



COMMERCIAL BULLETIN

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

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COMMERCIAL & CORPORATE

A party can't rely on its own breach to avoid a payment obligation.

The Court of Appeal¹ recently ruled that a buyer could not use their own breach to avoid paying a debt. This case concerned unfinished ship purchases, where the buyer was obliged to deposit 10% (around US \$4.9 million) with an escrow agent. The buyer however failed to provide the necessary forms to open the escrow account. When the seller sued for the deposit, the buyer claimed the payment wasn't due as the escrow account was a 'condition precedent'. The Court disagreed, saying that **a party cannot rely on its own breach to avoid an obligation to pay a debt.**

Loss of profits or wasted expenditure?

In a recent case between Tata Consultancy Services ('TCS') and Disclosure and Barring Service ('DBS')², the Court **distinguished between 'wasted expenditure' and 'loss of profits.'** The contract excluded 'loss of profits,' so TCS framed its claim as wasted expenditure. The Court, referencing an earlier judgment, noted that **'wasted expenditure' is a claim based on actual costs**, while **'loss of profits' is speculative and open-ended claim.** It ruled that TCS's claim was essentially for loss of anticipated savings, is equivalent to 'loss of profits,' and thus excluded under the contract.

Hague convention ratified by UK government.

The UK [ratified the Hague Convention](#) on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, effective 1 July 2025. **This will standardise judgment enforcement between the UK and other contracting states.**

Currently, English judgments are enforceable under the Hague 2005 Convention, but only applies where there is an exclusive English jurisdiction clause which was agreed after Hague 2005 came into force. Otherwise, the question of enforceability depended on whether there is a reciprocal arrangement for the enforcement of judgments between the UK and the relevant state.



EFFECTIVE CORPORATE GOVERNANCE

12th December, 2024

10:00AM – 4:00PM

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The mis-placed adjective that cost \$7.5m

A recent Court decision turned on the placement of an adjective in a contract³.

The case concerned Cantor that had been engaged by Yes Bank to raise funds.

Specifically, the letter engaged Cantor to procure investors in connection with ‘Financing’ which was defined as a:

“private placement, offering or other sale of equity instruments”.

Ultimately public financing was achieved and Cantor asked for its fee. Yes Bank refused as it was not private financing.

A dispute then followed about whether the word private was intended to apply to the whole sentence or only to the first comma.

The Court having considered the overall contract concluded that ‘private’ was intended to describe all the structures, and not just the first structure in the list. As a result, the broker was not entitled to a commission.

CONSUMER

Do consumers read your terms?

Ofcom’s recent research on user engagement with terms and conditions (available on the [Ofcom website](#)) shows many users do not read or understand online platform terms and conditions (T&Cs). The studies on video sharing platforms and social media reveal that T&Cs are often too complex, unclear, and not user-friendly, especially for children. Prompts help users engage more but do not improve comprehension.

More action on dark patterns.

In July, the CMA [announced](#) that Wowcher will change its online practices and refund over £4 million. The investigation revealed misleading urgency claims, hidden charges and pre-ticked boxes leading to unintended VIP memberships.



ENVIRONMENTAL, SOCIAL, AND GOVERNANCE ESG

Supply chain transparency

A landmark Court of Appeal ruling⁴ has clarified that businesses may be exposed to criminal liability under POCA⁵ if they deal in goods that they know, or suspect may be, tainted by human rights abuses, even if they pay a fair value for those goods. This decision highlights the importance of supply chain transparency and compliance.



DATA SECURITY

ICO issues £6 million provisional fine against processor Advanced Computer Software.

The ICO has issued a £6.09 million [provisional decision to fine](#) Advanced Computer Software Group following a ransomware attack in August 2022. The attack exposed personal data of 82,946 individuals, causing significant disruption, particularly to NHS services. The ICO criticised Advanced's lack of security measures, including the absence of multi-factor authentication (MFA). Organisations must implement MFA and regular vulnerability checks to avoid regulatory enforcement and protect data subjects.

The ICO stated: *We expect all organisations to take fundamental steps to secure their systems, such as regularly checking for vulnerabilities, implementing multi-factor authentication and keeping systems up to date with the latest security patches.*

EMPLOYMENT

Employment rights under the new Government.

The Government will set out changes to employment law in a new **Employment Rights Bill**, due to be introduced in the first 100 days of governance. Currently, it is unknown when the changes will come into force, but they will include:

- All workers will have the right not to be unfairly dismissed from day 1. Employers will be able to operate probationary periods to assess new hires.
- The right to parental leave and sick pay from day 1.
- Ending 'Fire and Rehire' and 'Fire and Replace' by reforming the law to provide effective remedies and replacing the previous Government's statutory code.
- Strengthening Statutory Sick Pay by removing the lower earnings limit and the waiting period.
- Making flexible working the default from day-one for all workers, with employers required to accommodate this as far as is reasonable.
- Making it unlawful to dismiss a woman who has had a baby for six months after her return to work, except in specific circumstances.

The Government has also announced a draft Equality (Race and Disability) Bill, which will introduce:

- the right to equal pay for ethnic minorities and disabled people and
- mandatory ethnicity and disability pay reporting to employers with 250 or more employees.

Equal Pay - Next potentially liable to pay £30m compensation to its retail workers

If two jobs done by a man and a woman are of equal value, an employer must pay the same rate for both jobs unless there is a material factor (unrelated to sex) which explains the difference.

An employment tribunal has upheld equal pay claims made by over 3,500 (predominantly female) Next retail workers, whose jobs are of equal value to warehouse jobs performed mainly by men. Next set basic pay for warehouse workers at the market rate, meaning warehouse workers received a higher rate than retail workers.

The tribunal found that:

- Paying the retail workers less had a disproportionate impact on women.
- Next relied mainly on cost saving aims to justify the lower pay, but could afford to pay higher rates to retail staff.
- Cost saving is not a legitimate aim.
- Market rates may be tainted by historical perceptions about the value of "men's work" versus "women's work".
- Using market rate to justify different pay rates would defeat the object of equal pay legislation.

Next intends to appeal the decision.

Disability discrimination - It may be reasonable to delay dismissal on capability grounds where a reorganisation is in prospect

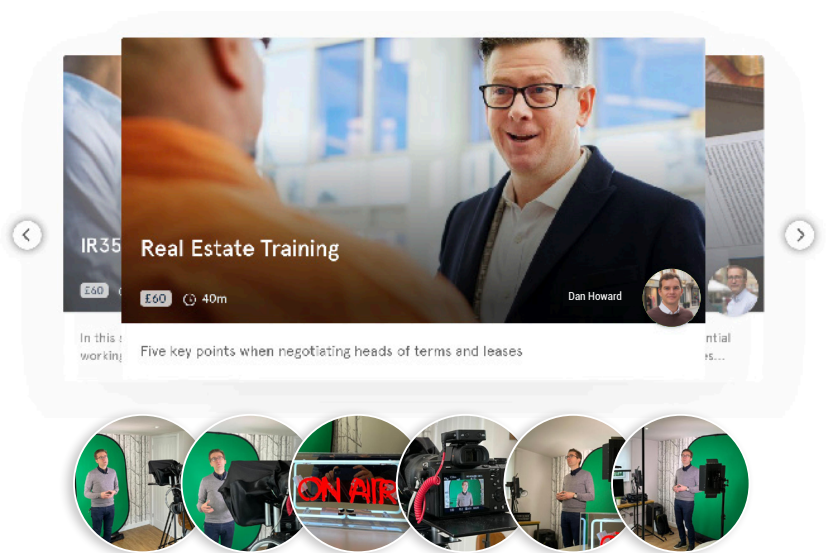
The EAT has confirmed that, where a disabled employee faces dismissal on capability grounds at a time when a reorganisation is in prospect, it may be reasonable to delay dismissal until after the reorganisation. Tribunals should assess the reasonableness of that step both at the point of dismissal and at the time of any dismissal appeal.

In this case, by the time the employer had heard the employee’s appeal against dismissal the reorganisation was weeks away and there may have been suitable permanent roles available post-reorganisation. The tribunal failed to consider the position at the time of the appeal or whether it would have been reasonable to continue employment for a further period until the reorganisation occurred. The EAT decided the claim must be reheard by a different tribunal.

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UPCOMING EVENTS

25th September, 2024



Senior Counsel Event – Post Office Scandal: What Lessons to Learn Online

Our interactive virtual sessions are an opportunity for in-house counsel to share experiences, insights and best steps to protect your organisations.

[Book Now](#) >>

02nd October, 2024



The Motor Ombudsman In-Person Training: Consumer Law 101 The Motor Ombudsman's Offices 71 Great Peter Street London SW1P 2BN

On Wednesday, 2nd October 2024, Radius Law and The Motor Ombudsman are coming together to host the first of their expert-led training programs designed to simplify complex issues: Consumer Law 101.

[Book Now](#) >>

12th December, 2024



Effective Corporate Governance Grant Thornton 20 Finsbury Square London EC2A 1AG

On Thursday 12th December 2024, Radius Law and Sewells are coming together to host the first of their expert-led training programmes designed to simplify complex issues: Effective Corporate Governance.

[Book Now](#) >>

Cases, laws, decisions referred to in this Bulletin

1	King Crude Carriers SA & Ors v Ridgebury November LLC & Ors [2024] EWCA Civ 719
2	Tata Consultancy Services Ltd v Disclosure and Barring Service [2024] EWHC 1185
3	Cantor Fitzgerald & Co. v YES Bank Ltd [2024] EWCA Civ 695
4	R (on the application of World Uyghur Congress) v National Crime Agency [2024] EWCVA Civ 715
5	Proceeds of Crime Act 2002
6	The King's Speech Background Briefing Notes
7	Ms M Thandi and Others v Next Retail Ltd and Next Distribution Ltd: 1302019/2018 and Others
8	Cairns v The Royal Mail Group Ltd [2024] EAT 80



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