RADIUS LAW

COMMERCIAL BULLETIN

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Corporate & Commercial

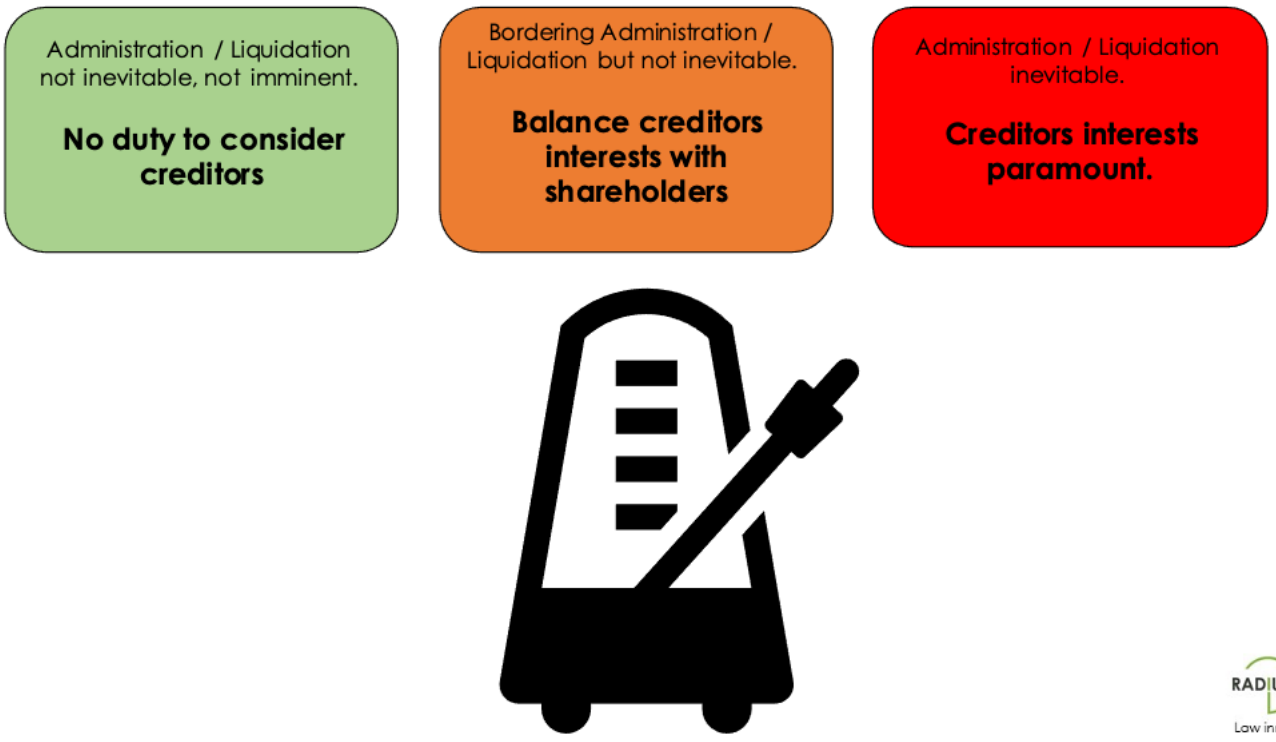
Decisions by sole director companies

In our July bulletin we reported on the High Court ruling[1] that ***decisions of sole director companies may not be valid where they are using Model Articles***. This is because 11(2) of the Model Articles states that the quorum of directors 'must never be less than two'. This ruling has been criticised as many commentators consider that 11(2) is disapplied by the effect of Article 7(2) of the Model Articles which suggests that decisions by sole director companies are nevertheless valid.

A more recent High Court decision[2] concerning a sole director company with Model Articles ruled that ***the sole director's decisions were valid*** but distinguished it from the earlier decision, noting that unlike the earlier case the director of this company had been consistent throughout and there had not been any modifications to the Model Articles.

A duty to creditors?

The Supreme Court has determined[3] that if a company's liquidation or administration is inevitable, directors must rank the interests of creditors as paramount, but if the company is merely bordering on insolvency/ administration the obligation of the directors is only to balance the interests of creditors against those of the shareholders. If liquidation/ administration is neither inevitable nor imminent, directors do not need to consider the interests of creditors.



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Law innovated

Data Security

Reform for UK Small Businesses

The UK Government has redefined the definition of a small business for certain reporting purposes. Since Monday 3rd October ***Businesses with fewer than 500 employees are now exempted from some 'reporting requirements and other regulations'***. Such reporting includes data concerning the executive pay ratio and the gender pay gap.

Claims for Deceit

The case of MDW Holdings v Norville[4] provides guidance to approaching assessment of compensation for deceit.

The Court of Appeal decided that a claimant's entitlement to compensation will vary depending on whether they would have proceeded with the transaction if they had known the truth.

If they would not have proceeded, they will be entitled to the difference between the price paid and the actual value plus any additional losses that they suffer.

If, however, they would have proceeded with the purchase the compensation will be limited to the difference between the price paid and the actual value. They will not be entitled to any additional losses.

Radius Collaborate™

Radius Collaborate™ provides one lawyer for both parties who acts as a neutral mediator:

Learn more

- to explain what needs to be documented;
- to facilitate the discussions – providing options and explaining what's normal
- to document what's agreed – with the necessary legal detail.

Tiktok to face potential £27m Fine.

Marking what will be the largest fine the Information Commissioner's Office (ICO) has ever issued, ***TikTok has been issued a notice of intent to a £27m fine for alleged data protection breaches.***

Though only a provisional measure, the notice of intent provides that TikTok has breached UK data protection laws by processing the data of children under 13 years of age without the appropriate consent from parents, processing special category data without the legal grounds to have done so, and failing to have provided proper information to its users in a transparent and concise manner.

Changes to Personal Data Transfers outside the UK

Since 21st September ***UK businesses are no longer permitted to use the old EU standard contractual clauses (SCCs) for any new arrangements to transfer personal data*** from the UK to jurisdictions without an adequate level of protection under the UK General Data Protection Regulation. Instead, businesses must now use the International Data Transfer Agreement (IDTA) or Addendum to the European Commission's SCCS (UK Addendum). Any such data transfer arrangements that existed before 21st September must be changed to the IDTA, UK Addendum or other lawful data transfer mechanism by the 21st March 2024.

Draft Employee Monitoring Guidance Published by the ICO for Consultation

The UK Information Commissioner's Office ('ICO') has launched a consultation on its draft guidance on monitoring employees at work.

The guidance addresses how to lawfully monitor workers, the use of automated processes in monitoring tools, data protection considerations for different types of monitoring, and the use of biometric data for time and attendance control. The consultation closes on 11 January 2023.

The ICO's new name and shame policy

The ICO announced it has reprimanded seven organisations for repeatedly failing to respond to data subject access requests under Data Protection law. The ICO further provided that it has written to 'thousands of organisations asking that they do more to resolve complaints involving access rights'.

The Information Commissioner, John Edwards, confirmed that ***'naming and shaming organisations that fail to comply is a new way for the ICO to work'*** and 'it's going to become more common'.

'Biggest cyber risk is complacency'

The ICO has issued a fine of £4.4 million to Interserve Group for failing to keep the personal information of its staff secure. The ICO found that Interserve had failed to follow-up on an initial suspicious activity alert, had relied on outdated software systems and protocols, failed to provide adequate staff training, and failed to carry out sufficient risk assessments.

Following this, the UK Information Commissioner stated that ***'the biggest risk businesses face is not from hackers outside of their company, but from complacency within their company'.***

The ASA holds HSBC climate adverts misleading

Two HSBC sustainability-focused adverts have been held by the Advertising Standards Authority to mislead customers. Each of the adverts highlighted both HSBC's involvement with and significant funding to clients of which are transitioning to net-zero emissions but omitted to mention the organisation's considerable contribution to rising emissions.

The HSBC ads in question appeared at bus stops across London and Bristol / Image via Adfree Cities

Employment

ACAS - new guidance on suspension

New guidance concerning suspension from work has been published by ACAS. The guidance provides that the circumstances of each individual disciplinary case should be considered before committing to suspension; it should not be used to discipline employees and should not automatically follow as part of a process. Furthermore, it is emphasised that ***employees should only be suspended if it is believed necessary to protect the person under investigation, other staff, the business, or the investigation.***

Changes to right to work checks

The *temporary adjustments to the right to work process introduced under the Government's response to Covid-19 have been revoked.* Since the 1st October 2022, employers will need to conduct one of three right to work checks before employment can commence: an online check using the Home Office online service, a check using Identification Document Validation Technology through certified digital identity service providers, or a face-to-face manual check using original documentation.

Commercial Law Update - Virtual Session

Learn more

At this month's session Radius Law will give a 'whistle stop' tour of the big commercial and employment law developments in the last 6 months and their impact on business.

30 November, 2022

Employer not liable for horseplay

The Court of Appeal have held in Chell v Tarmac Cement and Lime Limited[5] that an employer was not responsible for a misguided practical joke performed by its employee that left another person with personal injuries. ***The court decided that the risk of injury was not reasonably foreseeable and that holding expectations of an employer implementing a risk assessment process for everyday misbehaviour was unrealistic.***

Competition

Are 'Most Favoured Nation' clauses lawful?

Most Favoured Nation clauses ('**MFNs'**) limit the price at which a supplier can offer a product through alternative sales channels and have been in the spotlight since the Competition and Market Authority ('CMA') levied a ***£17m fine on Compare the Market for its use of wide MFNs in 2020.***

A wide MFN is where a supplier is restricted from charging lower prices through any other sales channel, whereas a narrow MFN only restricts a supplier from charging lower prices on its own website.

Since the Compare The Market decision it has generally been understood that wide MFNs are unlawful whereas narrow MFNs are acceptable. The new UK Vertical Agreements Block Exemption Order (**'VABEO')** emphasised this view by expressly listing wide MFNs as 'hardcore restrictions'.

In August, however, the Competition Appeal Tribunal ('CAT') set aside the CMA's infringement decision on Compare The Market. The CAT said that the ***CMA had failed to show that the wide MFNs had any appreciable anti-competitive effects.***

Businesses cannot however relax and assume that Wide MFNs are now permitted. The actions by Compare the Market pre-date the new VABEO which, as noted above, expressly lists wide MFNs as a hardcore restriction. This means that the CMA is no longer required to demonstrate an adverse effect on competition. Only time will tell whether the CMA adjusts its approach in the light of the CATs ruling.

Price Fixing

The CMA has announced ***fines of over £2 million against Rangers Football Club, JD Sports, and Elite Sports for illegal price fixing.*** Elite sold replica Rangers shirts for £60 but when JD sports undercut Elite's price by £5, the three parties colluded with one another and came to an understanding that JD would raise their retail price to better-align with that of Elite.

Cases, laws, decisions referred to in this Bulletin

1	Hashmi v Lorimer-Wing [2022] EWHC 191 (Ch)
2	Re Active Wear Ltd [2022] EWHC 2340 (Ch)
3	BTI 2014 LLC v Sequana S.A Case ID: UKSC 2019/0046
4	MDW Holdings Limited v James Robert Norville (& Ors) 2022 EWCA Civ 883
5	Chell v Tarmac Cement And Lime Ltd [2022] EWCA Civ 7 (12 January 2022)

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