Corporate
NEWSLETTER

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Google to change its Privacy Policy

Simon Miles, Head of Intellectual Property
Karen Lee, Associate

Google continues to make headlines in relation to personal data. It is currently working to resolve the issues resulting from the Court of Justice of the EU's ruling last year that Google must take down links to any content that is "inadequate, irrelevant or no longer relevant". This 'right to be forgotten' ruling has caused a great deal of debate as to whether free speech will be stifled as a result. However, on a related subject, and following an investigation from the UK Information Commissioner's Office (ICO), Google has agreed to change its privacy policy.

The investigation follows Google's introduction of a privacy policy in March 2012 which combined approximately 70 existing policies for various services into one. However the ICO ruled that such policy did not include sufficient information for service users to find out how and why

Editor's Note

Welcome to the Spring 2015 edition of our Corporate Newsletter. This issue covers a variety of useful articles of particular interest to Corporate, Commercial, Real Estate and HR lawyers.

If you have any queries about the issues raised within this newsletter, please do not hesitate to contact me directly, or your usual Edwin Coe contact.

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their personal data was being collected. The ICO found that Google was "too vague when describing how it uses personal data gathered from its web services and products".

Google has now signed a formal undertaking to improve the information it provides to people about how it collects personal data in the UK to ensure that it meets the requirements of the Data Protection Act. Google must now make the changes by 30 June 2015 with further commitments over the next two years.

The full list of steps Google must take under the undertakings are as follows:

- Carry out the steps set out in Annex 1 of the Undertaking to ensure that its privacy policy is accessible and easy to understand.
- Ensure that there is continued evaluation of the privacy impact of future changes to processing which might not be within the reasonable expectations of service users so that users are provided with prompt and adequate notice of such processing.
- Keep the content of the Privacy Policy and associated web content under review and take appropriate actions so that service users are informed as to the ways in which their personal data may be processed.
- Keep the overlay examples for the Privacy Policy under review to ensure that informative and relevant examples are always in use.

'Google has now signed a formal undertaking to improve the information it provides to people about how it collects personal data in the UK to ensure that it meets the requirements of the Data Protection Act. '

- Continue to ensure that any significant future changes to the Privacy Policy are reviewed by user experience specialists and with representative user groups before the policy and associated tools are launched as appropriate.
- Continue to pro-actively co-operate with the Commissioner and provide appropriate advance notice of any significant changes, and respond promptly to enquiries relating to the ways in which Google processes user data and its proposals for consequential changes to the Privacy Policy and supporting web content.
- Provide a report to the Commissioner by August 2015 setting out the steps which the data controller has taken in response to the commitments set out in this undertaking.

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PROPERTY & CONSTRUCTION LAW

Food for thought from the Gordon Ramsay case

Susan Johnson, Senior Associate

The recent and much publicised failed attempt by celebrity chef Gordon Ramsay to escape from the obligations of a lease guarantee gives food for thought.

‘ ...the case highlights the importance of always ensuring that an agent’s remit is explicitly clear by giving actual authority granted by formal powers of attorney, board resolutions or letters setting out the scope of the agent’s authority.’

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The case

In 2007 Northam Worldwide Limited granted a lease of the York and Albany pub, near Regent’s Park, to Gordon Ramsay Holdings International Limited, with Gordon Ramsay Holdings Limited and Gordon Ramsay acting as guarantors. The lease was for a term of 25 years at an annual rent of £640,000.

Gordon Ramsay claimed that he was not bound by the guarantee contained in the lease, as he did not sign the lease, his signature having been placed on the lease by means of a signature writing machine operated by, or under the direction of, his now famously estranged father-in-law, Christopher Hutcheson (who was the chief executive officer of Gordon Ramsay’s company and also Gordon Ramsay’s business manager at the time), and that he was unaware of the details the lease. Gordon Ramsay claimed that Mr Hutcheson did not have authority to place Gordon Ramsay’s apparent signature on the document, although it was accepted that, if Gordon Ramsay had operated the machine himself, this signature would have been valid.

After a lengthy eight day hearing, the court decided, with reference to historic evidence and to previous use of the signature writing machine, that Mr Hutcheson did have Gordon Ramsay’s authority to commit him to the lease guarantee on his behalf. The judge dismissed Gordon Ramsay’s claim that he thought that the machine was used for the purposes of signing only merchandise and cookbooks as entirely implausible.

Food for thought

The case raises concerns for parties entering into a contract. In the Ramsay case, the landlord was presented with an inked signature of Gordon Ramsay which the landlord understandably thought he could rely upon. Although in the Ramsay case Mr Hutcheson did have authority to enter into the lease on behalf of Gordon Ramsay using the handwriting machine, this may not always be the case. This creates an extra element of uncertainty for a party entering into a contract unless the contract is signed in the presence of all parties, or a solicitor confirms that it has been correctly signed.

The facts of the case demonstrate the binding nature of acts by an agent on behalf of a principal, and the case highlights the importance of always ensuring that an agent’s remit is explicitly clear by giving actual authority granted by formal powers of attorney, board resolutions or letters setting out the scope of the agent’s authority.

Finally, given the onerous terms of a lease guarantee (which is a promise by the guarantor to fulfil the tenant’s obligations in the lease if the tenant fails to do so) the case is a reminder that very careful consideration should be given by a guarantor when asked to provide a guarantee under a commercial lease.

CORPORATE & COMMERCIAL LAW

Late Payment of Commercial Debts

Myri Papantoniou, Senior Associate

Recent case law has clarified a provision in the Late Payment of Commercial Debts (Interest) Act 1998 (the "Act") which is relevant to international contracts which are subject to English law.

Background

The Act serves to imply a term into most business-to-business contracts, for the supply of goods or services, which entitles the relevant supplier of goods and services to charge simple interest on the price for late payments at a rate of 8% above base rate.

Section 12 of the 1998 Act contains a provision whereby the Act is disapplied in situations where there is an express choice of English law, if: (a) there is no significant connection between the contract and that part of the United Kingdom; and (b) but for that choice, the applicable law would be a foreign law ("Section 12").

The case has demonstrated and confirmed that the Act does not apply to international contracts, where there is no significant connection to the UK, purely by virtue of an English governing law and arbitration clause.

The facts

- A German company and a company registered in the Marshall Islands ("Marshall") entered into a charterparty contract with an arbitration clause, which provided that any arbitration should take place in London pursuant to English law.
- Marshall's managing agent was based in Greece and payment had to be made to an account in Greece.
- A dispute arose in relation to unpaid hire.
- The tribunal awarded in favour of Marshall and also awarded interest on that sum under the Act (at the rate of 12.75% per annum from 23 September 2005 until the date of payment).
- The tribunal was of the view that the choice of London as the form for arbitration satisfied the "significant connection" requirement under the Act.
- Marshall appealed on the basis that the Act did not apply as the contract was not connected to the UK except for the choice of London arbitration and English law.
- The Court held that the tribunal had acted in error as there was no significant connection between the contract and the UK.
- In order for the Act to apply there would need to be either a significant connection to the UK or the applicable law would be English law in any case under the Rome Convention (which provides that a contract is governed by the law chosen by the parties, and if the parties do not choose a governing law, the contract will be governed by the law of the country with which it is most connected).

Analysis

The Judge explained that the policy which underpins the Act is a domestic one being the protection of vulnerable commercial suppliers (whose financial position makes them vulnerable if their debts are paid late) and the general deterrence of late payment of commercial debts in the United Kingdom. It is, therefore, not appropriate to apply this to international contracts unless there is a real domestic connection.

The court concluded that what is meant by "significant connection" in Section 12 is a connection between the substantive transaction itself and England: the factors relied upon *"must provide a real connection between the contract and the effect of prompt payment of debts on the economic life of the United Kingdom".*

Without the choice of English law, Greek law would be most likely to apply.

Further, the Judge iterated that it is of considerable economic value that international parties regularly choose English law and jurisdiction to govern their contracts and Section 12 reflects that subjecting parties to a penal rate of interest on debts may discourage those who would otherwise choose English law to govern contracts of international trade. Accordingly, these consequences should not be automatic.

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CORPORATE & COMMERCIAL LAW

The Hut Group v Nobahar-Cookson and Another

Eoin Broderick, Associate

Whilst a recent case, *The Hut Group Ltd v Nobahar-Cookson and another*, dealt in main with principles of the valuation of damages for breach of warranty claims, the court also considered two other interesting issues arising out of a share purchase agreement: time periods for notification of claims and whether the fraud of an employee could be attributed to a company.

'The case highlights the importance of agreeing sensible time periods for the notification of claims...'

The Hut Group related to the sale and purchase of an online sports nutrition business. The sellers sold the target for cash as well as shares in the buyer. The buyer brought a claim for breach of warranty contending that the financial position of the company was not as warranted in the share purchase agreement and the sellers counter-claimed for fraudulent breach of the accounting warranties the buyer had given in relation to the consideration shares.

Notification of warranty claims

The share purchase agreement required that notice of warranty claims be served "as soon as reasonably practical and within 20 Business Days of becoming aware of the matter." The court considered what was meant by "becoming aware of the matter". The judge found that as a matter of commercial sense, the clock should not start until the relevant party knew that there was a proper basis for a claim and not simply when they became aware of the underlying facts. In this case, this point was not reached until the buyer had received advice from accountants that the warranty had been breached.

The case highlights the importance of agreeing sensible time periods for the notification of claims, so as to allow the time to review and consider a potential claim within that period.

Damages for fraud

In relation to the counter-claim, the buyer admitted liability for its breach of warranty but sought to rely on the limitation cap in the agreement. The cap was stated not to apply insofar as the breach resulted from fraud. The buyer accepted that its breach of warranty resulted from the fraud of its financial controller, but contended that the financial controller's fraud was not attributable to the buyer, as he was not a director and did not hold a senior enough job.

However, the judge found that, whilst the financial controller did not hold a senior position, he was heavily involved in the transaction and had provided financial information which was essential for the deal to go ahead. The fact that he was not 'front facing' was irrelevant. His fraud was attributable to the buyer and therefore the contractual cap did not apply.

Following this decision, companies should consider more carefully who they involve in transactions of this nature given that their actions may be found attributable to the company. Even agreements which state that the awareness of the parties is to be fixed by reference to the knowledge of named individuals may not be effective when considering whether fraud may be attributable to a party.

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EMPLOYMENT LAW

Holiday Pay still in a mess?

Well yes, but some issues are clearer following recent decisions

Rachel Harrap, Head of Employment

European Law provides that all workers are entitled to 20 days' paid leave a year. In the UK, the minimum holiday is 28 days (which may include the eight statutory public holidays).

In our view, the issue is still in a mess. There have been certain clarifications in recent cases which are helpful for employers on limiting liability for historic claims, but there still remain areas of uncertainty.

For more information, please read our guide on Holiday Pay Issues.

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BASIC GUIDE TO HOLIDAY PAY

1. Holiday entitlement should be calculated to include overtime pay and allowances
2. A gap of more than 3 months between holiday periods where there has been the correct calculation of holiday pay to include overtime and allowances should mean any earlier underpayments are out of time for claim.
3. It is likely that in calculating any 3 month gaps, the 20 days' European Union entitlement will be deemed to be taken first.
4. Whilst still uncertain, we are taking the stance that the reference period is based on 12 weeks.

EMPLOYMENT LAW

Tubby or Not Tubby? Fat is the question

Rachel Harrap, Head of Employment

The European Court of Justice (EJC) has recently given Judgment in the case of a Danish childminder, Mr Kaltof, weighing in excess of 25 stone with a body mass index (BMI) of 54. The Company dismissed Mr Kaltof by reason of redundancy. Mr Kaltof alleged the real reason was that he was obese and this was the reason he was selected for redundancy. He claimed that amounted to discrimination.

Over the years we have seen the extension of discriminatory matters that can give rise to protected characteristics such as sex, race, religion, nationality and disability. Mr Kaltof's claim was that obesity of itself should be a protected characteristic for the purpose of discrimination.

The ECJ rejected obesity of itself being a protected characteristic but accepted that obesity could in certain situations satisfy the statutory test of disability because of conditions that arise as a result of obesity, such as diabetes or reduced mobility.

Therefore, if an overweight employee has a condition linked to his obesity that gives rise to a physical or mental impairment which is likely to have a substantial adverse effect on the individual's day-to-day activities and which lasts or is expected to last for 12 months or more, that employee may be disabled for the purposes of disability discrimination.

An outcome that was envisaged was that there the ECJ would suggest an "objective test", to determine whether an overweight employee was disabled for example, an employee would only be deemed to be disabled due to obesity if he or she had a BMI over, say, 40. It was with some relief that this was not the outcome as many feared this could give rise to an agenda of encouraging overweight employees not to lose weight.

The real impact of this decision remains to be seen, but it seems to us clear that there will be cases where claims for disability discrimination are brought by overweight employees who have reduced mobility issues and ill-health problems, both physical and mental that can be attributed to obesity. This will leave employers in a position where such issues arise that they may have to consider what reasonable adjustments they can make to accommodate the employee at work. Some suggestions that have been mooted are whether these should include access to lifts, parking and adapted furniture and equipment.

'...there will be cases where claims for disability discrimination are brought by overweight employees who have reduced mobility issues and ill-health problems, both physical and mental that can be attributed to obesity.'

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We hope you find this newsletter useful and interesting, and we would welcome your feedback. For further information and additional copies please contact the editor: Russel Shear on t: +44 (0)20 7691 4082 e: russel.shear@edwincoe.com

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