Review - Caselaw

Commercial/IT

"Strong language" needed for exclusion clause to cover deliberate repudiatory breach

In the case of *Internet Broadcasting Corporation (t/a/NETTV)* and *NETTV Hedge Funds Limited v MAR LLC (t/a MARHedge)*, the High Court has held that clear, strong drafting would be needed to persuade a court that an exclusion clause covered a deliberate repudiatory breach of contract. This case is a significant development in the law on exclusion clauses. Exclusion clauses will need to be drafted differently going forward.

FACTS

Internet Broadcasting Corporation (NETTV) was in the business of constructing and providing interactive television platforms. MARHedge provided information and services to the hedge fund industry including arranging industry conferences. MARHedge was controlled exclusively by its president, Gary Lynch.

In May 2005, NETTV entered into an agreement with MARHedge under which NETTV would set up an internet television channel to broadcast material provided by MARHedge. The venture would be funded by subscriptions to the channel that the parties were to share. Under clause 13, the agreement could not be terminated for three years other than in response to a material breach that was not remedied within 30 days. Clause 17 of the agreement contained the exclusion clause:

> *"...Neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage."*

The venture was extremely successful and between August 2005 and May 2006, subscriptions to the channel exceeded £600,000. In late May 2006, MARHedge gave notice purporting to terminate the agreement with immediate effect and ceased providing any content for the channel. The parties subsequently agreed that this amounted to a repudiatory breach for which NETTV was entitled to damages. NETTV's main loss was loss of the profits it would have made had the contract continued for another two years as originally envisaged. The question for the High Court was whether MARHedge could rely on the exclusion clause for its repudiatory breach so as to exempt it from liability in respect of NETTV's claim for loss of profits.

DECISION

The High Court held that its role was to construe the true meaning of the exclusion clause. There was a strong presumption that an exclusion clause would not cover a deliberate, repudiatory breach. To cover such a breach, clear words (in the sense of strong language) indicating that it was intended to cover a deliberate, repudiatory breach would be needed. There was a particular need for such clear (strong) language where the breach in question was uninsurable. Language such as *"...including deliberate repudiatory acts by the parties to the contract themselves..."* would need to be used in such a case.

Furthermore, words, which in a literal sense would cover a deliberate, repudiatory breach, would not be construed so as to do so if that would lead to commercial absurdity and defeat the main object of the contract.

In this case, the starting point was the presumption that the exclusion clause would not cover the deliberate, repudiatory breach of contract. Here the repudiation was a personal one in the sense that it was caused by the controlling mind of MARHedge (its president, Gary Lynch). Such a repudiation was very unlikely to be insurable. Although the literal meaning of clause 17 did cover a deliberate,

repudiatory breach, to give effect to this literal meaning would defeat the main object of the contract. There was no clear, strong language to the effect that clause 17 was intended to cover a deliberate, personal, repudiatory breach and no reasonable businessman would understand clause 17 as currently drafted to cover such a breach.

COMMENT

Although this case is a significant development in the law of exclusion clauses aspects of the judgment are unclear. It is not clear, for example, whether the strict approach adopted by the High Court is intended to apply to deliberate, **personal** repudiatory breaches (as in this case by the 'controlling mind' of the company) or to deliberate repudiatory breaches generally (where the breach is not personal in the sense of the company having vicarious liability for the breach).

Nevertheless, in light of this case exclusion clauses should now be drafted to include 'strong' language stipulating that the clause covers deliberate, repudiatory breaches if this is what the parties intend. This is likely to lead to more protracted negotiations about the drafting of exclusion clauses.

In this case the parties accepted that UCTA was not applicable (as the contract was freely negotiated between two commercial parties). However, businesses should bear in mind that strong wording might not work when used in standard terms of business as UCTA does apply to these contracts and an exclusion clause will only be enforceable if it is reasonable.

No "parallel" remedy under DPA where malicious falsehood fails

In the case of *Christopher John Quinton v Robin Heys Peirce,* the High Court has refused to interpret the Data Protection Act 1998 (DPA) in such a way as to provide a "parallel" remedy for the claimant where his claim for malicious falsehood failed.

FACTS

The parties to the dispute were district council candidates for Woodcote in Oxfordshire. Quinton was the Conservative candidate and Peirce the Liberal Democrat candidate. The dispute concerned an election leaflet distributed by Peirce. The leaflet referred to proposed housing developments in the Woodcote area to which most of the local residents were opposed. It mentioned two district council planning meetings and pointed out that Quinton had failed to attend either. It also referred to a newspaper article written by Quinton that appeared to encourage local residents to submit suggestions to the district council about land in the local area suitable and available for development. In the leaflet, Peirce suggested that Quinton's failure to attend the meetings and the contents of his article suggested that, if elected, he would not adequately represent the local residents and that he, in fact, supported housing developments in the area. Quinton brought proceedings for malicious falsehood and infringement of the data protection principle requiring accuracy in the processing of personal data (s4(4), s70(2) and the fourth principle in schedule 1).

DECISION

The claim for malicious falsehood failed. The High Court found that the information contained in the leaflet was factually true and that Peirce was entitled to take advantage of it for electoral purposes. Furthermore, the court was not persuaded that Peirce had acted maliciously. He had simply been partial, biased and hard-hitting but these should not be equated with malice. A claimant had a high hurdle to overcome to succeed in establishing malice.

The claim for infringement of the data protection principle also failed. Although the court was persuaded that the information in the leaflet was personal data and that Peirce was a data controller it did not accept that there had been an infringement of the principle relating to accuracy. The court saw no reason to apply different criteria or standards in this respect from those it had applied when addressing the claim for malicious falsehood. Whilst the statements were biased they were not factually inaccurate and malicious. Eady J said:

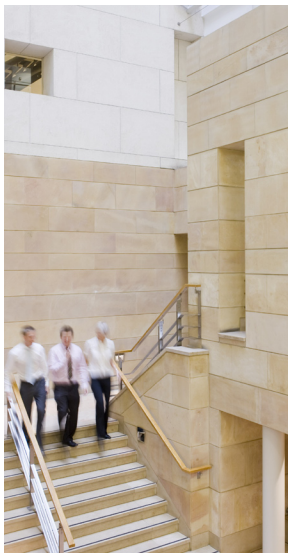
> *"I am by no means persuaded that it is necessary or proportionate to interpret the scope of the [DPA] so as to afford a set of parallel remedies when damaging information has been published about someone, but which is neither defamatory nor malicious. Nothing was cited to support such a far ranging proposition, whether from debate in the legislature or from subsequent judicial dicta."*

The court rejected Quinton's argument that to be fair under the DPA Peirce should have notified him in advance that the information was being processed. The court said that it would be absurd if the DPA required electoral candidates to give opponents advance warning each time reference was made to them in a document that happened to be computer generated.

COMMENT

From the High Court's reasoning it seems that if the claim for malicious falsehood had succeeded then the claim for infringement of the data protection principles would also have succeeded. Under s14(1), the court could have ordered Peirce to rectify the data which, in this case, would presumably have meant Peirce publishing Quinton's version of events. Whilst this case does seem to open up the possibility of a new avenue of claim parallel to a claim in defamation or malicious falsehood, it is questionable whether the DPA should be used or is suitable to be used in this way.

Split trial ordered in malicious falsehood claim



In the case of *Ajinomoto Sweeteners Europe SAS v Asda Stores Limited*, the High Court has for the first time ordered a split trial in a malicious falsehood claim ordering that the meaning to be attributed to the words complained of should be decided first before the questions of falsity and malice.

FACTS

Ajinomoto (AJ) manufactures and supplies the artificial sweetener aspartame. Asda launched a campaign to remove aspartame from all of its own brand products. In a major press release, Asda said:

"ASDA vows to remove artificial colours and flavours from all own-label food and soft drinks by the end of 2007. Supermarket to give customers the cleanest food in Britain with a 'no nasties' guarantee."

Asda used the phrase "NO HIDDEN NASTIES" on the labelling of its own brand products in conjunction with the wording "No artificial colours or flavours, no hydrogenated fat and no aspartame".

AJ brought proceedings for malicious falsehood alleging that the natural and ordinary meaning of the words used on the packaging was that aspartame was an especially harmful or unhealthy, or potentially harmful or unhealthy, sweetener and one which consumers concerned for their own health or that of their families would do well to avoid either altogether or in the quantities found in soft drinks or other food products.

AJ applied to the court for an order that the trial be split and that the court determine first the ordinary and natural meaning to be given to the words used by Asda before the questions of falsity and malice were considered. Asda opposed the application.

DECISION

The court ordered that the meaning to be given to the words used should be decided first as a preliminary issue. Its view was that split trials were common in defamation claims and that claims for malicious falsehood should be treated in the same way. The fact that the trial of a preliminary issue in a defamation claim was potentially 'case-breaking' (if the words were found to have a defamatory meaning then the case would continue, if not it would not) but not so in a malicious falsehood claim (even if the words were found to have the meaning alleged by the claimant, the claimant still had to prove falsity and malice) was not a reason to refuse to order the trial of the preliminary issue.

Trial of the preliminary issue would save costs because if the court rejected AJ's ordinary and natural meaning then that would be the end of the case and the parties would not need to incur costs dealing with the falsity and malice issues. If the court accepted AJ's ordinary and natural meaning then Asda would know what it was that AJ had to establish to succeed on falsity and malice and both parties would be assisted in the preparation of their case.

The court was satisfied that it was not AJ's intention to tactically slice up the action into three separate trials of meaning, falsity and malice. The major consideration for the court was whether the trial of a preliminary issue would save costs, subject always to the proviso that no order would be made if it would or could cause unfairness to the opposite party to the hive off the issue in question.

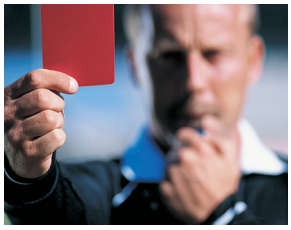
COMMENT

This judgment is very much in line with the current tendency of the courts to use their case management powers to closely control costs and will be of interest to practitioners involved in malicious falsehood litigation.

OFT gets tough on ticket sales

Tottenham Hotspur Football Club (Spurs) and Manchester United Football Club (MUFC) have amended their ticket sale terms following complaints to the OFT.

FACTS



Spurs has amended the term concerning ticket refunds by deleting the provisions which stated that match tickets would not be refunded or exchanged in any circumstances. The OFT considered this term was unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) by disadvantaging fans who purchased a ticket to a match which was subsequently postponed and who were unable to attend on the rescheduled date.

Separately, MUFC has amended the terms under which it sells its season tickets. Originally, the terms imposed an obligation on season ticket holders to purchase tickets for all home cup games but contained no reciprocal guarantee from MUFC to provide tickets for any of those games. This led to a situation where season ticket holders were obliged to buy tickets to all cup games (both important games (eg. Champions League matches) and more minor ties (eg. first round of the FA cup) but MUFC were not obliged to supply them with anything and so tended to provide tickets to only the less important matches. Because of the imbalance in obligation, the OFT considered this term inherently unfair. MUFC has now amended its terms so that season ticket holders are guaranteed to get tickets for all of the matches that they are obliged to buy them for.

Given the inherent nature of knock out cup competitions and the obligation to buy tickets to all home cup matches, season ticket holders could never be sure of the exact total cost of the season ticket. Following the OFT's action, MUFC has released more information on ticket prices together with estimates of the likely maximum total cost of a season ticket.

COMMENT

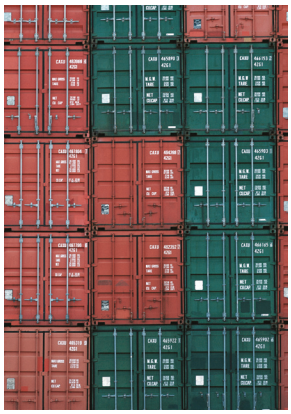
These actions are further evidence of the OFT's willingness to take action under the UTCCRs to ensure that businesses are dealing with consumers fairly. Businesses should review their terms and conditions of sale to ensure that they contain nothing that could fall foul of the UTCCRs.

The Equality Bill - impact on suppliers of goods and services

The new Equality Bill (the Bill) was published in May. The Bill is intended to harmonise discrimination law, by condensing the existing nine major pieces of legislation into a single act, and strengthen the law to support progress on equality. The Bill will have important implications for public authorities and employers but also suppliers of goods and services. This short summary focuses on the impact that the Bill will have on such suppliers.

The Bill prohibits discrimination, harassment and victimisation by suppliers of services, goods and facilities in respect of provision of the services, goods and facilities and the terms on which such services, goods and facilities are provided. The definition of a service provider under the Bill is "a person concerned with the provision of a service to the public or a section of the public, whether or not for payment". As such the Bill will apply to both private bodies and voluntary organisations. The prohibitions under the Bill relate to certain "protected characteristics". These characteristics are; age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

MEANING OF DISCRIMINATION, HARASSMENT AND VICTIMISATION



Discrimination includes both direct and indirect discrimination. Direct discrimination occurs where a person is treated less favourably than another because of a protected characteristic. Indirect discrimination occurs when a policy which is applied to everybody in the same way particularly disadvantages people with a protected characteristic.

The Bill envisages three types of harassment:

(1) harassment involving unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or violating the complainant's dignity (although this does not apply to the protected characteristics of pregnancy and maternity, marriage and civil partnership);

(2) sexual harassment involving unwanted conduct of a sexual nature where this has the same purpose or effect as above; and

(3) treating someone less favourably than another because they have either submitted or failed to submit to sexual harassment or harassment related to sex or gender.

Victimisation occurs where one person treats another badly because they, in good faith, have taken or supported any action taken for the purposes of the Bill.

WHAT IS NEW?

Although current legislation provides certain protection against discrimination or harassment in the provision of services, the treatment is not uniform for the different types of protected characteristics. The Bill seeks to provide a generally uniform approach to all the protected characteristics.

Inclusion of age as a protected characteristic is a significant addition, as there is currently no protection against age discrimination outside of employment and vocational training. The Bill provides that it will be unlawful to discriminate against someone aged 18 or over when providing a service, including the provision of financial services and insurance.

TIME FRAME

Implementation will be phased to allow service providers sufficient time to address the practical and organisational issues that may arise.

It is expected that the Bill will enter into the Commons Committee Stage in June 2009 and reach the House of Lords at the beginning of the new parliamentary session. Subject to the approval of both Houses it is expected to receive royal assent in early 2010.

COMMENT

Although most suppliers will never fall foul of the provisions of this legislation when it comes into force, they should be aware of the legislative developments impacting on their sphere of business.

Government abandons plan for central database of communications data

In the March edition, we reported on the government's plans to establish a central database to store the traffic, location and subscriber data retained by Communications Services Providers (CSPs) under the Data Retention (EC Directive) Regulations 2009. The government has now indicated that it has abandoned plans for such a database and will rely on CSPs to retain the data and hand it over to the authorities on request.

The proposed central database had been heavily criticised by privacy activists and the Information Commissioner's Office, which had called it a "step too far for the British way of life". In its consultation paper on the plans, the government says:

> *"The Government has no plans for a centralised database for storing all communications data. This could be the most effective technical solution to the challenges we face and would go furthest towards maintaining the current capability; but the Government recognises the privacy implications of a single store of communications data and does not, therefore, intend to pursue this approach."*

FURTHER INFORMATION

For more information relating to this article, please contact:

Mike Butler
Partner
T: +44 (0)20 7655 1239
F: +44 (0)870 460 2747
E: mike.butler@hammonds.com

Tom Bridgford
Partner
T: +44 (0)161 830 5368
F: +44 (0)870 460 3249
E: tom.bridgford@hammonds.com

Stuart James
Partner
T: +44 (0)121 222 3645
F: +44 (0)870 460 2892
E: stuart.james@hammonds.com