



# COMMERCIAL BULLETIN

Your guide to the latest legal updates  
from the team at Radius Law.

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## CORPORATE & COMMERCIAL

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### UK Subsidy Control Act 2022 enters into force

Intended to control the giving of subsidies by public bodies across the UK, *the Subsidy Control Act 2022 entered fully into effect* on 4th January. The Government has produced guidance on the new regime on its [website](#).

### Protecting confidential information

If an employee steals business information when leaving a business, the employer is likely to have contractual rights against the former employee and can also make a common law claim for breach of confidence. A recent High Court ruling<sup>1</sup> has provided a helpful clarification that *the employer does not need to demonstrate that it has suffered 'positive harm' or evidence that the defendant used the information*.

### Directors and risking automatic personal liability following liquidation

After entering liquidation, a company's directors are restricted from involvement in the management of new or existing companies that share or have a similar name to that of the company in liquidation. In *PSV 1982 Limited v Langdon*<sup>2</sup>, a director that breached this rule was held to be *'automatically' personally liable for the company's debts*.

### Reflective loss

The Court of Appeal<sup>3</sup> has recently clarified the reflective loss rule.

If a company has suffered a loss because of the actions of a third party, the shareholders of the company cannot make a claim against the same third party for the loss in value of their shareholding if the loss is merely a reflection of the company's loss. This is known as the *reflective loss rule and is principally to stop double recovery against the same third party*.

### Guidance for the drafting and interpretation of audit clauses

The recent case of *Pixdene v Paddington*<sup>4</sup> concerned a dispute about audit rights. The contract between the parties contained a very standard audit clause:

*'During the term of this agreement, a third party auditor may, upon prior written notice to*

*Paddington and not more than once per every two year period, inspect the agreements and any other business records of Paddington with respect to the relevant records or associated matters during normal working hours to verify Paddington's compliance with this agreement'*

Whilst such clauses are usually uncontroversial the parties in this case had a surprisingly long list of disputes about its requirements including who precisely was entitled to inspect the documents; whether documents could be redacted to hide confidential information and whether copies could be taken away.

The Court ruled that:

- Pixdene's auditor must be truly independent and Pixdene must meet the costs of any copies taken by the auditor;
- Pixdene was not entitled to inspect the documents provided to the independent auditor;
- Paddington could reasonably determine the location of the audit;
- Paddington must provide the auditor with documents it requested;
- Paddington could only redact documents that were legally privileged.

The court's interpretation will be of benefit to any party seeking to include an audit clause in their contract and, *should a party wish to vary its right to audit from the view of the court, they should expressly state the differences* in their contract.

## 'Good faith' clauses must be interpreted contextually

Contracts often include clauses to act in good faith, but what does this mean?

A recent Court of Appeal<sup>5</sup> case has stated that a Good Faith clause has a core duty of honesty and a party is likely to be in breach if its conduct is '*commercially unacceptable to reasonable and honest people*'. Beyond that, the Courts have resisted setting any minimum standards to be applicable to all good faith clauses. Instead, the Courts wish to retain flexibility to interpret such clauses in the context in which they are used.

## Non-contractual performance may be sufficient to mitigate force majeure

The Court of Appeal<sup>6</sup> has recently overturned a decision of the Commercial Court, providing that payment in an alternative currency would have overcome an event of force majeure, even where the terms of the contract stipulated a specific currency.

The decision indicates that an event of force majeure can be 'overcome' if the contractual obligations are achieved and its adverse consequences are completely avoided, despite performance deviating from the terms of the contract.

## 'Time scarcity - from cause to solution' - Virtual Session

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Going far beyond traditional time management, this interactive session provides a new lens to look at the underlying challenges, from our neurology to technology and provides new frameworks and tools to address them.

25 January, 2023

[Learn more](#)

### COMPLIANCE

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#### The SFO lands a first.

The Serious Fraud Office has successfully prosecuted a corporate for bribing another person under section 1 of the Bribery Act 2010 for the first time. Receiving the highest ever penalty following a corporate conviction, Glencore Energy UK, a UK subsidiary of the global mining and trading Group, Glencore plc, was sentenced and ordered to pay £281 million.

### DATA SECURITY

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#### The ICO publishes draft guidance on employers' handling of data concerning workers' health

The Information Commissioner's Office (ICO) has released [draft guidance on the handling of data concerning workers' health](#). The draft guidance does not introduce any new legal requirements but provides practical and straightforward guidance for employers. Highlighting both the sensitive nature of the information and that the processing of such personal data may be highly intrusive, the draft guidance acknowledges the many circumstances in which employees' health information needs to be processed and provides for special rules that must be adhered to when processing such data. The completed guide is expected in the early part of this year.

#### The ICO has revised its guidance on international data transfers

The ICO has introduced new [guidance on international transfers](#), created a [new section on transfer risk assessments \(TRA\)](#) and released a [new TRA tool](#). Transfer risk assessments are required before transferring personal data from the UK<sup>7</sup> to countries that

have not been approved by the UK as having adequate data protection standards.

## The ICO introduces new direct marketing guidance

The ICO has introduced [\*new guidance concerning organisations' direct marketing by email and live calls\*](#). There are no substantial changes from previous guidance but some useful added clarity. Until the final version of the draft Direct Marketing Code of Practice is published by the ICO, this guidance will serve to add clarity to the marketing rules.

## Compensation for distress resulting from a personal data breach

In a recent case a politician, Mr Driver, *has been awarded just £250 following a data breach*<sup>8</sup>. This concerned the CPS' release of information to a member of the public about a case against Mr Driver. Mr Driver alleged that he had suffered significant distress because of the CPS' communication. The Judge however concluded that as the information was already in the public domain the CPS communication could not have "... caused him anything like the level of anguish which he claimed." This case contributes to the developing court guidance as to the level of damages a claimant can expect in low level data breach claims.

## ADVERTISING & MARKETING

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### The CMA begins investigations into 'dark patterns'

Following its introduction of the Online Choice Architecture programme and focus on manipulative online selling practices, also known as 'dark patterns', the Competition and Markets Authority (CMA) has launched its first investigation. For its use of pressure-selling tactics, including countdown timers and urgent time-limited offers, in advertisements, the CMA subjected Emma Sleep to investigation.



Sarah Cardnell, the interim Chief Executive of the CMA, described the investigation into Emma Sleep as *'just the start' of the CMA's work on online misleading claims* and encouraged companies to consider their 'own practices and ensure they're in line with the law'.

## EMPLOYMENT

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### Low-paid workers cannot be prevented from working elsewhere by their employer

Under new regulations<sup>9</sup>, contractual terms prohibiting individuals from working elsewhere or from doing so without the consent of their employer are *no longer enforceable against low-income workers*. The Regulations apply to those with low earnings (currently £123 a week or less).

### Previous settlements cannot settle unknown future claims

The Employment Appeals Tribunal has provided that *an age discrimination claim can proceed, despite a previous age discrimination claim between the same two parties being settled*, because the claimant did not have knowledge of the second claim at the time of the initial agreement. Referencing legislation, the EAT held that settlement agreements are required to identify 'the particular complaint' and therefore *any statements that try to generally settle other claims will not be enforceable*.

### The justification defence to disability discrimination

The EAT has agreed that a Council's decision to dismiss an employee was fair and justified. The employee in this case, a social worker, had breached the Council's code of conduct. It was acknowledged that the conduct was influenced by the employee's autism, but nevertheless the EAT ruled that *the employee had 'breached boundaries' of the legitimate aims of the Council*.

### Substantial compensation awarded in whistleblowing cases

The Supreme Court in *Jhuti v Royal Mail Group*<sup>10</sup> *has awarded substantial damages to Ms Jhuti. Ms Jhuti had made a 'whistleblowing complaint'* but was then subjected to a 'campaign of bullying, intimidation and harassment' and was deemed automatically unfairly dismissed, preventing the employee from ever working again.

The Supreme Court ordered Royal Mail to pay the employee loss of earnings up to a retirement age of 67 with an annual 2% pay increase, £55,000 for personal injury, £40,000 for injury to feelings and £12,500 in aggravated damages and, having determined that Royal Mail unreasonably breached the ACAS Code of Practice on Disciplinary and Grievance procedures, awarded an uplift of 0.5%

## Cases, laws, decisions referred to in this Bulletin

1	Weiss Technik UK Ltd and others v Davies and others [2022] EWHC 2773 (Ch)
2	PSV 1982 Limited v Langdon [2022] EWCA Civ 1319
3	Burnford & Ors v Automobile Association Developments Ltd Burnford & Ors v Automobile Association Developments Ltd [2022] EWCA Civ 1943
4	Pixdene v Paddington and Company [2022] EWHC 2765 (IPEC)
5	Re Compound Photonics Group Ltd [2022] EWCA Civ 1371
6	MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406
7	Article 46 of the UK General Data Protection Regulation
8	Driver v CPS [2022] EWHC 2500 (KB)
9	Exclusivity for Zero Hours Workers (Unenforceability and Redress) Regulations 2022
10	Jhuti v Royal Mail Group [2019] UKSC 55



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In this working Five key points when negotiating heads of terms and leases

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