

*This is our summary of some of the key legal developments across a range of sectors for the week of 23 March 2009. It is intended for reference purposes only and does not constitute definitive advice. Links to the original source materials are included where there are no restrictions in terms of access. References may also be made to sources that require separate registration or subscription. A link to a source does not necessarily imply endorsement of the source or the material provided through the link.*

*For further information on any of the matters discussed in the summary please contact our Professional Support Lawyer, [Sarah Kirkness](#). If you have any comments, queries or suggestions please contact us at [comments](#). All suggestions and comments are most welcome. If you do not wish to receive this summary you can contact us at [unsubscribe](#).*

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## General

Execution of Documents - Practical Guidance on Application of *Mercury* Decision

Useful guidance on things to consider when signing and executing commercial documents can be found in the decision of the Administrative Court in *R (on the application of Mercury Tax Group Limited and Anor) v HMRC & Ors* [2008] EWHC 2721 - the court held that the documents in question had not been properly executed as deeds and although its judgment was limited to the particular transaction before it, the obiter comment about simple contracts (and the practical impact of the court's judgment on the parties) raised doubts about certain commercial practices when entering into a contract. PLC have now done a useful note on the case, which reminds parties that *Mercury* does not allow a signature page to be produced independently and then bound into a "deed", where that signature page has never been part of the whole (concluded) deed. They have said however, in principle and subject to the parties' own particular transaction, a scanned copy of a signed and witnessed document, delivered by e-mail (with all necessary parties' knowledge and authority), should not suddenly be cast aside because of the *Mercury* judgment and if the parties are signing a simple written contract, *Mercury* should not, in many cases, affect them at all. Guidance is currently being prepared about the impact of the decision on "virtual" completions. See <http://corporate.practicallaw.com/4-385-3396> for the PLC note and <http://www.casetrack.com/ct4plc.nsf/items/8-384-4395> for the judgment.

### EU Telecoms Commissioner Calls for One Day Number Porting

The EU's Telecoms Commissioner has called on the European Parliament and the Council of EU Telecoms Ministers to be "ambitious" as they enter the final negotiations on a new set of EU rules strengthening competition and consumer rights in a single market for telecoms services (such as mobile phone services and internet connections) and agree rules which will enable all Europeans to be able to switch their phone operator - whether mobile or fixed - within one day, as it is already the case in Ireland and in Malta. At present, on average across the EU, it takes 8.5 days for a mobile number and 7.5 days for a fixed number to be ported. (*EC Press Release Memo/09/126, 23 March 2009*).

### Commission Reports on State of EU Telecoms Market

The European Commission has published its annual review of the telecoms market in the EU, which shows continued growth (of 1.3%) in the sector, despite the general economic downturn. According to the figures, the mobile market remained the most dynamic telecoms segment in the EU in 2008, with mobile phone use rising from 112% of the population in 2007 to 119% in 2008 while at the same time prices fell significantly (by 34.4% from 2004). Further, growth in both fixed and mobile broadband remained strong - Denmark and the Netherlands were the world leaders in broadband, with over 35% of population having broadband. However, the review did identify a number of continuing problems which will need resolution in order to support continued growth - the need to strengthen national regulators' independence, ensure fairer competition between fixed and mobile operators, in view of increasing convergence between fixed and mobile telephony and prevent a bypassing of EU rules that could harm the single market. (*EC Press Release IP/09/473, 25 March 2009* - see [http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/annualreports/14threport/commen.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/14threport/commen.pdf) for the Commission's 14th Report on the Implementation of the Telecommunications Regulatory Package and [http://ec.europa.eu/information\\_society/policy/ecomm/doc/implementation\\_enforcement/annualreports/14threport/uk.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/14threport/uk.pdf) for the report on the UK market (note that additional country reports are also available)).

### MoJ Publishes Draft Bill to Reform Bribery Laws in the UK

The Ministry of Justice (MoJ) has published draft legislation to modernise the current law on bribery. The draft bill proposes a reform of the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery offences, both in the UK and abroad. The MoJ describes the current law as "old and anachronistic" with "inconsistencies of language and concepts between the various provisions and a small number of potentially significant gaps in the law". The MoJ is concerned therefore that the exact scope of the common law offence is unclear. It says the result is a bribery law that is "difficult to understand for the public and difficult to apply for prosecutors and the courts". The draft legislation proposes a "framework of two general offences; one dealing with the giving, promising, and offering of a bribe and the other with agreeing to receive or accept a bribe. In recognition of the problems experienced in prosecuting public sector bribery overseas, the Bill introduces a new discrete offence of bribery of a foreign public official. It also creates a new corporate liability offence of negligently failing to prevent bribery to underpin the Government's policy of promoting good corporate governance". The draft bill is modelled on the proposals in the Law Commission Report "Reforming Bribery", published on 20 November 2008 (and see <http://www.lawcom.gov.uk/docs/lc313.pdf> for the Commission's Report). See <http://www.justice.gov.uk/docs/draft-bribery-bill-tagged.pdf> for details. According to the accompanying impact assessment, no date has been set for implementation.

## Broadcasting

### Court of Appeal Allows BSkyB to Appeal ITV Ruling

The Court of Appeal has given permission for BSkyB to appeal the Competition Commission ruling that it must reduce its holding in ITV from 17.9% to no more than 7.5%. BSkyB had appealed the Commission ruling before the Competition

Appeal Tribunal however the Tribunal refused leave to appeal the decision but said an appeal could be made to the Court of Appeal. The Court of Appeal said that the issues raised by Sky's proposed appeal were arguable and of "some general importance". At the time of writing, the judgment is not available. (*The Guardian, 20 March 2009*).

### Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.14 (most offensive language must not be broadcast before the watershed), 2.3 (generally accepted standards), 2.13 (broadcasters must take precautions to maintain a low level of PSE risk), 9.13 (sponsorship must be clearly separate from advertising), 10.2 (advertising and programme elements of service must be separate), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence to a product or service in any programme) of the Broadcasting Code. A complaint of unfair treatment and a complaint of unfair treatment and unwarranted infringement of privacy were not upheld. A breach of Licence Condition 8 (Part 2 General Conditions) and Rule 4(a) of the Code on the Scheduling of Television Advertising (COSTA) were also recorded. Ofcom also published a notice about broadcast sponsorship (on-air sponsorship that offers organisations the opportunity to be associated with the content they are producing) and Rule 9.13 of the Code - Ofcom noted that the rule permits broadcasters the maximum freedom permitted under the TVWF Directive but in view of the number of breaches of the rule discussed in the latest Bulletin, it took the opportunity to provide guidance to broadcasters to assist them avoiding further breaches - it made the point that decisions about whether to broadcast certain material should not be made on the basis that previous broadcasts of similar material had not resulted in any regulatory intervention against either the licensee or any other licensee. See [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb130/issue130.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb130/issue130.pdf) for details.

### Ofcom Approves BSkyB's Application for Live Cricket Coverage in England

Ofcom has announced that it has considered BSkyB's application and supporting information together with the results of Ofcom's consultation on that application and decided to grant consent for BSkyB's exclusive live coverage of cricket test matches played in England in 2010 - 2013. Cricket test matches played in England are Group B listed events, which means that a non-qualifying service (one that is not available free-to-air to at least 95% of the population) may acquire the rights to live coverage, provided that the rights to broadcast highlights have been offered to a qualifying service. Five, which is a qualifying service, has acquired the highlights rights.

### Disagreement Over EPG Listing - Whether Position Breached Contractual Obligations

The claimant provided shopping channels on the digital multi-channel satellite television service which was operated by the defendant and which was launched in the UK in May 2008. The defendant allocated positions to the claimant's two shopping channels under the shopping section of the screen programme guide provided by the new service. The positions were lower down the list of shopping channels than the claimant said that they should be. The claimant's amended particulars of claim sought a declaration that the defendant's listing of its channels was invalid and a declaration that the defendant was obliged to perform its obligations by re-listing the channels in accordance with the applicable contractual requirements, ie the relevant provisions of the agreement between itself and the defendant, the Listing Policy and the Ofcom Code. However, the court refused the declaratory relief on the basis that, on the evidence, the claimant had failed to establish that the defendant was in breach of the EPG agreement. (*JML Direct Ltd v Freesat UK Ltd [2009] EWHC 616 (Ch)* - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/616.html> for the judgment).

## Corporate

### European Corporate Governance Forum - Statements on Director Remuneration and Cross Border Corporate Governance

The European Corporate Governance Forum has published statements concerning director remuneration and cross border issues in relation to corporate governance codes. The Forum said it believes that further progress needed to be made on the subject of director remuneration and in support of this, set out details about best practices for remuneration and said these should be included in a code of corporate governance that listed companies are required to apply (in the manner of comply or explain). It suggested that a Commission Recommendation to Member States support the evolution of best practices (such as ensuring that the level of variable pay were reasonable in relation to total pay level; ensuring that variable pay was linked to factors that represented real growth of the company and real creation of wealth for the company and its shareholders; ensuring that shares granted to executive directors under long-term incentive plans vested only after a period during which performance conditions are met; and ensuring that severance pay for executive directors was restricted to two years of annual remuneration and should not be paid if the termination was for poor performance) and that Member States organise a consultation at national level and monitor how best practices are included in their codes of corporate governance. See [http://ec.europa.eu/internal\\_market/company/docs/ecgforum/ecgf-remuneration\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-remuneration_en.pdf) for details. Separately, the Forum expressed its concerns about the application of corporate governance codes in cases where a company was incorporated in one Member State and its shares were listed in one or more other Member States and the fact that this may lead to a double application of corporate governance codes in two jurisdictions or no corporate governance code being applicable to a particular listed company. Accordingly, it said that

companies incorporated in the EU where the shares were admitted to trading on a regulated market should at least apply one code and should not materially have to apply more than one code and suggested the introduction of rules to that effect - see [http://ec.europa.eu/internal\\_market/company/docs/ecqforum/ecgf-crossborder\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecqforum/ecgf-crossborder_en.pdf) for details.

#### Article - Dealing With Concerns About Pre-Packaged Administrations

The latest New Law Journal looks at the topical issue of the use of pre-packaged administrations and asks whether specific concerns of creditors about achieving the best possible price for the assets and the possibility of the process being abused by unscrupulous company directors or investors as a means of "dumping" a company's debts while purchasing profitable assets from the administrator through a new corporate entity will in any way be dealt with by Statement of Insolvency Practice 16 "Pre-packaged Sales in Administrations" (SIP 16) (which came into effect in England and Wales on 1 January 2009). SIP 16 requires that administrators provide creditors with a detailed explanation and justification as to why a pre-packaged sale was undertaken and attempts to reduce the risk of connected parties being able to hide behind a fresh corporate veneer in order to purchase a company's assets. The article notes however that preventing abuse of the pre-pack procedure relies largely on strict self-regulation within the insolvency profession, rather than any legislative framework. (*"A Fair Deal?"* (2009) 159 NLJ 421; the article is available via LexisNexis).

### Gambling

#### Draft Regulations to Increase Prizes for Category C and D Machines

The draft Categories of Gaming Machine (Amendment) Regulations 2009 have been published. The Regulations propose amendments to the Categories of Gaming Machine Regulations 2007, SI 2007/2158 so as to increase the stake and prize limits for all Category C machines and certain Category D machines. The amendments proposed by the Regulations are a result of two public consultations conducted by the DCMS in August and November 2008 on providing economic assistance to family entertainment centres (such as seaside arcades) and to pubs and clubs (and see [http://www.opsi.gov.uk/si/si2009/draft/em/ukdsiem\\_9780111475706\\_en.pdf](http://www.opsi.gov.uk/si/si2009/draft/em/ukdsiem_9780111475706_en.pdf) for the accompanying Explanatory Memorandum to the draft Regulations, which contains details about the consultations and responses).

### Litigation

#### Preliminary Proceedings to Determine Meaning of Words - Whether Words Capable of Bearing Attributed Meanings

The court was asked to rule on the natural and ordinary meanings to be attributed to the words complained of in a libel action, which comprise a number of publications. The action was brought by the claimant following the defendant broadcaster's airing of a television programme about corruption in football - the programme conveyed the impression that the claimant was, while on camera while being covertly recorded, expressing interest in prospectively receiving an impermissible payment (or bung). The issue arose as to whether a reasonable viewer, while inevitably noting the claimant's interest in prospective "bungs", would have concluded that that was a new departure or momentary lapse, or alternatively, would he or she decide that the programme implied that that had been part of a pattern, providing evidence that he been one of those on whom the programme had focused as being "at it" already. The defendant submitted that the programme only imputed an interest in prospective payments. The court said it was important to acknowledge that assessing the meaning(s) of an hour-long television programme was, to a large extent, a matter of impression and that it was also necessary to remember that the test was objective, so that one had to always have in mind how the reasonable viewer would interpret it. Further, it said it was recognised in the authorities that the judge could take into account his or her own subjective reaction as part of the process. Beyond that, one could not be over-analytical, in the sense of subjecting the text to a leisurely or legalistic breakdown: ordinary viewers would not have had that opportunity. In the circumstances, the natural inference from the programme was that the claimant was "in the frame" as one of the prime suspects to whom the defendant had been drawing attention. Most reasonable viewers would think it stretching credulity too far to interpret what they had seen as an innocent being tempted by corruption for the first time. (*Bond v British Broadcasting Corporation* [2009] All ER (D) 196; the judgment is available via LexisNexis).

### Music

#### "Fair Play for Creators" - PRS For Music Launches Support Site

PRS For Music has launched a new website to highlight what it calls "the growing concerns of songwriters and composers over the treatment of their work on the internet". The site has three main aims: for Google to re-instate all music it removed from YouTube and properly recognise and reward creators for providing them with the business benefit they derive from their work; ensuring composers and songwriters should earn what they rightfully deserve from the use of their music in the online space; and highlighting the importance of royalties in nurturing creative music talent and providing them with an income stream which rewards their creativity in the same way any other creative person would be, eg fashion designer, playwright or author. See <http://www.fairplayforcreators.com/terms.html> for access.

#### Assignment of Copyright - Whether Copyright Reverted Under Terms of Agreement

The High Court has ruled that a provision in an agreement under which copyright assigned to a music publisher was to revert to the writers in the event that the publisher failed to remedy a breach within the time stipulated in the agreement, operated as an automatic vesting of those rights. The claimant had taken assignment of various copyrights in songs from the first defendant (the second and third defendants, the writers of the songs, having originally assigned the copyright to the first defendant). The agreement between the writers and the first defendant contained a clause which seemed to provide for a re-transfer of the copyrights to them in the event that material breaches of the original assignment agreement were unremedied after notice was given. The writers asserted those circumstances had in fact come about. The court had to decide whether this was the case. On the evidence, it dismissed the claimant's claim and held that the relevant cure notices were valid. (*Crosstown Music Company v Rive Droite Music Ltd & Ors* [2009] EWHC 600 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/600.html> for the judgment).

## Publishing

### Judgment in Guardian Confidential Documents Ruling

Last week's Need to Know discussed the ruling by the High Court maintaining the confidentiality of certain documents which had already been put into the public domain. The court ordered the continuation of the injunction, under the terms of which the Guardian had to continue to prevent the publication in whole or in part of the documents without the consent of the claimant, the supply of the documents to a third party other than a public authority, or incitement of any third party to themselves publish the documents. The judgment is now available - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/591.html> for details. (*Barclays Bank plc v Guardian News and Media Ltd* [2009] EWHC 591 (QB)).

## Consultations & Reports

Ofcom Report - Restricted Radio Services Annual Report 2008 - [http://www.ofcom.org.uk/radio/ifi/rbl/rsls/rsl\\_report08.pdf](http://www.ofcom.org.uk/radio/ifi/rbl/rsls/rsl_report08.pdf) (details about the number of restricted radio service licences granted by Ofcom under section 104(6) of the Broadcasting Act 1990)