

“Trip to the moon? When do you want to take off?”

A typical sales force is rewarded on their results. They win new business and earn their commission and then spend it! It might be tempting, therefore, for a salesman to go over the top with the can-do approach so as to secure a new piece of business without appreciating the consequences of making doubtful promises.

If asked whether he can arrange a trip to the moon, he might say yes without worrying too much about whether he can deliver against that undertaking. The salesman can leave it to someone else to sort out, possibly after he has moved on and spent his commission. Whether the salesman promises a trip to the moon or something more modest in scope, statements made which induce a party to enter into a contract can create significant legal liability for the business they work for.

At law, misrepresentations are false statements – classified into three categories – fraudulent, negligent or innocent. A fraudulent misrepresentation is a statement made without belief in its truth either knowingly or recklessly, without caring whether it is true, with the intention that it should be acted on. Note that a reckless disregard for the truth is sufficient to establish fraud.

Fraudulent misrepresentations entitle the person relying on the misstatement to claim damages or to rescind the contract (i.e. demand that he be put in the position as if the contract had never been entered into, or both).



Negligent misrepresentations, while falling short of fraud, will nevertheless entitle the person relying on the misstatement to claim damages and again, in appropriate cases, rescission of contract.

The recent case involving BSkyB and EDS considered this point. In the course of negotiation, EDS had made representations in relation to the resources, cost, time and methodology it would employ in fulfilling its contractual obligations. When the contract works were completed late and the costs had escalated considerably, BSkyB sought compensation.

EDS relied on an "Entire Agreement" clause to prevent BSkyB from claiming in relation to statements made before the contract was entered into. The Entire Agreement clause is a common 'boiler plate' clause stating that the only provisions which bind the parties are those set out in the contract itself, i.e. to prevent pre-contractual statements being binding on the parties. Whilst the case was decided on a consideration of the clause in question, the court decided that the Entire Agreement clause (on these facts) did not operate to prevent BSkyB from making a claim based on pre-contractual statements made by EDS.

The court awarded damages to BSkyB and (it is reported) an interim payment of £200 million has already been made by EDS. The cap on liability under the agreement was set at £30 million, but BSkyB was able to recover compensation in excess of this limit because the court decided that pre-contractual statements had been made and that these were fraudulent misrepresentations.

The BSkyB case highlights the impact of controlling what is being said in the course of negotiating contracts, you need to have risk management processes in place to control what provisions and representations your sales force (and other employees) make to customers about your products and services before the contract is made. If your sales force is offering the equivalent of a trip to the moon to secure a contract, the consequences may not come to light for some time, but when they do, the cost could be ruinous with contractual caps on liability being disregarded and damages being awarded on an unlimited liability basis.

Kirstin Roberts
dt: +44 (0) 121 234 0053
KRoberts@hbj-gw.com

Advice on World Cup fever

With the tournament kicking off on 11 June, many employers will be growing concerned about associated HR issues that may arise, including absence, misconduct and potential discrimination claims. The employment team has prepared these 'top tips' for HR professionals, which include:

- Keeping a chart of the date and times of all matches to flag suspicious absences
- Ensuring there is a reliable method of recording sickness absence
- Reminding employees that any absences during the World Cup period will be scrutinised closely
- Designating one manager to be a point of contact for all employees reporting sick during the World Cup to flag any patterns of sickness absence
- Utilising return to work interviews. The prospect of having to provide an explanation for their absence upon return to work may act as a deterrent for many employees
- Ensuring that there are clear rules, policies and procedures in place for dealing with absence

The World Cup should be seen as an opportunity to communicate and re-iterate an employer's existing policies and procedures so staff are under no illusion as to the consequences of issues like unauthorised absence. The World Cup does have the potential to bring to light anti-bullying, anti-harassment and other anti-discrimination laws and policies. Adhering to equal opportunities and repeating messages that no harassment or bullying of other employees will be tolerated, whether it is football related or not, will be important.

When granting holiday requests, employers should remind employees that such requests will be dealt with strictly in accordance with the company's usual holiday procedure to avoid claims of sex or age discrimination. Employers should also be aware not to make assumptions about who is or is not interested in football. The World Cup can have a very positive impact on a workforce: raising morale, bringing employees together and improving motivation. To strike a balance, however, employees need to be reminded of their employer's expectations and their own responsibilities.

Victoria Garrad
dt: +44 (0) 121 234 0040
VGarrad@hbj-gw.com

Holiday tides turn against employers

There have been a number of recent cases about holidays and sick leave that could affect employers.

In the *Stringer* case last year the European Court of Justice (ECJ) ruled that workers continue to accrue statutory holiday whilst on sick leave, and that workers should be paid for this holiday at their normal rate of pay, even if their sickness absence lasts for more than one full holiday year.

This conflicts with the “use it or lose it” principle of UK law which says that if you are unable to take your four weeks’ statutory holiday in one leave year, you cannot carry it over into the next. It was hoped that the House of Lords would resolve this conflict when the *Stringer* case came before the Lords last June. Unfortunately, they did not address this issue and confined their judgment to answering a technical question relating to the legislation under which these claims may be brought.

Meanwhile, other cases have added to the debate.

Another European case, *Pereda*, established that where a worker falls ill whilst on a pre-arranged holiday, they *must* be allowed to take the days ruined by illness at a later date, even if that means carrying them into a future holiday year. The ECJ also held that a worker can choose whether to take accrued holiday whilst on sick leave (on full pay) or to take the holiday at a later date (again, even if this rolls into a future holiday year).

However, the conflict with the “use it or lose it” principle of UK law remains, and the Government has announced that it will consult on the issue later this year.

In the meantime, *Shah v First West Yorkshire Limited* sought to address this. Here, an Employment Tribunal held that UK law *could* be interpreted to allow holiday ruined by sickness to be carried over into the following leave year. To do this, the tribunal added words into the UK Working Time Regulations to make them compatible with the “underlying thrust” of the European Working Time Directive – to ensure workers have paid periods of leisure time throughout the year.

Commentators have suggested that these decisions imply that workers can only be ill on their employer’s time, not their own.

Shah is an Employment Tribunal decision, so it is not binding on other courts and tribunals, and the outcome of government consultation or a decision from a higher court is needed to decide the issue, other than for public sector workers who can now directly rely on *Pereda*. In the meantime, *Shah* is strong indication of the way in which the holiday tides are turning against employers who, it seems, will have to bear the costs of these decisions.

So, what is the position now? Here is a brief summary:

- Workers are entitled to accrue holiday whilst on sick leave.
- Where a worker is sick whilst on holiday they can reclaim their sick days (assuming they follow the employer’s normal sickness absence reporting procedures).
- Worker’s on sick leave can take their annual leave whilst on sick leave if they choose to (on full pay). If a worker in these circumstances qualifies for statutory sick pay (SSP), this will continue to be paid during the annual leave and the SSP will count towards any holiday which is paid.
- UK legislation still says that if a period of statutory annual leave is not taken in the relevant holiday year this can be lost.
- However, case law says the opposite. Public sector workers can rely on the *Pereda* case to reclaim such days (or payment for them), but those in the private sector will have to await the outcome of future cases or the outcome of the government consultation which will be launched later this year.
- A worker may be able to seek a payment in lieu of their unused annual leave, perhaps spanning more than one holiday year.

Emma Griffiths
dt: +44 (0) 115 983 8239
EGriffiths@hbj-gw.com

Workplace pension reforms – will you be ready?

The government's workplace pension reforms (which will be introduced in 2012) will require all employers to enrol employees into a pension scheme automatically and, for the first time, there will be a legal obligation on employers to contribute towards employees' pension savings. We summarise the reforms below:

- Introduction of the automatic-enrolment obligation will be staged over four years from 1 October 2012, with the largest employers (based on the number of employees) being required to comply first;
- All employers will be required to automatically enrol employees into a qualifying pension scheme (which could be the centralised pension scheme, the National Employment Savings Trust (NEST) or the employer's own arrangement) if they:
 - are over 22, but under state pension age;
 - are not already participating in a qualifying scheme; and
 - earn more than £5,035 per annum (in 2006/7 terms – the figures are to be updated in due course);
- The minimum level of contributions will be phased in over five years from 1 October 2012. Initially, a minimum of 2% of the employee's qualifying earnings must be contributed to the pension scheme, at least 1% of which must be paid by the employer. From 1 October 2017, a minimum of 8% of the employee's qualifying earnings must be contributed, at least 3% of which must be paid by the employer;

- Contributions will be based on a percentage of "qualifying earnings" which are defined as the employee's earnings, including salary, overtime, bonuses, commission etc between £5,035 and £33,540 (in 2006/7 terms);
- Employees can opt-out of membership of the pension scheme but any employee who has opted-out must be re-enrolled every three years unless they reconfirm their decision to opt-out. The pensions regulator will be able to impose penalties on employers who seek to force or persuade employees to opt-out; and
- Although employers will only be required to automatically enrol employees who meet the above criteria, employees who: are under 22; earn less than £5,035; and/or have previously opted-out will be entitled to opt-in to the employer's pension scheme, in which case the minimum contribution provisions will apply.

The new government means there is some uncertainty over whether the reforms will come into force in their current form. However, the Conservatives have made it clear that they support the policy of automatic enrolment and a minimum level of contributions and so changes, if any, are likely to be to the finer details rather than the overall policy. Employers should therefore start thinking now about how they will comply with the new requirements and the cost implications of doing so.

If you would like any assistance with this, please contact Michael Collins or Mario Conti.

Michael Collins
dt: +44 (0) 121 234 0236
MCollins@hbj-gw.com

Mario Conti
dt: +44 (0) 121 234 0242
MConti@hbj-gw.com

Phonographic Performance Limited and Public Performance Rights

Phonographic Performance Limited (“PPL”) is the owner of Public Performance Rights relating to virtually all commercially released sound recordings in this country.

Licence fees for performance of recordings are payable annually and the licence is renewed from 1 January each year.

As a result of a Copyright Tribunal decision in October 2009 (*PPL v British Hospitality Association and Others CT91-93/05-“BHA”*), an attempt by PPL to impose significant new licence tariffs on licensees was found to be unreasonable. The practical consequence has been an effective fall in the licence income for PPL and in turn record companies and performers.

The willingness of PPL to take action to protect its rights has been well documented.

One aspect of the BHA decision was in fact relatively successful for PPL. This was the tribunal finding that “surcharges”; that is to say in practical terms a fine for late payment of licence fees, might in certain cases be reasonable.

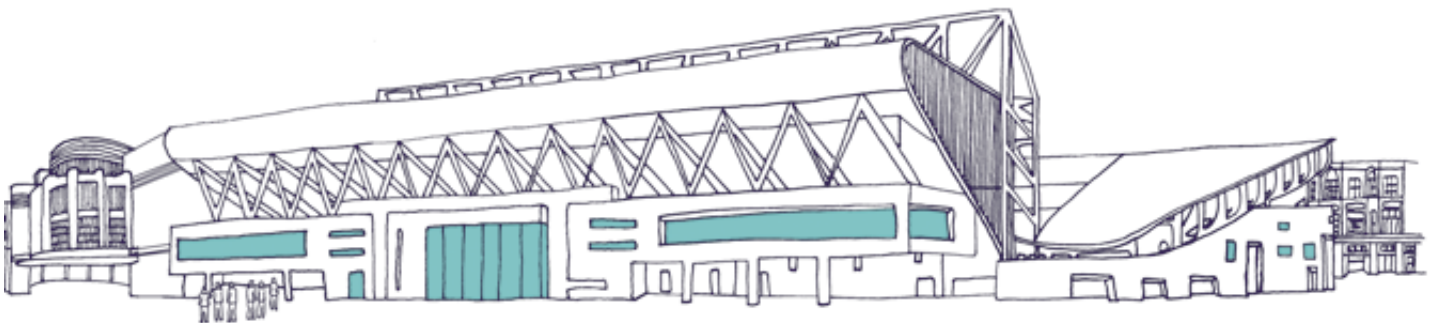
Allied with its significantly reduced licence income PPL appears intent upon imposing surcharges for late payment without apparent regard for the reasons for lateness of payment.

BHA plainly envisaged some culpability or intent to evade or delay payment on the part of licensees yet PPL, it would appear, are willing to demand surcharges be paid for licence fees if they are not paid in full on precisely the due date. The surcharge fees are considerable; 50% of the licence fee.

In addition to this, demands for payment of surcharge will frequently be accompanied by an allegation that non-payment has flagrancy about it, exposing licensees to further punitive damages of 200% of the licence fees (as was found in the decision *PPL v Stephen Russell Reader (2005) EWHC416 (CH)*).

The clear message is that the prudent licensee will always make payment for its licence whether aware of the surcharge or not and whether negotiations are pending on the exact extent of the licence or not. Failing this, whether reasonable or otherwise, PPL are likely to withhold a licence exposing the would be licensee to infringement proceedings and to take action to recover the surcharge.

Chris Greenwell
dt: +44 (0) 116 285 9056
CGreenwell@hbj-gw.com



A stroll in the (Wrotham) Park?

Or, does it really matter if you breach confidentiality letters?

Confidentiality letters or Non-Disclosure Agreements (“NDA”) are sometimes regarded as unworthy of serious commercial attention. Two recent cases have shown how the courts view breaches of confidence, how damages are assessed and emphasises the value in taking legal advice.

Where confidential information is disclosed to a third party, the disclosing party will always have to trust that the receiving party does not intend to misuse it. Serious harm may be done at the point the confidential information is misused but the disclosing party may only become aware of this long after the event. Proper contractual protection is therefore essential.

If a receiving party breaches the terms of a confidentiality letter or NDA, remedies may be found in claims for damages, injunctive relief or specific performance. In cases where confidential information has been misused, an injunction or an order for specific performance may be irrelevant, often because the damage is irreversible. The question then is what damages are available to the disclosing party.

Contractual damages are normally assessed by reference to the innocent party's loss and not by reference to the defaulting party's gain. In cases of a misuse of confidential information this can seem inequitable, particularly in cases where financial loss may be hard to quantify. The courts in the cases of *Pell Frischmann Engineering Ltd vs Bow Valley Iran Ltd & others* (“Pell”) and *Vercoe & others vs Rutland Fund Management Ltd & others* (“Vercoe”) have clarified the basis on which damages can be claimed.

In Pell, it was held that so-called ‘Wrotham Park’ damages are appropriate in cases of misuse of confidential information. These damages do not simply look at the financial loss suffered by the innocent party but, instead, consider a hypothetical negotiation on a willing basis between the receiving party and the disclosing party and assess the amount of money that the disclosing party would have received as a quid pro quo for allowing the receiving party to misuse the confidential information. In Pell, the Privy Council increased the original award of damages from £500,000 to £2,500,000.

The remedies sought in Vercoe were damages or, in the alternative, an account of profits made by the receiving parties. Whilst it might be possible to obtain an account of profits in some cases (for example, where there was a fiduciary relationship or where the facts related to certain types of intellectual property), it was held on the facts that the disclosing parties did not have the ability to choose between these remedies. The judge therefore applied Wrotham Park to the claim made in Vercoe and the receiving parties were held to be jointly and severally liable for an amount equal to the notional fair price that would have been paid to the disclosing parties for a release of their rights to prevent misuse of their confidential information. The damages award was approximately £2,700,000.

Pell arose from a joint venture and Vercoe from a proposed management buy in but these decisions will affect all confidentiality agreements. Legal advice is recommended before any confidential information is disclosed to a third party.

Chris Reed
dt: +44 (0) 121 234 0136
CReed@hbj-gw.com

Implementation of Consumer Credit Directive delayed

The implementation of the Consumer Credit Directive (“CCD”) has now been put back beyond the original implementation date of June 2010 due to the delay in finalising draft regulations.

The Department of Business Innovation and Skills (“BIS”) have now confirmed that all agreements which fall within the scope of the CCD will need to comply with the new requirements of the CCD in all respects from 1 February 2011.

This means that lenders will have to ensure new policies and procedures are in place *prior* to the implementation date to ensure that any agreements entered into on or after 1 February 2011 within the CCD’s ambit, are fully compliant with the new legislation. This will include providing customers with adequate explanations in relation to the credit agreement, undertaking an assessment of the customer’s creditworthiness in view of the credit to be provided and ensuring that the correct pre-contractual information, including provision of the SECCI (Standard European Consumer Credit Information), has been provided to the customer in advance of the agreement being concluded.

Transitional provisions will apply from 11 June 2010 during which time lenders are being encouraged to operate under the new regulations and provide customers with the new rights on a voluntary basis as early as possible. At the time of writing, BIS are still finalising these transitional provisions prior to the draft regulations being laid before parliament. BIS have indicated however, that where agreements are entered into between 11 June 2010 and 31 January 2011 under the old regime, lenders will have to provide customers under those agreements with the new post-contractual rights introduced by the CCD. These include the right as from 1 February 2011 to make partial early repayments under the agreement.

The finalised regulations are expected to be approved by parliament in April 2010.

Philip Alton
dt: +44 (0) 121 234 0076
PAlton@hbj-gw.com

Joanne Owens
dt: +44 (0) 116 285 9025
JOwens@hbj-gw.com

Corruption clean up

A new bribery bill is on the way in an attempt to clean up corruption in business. The penalties are significant with up to 10 years’ imprisonment for an individual and companies will face unlimited fines. The bill is expected by the end of 2010 and proposes four offences:

- bribing another person;
- requesting, accepting or receiving a bribe;
- bribing a foreign public official; and
- failure by a commercial organisation to prevent bribery by a person who provides services to it.

Employers will undoubtedly find the latter offence of most concern to them because it could render businesses liable for failing to prevent bribery committed by those who provide them with services including employees. Management teams would be wise to familiarise themselves with the new legislation and government guidance and set up appropriate policies to ensure compliance.

The requirements of policies and procedures will vary depending on the size of the business with smaller ones having less onerous requirements for compliance. Every business will be expected to have an anti bribery policy in place with a code of conduct setting out standards of behaviour and tight controls and be able to demonstrate that they have communicated it clearly to employees.

Larger organisations will also be expected to have a range of checks in place, expense controls, audits and other processes appropriate to the nature of their business.

In addition, organisations will be expected to have a whistle-blowing policy in place so staff can report any acts of bribery, each of which will need to be investigated by the employer.

It makes sense for business to include this on the risk register now and ensure that existing employment policies are amended now to reflect what will be introduced.

Kay Shotton
dt: +44 (0) 121 234 0055
KShotton@hbj-gw.com

New fines for breach of Data Protection rules

From 6 April 2010 the Information Commissioner (ICO) has a new power to fine organisations up to £500,000 for breaches of the Data Protection Act 1998.

Why is this significant?

Although substantial criminal fines for breaches have always been possible, the new civil fines can be more easily and quickly imposed. The ICO imposes the fine so there is no need to bring a court claim first, and there is no obligatory 'warning card' giving organisations an opportunity to remedy breaches before a fine is imposed.

The ICO has also been highly critical of low value fines imposed to date, and seems keen to use the new power to deter future breaches. Therefore, it is expected to make full use of the new power and, as it can set them, to impose higher fines than seen previously.

When might you face a fine?

There must be a serious breach (either deliberate or negligent) of a data protection principle of a kind likely to cause substantial damage or distress.

The following breaches are considered likely to attract fines:

- Data losses and security breaches, especially those involving sensitive personal data (e.g. medical information, ethnicity).
- Providing an inaccurate reference for an ex-employee that leads to a loss of a job opportunity.
- Collecting personal data under false pretences (e.g. a competition) and then disclosing it to a third party for commercial purposes (e.g. to populate a tracing or marketing database).

So, what can you do to avoid one?

The focus should be on compliance with the Act. A variety of steps can help to achieve this, but all organisations should consider:

- If their security measures are adequate (including in relation to premises, IT networks, and employees).
- If their privacy policy/statement is sufficiently brought to users' attention, and up-to-date.
- Implementing subject access request and data protection policies.
- Updating and/or removing old/obsolete data.
- Appointing a data protection officer.

Rebecca Andersen
dt: +44 (0) 121 234 0106
RAndersen@hbj-gw.com

Birmingham

One Eleven
Edmund Street
Birmingham B3 2HJ
t: +44 (0) 121 234 0000

Edinburgh

Exchange Tower
19 Canning Street
Edinburgh EH3 8EH
t: +44 (0) 131 228 2400

Glasgow

Cornerstone
107 West Regent Street
Glasgow G2 2BA
t: +44 (0) 141 221 2300

Leicester

Knightsbridge House
Lower Brown Street
Leicester LE1 5NL
t: +44 (0) 116 285 9000

London

Fleet Place House
2 Fleet Place
Holborn Viaduct
London EC4M 7RF
t: +44 (0) 20 7653 1600

Nottingham

City Gate East
Tollhouse Hill
Nottingham NG1 5FS
t: +44 (0) 115 983 8200

Dubai

Suite 303
Sheika Sana Al
Maktoum Building
Sheikh Zayed Road
Dubai UAE
t: +971 4 321 9999