangements remain

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¹ 2010/87/EU

² 2002/16/EC



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unchanged. If the parties wish to make changes or subcontract processing arrangements, they will be required to enter into a new contract which must comply with the updated version of the contractual clauses.

2. Data protection law has sharpened its teeth

Ever since the Data Protection Act 1998 (the DPA) has been in force, one of its flaws has been the limited nature of the sanctions available to the Information Commissioner's Office (the ICO), the authority that oversees and enforces the DPA against data controllers contravening the DPA. The DPA sets out principles under which "data controllers" being those persons (which can be individuals or businesses) who determine the purpose for which and the manner in which personal data are to be processed.

At last, the ICO will have new powers under the DPA which include fining deviant data controllers up to £500,000 as a penalty for serious breaches of the DPA. This is expected to come into force on 6 April 2010. Until now the DPA's powers were limited to issuing enforcement and information notices, inspecting data controllers' premises, providing assessments of good practice and inspecting overseas information systems. Under certain circumstances the DPA created a criminal offence, the existing penalties available to the ICO being the issuing of fines of up to £5,000 in a Magistrates Court or an unlimited fine in the Crown Court. Whilst many businesses take data protection seriously, the threat of a more substantial fine or facing prosecution by the ICO may be the appropriate sticks required to encourage those less stringent organisations from ignoring their obligations.

For more information on the proposed changes, the ICO has produced statutory guidance about how it proposes to use this new power.

3. Whose law is it anyway? Rome I regulations

The Rome I Regulations (Rome 1) replaced the 1980 Rome Convention for contracts entered into on or after 17 December 2009. The aim of Rome 1 is to provide further clarification on the applicable law governing cross border contracts.

Under the 1980 Rome Convention, the applicable law chosen by the parties could only be overridden when the mandatory laws of an EU state applied. The EU state's mandatory rules are those which a party cannot exclude in a purely domestic contract, e.g. certain consumer protection regulations.

Where there was an absence of an express governing law, a court with jurisdiction over the contract had to decide the applicable contractual law in accordance with the conflict of law principles in the EU state's jurisdiction. The general principle was that the relevant law was that of the EU state to which the contract was most closely connected.

Rome I, amongst other items, aims to standardise the principles of law governing cross border contracts and to harmonise international law.

As before, parties to a contract still have the freedom to choose the applicable law governing the contract. However, where no law is specified, Rome 1 sets out a targeted test based on the where the seller directs its professional, or carries on its commercial, activities. This differs from the location requirements of the Rome Convention. The tests differ depending on the nature of the contract.

Rome 1 also reinforces the principles of consumer protection: regardless of the choice of law made by the parties, in a consumer contract, the consumer must not be deprived of the mandatory consumer protection regulations in place in his country of habitual residence if it is the place in which he responded to an advert or invitation, he placed an order or the contract was concluded. The same rule applies even if the consumer travelled to another country (provided such arrangements were made by the seller for the purpose of inducing him to enter the contract).

As a matter of good practice and to ensure contractual certainty for businesses, particularly for those operating on an international basis and / or through a website, the contract should always stipulate the law applicable to it. Those businesses contracting directly with consumers must be aware of the local consumer protection regulations applicable in those territories where its customers are based, such regulations may well have an impact on the terms of the contract.

4. How effective are your website disclaimers?

A recent case, *Patchett v Swimming Pool & Allied Trades Associated Limited (2009)*, highlights the care required in drafting website disclaimers.

In this case, the Court considered whether a website owner owed a duty of care to customers for statements made on its website.

The Patchetts sought a contractor to build a swimming pool in their garden. Mr Patchett found the Swimming Pool & Allied Trades Association Limited's (SPATA) website on the Internet. He obtained a quote from Crown, an installer listed on SPATA's website. Unfortunately, Crown became insolvent prior to completing the pool and another contractor was hired to complete the job. Crown was not a full member of SPATA and therefore not subject to the vetting procedure required of full members; nor was it subject to SPATA's bond and warranty scheme. The Patchetts sought recovery of £44,000 from SPATA for the financial loss they maintained they suffered, alleging negligent misstatement by SPATA.

The Court held there was no duty of care owed by SPATA arising from the various representations on its website. Whilst it was expected that SPATA knew its representations were likely to be acted on by a customer, the Court's view was that the statements on the website had to be taken as a whole. In this case, it was reasonable to expect potential customers to have regard to all the information available on the website, not just part of it. Had the Patchetts done this, they would have seen reference to information packs supplied by SPATA. If the Patchetts had obtained one, it would have been immediately apparent that Crown was not a full SPATA member and that it was not covered by the warranty scheme.

It was found there was no assumption of responsibility, because the degree of reliance by its customers which SPATA intended, or should reasonably have expected, was limited by its advice in a statement to customers to obtain an information pack.

This case highlights the caution that businesses need to take in drafting their representations and disclaimers on websites; they should consider carefully the assumptions and reliance a potential customer could draw from each statement.

5. Bidding on Google Adwords – trade mark issues

A Google Adwords customer can bid on keywords which, when typed into the Google search engine by an Internet user, will cause the Adwords customer's advertisement to appear as a "sponsored link" alongside the Google search results. The question of whether or not Google infringed third party trade marks by "selling" keywords corresponding to those marks, or by displaying sponsored links resulting from the use of those keywords in its search engine, was referred to the European Court of Justice (ECJ).

In most countries, it is unlawful to use other people's trade marks to sell your goods and services. The rationale is that customers should be able to rely on trade marks as a guarantee of quality and origin. Moreover, the trade mark owner may have expended significant resources developing its products and their reputation as indicated by the mark.

In the UK and other EU states, trade mark law is harmonised through EC Directive 89/104/EEC. The Directive obliges Member States to confer on trade mark owners the exclusive right to prevent third parties from using, in the course of trade (1) signs identical to the owner's registered trade mark in relation to goods or services which are identical to those in relation to which the owner's mark is registered, and (2) signs which, because of their identity or similarity with the owner's registered marks, and the identity or similarity of the goods and services covered by the owner's registered mark and the sign, are likely to confuse the public, including because the public associates the sign with the mark. In addition, in some EU states, including the UK, trade marks with a reputation have further protection: the owner is entitled to prevent others from using, in the course of trade, signs which are identical or similar to the owner's registered mark in relation to any goods and services (regardless of similarity), if the owner's mark has a reputation in the State and the use of the sign, without due cause, takes unfair advantage of, or is detrimental to, to the distinctive character or repute of the registered mark. The infringement requires use of the mark in a "trade mark sense" and of interference with the essential functions of a trade mark, in particular, as a badge of origin and for advertising. It is not, for example, infringement to use another person's registered mark purely descriptively.

Under EC Directive 2000/31/EC (the Directive on electronic commerce), providers of "information society services" comprising hosting, are not liable

for the information transmitted via their services where those providers act as “mere conduits” of the information. Such persons are not obliged to monitor information transmitted via such services.

The question of whether Google's provision of the Adwords service involved infringement was referred to the ECJ by the French court when hearing three cases (*Google France and Google Inc. v Louis Vuitton Malletier, Google France v Luteciel, and Google France v CNRRH, Joined Cases C-236/08, C- 237/08 and C-238/08, 22 September 2009*). Louis Vuitton complained also that its trade marks had been used in combination with words, such as “copy”, denoting counterfeit goods. The other claims did not involve the sale of counterfeit products.

The ECJ issued its preliminary ruling on 24 March 2010. It found that Google was not liable for trade mark infringement. Google was not using the trade marks in a “trade mark sense”, since it did not use the marks in its own commercial communications.

Google's customers were, however, making “trade mark use” of the marks in question, and, whether or not the marks were displayed in the search sponsored links, those customers' use of them as keywords was use in relation to goods or services identical to those in relation to which those marks were registered. Moreover, the advertisers' use of the mark could interfere with its function as a badge of origin where the advertisement does not enable the normally informed and reasonably attentive Internet user, or enable him only with difficulty, to ascertain if the goods and services originate from the owner of the registered mark. This will be a question of fact for the national court to decide. The ECJ did not consider that Google Adwords customers were interfering with the advertising function of the trade marks, given that the proprietor's home and advertising webpage would be displayed in a high position in the list of natural search results displayed alongside the sponsored links.

The ECJ also found that Google, as an Internet referencing service provider, was excluded from liability under the hosting exemption referred to above, bearing in mind that it had not played an active role such as would have given it knowledge of, or control over, the data it stored.

So, brand owners will need to shoot any competitors rather than the messenger, if those competitors are committing infringements.

6. Company director held liable for company's intellectual property rights infringement

In a salutatory reminder, the High Court has found a director liable for IPR infringement committed by his company – see *Boegli-Gravures SA v (1) Darsail-ASP LTD (2) Andrei Ivanovich Pyzhov [2009] EWHC 2690 (Pat)*.

Beogli owned a European patent for a new type of embossing rollers for satinizing and embossing packaging foils, so as to produce shadow embossings. The court found that Darsail infringed the patent by threatening to supply into the UK rollers made to the patent, and supplying into the UK foil samples made by working the patent. It found Mr Pyzhov jointly liable with his company for the supply of the foil samples. Mr Pyzhov had done more than carrying out his constitutional role as director in the governance of the company, and exercising his power as a shareholder by voting at general meetings and appointing directors. A director is jointly liable with his company if he intends and procures and shares a common design to infringe. Darsail was a small company that Mr Pyshov owned in equal shares with two business partners. Mr Pyshov would know about anything important that happened within the company, was the principal inventor of its technology, personally registered its domain name and controlled its website, and was one of three named contacts on the website, but none of those facts made him personally liable. What made him liable was that he personally handled the negotiations for the supply, personally, with his co-directors, made the decision to supply the rollers, and personally made the decision to supply the foil, and was involved in giving relevant instructions to Darsail's staff.

Note that the same rules will apply to the infringement of copyright and other IPR. In addition, just a reminder that directors can be guilty of a criminal offence where they have connived in or consented to an offence to a copyright or trade mark infringement committed by the company.

7. Indemnities against intellectual property rights infringement – what do they mean?

Indemnities, taking various forms, are common, if not usual, in licences of intellectual property rights, such as software licences, trade mark licences, etc. One such indemnity was examined by the court in *The Codemasters*

Software Co. LTD v Automobile Club De L'Ouest [2009] EWHC 2361 (Pat).

Codemasters is a computer games publisher and Automobile Club de l'Ouest owns Le Mans. Automobile Club de l'Ouest granted Codemasters a licence to use Ferrari, Porsche and Lamborghini names, marks and designs in a racing game. Automobile Club de l'Ouest warranted that it had the legal right to grant the licence, and that Codemasters' use of the names, marks and designs would not infringe any intellectual property rights. It agreed to indemnify, defend and hold harmless Codemasters from "claims, causes of action, suits, damages or demands whatsoever arising from breach or alleged breach [of that warranty]".

The car makers claimed infringement by the use of images of their cars in the game. Codemasters reached settlements with Ferrari and Lamborghini and was in the process of negotiating with Porsche. Codemasters sued Automobile Club de l'Ouest under the indemnity for the sums payable in the settlements. Automobile Club de l'Ouest denied liability, arguing that that the car makers' claims were not for breach of warranty, and so not covered by the indemnity.

The court would have none of this, but preferred a commercial approach in interpreting the indemnity – the indemnity applied because it made commercial sense that Automobile Club de l'Ouest must have intended to agree to protect Codemasters where Automobile Club de l'Ouest had breached its warranty. The judge stated that it would have been easier to accept uncommercial consequences had the clause been clearly drafted, which it was not.

A further discussion point made by the judge relates to the scope of an indemnity. In general, for a settlement to be covered, it must be reasonably made in the light of the strength of the claim and also reasonable in amount, or it may fail on causation (being caused by the actions of the indemnified party rather than the breach of the indemnifying party) or as a matter of contract.

At any rate, the moral of the case is that what must have been significant legal costs would have been best avoided by clearer drafting of the contract.

8. Liability for misrepresentation

Although the case of *BSkyB Limited -v- Electronic Data Systems Limited* [2010] EWHC 86 is noteworthy for a number of reasons, not least the volume of evidence, there are sound lessons to be learnt by IT and outsourcing service providers and by their customers.

BSkyB appointed EDS to design, build, implement and integrate a new customer relationship system. As is invariably the case in this type of project, during the lead up to the letting of the contract, the supplier made various representations to the customer. In particular the supplier represented that it had carried out a proper analysis as to the time required for the project and that, in its opinion, it could deliver the project in the timescales put forward. In the event, the supplier failed to deliver the project on time and on budget. The customer brought an action based on misrepresentation and on breach of contract.

The customer alleged fraudulent misrepresentation in relation to the original contract and also alleged negligent misrepresentation in relation to a later agreed variation of the contract. On the evidence, the court found that the representations leading up to the letting of the contract were false as there had been no proper analysis of the time needed for the project and the supplier had no reasonable grounds for holding the opinion but it could meet the contractual timescales. Further, these representations were made dishonestly by a senior manager of the supplier who knew them to be false. The supplier was liable in deceit and as a consequence, the contractual cap of £30m on the supplier's liability was not effective in limiting the damages claim in an amount greatly in excess of that figure. The court also found the supplier liable for negligent misrepresentation in respect of the later variation of the contract although the liability cap of £30m was held to be effective in relation to that claim.

A further point of note was that, whilst an entire agreement clause might be effective in excluding liability for negligent misrepresentation, the court held that the wording of the actual clause in this case did not achieve this. The court held that, although the clause meant that the pre-contract representations did not form part of the contract, it did not have the effect that these representations were withdrawn, overridden or of no legal effect.

This case is a lesson both in drafting – main contract and variations - and, so far as suppliers are concerned, also in controlling not just the sales

process but change controls.

9. Effective limitations...or not

The High Court decision in *GB Gas Holdings Limited -v- Accenture (UK) Limited* [2009] EWHC 2734 is a useful reminder of how courts are likely to approach contractual provisions intended to restrict or limit the obligations or liabilities of a supplier. The contractual provisions in question were quite complex but the general thrust of the decision is that the courts will be prepared to construe specific requirements upon the customer to detail defects or breaches as a form of exclusion clause, excluding or limiting the supplier's liability. As such, the court construed such provisions strictly against the supplier.

The decision included a consideration of a clause limiting the supplier's liability for direct or indirect loss of profits, contracts, business or revenues or for any other losses to the extent that they are indirect or consequential. The court considered the various categories of loss claimed by the customer against the rule in *Hadley -v- Baxendale*. The court found that each category of loss claimed fell within the first limb of that rule, i.e. that damages are recoverable to the extent that they "may fairly and reasonably be considered ... arising naturally, i.e. according to the usual course of things, from such breach of contract". The court rejected the supplier's contentions that the items of claim in question were indirect or consequential losses and held that these claims were not precluded by the consequential loss provisions.

The categories of loss claimed by the customer included the increased wholesale cost of gas paid by it because of the over-estimate of amounts billed to its own customers; compensation paid to its own customers; additional borrowing costs caused by late or non-billing of its own customers; costs incurred in chasing its own customers for unpaid bills which turned out to be incorrect; and additional costs incurred in keeping its own customers informed of the problems.

The case is a reminder that a properly drafted cap on a supplier's liability may be a more important protection for a supplier than attempts to exclude indirect or consequential loss.

10. Court rules on meaning of “subsidiary”

In the recent case of *Enviroco Ltd. v Farstad Supply A/S* [2009] EWHC 906 (Ch), the Court of Appeal overturned the decision of the High Court and ruled that as a result of a holding company’s pledge to a bank of shares in its subsidiary and the registration of the shares in the name of the bank’s nominee as security, the subsidiary ceased to be a subsidiary of the holding company within the meaning of sections 736 and 736A Companies Act 1985.

The security was governed by Scottish law and as a result, the creation of effective security over shares required the shares to be pledged and actually transferred to the lender by registering the lender in the company’s register of members.

As Section 1159 the Companies Act 2006 replicates sections 736 and 736A of the 1985 Act in substance, the decision will equally apply to the interpretation of the term "subsidiary" in the 2006 Act.

The ruling could have significant implications for any corporate group structure or financial transaction where the shares in a group company or subsidiary are transferred to a security holder. In particular, contractual provisions which rely on definitions such as "group" "subsidiary" or "affiliate" under the 1985 and 2006 Acts will be affected (typically provisions relating to change of control, assignment rights, indemnities, VAT clauses and provisions relating to parent company guarantees). Commercial contracts and financing arrangements typically contain change of control provisions and covenants prohibiting the transfer of shares which, pursuant to the Court of Appeal’s interpretation, can be triggered upon the enforcement of security and subsequent transfer of shares.

Consideration should be given to using customised definitions of "group" "subsidiary" or "affiliate" in the drafting of agreements where such provisions are commonly used so that transferring shares in a subsidiary by way of security to a bank, nominee or other security holder does not sever the relationship between the subsidiary and its holding company.

11. Safeway suing employees for cartels

On 15 January 2010, the High Court dismissed an application to strike out a claim by Safeway group companies against former directors and employees, for damages resulting from competition law violations.

The claim will therefore proceed, and it opens out the possibility that directors and employees of companies may be held personally liable to their companies for damages, where their conduct led to the company in question breaching competition law.

The claim is based on an investigation launched by the Office of Fair Trading (the OFT) in 2005, regarding alleged cartel activity by supermarkets and dairy producers concerning dairy products. Companies in the Safeway group (the "Claimants") have brought a claim for damages and/or equitable compensation against certain former employees, including directors (the Defendants), seeking an indemnity against liability for the penalty to be imposed by the OFT plus costs. The claim is based on breach of employment contracts, breach of fiduciary duties owed to the Claimants and negligence.

The Defendants applied for the claim to be struck out, on the basis that it was barred as a matter of public policy, as it infringed the rule that a person who commits an illegal or unlawful act cannot maintain an action for an indemnity against the liability which results from such act (i.e. *ex turpi causa*). The defendants further argued that the claim was fundamentally inconsistent with the Competition Act 1998 and the UK competition regime.

The Court dismissed the defendants' applications on the basis that Safeway had a real prospect of defeating the public policy defences at trial. It said that while the company could not recover damages resulting from its own wrongdoing, this meant that the violation would have to result from the company's own conduct, not that of its employees.

We have yet to see if Safeway succeeds against its ex-directors and employees, but directors and employees should take note in case they face action from the company, not to mention the OFT.

12. Vertical restraints

At the end of May, new EU rules on the distribution of goods, promulgated by the European Commission, will come into effect.

During the last decade, the use of the Internet to distribute goods has developed and increased exponentially, so the new rules are, in particular, highly significant in the digital world.

The rules provide an automatic exemption from the prohibition of anticompetitive agreements, for distribution agreements which contain restrictions, such as exclusivity obligations, within certain parameters. This enables most distribution agreements to benefit from a "safe harbour", ensuring that the agreements will not be unenforceable under competition law because of the restrictions.

A key aspect of distribution agreements is the extent to which suppliers may restrict distributors in the way in which the distributors re-sell the goods in question. For example, resale price fixing is a serious infringement of competition law, and a distribution agreement which imposes this or has the effect of imposing it, will be void and unenforceable in its entirety. Moreover, the parties may face fines from the competition authorities.

Other restrictions, whilst potentially anticompetitive, may be admissible due to their perceived benefits. Such restrictions include restrictions imposed by the supplier in order to protect brand image or to ensure the correct level of customer service. The question of how far a supplier may restrict a distributor's use of the Internet, including the distributor's own site and third party sites, to re-sell the goods is a key question which has exercised the European Commission and given rise to much debate.

The debate is continuing right up to the wire and the stakes are high: the outcome of the debate will shape Internet distribution for the next decade. At the same time, sector specific rules covering the distribution of motor vehicles are being similarly reviewed.

13. Regulatory intervention in the supermarkets sector

It was as long ago as May 2006 that the Office of Fair Trading (the OFT) referred the supply of groceries by retailers in the UK to the Competition Commission (the CC).

At the end of April 2008, the CC published its report on the investigation, in which it concluded that there were adverse effects on competition. Amongst the CC's proposed remedies to deal with these effects was a new Groceries Supply Code of Practice (GSCOP), together with the appointment of an Ombudsman to arbitrate on disputes between grocery retailers and suppliers and investigate complaints.

The GSCOP came into force on 4 February 2010, replacing the previous Supermarkets Code of Practice (SCOP), which dated from 2001. Broadly speaking, the GSCOP covers food, alcoholic and non-alcoholic drinks, pet food, cleaning products, toiletries and household goods, but it does not cover products such as petrol, cigarettes and tobacco, pharmaceuticals, newspapers and magazines, CDs and DVDs, books, clothing or DIY products.

The GSCOP places a statutory duty on the major supermarkets, with a right of action on the part of aggrieved parties, and monitoring and enforcement by the OFT.

The GSCOP imposes a principle of fair dealing and, more specifically, covers the circumstances when, for example, a major supermarket may require the supplier to contribute to marketing costs, to cover the costs of shrinkage and wastage and to pay for stocking or listing. The GSCOP also sets out the procedure for de-listing.

The GSCOP must be incorporated into supermarkets' agreements with suppliers and the supermarkets must nominate a Code Compliance Officer and provide their employees with regular training.

In a future edition, we will be examining the significant changes to the GSCOP, to assist our clients in their compliance reviews once the new rules are in force.

14. Oakland v Wellswood: automatic transfers of employees - but not under TUPE

Oakland v Wellswood (Yorkshire) Limited [2010] EW CIVC 24 was one of the first cases to be brought under the new insolvency provisions in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Under these provisions, the usual automatic transfer of employees under TUPE does not apply.

The critical question is whether a “pre-pack” administration was an “analogous insolvency proceeding”. Pre-packs are an increasingly common mechanism by which an administrator, on or immediately after his appointment as administrator, realises the assets of a business through a sale that has been agreed and structured in advance of his appointment. Clearly, if the employee of the business could be left behind, pre-packs would be a lot easier and simpler to arrange.

The facts of the case were simple. Mr Oakland was originally employed by Wellswood Limited (Oldco). The owners of Oldco set-up a new company, Wellswood (Yorkshire) Limited (Newco). An administrator was appointed to Oldco and, immediately upon his appointment, transferred Oldco’s assets to Newco. Mr Oakland was then offered, and accepted, employment by Newco. This was a classic pre-pack administration.

One year later, but shortly before Mr Oakland had completed one year’s continuous service, Newco dismissed him. He claimed unfair dismissal, a claim that can be made only if an employee has at least one year’s continuous service. If TUPE applied to the sale of Oldco’s business to Newco, Mr Oakland’s continuity of service would have been preserved and his unfair dismissal claim could proceed. Newco argued that there was no such TUPE transfer. Newco said that Oldco’s administration counted as “analogous insolvency proceedings”, so that there was no TUPE transfer.

This was a novel argument on Newco’s part, given that the statutory purpose of administration is: (i) Rescuing the company as a going concern (the primary objective); or (ii) Achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration) (the second objective); or (iii) Realising assets in order to make a distribution to one or more secured or preferential creditors (the third objective).

However, the Employment Tribunal at first instance and the Employment Appeals Tribunal both upheld Newco's defence. This was because the administrator, on his appointment, 'jumped' straight to the third objective of an administration. The third objective, the Tribunals reasoned, meant that the administration of Oldco was an "analogous insolvency proceeding".

The case went up to the Court of Appeal which referred to the "change of employer" provisions in section 218 of the Employment Rights Act 1996. These provisions, which pre-dated the original TUPE and were largely superseded by it, are often overlooked. They provide that if a trade or business, or an undertaking is transferred from one person to another: (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and (b) the transfer does not break the continuity of the period of employment.

On that basis, Mr Oakland's period of employment with Oldco was to be added to the period of just under a year with Newco. That, the Court said, conferred jurisdiction on the Employment Tribunal to resolve the question of his unfair dismissal without any need for him to rely upon the provisions of TUPE.

So the critical question for business generally and the insolvency and turn-around sectors in particular, which is whether TUPE applies to employees on a "pre-pack" has not been directly answered. However, as an aside, the Court of Appeal did observe that there were strong grounds for thinking that the Employment and Employment Appeal Tribunals took the wrong approach to their construction of the insolvency provisions in TUPE. Consequently, it looks unlikely that a pre-pack could be used as a way of avoiding employment liabilities on the sale of a business by a company in administration.

15. Other hot topics

OFT market study - The OFT launched a market study on 4 February 2010 into how and why consumer contracts cause problems for consumers or firms. The purposes of the study are wide-ranging, to: understand better the nature of and circumstances in which contracts are entered into; consider practical remedies to problems to make the market work better; publish information to help consumers; encourage industry codes of practice and consider investigation and enforcement action against companies suspected of breaching consumer or competition law. The study is expected to be completed in Winter 2010.

New e-Money Directive - A new e-money directive (2009/110/EC) was introduced in September 2009 and is currently in the transposition period during which European member states are considering the text and drafting their domestic regulations to incorporate it into their national law by April 2011. This directive will replace the existing law relating to the issuance of electronic money (a prepaid financial product) in Europe.

Internet cookies - The use of cookies on websites will require the user's consent or must be strictly necessary for services explicitly requested, following changes to the ePrivacy Directive.

Article 29 Working Party Review - The Article 29 Working Party was created by the Privacy Directive and is responsible for advising on data protection in the EU and "third countries" (i.e. outside the EU). It has published its first review of the application of the Privacy Directive and changes to the data protection regime, covering issues of jurisdiction, transparency, consistency and data export.

Internationalized domain names - ICANN has approved the registration of domain names using characters from sets other than ASCII (a, b, c...1, 2, 3...) so that, for example, Cyrillic, Arabic or Chinese characters may be used.

Lucasfilm v Ainsworth - This case decided that the Stormtrooper helmets used in the Star Wars films were not protected by copyright. This was because the helmets were utilitarian in function and lacked artistic purpose, even though they may have artistic merit. They were not sculptures or works of artistic craftsmanship. Further, under section 51,

Copyright, Designs and Patents Act 1988 (which prevents copyright in being used inconsistently with design right protection) copyright the design documents was not infringed by making the helmets.

Trade mark dispute tactics - if your opposition or resistance to registration fails, you may be estopped from prosecuting/defending in the courts (*Evans v Focal Point Fires*).

If you would like to discuss any of the issues raised in the publication, or if there are any other issues you wish to discuss, please do not hesitate to contact your usual Salans partner or any of our lawyers listed in this publication.

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