



Corporate & Commercial

The £80m wasted expenditure claim

In a recent case¹ concerning a failed IT system, the Court of Appeal, overturning the High Court decision ruled that the claimant, Soteria Insurance, was *entitled to claim its wasted expenditure* of implementing the system, from the supplier, IBM.

IBM had refused to pay because the contract excluded liability for loss of profits, but the Court decided that wasted expenditure is not the same as loss of profits and therefore was not excluded by the contract.

In the Judgment the Court explained that if a party wants to exclude a valuable right (exclusion of wasted costs in this case) the language must be clear. There was no express exclusion of wasted costs in this instance.

New Rules on Diversity and Inclusion Reporting for Company Boards and Executive Management in the UK

The FCA has <u>finalised rules</u> requiring listed companies to report information and disclose against targets on the representation of women and ethnic minorities on their boards and executive management. Companies will be required to make the new disclosures in their annual reports for financial years starting on or after April this year.

Shell directors sued for "failing to prepare for net zero" in groundbreaking ESG claim

ClientEarth, a shareholder of Shell, has taken the <u>first</u> steps to issue a claim against Shell's directors for *failing* to manage climate risk as required by the Companies Act. Section 172(1)(d) requires a director in discharging its duties to have specific regard to '...the impact of the company's operations on the community and the environment' If the claim is successful, the court could force Shell to revise its net zero transition strategy and may find that its directors have acted in breach of their statutory duties.



Senior Counsel Event - Commercial Law Update

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The 10 biggest things to get right in In House Legal Tech and Operations

25 May, 2022



Register of overseas entities

The government has brought forward the implementation of the Economic Crime (Transparency and Enforcement) Act 2022 which received Royal Assent on 15 March, bringing in the register of overseas entities that own UK property.

The law will require overseas companies or similar entities that are the registered proprietors of UK residential or commercial property to investigate and provide details of their beneficial owners or individuals who control them to UK Companies House. The information will appear on a register that is publicly accessible. It is not yet clear when the provisions setting up the register will come into force, but we expect this to happen once Companies House and the Land Registry have set up the necessary systems to deliver the Act's requirements.



Data Security

Google responds to CNIL Cookie Fine

Google has <u>announced</u> the completion of 'a full redesign' of its cookie consent practices. Under this new practice, users will see a new cookie consent choice window with equal 'Reject all' and 'Accept all' buttons on the first screen.

The revised practice follows the €150m cookie-related fine issued by the French data regulator, CNIL, to Google at the end of 2021 because of Google's failure to make it as easy for French users to reject all cookies as it was to accept all cookies.

The UK data regulator, the ICO, has issued a <u>statement</u> welcoming this action by Google, and commenting 'we expect to see industry following Google's lead to provide clearer choices for consumers'.

Annual Automotive Law Update – In Association with TMO and mLex

The automotive sector is undergoing rapid change, with developments to the retail model, the shift to EVs and changes to regulation and each change is either driven by the law or has legal and compliance consequences.

Learn more

This annual industry event will unpack these issues, explaining how they are likely to impact automotive businesses.



No privacy of personal emails sent on business email accounts

The Court of Appeal has ruled² that an employer acted lawfully by accessing an email account used by a former employee under investigation.

The Court decided that the *employee could not have had any expectation of privacy* as it was an enquiries email account for event bookings and accessed by other staff, but even if there had been a reasonable expectation of privacy, the defendants had only disclosed the emails to their professional advisors, a trustee in bankruptcy and to another business associate which did not amount to a breach of privacy.

Law firm fined for failure to implement basic controls.

A law firm has been fined following a ransomware attack. The fine was small (£98,000) so not likely to make any headlines, but the ICO's penalty notice contains some helpful pointers that show the minimum expectations on any organisations to meet their security obligations:

- Multi-factor authentication (a relatively low cost security measure to require two or more verification measures to access an account);
- Patch it up (The law firm had waited more than four months after a software patch was released before installing it, despite the patch being widely publicised (and free)); and
- Encryption.

Employment

Government announces new statutory code on the practice of 'fire and rehire'

Following some high-profile instances of 'fire and rehire' (where an employer dismisses a worker and then re-engages them on less favourable terms) *the government has announced* a new statutory code on the practice which details how employers should hold fair, transparent and meaningful consultations on proposed changes to terms of employment.

Courts and employment tribunals will take the code into account when considering cases and unreasonable failure to comply with the code may increase compensation for each employee by 25%.

Mother of triplets dismissed due to direct sex discrimination, tribunal rules

A lawyer, Ms Long, who was engaged by British Gas has won a claim for discrimination and unfair dismissal³.

Ms Long had returned to work after her maternity leave on a part-time job share contract, but when her job-share partner left, Ms Long felt she was put under pressure to work outside her contracted hours. The tribunal saw evidence of this in emails between her line managers which



referred to telling her that work does not stop at the end of her contracted hours.

In 2019 Ms Long was told that she had been put on a performance improvement plan and at risk of redundancy. In the scoring matrix, Ms Long scored 1 out of 7 for 'focus'. The tribunal found that *the score was 'irrational'* as her line manager told the tribunal that Long's focus was 'good in respect of the lion's share of her work'.

To make matters worse for British Gas, it was unable to justify why her male colleague was paid £2,000 a year more than her

Revised workplace guidance

Following the relaxation of government measures under its plan for <u>Living with COVID</u>, the onus is on employers to assess and manage COVID safety through internal policies.

The UK Health Security Agency has published revised guidance for reducing the spread of respiratory infections, including COVID-19 in the workplace.



Right to work checks

Since the 6 April, employers have been required to use the Home Office's digital right to work check service for employees who hold a biometric residence card, a biometric residence permit or a frontier worker permit. For other employees, the end date for temporary adjustments to right to work checks has been pushed back from 5 April to 30 September 2022.

Consumer

Landmark changes to consumer protection rules and enforcement powers

The UK Government has <u>announced</u> sweeping reforms to UK consumer protection rules. These include new powers for the Competition and Markets Authority ('CMA') to impose large fines of up to 10% of global turnover and to order consumer compensation.

Aside from these financial measures the Government says that it wants to:

- Grant the CMA stronger powers for direct enforcement of investigation and fines without requiring the CMA to go through the courts;
- Enable all public consumer enforcers to apply to the civil courts to impose financial penalties for consumer law breaches;
- Support consumers and traders to resolve more disputes independently particularly by encouraging the uptake of alternative dispute resolution services.



There are some specific concerns that the new laws will address:

- Tackling so-called 'subscription traps' by requiring clearer information and mandating autorenew reminders;
- Addressing fake reviews online hosting reviews without taking reasonable and proportionate steps to check they are genuine will be illegal; and
- Strengthening prepayment protections.

We now await the publication of the Government's draft legislation to build out the detail of these proposals.

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Cases, laws, decisions referred to in this Bulletin

1	Soteria Insurance Limited (formerly CIS General Insurance Limited) v IBM United Kingdom Limited [2022] EWCA Civ 440
2	Nihal Mohammed Kamal Brake, Andrew Young Brake and Geoffrey William Guy, The Chedington Court Estate Limited, Axnoller Events LTD, CA-2021-000586 and 000587
3	Mrs G Long v British Gas Trading Limited, Case Number: 3327522/2019



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