



# COMMERCIAL BULLETIN

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

MARCH 2023

# Nº 76

## CORPORATE & COMMERCIAL

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### Unjust enrichment ‘mends no one’s bargain’

A recent case<sup>1</sup> considered both **implied terms** and **unjust enrichment**. It concerned a deal struck by Mr Barton and Foxpace where Foxpace agreed to pay Barton £1.2m if he sold a property for £6.5m or more. Barton agreed the sale at £6.5m but the price was reduced to £6m before completion. Foxpace refused to pay Barton a fee as the £6.5m sale price had not been achieved. Barton sued. Ultimately, the Supreme Court ruled in Foxpace’s favour. Although Foxpace had an unexpected windfall by avoiding the obligation to pay Mr Barton a fee, there was no claim for unjust enrichment as the contract was clear - payment was only due on a sale of £6.5m or more. Mr Barton’s request for the court to imply a term stating what he should be paid if the sale was below £6.5m also failed.

The Court stated ‘it is not enough for the court to consider that the implied term expresses what would have been reasonable for the parties to agree to. The court must be satisfied that it is what the contract actually means’.

### Exclusion and limitation clauses must be reasonable.

Under the Unfair Contract Terms Act 1977 (UCTA), a party to a business-to-business **cannot limit or exclude liability for breach of terms implied by statute unless that limitation or exclusion is ‘reasonable’**. A recent court decision<sup>2</sup> suggests that equality in bargaining position, a prior course of dealings, and no evidence to suggest a party failed to understand or consider the relevant provision, cumulatively, make for a ‘reasonable’ clause.

## DATA SECURITY

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### Security of connected products

Consumer connected devices like smart TVs and home assistants, are often password protected with default, easy to hack passwords. The UK government previously issued a voluntary [Code of Practice for Consumer Internet of Things Security](#), but has now decided to implement the principles of this Code into law with the Product Security and Telecommunications Infrastructure Act (PSTI Act)<sup>3</sup> which became law in December.

The exact nature of the security requirements will be published in secondary legislation, but are likely to align with the standards in the Code of Practice particularly:

- a ban on universal default passwords;
- a requirement to implement a means to manage reports of vulnerabilities;
- a requirement to be transparent about how long, at a minimum, the product will receive security updates.

### Facebook and Instagram owner Meta has been fined €390 million by the Irish data regulator.

Facebook and Instagram owner Meta has been fined €390 million by the Irish data regulator. The regulator decided that the way in which the company obtained consent for its use of personal data breached the law.

**The consent to use customer data was buried in the company's terms and conditions and did not meet the requirements of being freely given consent as users were given no option to decline.** The decision also raised concerns as to transparency in determining that Meta was not clear enough with its users about how and why their personal data was used.

## COMPETITION

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### The CMA brands no-poaching agreements as anti-competitive

The UK competition regulator, the Competition and Markets Authority ('CMA') has reminded employers in [guidance published in February](#) that no-poaching agreements, wage-fixing agreements, and the sharing of information concerning terms and conditions offered to employees can be unlawful.



The guidance recommends businesses, legal advisers and recruiters follow these steps:

- Understand how competition law applies to no-poaching and wage-fixing agreements;
- Don't agree with a competitor to fix wages;
- Don't agree with a competitor not to approach or hire each other's employees;
- Don't share sensitive information about their business or employees with a competitor;
- Provide recruitment staff with training on competition law and how it applies in the recruitment context;
- Ensure solid internal reporting processes are in place, and that staff are aware of these and how they can use them.

### Competition and Markets Authority has its territorial wings clipped.

The CMA has the right for the purposes of investigating competition law breaches, to require a person or business to produce information which the CMA considers relates to the investigation.

**A recent Competition Appeal Tribunal (CAT) decision<sup>4</sup> however has restricted the CMA's investigation powers to a person or business with a territorial connection to the UK.**

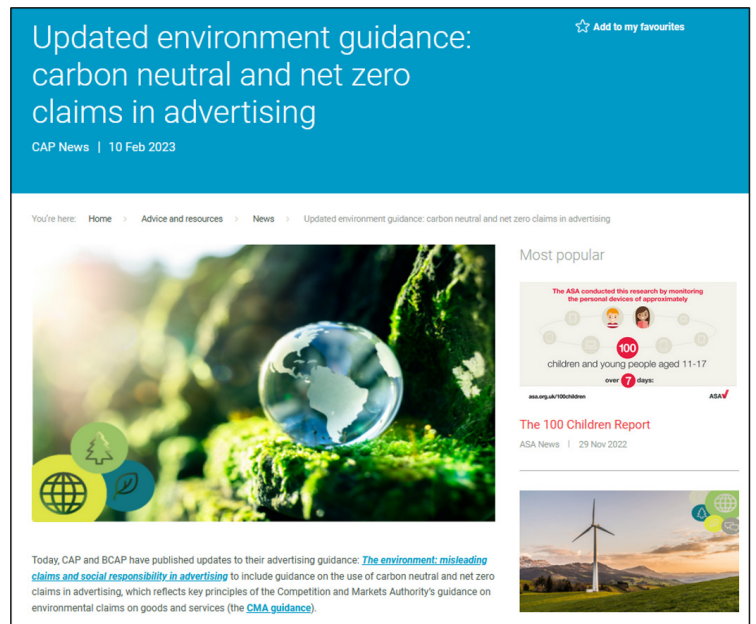
The CATs decision related to appeals by Volkswagen AG and BMW AG that are domiciled in Germany and that do not have a no branch or office in the UK. Accordingly, they were not required to comply with the information requests.

## ADVERTISING & MARKETING

### ASA updated guidance: Carbon neutral and net zero claims in advertising.

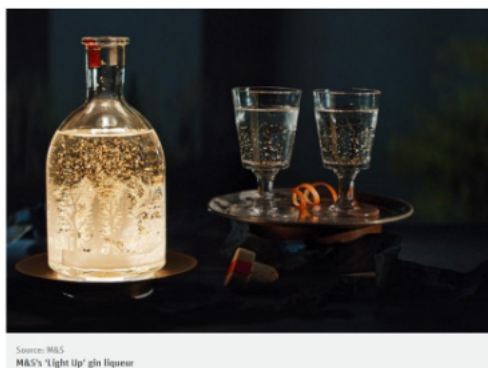
Drawing on key principles of the Competition and Markets Authority guidance, the Advertising Standards Authority (ASA) has [updated its guidance](#) concerning the use of carbon neutral and net zero claims in advertising. Key points include:

- Explain the basis of carbon neutral, net zero or similar claims.
- Claims based on future goals relating to reaching net zero or achieving carbon neutrality must be based on a verifiable strategy to deliver them.
- Offsetting claims must comply with the usual standards of evidence for objective claims set out in the ASA guidance and provide information about the offsetting scheme used.
- Where it is necessary to include qualifying information about a claim, it must be sufficiently close to the main aspects of the claim for consumers to be able to see it easily and take account of it before they make any decision.



### Aldi's 'Infusionist' line infringes design registered by M&S

If a design is registered and the **design of another product fails to vary its 'overall impression' on informed consumers, the registered design is infringed**. The Court has provided that the bottles created by Aldi for their Christmas-themed 'Infusionist' line of gin drinks infringed the registered design of the festive bottles M&S developed for their own gin-based drinks.<sup>5</sup>



Marks & Spencer



Aldi

## Broader protections for ‘well known’ brands

Intended to expand protections and grant holders of unregistered but ‘well-known trade marks’ the right to prohibit use or registration of a conflicting mark on dissimilar services and goods, **a new regulation, amending section 56 of the Trade Marks Act 1994,<sup>11</sup> came into force on 27th of December, 2022.**

## The CMA launches new greenwashing investigation

In a press release on 26th January, the **Competition and Markets Authority (CMA) announced an expansion of ongoing work into greenwashing** and provided for the launch of a new investigation into the accuracy of green claims made about household essentials – such as food, drink and toiletries – to make sure shoppers are not being misled.

Sarah Cardell, the CMA’s Chief Executive, has provided: ‘our work to date has shown there could be greenwashing going on in this sector, and we’ll be scrutinising companies big and small to see whether their environmental claims stack up. Now is a good time for businesses to review their practices and make sure they’re operating within the law’.

### Annual Conference:

#### Business & Law Update for the Automotive sector

Radius Law and The Motor Ombudsman are coming together to host their Annual Conference – Business & Law Update for the Automotive sector.

**03 May, 2023**

[Book Now](#)



## CONSUMER

### The Consumer Duty is not a ‘re-expression of treating customers fairly’

The Financial Conduct Authority (FCA) has expressed concern that some firms are assuming that the Consumer Duty is a ‘re-expression of treating customers fairly’.

The FCA have indicated that, in order to apply the Consumer Duty by the deadline on 31st July 2023, firms’ attention should be paid specifically towards:

- Prioritising poor-outcomes risk reduction;
- Collaborating and communicating with distributors within their chain; and
- Establishing times for reviews and providing evidence that the Duty is embedded both in the culture of the firm and in business growth strategies.

## EMPLOYMENT

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### Disability discrimination and dismissal for poor attendance

The Employment Appeal Tribunal has recently held that **dismissal for poor attendance or absence from work by virtue of a disability can be justified.**

For a claim under section 15 of the Equality Act 2010<sup>6</sup> to succeed, following ‘something arising in consequence of the employee’s disability’, the employer must have treated the employee ‘unfavourably’. Despite this, the employer in this case<sup>7</sup> successfully demonstrated that the dismissal of the employee for long-term sickness was a proportionate means of maintaining both an efficient use of resources and an effective and fair sickness management process.

### Is there a reasonable expectation of privacy in private WhatsApp messages found at work.

In a recent case<sup>8</sup>, the High Court has stated that whether an individual has a **legitimate expectation of privacy for personal messages stored on a work device will depend on the circumstances**, including the nature of their relationship with the message recipients.

In this case the messages accessed by the employer were clearly intended to be private as they included information about the employee’s health and sex life. The employer should have immediately notified the employee and returned the messages, even where tribunal proceedings were ongoing at the time.

### Menopause and the workplace

The government [has rejected a call to make the menopause a new protected characteristic](#) under the Equality Act 2010 and will not introduce a new duty to make reasonable adjustments for menopausal women. The government has, however, accepted some of the [Women and Equalities Committee’s recommendations](#), including:

- introducing a new ‘Menopause Employment Champion’ who will report to DWP ministers at regular intervals
- developing ‘strengthened guidance for employers to support disabled people and those with long term health conditions in the work environment.’
- updating flexible working laws to make flexible working a day one right, allow employees to make two flexible working requests within a 12-month period (rather than only one) and reduce the time employers have to respond to two months (from three months).

## Radius Collaborate™

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

- 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.

[Learn more](#)

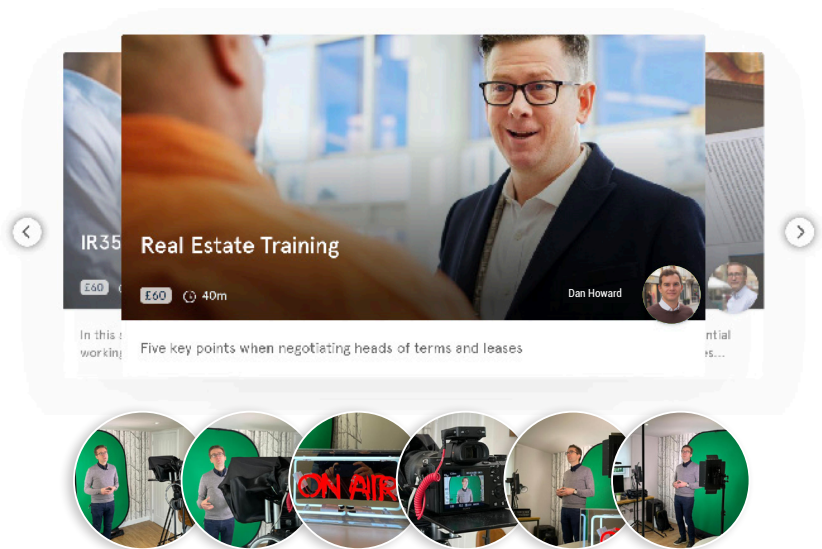
## Cases, laws, decisions referred to in this Bulletin

1	Barton v Morris [2023] UKSC 3
2	Last Bus Ltd (trading as Dublin Coach) v Dawsongroup Bus and Coach Ltd [2022]
3	Product Security and Telecommunications Infrastructure Act 2022
4	UK Competition Appeal Tribunal, Volkswagen / BMW, Case No. 1574/10/12/228
5	Marks and Spencer Plc v Aldi Stores Ltd [2023] EWHC 178 (IPEC)
6	Equality Act 2010
7	McAllister v Revenue and Customs Commissioners [2022] EAT 87
8	FKJ v RVT and others [2023] EWHC 3 (KB)

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