

A person wearing a blue suit jacket and a black watch is holding a brown leather briefcase. The briefcase has a gold-colored clasp and handle. The background is a light, textured surface.

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Corporate & Commercial

When is control too remote?

A party to litigation has a **duty to disclose documents in its control** but are documents held by a subsidiary company, in the parent's control? A recent case¹ has clarified control will not be implied simply because there is a parent-subsidary relationship, but a parent company will be deemed to have control over a subsidiary's documents where there is an existing arrangement or understanding (**whether or not that's legally enforceable**) which, in practice, provides the parent with a right of access to the subsidiary's documents.

Recovery of losses

A recent High Court case² saw a **direct challenge to the traditional approach of categorising losses** that arise from a breach of contract. This followed several cases in recent years³ where the judiciary have called for the need to reform this area of law and a 2016 decision⁴ where the Court departed from the traditional approach, albeit by reference to specific wording.

The traditional approach established in the *Hadley v Baxendale* [1854] case categorised recoverable losses as either:

- **direct losses - losses that arise naturally from the breach** (e.g. if a factory is destroyed, direct losses would include the cost of rebuilding it and the loss of production during the rebuild); or
- indirect losses (often also referred to as consequential losses) - **losses which may reasonably have been in both parties' contemplation at the time of the contract** (e.g. the loss of a long-term contract).

The problem with this distinction is that it does not match the common business understanding of the terms. Most business people are likely to assume that by excluding indirect losses in their contracts, they are excluding anything that is not obviously a direct loss – so, in this example above are likely to assume that they have also excluded the loss of production during the rebuild.

We expect to see further attacks on this traditional approach – so recommend that more clarity is added to the types of losses that the contracting parties want to exclude to avoid uncertainty in the future.

Can an invalid deed be enforced as a contract?

The High Court has confirmed⁵ that **if a deed is held to be invalid** (e.g. because it is not signed or sealed in the presence of a witness), **it can still be enforced as a contract** provided it meets the required formalities of a contract and the transaction does not require a deed (e.g. a land transfer or a power of attorney)

A new dominant purpose test for legal advice privilege

A recent court decision⁶ has clarified that for a document to have the benefit of legal advice privilege **the dominant purpose of the document must be for legal advice**. In the judgement the Court gave guidance about multi-addressee emails (from and to both lawyers and non-lawyers):

- if a communication is sent by a person authorised to obtain legal advice and the dominant purpose of the communication is to provide instructions to a lawyer to obtain advice – then the communication is likely to be privileged;
- if the dominant purpose is to obtain the commercial views of the non-lawyer addressees, then it will not be privileged, even if a subsidiary purpose is to obtain legal advice.
- if the lawyer's response contains legal advice, it will almost certainly be privileged regardless of whether it is copied to more than one addressee and whilst the dominant purpose test applies, the court is unlikely to challenge whether the dominant purpose was the provision of legal advice or not.



Our COVID-19 interactive virtual sessions are an opportunity for in-house counsel to share experiences, insights and best steps to protect your organisations.

[Please register now](#) to join us each week. Content will change each session to help support you through these evolving times.

Please also let us know any points you would like to discuss through the [Sli.do app](#) using the event code: FS2503 and these will be covered by the hosts during the call.

Data Security

Employer not liable for employee's deliberate data breach.

The Supreme Court⁷ has **overturned the Court of Appeal decision that held Morrisons liable for a deliberate data breach committed by a disgruntled ex-employee** (which exposed the personal data of over 100,000 of its employees) and led to Morrisons facing a substantial class action by affected employees. The Supreme Court decided that Morrisons should not be liable for a deliberate breach which 'did not form part of the ex-employee's functions or field of activities.... or an act which he was authorised to do'.

Strictly Confidential

The High Court has, for the first time, considered the application of the EU Trade Secrets Directive which was implemented into UK law in June 2018.

Whilst the Directive largely restates existing UK law, it is generally considered to create a wider scope of what is confidential information. Broadly, it states that information will be confidential if it is secret, has commercial value and has been subject reasonable steps to keep it secret.

The Court in this case said that the **Directive provided the 'best guide' to determine whether information should be classified as confidential.**

The Directive also makes it unlawful for a recipient to use such information if it 'knew or ought to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully.'

This case involved common circumstances - where former employees established a rival company using customer information belonging to their former employer. The Court had no hesitation in agreeing that the former employees and the new rival company breached their duty of confidence to the former employer.

Employment

A few planned changes to employment law were effective from 6th April including:

- **Written statements:** The obligation to provide written statements of particulars of employment to employees has been **extended to include workers, must be provided before work commences** (subject to a few exceptions) and **must include more information** including probationary, training and benefits information. There is a similar but reduced requirement for agency workers.
- **Holiday Pay:** Holiday pay must be calculated by **reference to average pay over a 52-week reference period** (or the individual's length of engagement if they have fewer than 52 weeks' service).
- **Minimum Statutory Rates:** Statutory minimum payments have increased. Full details are available on the [Government website](#).
- **Swedish Derogation:** The 'Swedish derogation', which provides an exception to provide pay parity between agency workers and employees subject to certain criteria, is no longer effective.
- **Parental Bereavement Pay and Leave:** A new right for paid leave for bereaved parents of a child or who have suffered a stillbirth after 24 weeks of pregnancy. Detailed guidance is available on the [Government website](#).

Meanwhile, due to COVID-19 changes to the **off-payroll rules (known as IR35) have been postponed** to April 2021 and the obligation for relevant employers to publish their **2019/2020 gender pay gap information has been suspended.**

No liability for self-employed medical practitioner

In *Barclays Bank plc v Various Claimants*¹⁰, the Supreme Court, has held that Barclays was not liable for the acts of a self-employed medical practitioner who was alleged to have committed sexual assaults while carrying out medical assessments of the bank's prospective employees. He was in business on his own account and worked for a portfolio of clients, one of which was Barclays. The Court held that the **relationship was not akin to employment so could not give rise to liability to the bank.**

National minimum wage guidance

On the 6 April, the Government made changes to the enforcement of breaches to National Minimum Wage ('NMW'), including:

- the **reintroduction of naming and shaming businesses**, but has increased the threshold for naming and shaming from £100 or more on aggregate (owed to employees) to £500;
- broadening the category of 'salaried hours' work and allowing more flexibility for the employer in determining how to calculate pay;
- not naming and shaming businesses or fining business that breach NMW merely due to a salary sacrifice or deduction arrangements where the worker has consented (but note that deductions for uniform purchases or other items connected with the worker's employment are still likely to trigger enforcement action and the where the reduction or deduction takes the worker below the NMW, the employer will still have to repay their workers)

New guidance concerning the National Minimum Wage (NMW) regulations has been published on the [Government website.](#)



[Read](#) our COVID-19 Special Bulletin

Competition

Dominance and excessive pricing.

The Court of Appeal agreeing with the earlier Competition Appeal Tribunal's (CAT) has annulled the Competition & Markets Authority ('CMA') decision that Pfizer and Flynn had abused their dominant market position by charging excessive prices for their anti-epilepsy drugs.

The **CMA was criticised for taking an over-simplistic analysis** by deciding that prices were excessive based on an abstract analysis, which compared the price with a notional benchmark of 'cost plus 6%', but ignored evidence about the pricing of similar products. The matter has been referred back to the CMA for reconsideration.

Price monitoring tools

The CMA has issued the music equipment suppliers Roland and Korg with a charge sheet alleging unlawful price fixing.

What's particularly noteworthy is that Roland and Korg utilised commonly used software tools to monitor the prices which retailers sell their products. The CMA has alleged that the use of sophisticated **'all-seeing' software has the effect of scaring retailers into complying with suppliers pricing rules** in the first place and therefore undermining retail competition.

This investigation follows the CMA's investigation into Casio and subsequent fine of £3.7 million for engaging price fixing activities which was also exacerbated by its use of online price monitoring software.

Cases, laws, decisions referred to in this Bulletin

1	Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm)
2	Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972 (TCC) (24 April 2020)
3	Caledonia North Sea Limited v BT plc [2002], ALL ER (Com) 321; Scottish Power UK Plc v BP Exploration Operating Company Ltd [2015] EWHC 2658 (Comm); Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372.
4	Star Polaris LLC v HHIC-Phil Inc [2016] EWHC 2941 (Comm)
5	Signature Living Hotel Limited v Andrei Sulyok Roxana Monica Cocarla [2020] EWHC (257) Ch
6	The Civil Aviation Authority v JET2.COM Limited [2020] EWCA Civ 35.
7	WM Morrisons Supermarket PLC v Various Claimants [2018] EWCA Civ 2339.
8	Trailfinders Limited v Traveller Counsellors Limited & Ors [2020] EWHC 591 (IPEC).
9	Coty v Amazon (C 567/18),
10	Barclays Bank plc v Various Claimants [2020] UKSC 13



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