March 2010

Review

Commercial

This second edition of our Commercial Review details some of the more noteworthy cases and developments that have occurred since our first edition in September 2009.

£500,000 Fines – How good is your data security?

Businesses may want to take a careful look at their internal data protection compliance procedures following the news that from 6 April 2010, the Information Commissioner ('IC') will be able to impose fines of up to £500,000 for breaches of the data protection principles. Not only will businesses face a fine, but they will also be publically 'named and shamed' as any fines imposed will be made public on the IC's website.

All data controllers in the private, public or voluntary sectors are at risk of fines and it is worth noting that even if the action is that of the data controller's processor it will be the data controller who will be subject to the penalty.

There is some comfort for data controllers as it is clear from the IC's guidance that those businesses that have thought seriously about their data protection obligations in advance and put in place robust compliance procedures to prevent breaches, or at least deal with them effectively when they happen, are likely to escape high fines or possibly avoid the imposition of a penalty altogether.

Hammonds have a unique data protection compliance tool kit, DATAEdge to assist businesses review their internal data protection compliance. DATAEdge provides detailed and extensive, but user-friendly, compliance guidance and documentation. The updated fourth edition of DATAEdge will be available shortly.

The opening of the floodgates against IT suppliers…?

The eagerly awaited judgment in the case between BSkyB and EDS (now HP) (BSkyB Limited & another v HP Enterprise Services UK Limited & another [2010] EWHC 86 (TCC)) was handed down on 26 January, nearly a year and a half since the trial ended. This case has been highly publicised and has been touted by many as a case which could change the landscape for IT and outsourcing suppliers, as well as suppliers in other fields, forever.

To recap, the case related to the implementation of BSkyB's CRM project, which was delivered 4 years late and some £217.4m over budget. BSkyB alleged that EDS made a number of fraudulent statements to BSkyB in its tender response and subsequent discussions that led to it entering into agreements with EDS. BSkyB brought claims for fraudulent misrepresentation (in addition to claims for negligent misrepresentation and misstatement and breach of contract). As liability for fraudulent misrepresentation cannot be limited or excluded, the claim for fraudulent misrepresentation could have potentially allowed BSkyB to circumvent the £30m cap on EDS' liability in the contract and recover damages in excess of the cap.

It is this aspect of the case that has attracted publicity as, if BSkyB succeeded, new avenues of claim could potentially be taken against IT suppliers when a project goes wrong through, for example, substantial delays or increased costs. The same could also be true of any business that wins work through tender and pitch processes and then fails to deliver as promised.

BSkyB did in fact succeed in one of its claims for fraudulent misrepresentation. This related to statements made by EDS regarding the timescale for delivery and completion of the project. As a result of the judgment, BSkyB estimate that they will recover around £200m but EDS have already said that they will be seeking permission to appeal.

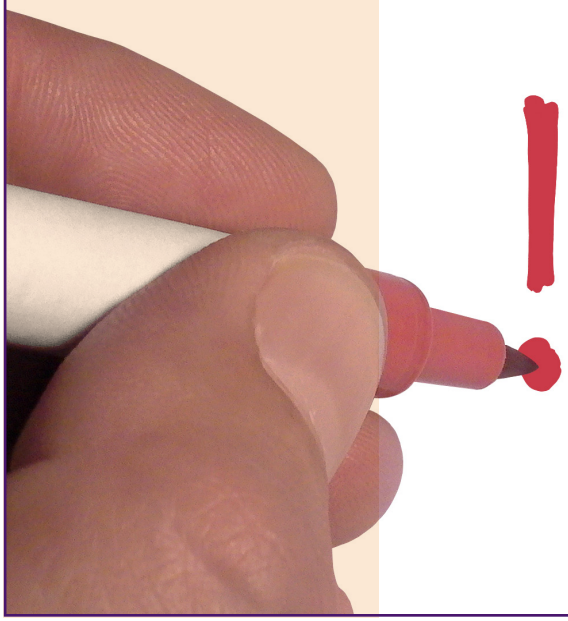
Whether or not this proves to be the end of the story, businesses, particularly those that do project-based work on the back of pitches and tenders, might wish to consider training their staff in the tender and pitch processes to ensure that their sales teams do not "promise the earth" without knowing (or caring) whether these promises can be lived up to or not.

A more detailed analysis of the case is available on our website www.hammonds.com

UK Patent Tax Rate Reduction

The Government will consult during 2010 on the introduction of a 'patent box' regime for UK companies with effect from April 2013. The intention is that there will be a reduced corporation tax rate of 10% for income from patents registered from that date. There are still no detailed proposals available and final legislation is unlikely to emerge until 2011.

Whilst the new regime will be good news and make the UK a more attractive place to hold IP, there is obviously some disappointment concerning the delay of more than 2 years before its introduction. It is also worth noting that the UK patent box will still have to compete with similar provisions in non-UK jurisdictions where the tax rate is closer to 5% and the scope is wider to include other intellectual property rights in addition to patent rights.



Keeping Your Customers Informed

The Provision of Services Regulations 2009 (the 'Regulations') came into effect on 28 December 2009 and are aimed at facilitating a greater provision of cross border services in EU Member States, which should benefit UK businesses wanting to enter into the EU market.

WHO IS AFFECTED?

The Regulations apply to a wide range of businesses that provide services to both businesses and consumers, including for example marketing, consultancy, decorating and plumbing. However, it is worth noting that there are a few service sectors that are excluded from the Regulations which include financial services, electronic communications, transport, healthcare and gambling.

The Department for Business Innovation & Skills ('BIS') has also advised that retailers will fall under the Regulations where their activities are not exclusively concerned with the sale of goods, for example where after sales services or customer advice is provided.

WHAT DO THE REGULATIONS MEAN TO AN AFFECTED BUSINESS?

The main thrust of the Regulations is to require businesses to make the following information available to their customers:

Details of where customers can send complaints or a request for information; the service provider's name, address, legal status and VAT number; details of any trade registrations or authorisation schemes to which the service provider is subject; the main features of the services and details of any after sales guarantees offered; details of any professional liability insurance which the service provider is required to hold; and details of any dispute resolution procedure available.

This information can be made available in a number of ways, such as on a website that has been notified to the customer or in any pre-contractual documentation supplied to the customer.

Service providers are also under a number of other obligations under the Regulations that include:

Responding to complaints "as quickly as possible" and using their 'best efforts' to find a satisfactory solution and not discriminating on the grounds of nationality or place of residence in their general terms and conditions, unless it can be objectively justified. For example, a service provider must not refuse to supply customers outside of London unless it can be objectively justified. There is little guidance on what justifications would be acceptable but BIS has suggested additional costs, market conditions and lack of the necessary IP protection in a particular territory may qualify in certain circumstances.

ENFORCEMENT

The OFT is able to take action against businesses in breach of the Regulations where the breach harms the collective interests of consumers. However, individual businesses and consumers are left to seek redress for any non-compliance themselves through the courts.

PRACTICAL TIPS

Regardless of whether doing business in Europe is part of your business strategy, if your business could extend to providing services in Europe, then you should review your practices to ensure that all necessary information is provided to customers, that complaints are properly and efficiently handled and that any difference in terms offered to customers in different locations is objectively justifiable.

More checks for employers

In October 2009, the Government began phasing in a single vetting scheme for checking the suitability of potential employees in a regulated activity to work with children and vulnerable adults. Whilst mandatory checking of individuals will not be required until November 2010, from 12 October 2009 it became an offence for an employer to allow a person to engage in a regulated activity whom it knows (or has reason to believe) is on the Independent Safeguarding Authority's (ISA) barred list. The offence could result in fines and/or imprisonment for up to 5 years for the employer or its directors or managers responsible for hiring the barred individual. A mandatory referral process was also introduced under which employers now have a duty to refer information to the ISA about individuals working with children or vulnerable adults in a regulated or controlled activity where they have caused or posed a risk of harm. Failure to provide the information could result in a fine of up to £5,000.

From July 2010 employers will be able to check the ISA status of new starters online if they are to work in a regulated activity with children or vulnerable adults.

Following recent outcry from, for example, parents who were worried they would have to be vetted before they could take their turn on the school run, the Government has recently announced that it will be making a number of adjustments to the scheme during 2010. These changes include amendments to the definitions of 'frequently' and 'intensively' in relation to contact with children, so as to reduce the number of people required to register. It will also issue revised guidance for employers. It has also stated that these changes will not affect the timing of the July and November implementation stages.

Stop Press… FSA may enforce penalties of up to 20% of firms income

You may recall the fine imposed on 3 HSBC firms of over £3 million by the FSA for failing to have adequate systems and controls in place to protect their customers' confidential details that were lost in the post on 2 occasions. Following on from this the FSA will publish shortly a response paper on a 2009 consultation aimed at increasing enforcement financial penalties that it can impose.

In its consultation paper, the FSA proposed the introduction of a 5 steps framework to determine the fine in an enforcement action:

- Step 1 - 'disgorgement' of any benefit derived as a result of the breach;
- Step 2 – determination of a figure reflecting 'the nature, impact and seriousness of the breach';
- Step 3 – adjustment of the Step 2 figure to reflect any aggravating or mitigating factors;
- Step 4 – 'an upwards adjustment' to the figure may be made 'if necessary to ensure the penalty has an appropriate deterrent effect';
- Step 5 – a settlement discount may be applied.

Under the proposed scheme the penalties imposed may vary depending on whether the fine is imposed on a firm or an individual. For cases against firms, the FSA propose arriving at the Step 2 figure by taking a percentage of the firm's relevant income. According to the seriousness of the breach percentage fines will be applied at zero, 5, 10, or 20% of the firm's income. In deciding the appropriate percentage fine the FSA propose taking into account various factors relating to the impact and seriousness of the breach.

For penalties imposed on individuals, the FSA propose fines of up to 40% of the individual's income, calculated as the gross amount of all benefits received by the individual from the employment in connection to the breach and for the period of the breach. In relation to penalties against individuals for market abuse, the FSA propose a minimum fine of £100,000.

We will keep you updated of any change to the FSA's powers.

Time is running out…

Back in July 2009 the OFT opened registration for certain categories of business that need to register with the OFT and who will be supervised by the OFT under Government anti-money laundering regulations. These regulations aim to reduce the possibility of legitimate businesses being used for money laundering or terrorist financing. Relevant businesses have had until 31 January 2010 to be on the OFT register.

The categories of business that should have registered are:

- Consumer Credit Financial Institutions (CCFI) – these are organisations involved in consumer credit lending activities which are not authorised by the FSA or supervised by HMRC as a money service business; and
- Estate Agents – these include residential and commercial estate agencies, relocations agents and property finding services.

Carrying on a business as a CCFI or an estate agent after 31 January 2010 without being registered is a criminal offence and could result in prosecution.

And now the team news...

All work and no play?

No such thing for our commercial team. Following on from Sam's example last winter with the Tough Guy challenge, in October Stuart James completed the Birmingham EDF Half Marathon and Del Diaz took part in her first triathlon (having only learned to swim a decent front crawl a few months beforehand!) completing the Warwickshire sprint triathlon in a respectable 1.33.23. Del has vowed to beat her performance in her next triathlon. Watch this space in October 2010!

Finally we could not close this section of the team's news without reporting Stuart's near miss for his Best Dressed Male nomination at the Birmingham office's Winter Party. No doubt his legendary taste for odd socks will place him right back in the competition next year...

To what endeavours?

Finally some useful guidance has been given by the High Court in the case of CEP Holdings Ltd and CEP Claddings Ltd v Steni AS [2009] EWHC 2447 (QB) on the factors that may be considered by a court in determining what is meant by "all reasonable endeavours".

In this case, Steni served notice to terminate its exclusive distribution agreement with CEP on the grounds that CEP had failed to comply with its express obligation under the agreement "to use all reasonable endeavours" to promote and sell products in the UK and Eire. The judge considered that, in the context of this exclusive distributorship agreement which was for a minimum term of 20 years, the parties must have understood the term 'all reasonable endeavours' to mean that CEP should do everything that a reasonably competent and energetic distributor would do to promote the marketing and sales of Steni's products in the relevant territory, knowing that Steni was entirely dependent upon CEP's efforts to achieve sales in that territory over a period of many years. However, this understanding did afford CEP a reasonable margin of appreciation/ discretion in deciding how best to market and promote the sale of the products.

The judge held that CEP was in breach of its obligation to use all reasonable endeavours to promote and sell the products. Some of the factors the judge took into account included: **declining sales figures:** this was set against substantial growth in the rest of the comparable market in the territory, although on its own this would not have been determinative; **inadequate systems for preparation of forecasts and logs of specifications and quotes:** CEP's systems were haphazard and poorly maintained, meaning that CEP's board was inadequately informed as to the potential for sales of Steni products; **marketing material:** the judge said that CEP should have produced and distributed appropriate marketing materials but had not; **trade fairs:** lack of attendance at trade fairs counted against CEP; **pricing:** Steni argued that CEP should have ensured the products were priced below competitors' products. The judge said that reducing margins was essentially a commercial decision for CEP and CEP was not in breach of its obligations in this respect.

SO WHAT DOES THIS MEAN IN PRACTICE?

Although what is meant by "all reasonable endeavours" will be determined on the facts of each particular case, this case is a useful illustration of what factors a court might take into account in deciding whether a party has complied with its obligations. The case also makes it clear that a distributor will have a degree of flexibility in how to best market and promote products but that it must be able to show that it has made meaningful and organised efforts to make sales.

The Cycle to Work Scheme

The Government's Cycle to Work Scheme allows employers to hire bicycles and safety equipment to employees, with the employees being able to save up to 50% off the cost as a tax benefit. However, there are a number of legal and practical issues that arise when implementing it, which are not immediately obvious.

Most people do not realise that the agreement with the employee must be a hire agreement to qualify for the tax benefit. This means the employee cannot own the bicycle or equipment during the hire period or have an automatic right to own them at the end. Any sale at the end of the hire period must be under a separate agreement and for market value.

The scheme also falls under the Consumer Credit Act 1974 ('Act') which means that various requirements of the Act must be complied with, for example, in relation to the form of the hire agreement. Although, a separate consumer credit licence is not needed to operate the Government scheme up to the value of £1,000 per employee, a licence is needed if packages are outside of the scheme or above £1,000 are offered.

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