RADIUS LAW

COMMERCIAL BULLETIN

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

MAY 2024

Nº 83

COMMERCIAL & CORPORATE

Limitation of Liability for failing to pay.

A recent dispute between Costcutter Supermarkets and one of its supermarket customers raised a question about the liability cap in the contract.

Costcutter had sued the customer for not paying its invoices. The customer counter-claimed for lost profits caused by a change in Costcutter's business model.

The liability clause stated:

*'in respect of all acts, omissions, events and occurrences whether arising out of any tortious act, breach of contract or statutory duty or otherwise arising … **[is limited] to five times the Service Charge paid… [in the previous year].'***

There had not been any service charge, so the first instance court ruled that the **maximum liability of both parties was £zero.**

The High Court disagreed[1]. Costcutter's claim was for non-payment of goods which, at law, is considered a primary obligation, rather than a claim for damages for breach of contract (a 'secondary obligation'). The High Court ruled that **only the 'clearest of wording' would enable liability to be capped at zero for a primary obligation.**

The words were not clear in this instance and therefore Costcutter could recover its debt.

Companies House chaos

Companies House has launched an 'urgent review' after it was identified that there had been over **800 erroneous filings on 190 companies**, raising fears over a sophisticated fraud targeted at banks.

The erroneous filings wrongly showed that charges had been released.

The attack exposed the lack of controls at Companies House for discharging charge registrations. Whilst the removal of the charge registrations is unlikely to affect the underlying agreements (usually with a bank) it could mislead third parties and potentially affect the lender's priority in case of a borrower's insolvency.

As previously reported, the new Economic Crime and Corporate Transparency Act will require Companies House to improve its processes for identification and verification of its register, but the timescale on most of these changes has not yet been finalised to allow time for Companies House to implement the necessary systems changes.

ADVERTISING & MARKETING

The CMA and the ASA Double-Up on Simba Sleep

We reported on the Competition and Markets Authority ('CMA') investigation concerning manipulative online selling practices into Emma Sleep in our September Bulletin. The CMA has now turned its attention to another mattress company, Simba Sleep, for very similar concerns including the use of **countdown clocks to pressure snap purchasing decisions and alleged misleading price comparisons** (e.g. the use of 'was/now' prices to suggest a higher 'everyday' price that the product is usually sold at).

The Advertising Standards Agency has already made a ruling against the firm so we anticipate that the CMA will also rule that they need to change their practices. If the CMA cannot resolve by Simba agreeing to undertakings, it will need to take court action.

Businesses should note that the **CMA will soon be able to impose fines directly** once the Digital Markets, Competition and Consumers Bill is implemented.

Supreme Court rules against Amazon for use of UK trademarks.

The Supreme Court has recently ruled[2] against Amazon for infringing the UK trademark: BEVERLEY HILLS POLO CLUB that's owned by Lifestyle.

Amazon accepted that Lifestyle owned the UK trademark but said that there was no infringement because the mark was used on its U.S.com website.

The Supreme Court however sided with Lifestyle. It stated that it was obvious that the website was targeting UK consumers because it had references to 'deliver to the UK' and other similar statements. Accordingly, Amazon's use of the marks infringed Lifestyle's UK trademark.

CONSUMER

Click to accept.

Everyday consumers are 'clicking to accept' terms in online contracts, but is that a valid way of incorporating terms into such contracts? Should the consumer be required to scroll through the terms before accepting? These were some of the issues considered by the Court of Appeal in a recent case.

The Court of Appeal[3] (agreeing with the earlier High Court decision) ruled: Provided there are no terms that are unusual or unfair then 'clicking to accept', without scrolling through the terms, is a valid way of incorporating the terms into consumer contracts.

The Court has recommended that the Law Commission reviews whether the law needs to be reformed to protect consumers that mostly accept terms without reading them.

ENVIRONMENTAL

Directors' climate duties

The Companies Act requires directors to have regard to the 'impact of the company's operations on.... the environment' and we are seeing more legal actions against companies and directors alleging that they have failed in this duty. We have previously reported on Client Earth's action against Shell's directors.

'there is much force in the view that directors may and, increasingly, must take into account and accord significant weight to climate change in their decision-making'

Lord Sales, Justice of the Supreme Court.
Speaking extra-judicially in 2019

A recent report by the Commonwealth Climate and Law Initiative recommends that directors do more to consider nature related risks and take action. These words reflect the comments of Lord Sales, Justice of the Supreme Court who has said:

'there is much force in the view that directors may and, increasingly, must take into account and accord significant weight to climate change in their decision-making'.

The CMA Closes its Greenwashing Investigation into Fashion Retailers with an Open Letter

We have previously reported on the Green Claims Code which sets out prescriptive rules on organisations making 'green claims' particularly that they must be substantiated.

The fashion industry has been under the spotlight by the Competition and Markets Authority ('**CMA**'). Following investigations by the CMA, ASOS, Boohoo and Asda have signed undertakings that the CMA hailed as '**landmark changes' to their approach to making environmental claims**.

In March the CMA published an 'open letter' to fashion retailers warning that:

'Businesses should familiarise themselves with the [Green Claims] Code and with the commitments in the undertakings, and take all necessary steps to ensure that any environmental claims they make comply with consumer protection law'

Inevitably the CMA will turn its attention to other sectors soon so it's important that all businesses learn from these early actions in the fashion industry.

'Businesses should familiarise themselves with the [Green Claims] Code and with the commitments in the undertakings, and take all necessary steps to ensure that any environmental claims they make comply with consumer protection law'

CMA Open Letter to Fashion sector, March 2024

DATA SECURITY

Regulating AI

There is a stark difference between the UK and EU approach to AI.

The EU is legislating with the AI Act. There is a staggered implementation and it will be three years before its fully in force. The regulation will reflect the 4 risk levels: Unacceptable, High, Limited and Minimal. AI systems in the Unacceptable category will be banned and must be phased out within 6 months.

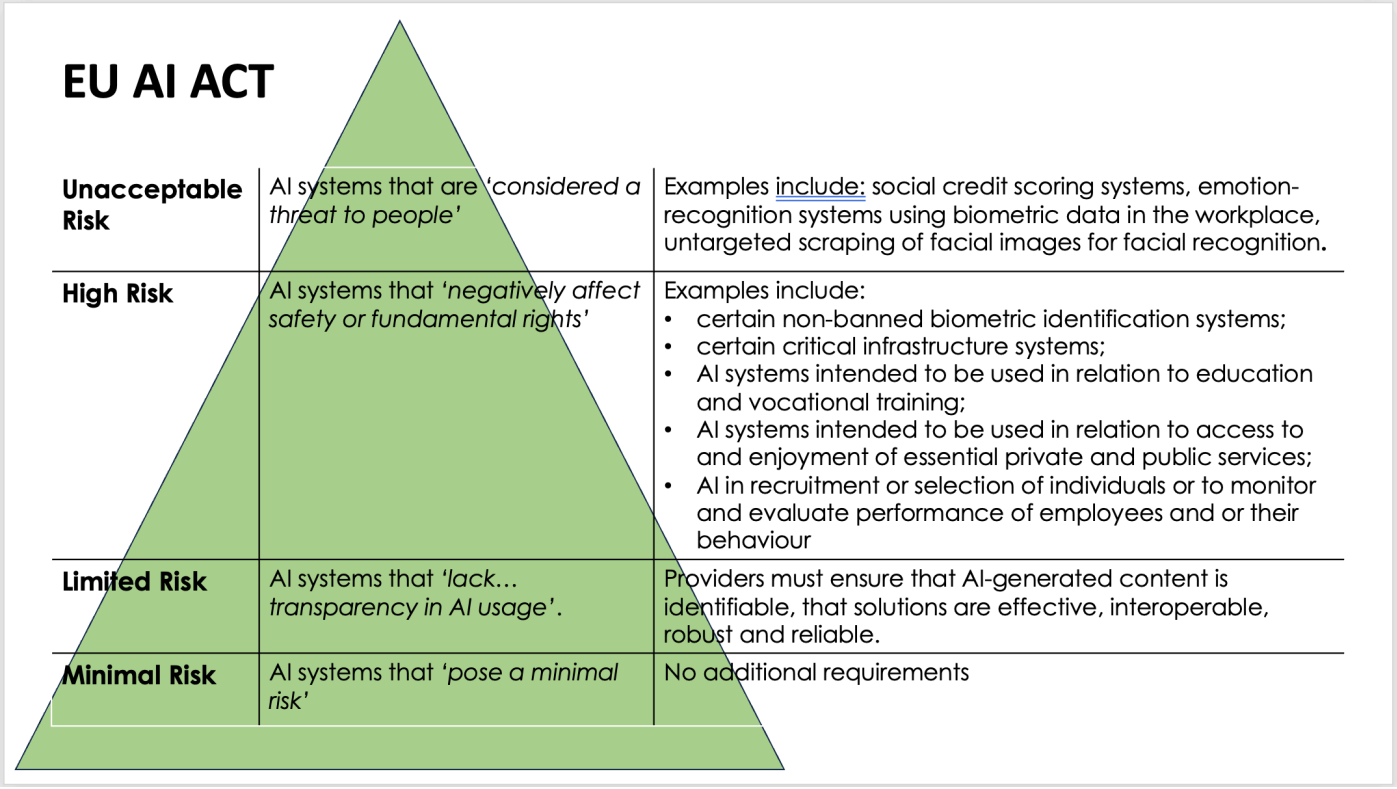
Non-compliance with the rules will lead to fines ranging from €7.5 million or 1.5% of global turnover to €35 million or 7% of global turnover, depending on the infringement and size of the company.

Meanwhile the UK is adopting a laissez-faire approach. Rather than seeking to regulate AI with comprehensive laws, the UK government will go ahead with adopting non-statutory, contextual, cross-sectoral principles-based rules.

UK businesses should however be aware that they may still be caught by the EU laws – which are broadly scoped and will apply to both providers and deployers of in-scope AI systems that are used in or produce an effect in the EU.

Recently the ICO has issued draft guidance on automated decision making in recruitment (which states that there must be 'meaningful' human involvement in all recruitment processes and has issued its third instalment in its generative AI series. The UK Department for Science, Innovation and Technology (DSIT) has also published guidance on responsible use of AI in recruitment and published a 'Responsible AI Toolkit'

Finally, a lesson from abroad. A Canadian Court has told Air Canada to refund a customer after its chatbot gave the wrong information.



The ICO Releases New Guidance on Biometric Data Processing

Use of a biometric recognition system entails the processing of special category data, of which is afforded additional protection under data protection legislation. New Information Commissioner's Office guidance acts as a useful reminder of the unique nature of this data and the inherent risks of using or processing it incorrectly.

New Legislation Concerning Connectable Products in the UK

New Product Security laws came into force in April[4]. Manufacturers obligations under the new laws include:

- ensuring pre-installed device passwords are unique or chosen by the user;
- inform consumers how long security updates will be provided for.

Manufacturers, distributors and importers also have a responsibility to:

- investigate any failure to comply with the security requirements and take action accordingly;
- stop supplying products where there is a compliance failure by the manufacturer;
- keep records of any compliance failures and investigations for at least 10 years.

Businesses that fail to comply with the legislation may be **fined up to the greater of £10 million or 4% of worldwide revenue.**

EMPLOYMENT

New Legislation

Government Updates Guidance on Changes to Holiday Pay

In our March bulletin we reported that the Government published guidance in January on the changes to the Working Time Regulations.

The guidance was updated on 1 April and now confirms that:

- the definition of part-year worker includes term-time only workers who are paid all year round, provided:
  - there are periods of at least one week when they are not required to work and
  - the pay they receive is not 'for' the period when they do not work.

This means that term-time only workers (such as teaching staff) who are paid an annual salary in 12 equal monthly instalments are part-year workers and the new rules on accrual and calculation of holiday pay apply to them.

Employment (Allocation of Tips) Act delayed until October.

The Employment (Allocation of Tips) Act 2023[5] will now come into force on 1 October 2024. The government has published its response to the recent consultation on the draft statutory Code of Practice on Fair and Transparent Distribution of Tips and confirmed the final version of the code (subject to parliamentary approval).

EHRC Updates Toolkit on Pregnancy and Maternity Protections in the Workplace.

The Equality and Human Rights Commission (EHRC) has published an updated toolkit on preventing pregnancy and maternity discrimination at work to reflect the legislative changes which came into effect in April 2024.

The toolkit sets out changes employers must make, including:

- ensuring that pregnant women and those on maternity, adoption and shared parental leave:
  - are protected from redundancy and
  - are offered suitable alternative roles in a redundancy situation and are given priority for the roles over other employees.
- providing the right to request flexible working from the first day of employment.

Employers should update their redundancy and family leave policies, to ensure compliance.

Recent Cases

Dismissal Due to Irretrievable Breakdown in Employment Relationship

In Matthews v. CGI IT UK Ltd[6], Mr Matthews was dismissed due to an irretrievable breakdown in the employment relationship, without a formal written warning or being offered a right to appeal.

The Employment Appeal Tribunal (EAT) held that the dismissal was not unfair and confirmed that:

- in exceptional circumstances, an employer's failure to follow procedure may not amount to an unfair dismissal if it can be shown that procedural steps would have made no difference to the outcome.
- where a working relationship has broken down, an employer is not required to take "all reasonable steps" prior to dismissal.
- CGI had made significant efforts to accommodate Mr Matthews and rebuild trust (including creating a new role for him), but these were consistently rejected.
- This was an exceptional case where any further procedural steps (including mediation) would have been futile.

A Trial Period in a New Role can be a Reasonable Adjustment

Where a disabled employee faces a substantial disadvantage at work, compared with a non-disabled employee, employers must make reasonable adjustments or modifications to remove that disadvantage.

In Rentokil Initial UK Ltd v Miller[7], the EAT confirmed that where a disabled employee cannot continue in their present job, and they are at risk of imminent dismissal, it can be a reasonable adjustment to give them a trial period in a new suitable role, even if it is not certain that the employee will be successful.

UPCOMING EVENTS

15th May, 2024

Annual Conference – Business & Law Update for the Automotive Sector
The Motor Ombudsman's London offices, 71 Great Peter Street, London, SW1P 2BN

On Wednesday, 15th May 2024, Radius Law and The Motor Ombudsman are coming together to host their Annual Conference – Business & Law Update for the Automotive sector.

Book Now >>

Cases, laws, decisions referred to in this Bulletin

1	Costcutter Supermarkets Group Ltd v Vaish and another [2024] EWHC
2	Lifestyle Equities CV and another v Amazon UK Services Ltd and others [2024] UKSC 8
3	Ms Parker Grennan v Camelot UK Lotteries Ltd [2024] EWCA Civ 185
4	Product Security and Telecommunications Infrastructure Act 2022; Product Security and Telecommunications Infrastructure (Security Requirements for Relevant Connectable Products) Regulations 2023
5	Employment (Allocation of Tips) Act 2023
6	Matthews v. CGI IT UK Ltd [2024] EAT 38
7	Rentokil Initial UK Ltd v Miller [2024] EAT 37