September 2011

Review

Commercial

Welcome to the Birmingham Commercial Review, which we hope that you find interesting. The Review provides a brief and informal insight into some of the most recent commercial developments.

If you have any comments, feedback or would like more information about any of the articles then please contact Vicky or Stuart, whose details are below.

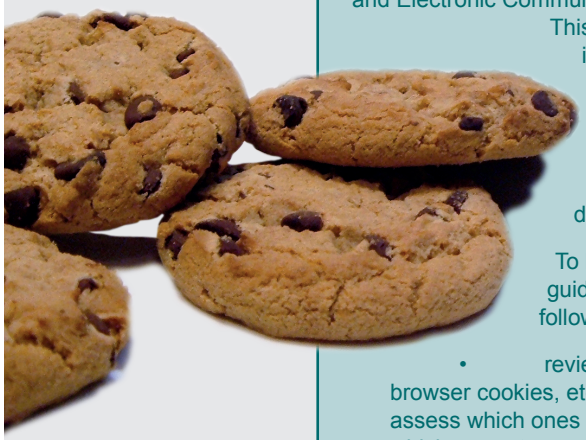
When employees confess to data theft...

In our last Review, we reported on 2 former employees of T-Mobile who illegally obtained and sold lucrative mobile phone contract details owned by their employer to third parties. Following investigations by T-Mobile with the assistance of the Information Commissioner, both employees pleaded guilty and were convicted under the Data Protection Act 1998. The pair were ordered to pay a total amount of £73,700 in fines and confiscation costs.

The case highlights the need for employers and data controllers to have clear policies and processes in place to prevent misuse of personal data and cooperate efficiently with the Information Commissioner in the course of any investigations. In this particular case T-Mobile were able to avoid liability as they had clear policies in place on the protection and retention of personal data and staff had been trained in this area.

New cookies rules – now in force!

The UK implemented the revised "Cookies" Directive (2002/58/EC) earlier this year with the Privacy and Electronic Communications (EC Directive) Amendment Regulations 2011 (the "Regulations"). This means that website operators are now required to ensure that users are informed and provide their consent to the use of cookies stored on their devices (including, laptops, desktops and mobile devices).



We have mentioned cookies in previous editions of the Newsletter, but to recap they are small text files that are stored on a user's device when visiting a website. The cookie assists the website in recognising the user's device and delivering a more tailored and user-friendly experience.

To help businesses the Information Commissioner's Office (ICO) has published guidance relating to the Regulations recommending that businesses take the following actions immediately:

- review and list the cookies and similar technologies (such as flash cookies, browser cookies, etc) currently used on its website (including any third party cookies used) to assess which ones are strictly necessary to provide users with web-based services and those which are not;
- consider how intrusive its use of cookies are and talk to third party cookie providers to agree a suitable approach to obtain users consent. The ICO has stated that "The more privacy intrusive [the] activity, the more priority [a business] will need to give to getting meaningful consent";
- begin to create and implement appropriate and tailored solutions to gain users' consent.

Under the Regulations the ICO also has the power to impose monetary penalties of up to £500,000 where serious breaches of the Regulations have been committed.

Although the Regulations are now in force, the ICO has stated that formal enforcement action is unlikely to be taken before May 2012. However, by that date businesses are expected to have reviewed their cookies practices and to have implemented a practical and effective strategy to obtain users' consent.

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When the hired help becomes an employee

The Agency Workers Regulations ("Regulations") are due to come into force on 1 October 2011. Under the Regulations agency workers will, after a 12-week qualifying period, become entitled to the same basic working and employment conditions as if they had been recruited directly by the hirer. This means that, subject to some exceptions, agency workers will be entitled to, for example, the same basic rate of pay as permanent staff.

The Regulations will almost inevitably add to the cost of using agency workers, bearing in mind the additional amounts to be paid to them and the increased administration. To assess the scale of the likely impact of the Regulations on a business, a business should determine the number of agency workers it places across its business and determine the approach it should take.

We can forward to you a copy of our detailed guidance note that may assist in your compliance plan for the new Regulations.

Remoteness... forseeability... recovery of future loss... revisited

The Court of Appeal in a recent case, Conarken Group Ltd and another v Network Rail Infrastructure Ltd [2011] EWCA Civ 644 gave a useful restatement of the laws on the foreseeability and remoteness of economic loss arising from negligent property damage.

The defendants in the case, Conarken Group Ltd and Farrel Transport Ltd, caused damage to property owned by Network Rail resulting in temporary track closures. As a consequence of the track closures, Network Rail was obliged to pay compensation to train operators under the terms of its relevant Track Access Agreements. These payments included compensation for two elements, known as the marginal revenue effect and the societal rate, which provide for compensation for: (i) the train operator's estimated loss of revenue, including future loss of income; and (ii) for sums payable by the train operator to the Department of Transport for disruptions.

The defendants accepted that the property damage had been negligently caused but did not accept that the types of loss claimed by Network Rail were reasonably foreseeable and not too remote.

The Court confirmed that even though Network Rail and the train operators had an agreed compensation mechanism the extent of the defendants' liability was still to be determined by ordinary tortious principles including the reasonable foreseeability of the damages, taking into account the scope of the defendant's duty and the remoteness of damages claimed.

The Court held that the losses were a direct consequence of the defendant's actions and that the losses were reasonably foreseeable. It was clearly foreseeable to the Court that, if Network Rail's property was damaged, the train operators' services, and their value to the public, would be diminished and that the franchising authority would penalise the operators for the disruption.

The future of IP... another report

In May this year, the latest in a long list of reports on IP, the Hargreaves Report, was presented to the government. The report includes a number of key recommendations that include:

- establishing a digital copyright exchange to facilitate licensing;
- introducing new copyright exceptions to bring the law up to date, including for format- shifting, parody, non-commercial research and library archiving ;
- creating a scheme for the use of orphan works;
- taking measures to reduce the density of patent "thickets"; and
- introducing a small-claims track for low-value IP claims.

However it is the digital copyright exchange proposal that has attracted the most interest. In brief, the idea is to establish a fast, reliable and secure licensing exchange, consisting of a network of interoperable databases, allowing potential licensees to quickly identify and contact the relevant rights-holder. This concept of a 'one stop-shop' for copyright clearance has been met with cautious approval, with one of the key concerns being that participation in the scheme would be voluntary meaning it would only succeed if rights holders chose to participate.

The report suggests that participation in the exchange should be incentivised by advantages, including requiring ISPs to take a range of technical measures against infringing subscribers and making a search of the exchange a prerequisite of using orphan works. However, the effect of this would be to create a two-tier system of protection with those who are reluctant to relinquish control of their IP having remedies taken from them.

There are many positives to be taken from the report but quite whether any of these are taken up by the government, which is due to publish its response before the summer break, or whether ultimately rights holders participate in an exchange will have to be seen.

The "endeavours" debate continues

When parties impose obligations on each other they often try to qualify these obligations by agreeing to only use some form of "endeavours" to achieve it.

In the recent case of Jet2.com Ltd v Blackpool Airport Ltd, Jet2.com entered into an agreement with Blackpool Airport Limited (BAL) to allow it to use Blackpool airport as a base for its low cost airline. A clause in the agreement stated that BAL would "use all reasonable endeavours to provide a low cost base to facilitate Jet2.com's low cost pricing." BAL had published opening hours, but the agreement itself did not state any specific hours of the day in which Jet2.com could operate its flights. However, both parties understood that a low cost airline operation required flexibility to fly to and from the airport both early and late in the day. For the first few years of the agreement BAL ran at a loss, but to improve profitability, after the fourth year BAL refused to accommodate arrivals and departures from Jet2.com outside of BAL's published opening hours and gave Jet2.com a week in which to change their schedule. Jet2.com sued for breach of contract.

Previous case law concluded that in using "all reasonable endeavours" a party would not have to do anything that would mean acting against its own commercial interests. However, the judge distinguished this case from others in that BAL's ability to fulfil its duty to use all reasonable endeavours was within its own control and not, as in previous cases outside of its control. In his decision, the judge determined that BAL could not "pick and choose" what to do in its own interest and that it's actions was a serious breach of contract.

Perhaps the most important thing to note from this case is that more detail within the agreement on specific terms, such as the operating hours, would have eliminated most of the argument and saved both parties a lot of time and expense. It may also have been prudent to decide and detail within the agreement what exactly BAL were and were not required to do in order to fulfil its "all reasonable endeavours" obligation.

The CRC Energy Efficiency Scheme gets a makeover

In our last review we discussed how revenue created from the CRC Energy Efficiency Scheme would now be used to support public finances rather than being recycled to participants. Following a series of informal discussion papers earlier this year, on 30 June the Government outlined further proposed changes, aiming to simplify the scheme and reduce the administrative burden created by it.

The main proposals include:

- in phase 2, two fixed price sales p.a with unlimited allowances available will be introduced instead of auctioning a capped amount of allowances. This is hoped to increase business certainty, but allow for some market forces by having a lower sale price in the first sale each year;
- simplification of organisational rules to reflect 'natural business units'. Ahead of each phase the Environment Agency should, as before, be informed of the overall group structure by the parent organisation. Flexibility is however introduced by allowing the group to choose if they would like to disaggregate business units of any size;
- simplification of the qualification process, requiring only electricity measured by settled half hourly meters to be taken into account;
- limiting the number of fuels covered to electricity, gas, kerosene and diesel (for the last two, only if they are used for heating). This is a large reduction from the original 29 fuels;
- removal of footprint reports and the 90% rule, with organisations now having to detail 100% of their supplies of the 4 fuels above; and
- to reduce the overlap with other schemes, businesses covered by a Climate Change Agreement (CCAs) or the EU Emissions Trading Scheme (EU ETS) will be excluded from the CRC at the point of qualification. This removes the need for the existing complex CCA exemption process.

Those wishing to comment on these proposals have until 2 September to do so. Full consultation on the draft legislation will then take place from February to April 2012, with the aim of the proposed changes coming into force in April 2013.

Team News

Now for a quick round up of what the team has been up to whilst away from their desks over the past few months.

Caroline Egan and her daughter recently took part in the Cancer Research UK Race for Life. Despite carrying a knee injury which threatened to rule her out of the race entirely, Caroline took to the start line and managed to complete the 5K course. So far, Caroline has raised over £150 in sponsorship. Anyone wishing to make a donation can do so at http://www.raceforlifesponsorme.org/carolineegan3007

Jason Kelly, Delizia Diaz and Simon Carrington got their wooden spoons out at the BBC Good Food Show for a cooking masterclass with the current Masterchef champion Tim Anderson. The team were treated to a lesson in Tim's Japanese-inspired cuisine and cooked a dish of trout, miso mayonnaise, a daikon and ginger 'slaw' and steamed vegetables. Although none of the team will be rushing to enter Masterchef themselves any time soon, they were all pleased with the end result.

Finally, congratulations to Stuart James and his wife Alison, who celebrated the birth of their first child, Matthew Peter James on 10 June. Mother and baby are both doing well, though we wonder how long it will be before Stuart introduces Matthew to the wonders of odd socks, prog rock and Villa Park…