

Corporate NEWSLETTER

Summer 2018

INSIDE THIS ISSUE:

PROPERTY LAW

Ups and downs of the
"staircase tax"

INTELLECTUAL PROPERTY LAW

Will the General Data
Protection Regulation
(GDPR) show its teeth?

EMPLOYMENT LAW

Nom Nom!
The Supreme Court finds
"no oral modification"
clause to be effective

PROPERTY LITIGATION LAW

The different between
Legal Advice Privilege and
Litigation Privilege

EdwinCoeLLP





Content Page

PROPERTY LAW

Ups and downs of the
"staircase tax" 2-3

INTELLECTUAL PROPERTY LAW

Will the General Data
Protection Regulation
(GDPR) show its teeth? 4-5

EMPLOYMENT LAW

Nom Nom!
The Supreme Court finds
"no oral modification"
clause to be effective 6-7

PROPERTY LITIGATION LAW

The different between
Legal Advice Privilege and
Litigation Privilege 8-9

PROPERTY LAW

Ups and downs of the "staircase tax"



Susan Johnson, Senior Associate

Downs – the consequences of *Woolway v Mazars* 2015

For years, firms in adjoining units or rooms received one rates bill, but following the decision in *Mazars v Woolway*, they have faced multiple business rates bills for operating in an office linked by a communal lift or stairs.

The "staircase tax" is a colloquial term given to the effects of the *Mazars* case. The facts of this case are that Mazars LLP occupied the second and sixth floors of Tower Bridge House (an eight storey office block in St Kathryn's Way, London) under separate leases, and the floors were separated by common areas. In 2005, the second and sixth floors of Tower Bridge House were entered as separate hereditaments in the



Editor's Note

Welcome to the Summer 2018 edition of our Corporate Newsletter which contains a variety of articles covering property, intellectual property, employment and property litigation law.

With the GDPR now in place across Europe, we want to ensure that you and your colleagues are kept informed of the latest legal issues. To update your preferences and allow colleagues to receive Edwin Coe updates please [click here>>](#)

We continuously strive to provide the most relevant and latest topics across numerous industries for the respective business unit. If there are any particular areas of interest that you would like us to consider in the next edition, please do get in touch.

If you have any legal issues or concerns that you would like to discuss, please do not hesitate to contact me.



Russel Shear

Head of Corporate & Commercial
t: +44 (0)20 7691 4082
e: russel.shear@edwincoe.com



rating list. In February 2010, Mazars successfully applied to the Valuation Tribunal for England for the merger of the two entries to form a single hereditament for the purposes of setting business rates. On appeal by the valuation officer (Mr Woolway) the Upper Tribunal (Lands Chamber) confirmed the decision of the Valuation Tribunal. The Court of Appeal dismissed a further appeal by the valuation officer, who then appealed to the Supreme Court. The Supreme Court then decided that each floor in a multi-occupied building should be subject to a separate rates bill, even where immediately above or below another floor occupied by the same entity, unless linked by a private staircase or lift.

A further consequence of the Mazars case decision is that business ratepayers who were eligible for Small Business Rate Relief but have seen their property split into two parts as a result of the Mazars case, may have lost the relief because they are now considered as having two or more hereditaments and are accordingly not eligible for the relief. It is estimated that up to 1,000 ratepayers could have been affected by the loss of Small Business Rate Relief.

Ups – new legislation

This “staircase tax” has unfairly affected many businesses. The Government surprised the rating world by announcing in the autumn 2017 budget that legislation would be introduced to restore the practice of the Valuation Office prior to the Supreme Court decision in the Mazars case. A consultation process has already been held and a draft Bill has been published. The current status of the Bill is that it went for its second reading at the House of Lords on the 4 June 2018. When the new Act is in force, floors will be treated as one provided they are occupied (or, if vacant, were last occupied) by the same entity and are “contiguous”.

Contiguous means here that they either touch or are separated only by a void (e.g. a raised floor accommodating landlord’s services).

Further good news is that **the Act will apply retrospectively with effect from 1 April 2010**. Once the Bill receives Royal Assent and the appropriate secondary legislation is in force, ratepayers will be able to approach the Valuation Office Agency to have the provisions applied.



For further information with regard to this article, please contact:

[Susan Johnson](#)

Senior Associate

t: +44 (0)20 7691 4085

e: susan.johnson@edwincoe.com

Or any member of the Edwin Coe [Property team](#)



Brexit Implications

As March 2019 approaches, the UK will officially withdraw from the European Union which is still very much a hotly debated topic. Companies should consider incorporating Brexit clauses into their contracts and our Corporate & Commercial team has written an article highlighting the Brexit implications for businesses.

To view our full blog, please [click here](#).





INTELLECTUAL PROPERTY LAW

Will the General Data Protection Regulation (GDPR) show its teeth?



Nick Phillips, Partner

Much has been written about the GDPR and the financial penalties that can be levied for non-compliance. Clearly the ability of the supervisory authority to impose fines of up to Euros 20 million or 4% of worldwide turnover is a headline grabber but what is the reality? Are fines of anywhere near the maximum really likely and in relation to what kinds of breaches are they likely to be made?

“The Information Commissioners Office, during the course of their investigation, will take into account the previous track record of the company in relation to cybersecurity and how easy it would have been to protect against the breach.”

Dixons Carphone

With the GDPR having been in force for just over a month, Dixons Carphone, the electrical and mobile phone retailer has reported the first data breach since its enactment. In a statement entitled ‘*Investigation into Unauthorised Data Access*’, the retailer stated that ‘*as part of a review of our systems and data, we have determined that there has been unauthorised access to certain data held by the company*’. The scale of the breach is also revealed by the statement which goes on to provide that ‘*...there was an attempt to compromise 5.9 million cards in one of the processing systems... however, 5.8 million of these cards have chip and pin protection*’. Nevertheless, approximately 105,000 of the cards that were accessed are non-EU issued payment cards meaning they do not have chip and pin protection.

The investigation also found that 1.2 million records containing non-financial personal data, such as names, addresses and email addresses have been accessed but that there is currently no evidence suggesting that the data has left the systems.

Under the GDPR, national regulatory authorities such as the Information Commissioners Office (ICO) has the ability to levy fines as high as £17.6 million (€20 million) or 4% of global annual turnover. If Dixons Carphone were to have the latter imposed upon them, based on their 2017 revenues, the company could be liable for a fine of up to £420 million. However, whilst the data breach was discovered mid-June 2018, as it took place in July 2017, prior to the implementation of the GDPR, it will be investigated under the Data Protection Act 1998. As a result, the maximum possible fine that the ICO can impose will be £500,000.

The Information Commissioners Office, during the course of their investigation, will take into account the previous track record of the company in relation to cybersecurity and how easy it would have been to protect against the breach. Whilst the track record of the organisation may not be entirely spotless, having suffered a similar attack in 2015 during which the card details of 90,000 Dixons Carphone customers were exposed, the ever changing





nature of the cybersecurity arena would mean that even if the previous fault in the system had been addressed, hackers would have likely found a new way to gain access to their systems. This has ensured that the area has remained fertile for regulators.

The 2015 TalkTalk breach

In 2015, the telecommunications company TalkTalk suffered a cyberattack that led to the theft of data belonging to 157,000 customers. Whilst the hackers gained entry into the TalkTalk systems via insecure websites that it acquired during its takeover of Tiscali, the ICO found that the attack was preventable and that the company had not encrypted all of its personal data.

As a result of the major security failings, the company was handed a record fine of £400,000, just short of the maximum fine that the ICO could have imposed. More significantly, the company also experienced a significant drop in share price from which it has never recovered demonstrating a lack of customer trust and the severity of the reputational damage that can result from security failings.

The GDPR and cybersecurity

Under the GDPR, organisations are required to ensure that the personal data they hold is processed securely using the appropriate technical or organisational measures. This is one of the key principles of the Regulation, with Article 5(f) stating that personal data shall be processed:

'...in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures'.

This leaves the onus of deciding on the specific level of security up to each individual organisation which must implement security measures that are appropriate to the risks posed by the specific processing activities undertaken. For example, medical records would likely require a more robust security system than email addresses.

The ICO recently worked alongside the National Cyber Security Centre (NCSC) to produce guidance on the GDPR security outcomes which can be found at <https://www.ncsc.gov.uk/guidance/gdpr-security-outcomes/>. The guidance largely echoes Article 32 of the GDPR, providing practical ways for organisations to adopt the requisite level of cybersecurity such as the implementation of internal policies and processes, identity and access control, data security, system security and staff training.

Interestingly, the guidance also highlights the potentially advantageous uses of penetration testing, a form of ethical hacking, to detect system flaws. Organisations such as Google, Facebook and PayPal have adopted this approach in recent years with the increasing digitisation of personal records, invoices, payments and other aspects of our personal and professional lives. However, due to the high black-market value of the information that can be obtained by the hackers, many companies are offering what are known as responsible disclosure policies or "bug bounty" programs whereby hackers are paid for detecting flaws in their security systems. In doing so, companies are provided with an early warning as to the potential downfalls of the websites and are able to rectify the problem before any personal data is stolen.

The future

Although the Dixons Carphone case is being investigated under the old Data Protection Act, as it is the first major data security breach to be reported since the GDPR was brought into force in May 2018, we look forward to seeing how the ICO investigation progresses and the severity of the financial penalties imposed.

Our prediction is that security breaches which put at risk large amounts of data are likely to continue to attract both the most amount of attention from the ICO but also the largest fines. Indeed it is likely to be a breach of security where the ICO decides to flex the muscles of its newly acquired power and impose a record fine. It is however, worth adding that the impact on an organisation's reputation is likely to far outweigh the impact of any fine that a supervisory authority might impose.

"The impact on an organisation's reputation is likely to far outweigh the impact of any fine that a supervisory authority might impose."

For further information with regard to this article, please contact:

Nick Phillips

Partner, Intellectual Property

t: +44 (0)20 7691 4191

e: nick.phillips@edwincoe.com

Or any member of the Edwin Coe
[Intellectual Property team](#)





EMPLOYMENT LAW

Nom Nom!

The Supreme Court finds “no oral modification” clause to be effective



Rachel Harrap, Consultant

In the recent case of *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC24 the Supreme Court overturned our Court of Appeal’s decision by holding that a “no oral modification” (NOM) clause was legally effective. The NOM clause stated that: “All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect”.

Rock was in arrears under the Licence Agreement and proposed a revised payment schedule. The Court of Appeal had found that the oral agreement to vary the payments was valid and amounted to an agreement to dispense with the NOM clause. The Supreme Court disagreed, upholding the trial judge’s decision that a NOM clause is effective.

The decision was to give legal effect to contractual provisions requiring specified formalities to be observed, in this instance, for a variation of the contract and that to hold otherwise would override the parties intentions as they would not be able to validly bind themselves as to how future changes in their legal relations were to be achieved, however clearly expressed their intentions in the contract.

The argument that to make such a NOM clause ineffective to preserve party autonomy was a fallacy. The parties autonomy to negotiate and agree terms operates up to the point when a contract is made but thereafter only to the

extent that the contract provides. The Judgment stated there were legitimate commercial reasons for using NOM clauses as they:

- (a) prevent attempts to undermine written agreements by informal means;
- (b) avoided disputes about whether a variation had been intended and about its exact terms; and
- (c) provide a formality in recording variations, making it easier for corporations to police internal rules restricting the authority to agree them.

This is an important decision for employers as employment contracts frequently include a provision that any variations to the employment terms and conditions are only valid if in writing. If the employer/employee wishes to amend an agreement it is therefore important for them to follow any formal procedures set out in the employment contract to vary its terms. If the employment contract contains a NOM clause

“Whilst establishing that NOM clauses are effective, this decision also recognises that it carries the risk that a party may act on a variation to a contract agreed orally.”



(and we are of the view it is preferable that they should do so), an oral agreement to vary the contract may not be effective, even where both parties agree to it. Whilst establishing that NOM clauses are effective, this decision also recognises that it carries the risk that a party may act on a variation to a contract agreed orally. In future, we may, therefore, expect to see parties seeking to rely on the equitable

doctrine of estoppel in such cases, that is where a party has acted and relied on the change the other party cannot then seek to withdraw from it where it would be inequitable to do so. However, the Supreme Court also acknowledged that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty stipulated by the parties when they agreed the terms of the NOM clause.

For further information with regard to this article, please contact:

Rachel Harrap

Consultant

t: +44 (0)20 7691 4000

e: rachel.harrap@edwincoe.com

Or any member of the Edwin Coe
Employment team

EdwinCoe LLP

Legal Updates

EdwinCoe LLP
Banking & Finance Legal Update

EdwinCoe LLP
Construction Legal Update

EdwinCoe LLP
Immigration Legal Update

EdwinCoe LLP
Litigation & Dispute Resolution Update

EdwinCoe LLP
Private Client Legal Update

EdwinCoe LLP
Property Update

EdwinCoe LLP
Restructuring & Insolvency Legal Update

- Banking & Finance
- Charities & Philanthropy
- Compliance & Regulatory Enforcement
- Construction
- Corporate & Commercial
- Employment
- Immigration
- Insurance Litigation
- Intellectual Property
- Litigation & Dispute Resolution
- Private Client
- Property
- Property Litigation
- Restructuring & Insolvency
- Tax

EdwinCoe LLP
Charities & Philanthropy Legal Update

EdwinCoe LLP
Corporate & Commercial Legal Update

EdwinCoe LLP
Employment Legal Update

EdwinCoe LLP
Insurance Litigation Legal Update

EdwinCoe LLP
Intellectual Property Legal Update

EdwinCoe LLP
Property Litigation Legal Update

For more information about our legal updates, or if you would like to join our mailing list, please contact our Marketing team at info@edwincoe.com

Follow us on LinkedIn or Twitter





PROPERTY LITIGATION LAW

The different between Legal Advice Privilege and Litigation Privilege



Joanna Osborne, Head of Property Litigation
Tim Clark, Associate

"It is easy to lose the protection of privilege by waiver and so care needs to be taken to preserve confidentiality."

Legal professional privilege under English law allows parties to seek legal advice and investigate the merits of their case without being forced to disclose confidential and sensitive documents in legal proceedings or to third parties.

There are complex issues surrounding when this right to privilege applies, and it is not always the case that communications with lawyers and third party advisers are protected. It is easy to lose the protection of privilege by waiver and so care needs to be taken to preserve confidentiality.

There are two distinct types of legal professional privilege that can arise; legal advice privilege and litigation privilege.

Legal advice privilege

Legal advice privilege is broader than litigation privilege and allows clients to discuss their legal position with their lawyers in the knowledge that their communications will remain confidential, even when there is no litigation in prospect.

This privilege covers confidential communications between a lawyer and their client for the purpose of giving or receiving legal advice, it applies to both contentious and non-contentious communications and covers all advice in relation to a client's legal rights and obligations. It does not apply to commercial or strategic advice.

Only those at the client engaged in the seeking and receiving of advice from external lawyers are entitled to legal advice privilege. Internal communications

made by other employees that contributed to the seeking of that advice are not protected. However, a lawyer's preparatory work will be privileged whether or not it is sent to the client.

Provided the communication is confidential when created, it will remain confidential. As with litigation privilege, the privilege can be lost by circulating privileged material to third parties and once lost, can lead to the loss of privilege in related material.

Litigation privilege

Litigation privilege is more limited in scope and is designed to allow parties to investigate potential disputes without the worry that those investigations could be disclosed to the other side. It can exist outside of the typical client/solicitor relationship and covers any document or communication which has been produced for the purpose of obtaining information or advice in connection with existing or contemplated litigation subject to certain conditions. Those conditions are that:

1. The document is a communication between:
 - (i) lawyer and client,
 - (ii) lawyer and a third party (e.g. an expert, witness or other professional), or
 - (iii) the client and a third party;

For further information with regard to this article, please contact:

Joanna Osborne

Head of Property Litigation

t: +44 (0)20 7691 4034

e: joanna.osborne@edwincoe.com

Tim Clark

Associate

t: +44 (0)20 7691 4168

e: tim.clark@edwincoe.com

Or any member of the Edwin Coe
[Property Litigation team](#)



2. Litigation must be in progress or in contemplation;
3. The communications must have been made for the sole or dominant purpose of conducting that litigation; and
4. The litigation must be adversarial.

1. What documents are communications?

Documents regarded as communications for the purposes of privilege include anything that is recorded, including emails, letters, voicemails, tape recordings and documents on a computer, as well as other written documents, including those written in manuscript. Confidential documents that have been created to allow a party to give or seek legal advice may also be protected by litigation privilege, even if they are not physically transmitted to another party.

2. The litigation must be ongoing or in contemplation

Litigation privilege will only apply to documentation created in ongoing litigation or where litigation is reasonably contemplated.

If in doubt and litigation is not already underway, it may be sensible to head up a document with a statement that it is *'prepared with a view to litigation'* or *'privileged and confidential'*. However, merely marking a document in this way does not guarantee privilege and will not protect against waiver of privilege if there is loss of confidentiality.

Advice taken by a client from an expert in the absence of litigation is not privileged.

3. Dominant purpose

Litigation privilege protects communications so long as the documents were brought into existence for the dominant purpose of litigation.

Statements within a document remarking that it was prepared to enable the lawyer to advise on the litigation, or evidence put to the Court that the document was prepared for a particular purpose, will not necessarily lead the Court to find that the document was created for the dominant purpose of litigation.

4. Adversarial

For a document to qualify for litigation privilege, the proceedings to which the document relates must be adversarial in nature. This means

that litigation privilege can be claimed in proceedings where a Court or tribunal will make an order as the outcome.

The definition of an adversarial matter is still an issue of great contention. Reports produced in matters which are merely fact gathering exercises, such as a banking enquiry or any type of administrative tribunal, will not usually be subject to litigation privilege.

Risk of waiver of privilege

Confidentiality is a key component of litigation privilege. If confidential, privileged information is placed into the public domain by being read out in open Court or communicated to a third party, then it will cease to be privileged.

If a client forwards advice from its lawyer to a third party, then the advice will no longer be confidential and the client will waive its right privilege, not only in that advice, but potentially all communications with its lawyer on that matter.

Instructions to and reports produced by expert *advisers* to advise on a confidential basis on the merits of a case are protected by litigation privilege. However, the position in relation to expert witnesses is different.

Where it is the intention for an expert to produce a report which is to be relied on in Court, the substance of the instructions to write the report must also be set out within the report. Although the Court will not usually order disclosure of any specific documents surrounding the instructions or permit the expert to be questioned in relation to those instructions in Court, there is obviously the potential for an application to be made for such instructions to be disclosed. Usually such disclosure is only ordered if the instructions are believed to be either inaccurate or incomplete.

Proceed with caution

- Great care has to be taken when documents are distributed within a client company to those who are **not** dealing with the litigation within the client on a day to day basis.
- It is key that any documents produced when litigation may be reasonably contemplated are not circulated more widely than is necessary and certainly not outside of the core client group.
- No annotation or comment should accompany the document as that element may not be privileged.
- Ideally the information should be provided by the lawyer direct.
- As in the real world that is not always possible or desirable, then at the very least any documents that do need to be circulated should be marked *'confidential and privileged'* and *'not for onward circulation'* to highlight the importance of the privileged information and to try to preserve its confidentiality.
- If possible, internal documents regarding litigation or legal advice should not be recorded in any way, particularly in larger organisations.

We hope you find this newsletter useful and interesting, and we would welcome your comments. For further information and additional copies please contact the editor: [Russel Shear](mailto:russel.shear@edwincoe.com) on [t: +44 \(0\)20 7691 4082](tel:+442076914082) or [e: russel.shear@edwincoe.com](mailto:russel.shear@edwincoe.com)

Edwin Coe LLP is a Limited Liability Partnership, registered in England & Wales (No.OC326366). The Firm is authorised and regulated by the Solicitors Regulation Authority. A list of members of the LLP is available for inspection at our registered office address: 2 Stone Buildings, Lincoln's Inn, London, WC2A 3TH. 'Partner' denotes a member of the LLP or an employee or consultant with the equivalent standing. **This newsletter concerns the law in England and Wales and is intended for general guidance purposes only. It is essential to take specific legal advice before taking any action.**

Edwin Coe LLP
2 Stone Buildings
Lincoln's Inn
London WC2A 3TH

[t: +44 \(0\)20 7691 4000](tel:+442076914000)
[e: info@edwincoe.com](mailto:info@edwincoe.com)