RADIUS LAW

COMMERCIAL BULLETIN

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

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COMMERCIAL

‘Sole and Exclusive Remedy’ Drafting Stands

Contracts sometimes specify a remedy for a breach of contract is the ‘sole and exclusive remedy’. This was the case in a recent haulage services contract considered by the High Court[1] which stated that a failure to buy a certain volume of haulage services provided the haulier with the ‘sole and exclusive remedy’ to levy a surcharge.

The haulier however was under the *common misconception that, despite the ‘sole and exclusive remedy’ provision, it would still be entitled to terminate the contract.* The High Court rejected the haulier’s argument that it had a right to terminate.

When Consent is Required to Assign Contracts

Most contracts include standard provisions that are often referred to as the ‘boiler plates’. *The boiler plates are often wrongly overlooked and can have a significant impact.* Amongst the boiler plates is usually a provision that states whether the contract can be assigned to another party.

In a case recently considered by the High Court[2] the contract stated that the contract could not be assigned without the consent of the other party. One party had insured against the risk of a contract delay and when a delay happened, claimed on the insurance. The insurance company then attempted to recover its losses by pursuing the other party to the contract that was responsible for the delay. The insurance company’s claim was unsuccessful. The insurance company did not have the right to sue under the contract because it was not a party to the contract and the assignment clause prevented it from being assigned.

Binding Agreements Resulting from Contract Negotiations

Often parties start performing services before their contract has been finalised. In a recent case a financial advisory firm provided services over 11 months but, despite extensive contract discussions, did not have its engagement formalised with a signed contract.

The Court decided that *no binding agreement had resulted from the contract negotiations* because both parties, who had been represented by law firms in the contract negotiations, had been clear that they expected their relationship to be subject to a formal signed engagement letter.

The Court did however agree a small consolation for the financial advisory firm; it was entitled to some fees for the services it had provided as otherwise their client would be ‘unjustly enriched’ for the services that had been provided.

Engaging During the Notice Period

A recent High Court case[4] has confirmed that parties should continue to engage during a termination notice period. In this case Volkswagen Group UK (‘VWG’) had terminated a non-exclusive contract with a car rental company for the supply of rental cars.

In the notice period VWG stopped providing the rental company its booking master sheet which provided information about its need for rental cars and the rental company was therefore unable to offer its rental cars for those opportunities.

Whilst VWG would not have been obliged to accept any of the rental company’s offers of cars, the Court held that

VWG was, nevertheless, in breach of the contract. The contract terms stated that 'VWG engages the Provider to provide the services to VWG'. *VWG's decision to stop providing the master booking sheet left VWG in breach of its obligation to engage the rental company in the provision of the services.*

A 'material breach'?

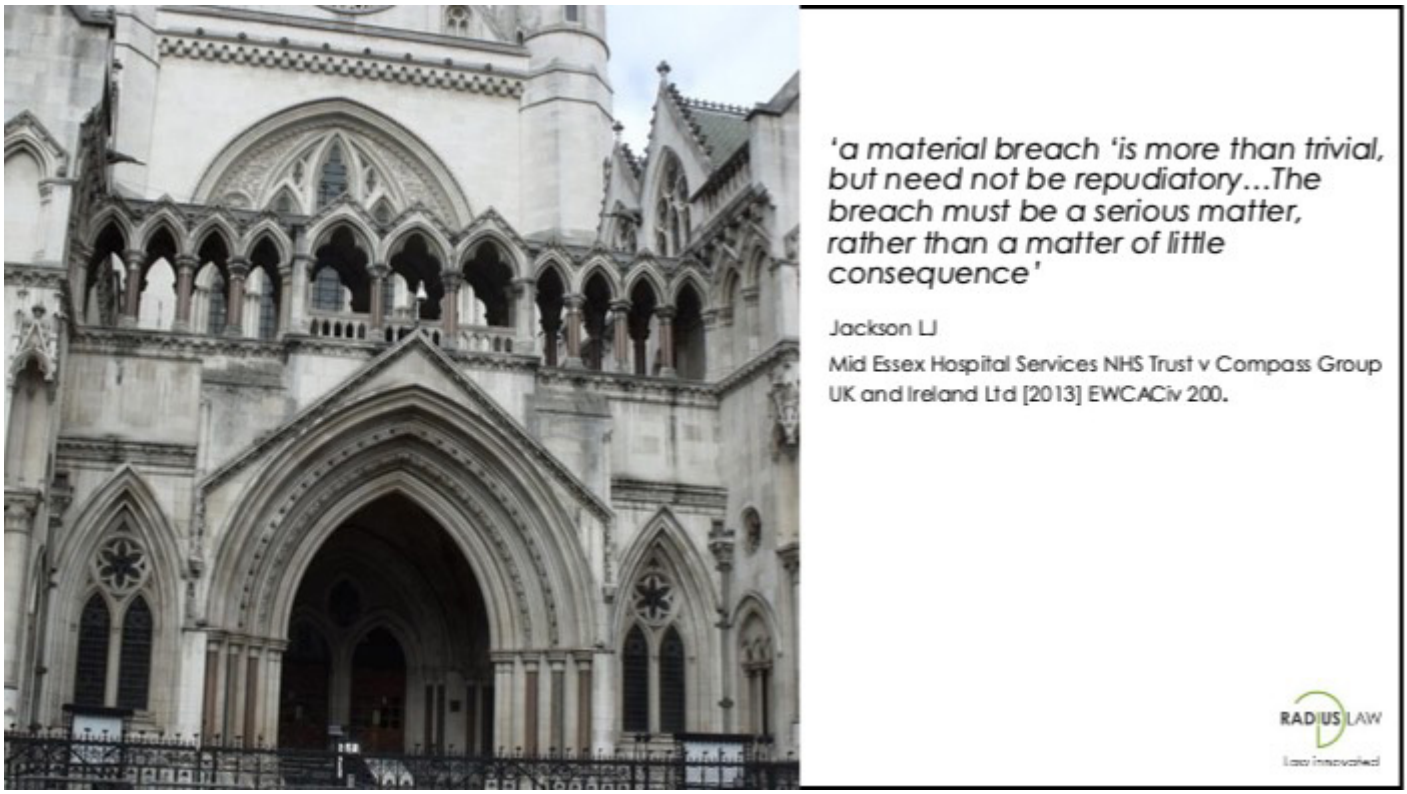
Contracts sometimes contain specific provisions entitling a party to terminate where a 'material breach' has occurred – but what is a 'material breach'?

The recent decision in RiverRock v Harnack[5] provides a useful overview of the law on what constitutes a 'material breach'

In this case RiverRock sought to terminate a contract with its service provider for material breach because the service provider had been struck off from Companies House due to a failure to provide certain documentation. The Court decided that this was not a material breach as it could be easily corrected and would have no consequence on RiverRock.

The Court acknowledged that 'the concept of a material breach has not been easy to define' and referred to Jackson LJ who stated (in the leading Court of Appeal case on material breach[6]):

'a material breach 'is more than trivial, but need not be repudiatory...The breach must be a serious matter, rather than a matter of little consequence'.



ENVIRONMENTAL

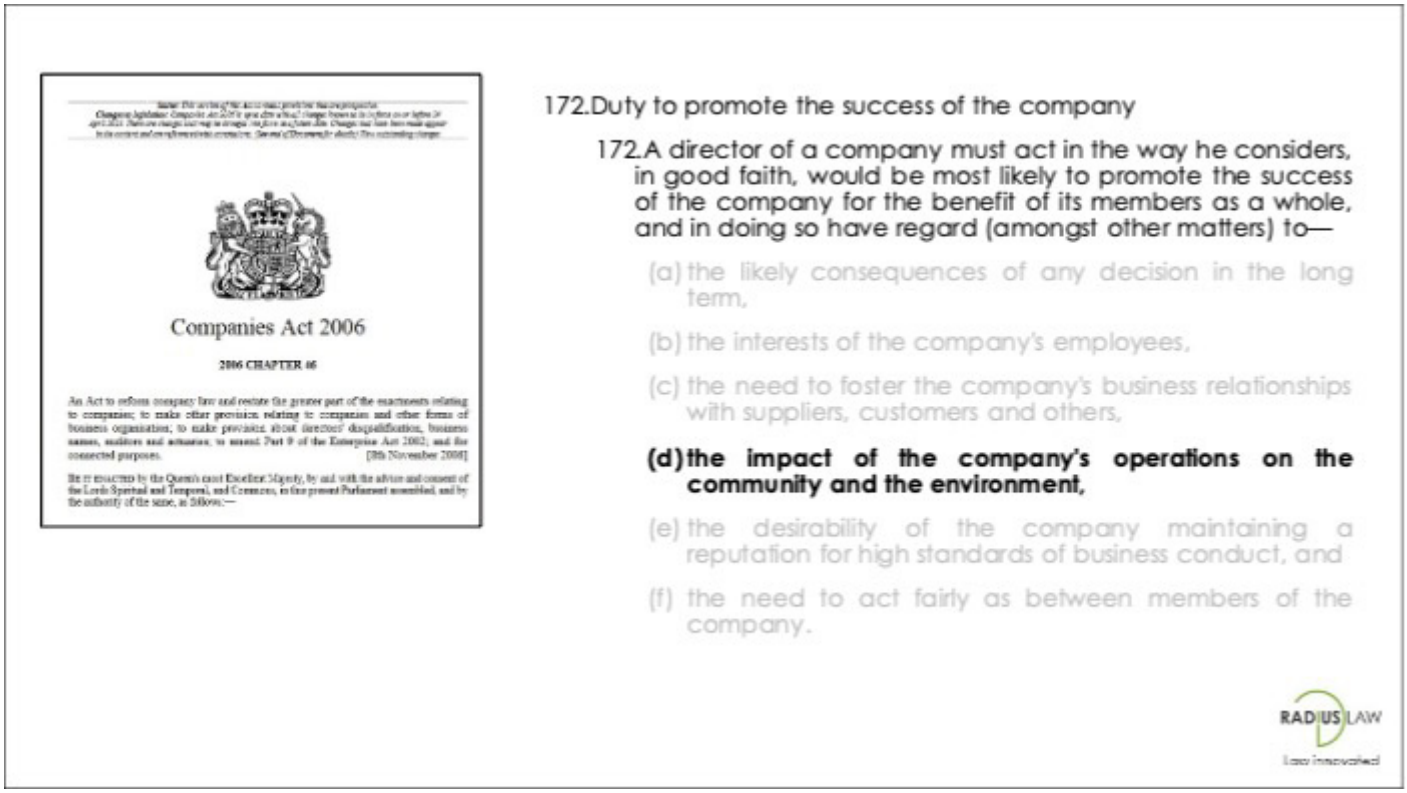
When Competition Law Meets Sustainability

Collaborating with competitors can be dangerous and may breach competition law. New draft guidance from the Competition and Markets Authority ('CMA') provides comfort that some collaborations with competitors are permitted where they provide environmental and sustainability benefits. 'Acceptable' agreements may include:

- phasing out or withdrawal of non-sustainable products or processes;
- creation of industry standards that promote sustainability;
- pooling sustainability credentials on suppliers or customers;
- industry-wide efforts to tackle climate change; and
- co-operation on sustainable R&D.

Derivative Climate Change Action Targets Shell's Board of Directors

ClientEarth has issued proceedings against Shell's eleven Directors for allegedly failing to ensure the company was protected against risks relating to climate change. ClientEarth's claim is framed on section 172(1)(d) of the Companies Act which requires a director to have specific regard to '...the impact of the company's operations on the community and the environment'



Companies Act 2006

2006 CHAPTER 46

172.Duty to promote the success of the company

172.A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

CONSUMER

Online dark patterns

We mentioned in our January Bulletin that the CMA launched it campaign against manipulative online selling practices also known as 'dark patterns' (e.g. countdown timers and urgent time-limited offers, in advertisements). The CMA has since delivered an open letter to online businesses warning against such activity and launched a whistle blowing programme for consumers 'to call it out and report it'.

New Digital Markets, Competition and Consumers Bill

The Competition and Markets Authority (CMA) has announced draft legislation for a new Digital Markets, Competition and Consumers (DMCC) Bill. It's possible that this will become law before the end of the year. The Bill will:

- bans people from receiving money or free goods for writing glowing reviews;
- make it easier for consumers to exit subscription contracts;
- grant the CMA direct enforcement powers for breaches of consumer laws; and
- provide penalties of up to 10% of global turnover for breaching consumer law.

EMPLOYMENT

High profile cases on Off-Payroll Working Rules (IR35)

In many organisations some staff are regular employees, but others are contracted through an intermediary (often a company that they have established). This usually reduces the tax ultimately payable. The shake up in the IR35 rules (previously reported by us in our March 21 and March 22 Bulletins) in most cases makes the ultimate employer liable for the tax shortfall where the individuals engaged through an intermediary are akin to employees.

There are, however, lots of detailed and technical rules. Some of those technical rules were examined by the

First Tier Tribunal (FTT) in the recent Gary Lineker case[7]. Lineker's sports presenting services to the BBC and BT Sport were provided through the partnership Lineker had established with his former wife and he had signed the contracts himself thereby acting as the principal and making it a contract directly between him (as the individual) and the BBC/BT Sport (as the client). The FTT having examined the principles set out in the *Partnership Act 1890* found that unlike a limited company, *a partnership does not have a separate legal personality* and therefore there is no intermediary and accordingly *IR35 cannot apply*. HMRC intends to appeal.

In another high-profile case8, Eamonn Holmes was found by the FTT to be employed by ITV for tax purposes under IR35, under a contract between Holmes' limited company and ITV.

Neurodiversity and discrimination arising from a disability

The claimant had *'meltdowns' at work*, with loud and angry behaviour, which led to disciplinary proceedings. The EAT upheld an employment tribunal's findings that the *claimant's conduct* when he came into conflict with co-workers *was not something arising in consequence of his disabilities* (namely dyslexia, Asperger's Syndrome and left sided hearing loss) but because he had a 'short temper' and *'he resented being told what to do'*.

The disciplinary proceedings did not, therefore, amount to discrimination arising from the disabilities.

When dealing with *inappropriate behaviour* by a disabled employee, employers must first *understand the condition* and any medication the employee takes by obtaining information from the employee and advice from a medical professional. They can then decide upon the appropriate action to take: make reasonable adjustments (e.g. coaching) or start a disciplinary process.

Government publishes voluntary guidance for employers on Ethnicity Pay Reporting

The guidance includes advice on ethnicity pay reporting.

- collecting ethnicity pay data for employees
- how to consider data issues such as confidentiality, aggregating ethnic groups and the location of employees
- the recommended calculations and step by step instructions on how to do them
- reporting the findings
- further analysis that may be needed to understand the underlying causes of any disparities
- the importance of taking an evidence-based approach towards actions

Organisations who choose to report on ethnicity pay gap should follow the Government's newly issued guidance *on taking positive action in the workplace*, to ensure compliance with the law.

ACAS guidance on reasonable adjustments for mental health at work

The guidance is *non-statutory* and is there to support employers and employees in respect of making reasonable adjustments for those suffering from mental health issues. The guidance:

- offers guidance on responding to mental health conditions
- provides examples of possible reasonable adjustments
- sets out the process it recommends employees and employers follow when considering reasonable adjustments
- recommends employers have a reasonable adjustment policy

Cases, laws, decisions referred to in this Bulletin

1	James Kemball Ltd v "K" Line (Europe) Ltd [2022] EWHC 2239 (Comm)
2	Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2022] EWHC 3287 (Comm)
3	Fenchurch Advisory Partners LLP v AA Ltd (formerly AA PLC) [2023] EWHC 108 (Comm)
4	AMT Vehicle Rental Ltd v Volkswagen Group United Kingdom Ltd [2022] EWHC 2934 (Comm)
5	RiverRock European Capital Partners LLP v Harnack [2022] EWHC 3270 (Comm),
6	Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200
7	Lineker and Bux trading as Gary Lineker Media v Revenue and Customs Commissioners [2023] UKFTT 340 (TC)