RADIUS LAW

COMMERCIAL BULLETIN

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

SEPTEMBER 2023

Nº 79

CORPORATE & COMMERCIAL

The Court Deems 'Charges Unlawfully Avoided' are Loss of Profits

The High Court has recently ruled[1] on a dispute between Virgin and EE.

EE claimed that Virgin had breached an exclusivity agreement and had therefore lost income that it would have otherwise earned.

Virgin denied breaching the exclusivity provisions and said that even if it had breached the contract, EE's loss was a loss of profits claim which was excluded under the contract terms.

The relevant clause stated:

34.5 neither Party shall have liability to the other in respect of:

(a) anticipated profits, or

(b) anticipated savings.

EE argued that its claim was 'charges unlawfully avoided' rather than a loss of profits claim. The Court disagreed ruling that if EE had a loss it was a loss of profits claim and those losses were excluded. The Court added that it thought ***EE's argument was 'fanciful'.***

Does novation require written consent?

Novation is the act of changing the contracting parties to a contract.

In a recent case[2] two parties, Octave and Musst, entered into a contract. Under the contract Octave owed fees to Musst. Octave was subsequently replaced with another company, Astra. A novation document was produced but was never signed. Nevertheless, Astra and Musst proceeded on the basis that the contract had been novated from Octave to Astra. Musst issued invoices to Astra and they were paid. When further invoices were issued, Astra refused to pay claiming that the contract had never been novated and Astra was not therefore liable to make payments to Musst. Astra argued that the original contract terms included:

- a no oral variation clause – which required any variation to be agreed in writing and
- a no dealing clause – which prohibited any assignment or transfer of the contract without the consent of both parties.

The Court of Appeal disagreed with Astra and ruled the contracts had been novated from Octave to Astra:

- the no oral variation clause was not relevant as this was a novation and not a variation; and
- in relation to the no dealing clause, the Court decided the obligation to provide consent for any transfer had been waived by the parties conduct.

Insolvent companies – the Creditor duty.

We reported in our November Bulletin that the Supreme Court held that ***only when liquidation or administration is inevitable must a company rank the interests of creditors as paramount***[3].

In a recent case[4], the High Court considered circumstances where the solvency of the company was dependent on it successfully defending a HMRC challenge to a tax scheme that it had implemented.

The Court ruled that where a company is faced with a claim of such a size that its solvency is dependent on successfully challenging it, then ***the creditor duty arises once the directors know or ought to have known that their challenge has a real prospect of failing.***

In this case the Court decided that the directors had continued to trade beyond the time that it was obvious that there was a real prospect of their challenge failing. Accordingly, they had breached their directors' duties and could be held personally liable to the creditors.

ADVERTISING & MARKETING

ASA Update Guidance: Misleading Environmental Claims and Social Responsibility

We reported in our March Bulletin that the Advertising Standards Authority (ASA) updated its guidance concerning the use of carbon neutral and net zero claims in advertising. The regulator has since updated its guidance on misleading environmental claims and social responsibility. Key points provide:

- the basis of environmental claims should be clear so as to not mislead the audience;
- positive environmental claims that are specific in nature but exaggerate a business's overall environmental credentials are misleading;
- consumers' level of knowledge, including their understanding of 'carbon neutral' and 'net zero', should not be assumed;
- claims are misleading if they cannot be substantiated adequately;
- businesses are responsible to both consumers and society, so environmental claims should be prepared accordingly.

The CMA Formally Address Emma Sleep's 'Dark Patterns'

We reported in our January Bulletin that the Competition and Markets Authority (CMA) launched its first investigation concerning manipulative online selling practices into Emma Sleep (including misleading countdown timers and urgent time-limited offers). In the next step in this investigation the CMA has written to Emma Sleep ***demanding that it undertakes to change its online sales practices or face Court action.***

To further address concerning online sales practices, the Government has proposed an amendment to the practices that will always be considered to be unfair in the new Digital Markets, Competition and Consumers Bill

(DMCC) to prohibit falsely stating that a product will only be available for a limited time.

We anticipate that the DMCC will become law next year.

CONSUMER

The FCA's Consumer Principle Goes Live

We reported in our March Bulletin that firms must apply the Financial Conduct Authority's Consumer Principle by the 31st July 2023 deadline. Having now entered into force, the FCA requires regulated firms to act to deliver good outcomes about products and services, price and value, consumer understanding, and consumer support, for customers. To comply, FCA regulated firms must adhere to the 3 cross-cutting rules:

- act in good faith;
- avoid foreseeable harm, and
- support customers to pursue their financial objectives.

ENVIRONMENTAL

The Court Maintains its Position on ClientEarth's Pursuit of Shell's Directors

In both our May Bulletin and July Bulletin we reported on ClientEarth's continued efforts to claim against the directors of Shell for their alleged mismanagement of risk the business poses to the climate. At an oral hearing[5], the Court again dismissed ClientEarth's application5. ClientEarth has since announced their intention to appeal the decision.

DATA SECURITY

Data security requirements.

The UK GDPR requires organisations:

- to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk (Art 32(1));
- to have a process for regularly testing, assessing and evaluating the effectiveness of those measures (Art 32(1)(d).

In a recent case the Information Commissioner Office ('ICO') has reprimanded an organisation - New Media World ('NMW') as it could not provide evidence to show the security measures in place, nor that the measures had been tested. NMW had relied on the assurances of third parties and employees, without proof of any contracts being in place.

The ICO has recommended that organisations consider its technical security checklist and the NCSC guidance that recommends monthly scanning.

The EU Commission Adopt EU-US Adequacy Decision

The ***EU has approved a new means of transferring personal data to the US***, the Data Privacy Framework ('DPF'). In practical terms it means it will be simpler for EU organisations to transfer personal data to U.S. organisations that have joined the DPF. There will no longer be a need to implement standard contractual clauses, nor to undertake a 'transfer impact assessment'.

This decision does not change things for UK businesses but Joe Biden, and Rishi Sunak, have announced that ***a shared 'commitment in principle' to establish a UK-US 'data bridge'*** has been reached.

A word of caution, the scheme may not last long as it is already subject to a legal challenge.

EMPLOYMENT

Employment Businesses Cannot Supply Temporary Workers to Cover for Striking Employees

In 2015 the Government consulted on a proposal to remove the prohibition on using agency staff to cover for employees taking part in industrial action, but the proposal was abandoned. In June 2022, the Government revoked the prohibition without further public consultation.

Following a challenge by thirteen trade unions, the High Court[6] found that the ***2022 Regulations[7] which revoked the prohibition are illegal and should be quashed.***

The High Court held:

- The Government failed to comply with a statutory duty to consult before making the 2022 Regulations and could not rely on the 2015 consultation.
- It disagreed with the Government's argument that it was "highly likely" to have made the same decision had another consultation been run in 2022.
- There was no evidence that the Government had considered the responses to the 2015 consultation when making the 2022 Regulations.

The Government will not appeal the decision. As of 10 August 2023, employment businesses cannot supply temporary workers to cover for employees involved in industrial action.

Consultation on the Strikes (Minimum Service Levels) Act 2023

The Department for Business and Trade (DBT) has launched a ***consultation*** ***on the reasonable steps trade unions should take when implementing minimum service levels during strikes in certain public services, as required under the new Strikes (Minimum Service Levels) Act 2023[8] (the Act).*** The consultation closes on 6 October 2023.

The TUC plans to challenge the validity of the Act, so watch this space.

Balancing Conflicting Beliefs

Employers must not dismiss employees because of, or for a reason related to their gender critical beliefs. Employers may, however, dismiss employees for inappropriately manifesting the beliefs.

Courts must balance the employee's freedoms to hold the belief against the legitimate interests of the employer and others.

Recently, the EAT listed possible factors to consider when determining whether the manifestation of the belief was inappropriate, including:

- The content, tone and extent of the manifestation
- The impact on the employer's ability to run its business
- Whether the views might be seen as representing the views of the employer (and the associated reputational risk)
- Whether the employer could have responded in a less intrusive way.[9]

TUPE: Employee's Right to Participate in SIP Transferred to New Employer

In Ponticelli v Gallagher[10] the Inner House of the Court of Session agreed that ***an employee's right to participate in a Share Incentive Plan (SIP) had transferred to the new employer*** under regulation 4(2) of TUPE 2006.[11]

The Court held that Mr Gallagher was entitled to be a member of a SIP equivalent to the plan offered by his former employer, even though the entitlement was not mentioned in his contract of employment and was detailed in a separate tripartite agreement to which the new employer was not a party.

ACAS Advice and Guidance

ACAS has recently issued the following advice and guidance:

- advice to employers on how to manage stress at work, including on the duty to carry out risk assessments and dealing with absent employees.
- updated guidance for employers and employees on dealing with coronavirus and on managing long covid.
- updated guidance on managing holidays, sickness and leave, including guidance on calculating holiday entitlement for part-year and irregular hours workers.

Cases, laws, decisions referred to in this Bulletin

1	EE Limited v Virgin Mobile Telecoms Limited [2023] EWHC 1989 (TCC).
2	Musst Holdings Limited v Astra Asset Management UK Limited [2023] EWCA Civ 128.
3	BTI 2014 LLC v Sequana S.A Case ID: UKSC 2019/0046
4	Hunt v Singh [2023] EWHC 1784 (Ch)
5	ClientEarth v Shell Plc & Ors [2023] EWHC 1897 (Ch)
6	Unison v Secretary of State for Business and Trade [2023] EWHC 1781
7	Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022
8	Strikes (Minimum Service Levels) Act 2023
9	Higgs v Farmer's School & Anor [2023] EAT 89
10	Ponticelli v Gallagher [2023] CSIH 32
11	Transfer of Undertakings (Protection of Employment) Regulations 2006