This is our summary of some of the key legal developments across a range of sectors for the week of 6 July 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

IPO - Responses to Consultation on Proposals for Fees and Services

The Intellectual Property Office (IPO) has published details of the responses to the consultation it began in March this year on proposals for improving the system of registering trade marks in the UK. The IPO said that The Trade Mark Rules 2008 (and related fees rules) and the Patents (Fees) Rules 2007 will be amended, to the extent necessary, to facilitate the proposed changes, which are intended to assist businesses to register trade marks more quickly and cost effectively. The implementing statutory instrument will come into force on 1 October 2009. See http://www.ipo.gov.uk/response-feeservices.pdf for a summary of the responses and the IPO's stated course of action.

Lords Reaffirm Objective Approach for Construing Contractual Terms

The House of Lords has reaffirmed that an objective approach must be taken when construing contractual terms in its recent ruling. The Lords were asked to consider the extent to which pre-contractual negotiations can be taken into account when construing a contract. The dispute arose in the context of an agreement for the development of land and the price which was payable as a result of how the figures were to be calculated. The Lords leading judgment said, "It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out". It noted "To allow evidence of pre-contractual negotiations to be used in aid of construction would therefore require the House to depart from a long and consistent line of authority, the binding force of which has frequently been acknowledged" but that it "would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used". The Lords reaffirmed that an objective approach must be taken when construing contractual terms and held that, where it is clear that something has gone wrong with the language of a contract, the court will construe it in accordance with what a reasonable person would have understood the parties to have meant, taking into account the relevant background. (*Chartbrook Ltd v Persimmon Homes Ltd & Ors [2009] UKHL 38 - see http://www.bailii.org/uk/cases/UKHL/2009/38.html for the judgment*).

Commercial Agents - Authority to Contract

The appellant appealed a decision that he had not been a commercial agent within the meaning of the Commercial Agents (Council Directive) Regulations 1993 while selling jewellery for the respondent under an oral contract. The respondent said that the appellant made contracts in his own name and on his own behalf, and that although he was using a trade name, he never fell within the definition of "commercial agent". The Commercial Court had ruled that the appellant had no authority from the respondent to negotiate or contract on his behalf and that the appellant was not a commercial agent and that the terms of the Regulations did not apply to him. The Court of Appeal ruled that for the purposes of the Commercial Agents (Council Directive) Regulations 1993, agents with authority to contract (as opposed to authority to negotiate) were only "commercial agents" if they had authority to contract and enter into contract in the name of the principal as well as on his behalf. The appellant did not have this authority since, as the evidence showed, he never contracted in the respondent's name but only in his own trading name. It was possible as a matter of English law for a principal to authorise an agent to make a contract on behalf of the principal but in the name of the agent rather than in the name of the principal, but agents who entered into contract in that way did not come within the definition of "commercial agents". (*Sagal (t/a Bunz UK) v Atelier Bunz GmbH [2009] EWCA Civ 700 - see http://www.bailii.org/ew/cases/EWCA/Civ/2009/700.html for the judgment*).

New Legislation - Data Protection Notification and Notification Fees Amendment Regulations

The Data Protection (Notification and Notification Fees) (Amendment) Regulations 2009, SI 2009/1677 have been laid before Parliament. The Regulations, part of which come into force on 31 July 2009 and then 1 October 2009 amend the Data Protection (Notification and Notification Fees) Regulations 2000 to create an exemption from the obligation under the part 3 of the Data Protection Act 1998to notify the Information Commissioner when data controllers are processing personal data on the instructions, or behalf, of a judge and is for the purposes of exercising judicial functions and amend

the fee that must be paid by a data controller to register with the IC and change the current flat notification fee structure to a tiered fee structure. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091677_en.pdf for details.

Partial Dismissal of Plaintiffs' Claims in YouTube Suit

The latest ruling in the ongoing class action suit against YouTube by the Football Association Premier League and others has seen the dismissal of some of the plaintiffs' claims - a New York District Court judge has ruled that damages were not available for any foreign works that were not registered in the US, except those that fall under a "live broadcast exemption" in the US Copyright Act (this is the same ruling as was previously given in the suit brought by Viacom - the actions have been consolidated for the purposes of discovery). However, the ruling has left open the possibility of statutory damages for the infringement of live broadcasts, should the plaintiffs be successful at trial.

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with adjudications on breaches of Rules 1.3 (children must be protected by appropriate scheduling), 2.1 (generally accepted standards), 2.3 (material which may cause offence justified by context), 9.9 (radio credits must be short branding statements), 9.12 (sponsorship credits separate from programmes), 9.5 (no promotional reference to sponsor in programme) and 10.4 (no undue prominence in programme to product or service) of the Broadcasting Code. Ofcom also published a note to daytime and adult sex chat service broadcasters in the Bulletin, reminding them of their obligations to take all reasonable steps to protect people under 18 and ensure that generally accepted standards are applied to their material and that the material is appropriate for the time when it is broadcast. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb137/Issue137.pdf for details.

Corporate

Commission Consults on International Standards for Auditors

The European Commission is consulting on the adoption of the International Standards on Auditing (ISA) issued by the International Auditing and Assurance Standards Board (IAASB) for the statutory audits of EU private entities. The Commission said that it considers that the current governance of the IAASB have matured to a stage where it may be justifiable to adopt ISAs in the EU but that a choice needs to be made whether the EU takes international leadership by adopting the ISAs at European level or whether it should take a "wait and see" stance until international acceptance is further confirmed in other international fora or organisations. The consultation is in parallel with the publication of an independent study on the costs and benefits that would result from an adoption of International Standards on Auditing (ISAs) in the EU. The study analysed the impact such an adoption may have on audit firms, their clients, investors and audit regulators - see http://ec.europa.eu/internal_market/auditing/docs/ias/study2009/report_en.pdf for the study and http://ec.europa.eu/internal_market/consultations/docs/2009/isa/consultation_ISAs_en.doc for the consultation document.

FSA Consults on Financial Penalties in Enforcement Cases

The FSA is consulting on proposals to change its current policy on determining the level of financial penalties in enforcement cases brought under its Financial Services and Markets Act 2000 (FSMA) powers and non-FSMA powers (such as the Money Laundering Regulations 2007 and the Payment Services Regulations 2009) in order to be "more transparent" and consistent in the way in which they determine the level of the penalty and increase the amount of the penalties imposed. The FSA noted that stakeholders have commented that, on occasion, penalties imposed in apparently similar cases do not appear consistent and that to achieve a level if credible deterrence, wrongdoers must not only realise that they face a real and tangible risk of being held to account, but must also expect a "significant penalty". Accordingly, they are proposing the financial penalty for companies would be based on a maximum of 20% of a company's income from the product or business area linked to the breach over the relevant period; the financial penalty for individuals would be based on a maximum of 40% of an individual's salary and benefits (including bonuses) from their job relating to the breach in non-market abuse cases and for individuals in market abuse cases there would be a minimum starting point of £100,000 for financial penalties. See http://www.fsa.gov.uk/pubs/cp/cp09_19.pdf for the consultation.

Company Names Tribunal Practice Note on Joining Co-Respondents to Proceedings

The Company Names Tribunal has issued a Practice Note on the procedures involved when joining co-respondents to proceedings. Section 69 of the Companies Act 2006 deals with the grounds for making objections to a company's registered name and sub-section (3) provides that while the company concerned shall be the primary respondent, any of its members or directors may be joined as respondents. The Note outlines the procedural requirements but also emphasises the discretionary nature of the adjudicator in exercising the right - it is necessary for the applicant to request that a party(ies) is joined to a case and the adjudicator will consider the merits of the case before a decision is made. See http://www.ipo.gov.uk/cna/cna-practicenotice/cna-pn-0209.htm for details.

New Legislation - Companies Act 2006 (Accounts, Reports and Audit) Regulations

The Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009, SI 2009/1581 came into force on 27 June 2009, save for regulation 10, which comes into force on 1 October 2009 (this amends section 444A of the Companies Act 2006 by revoking a provision requiring signature of the auditor's report that will become spent on 1 October 2009). The Regulations Parts 15 and 16 of the Companies Act 20061 on accounts and audit so as to complete the implementation of the EU Company Reporting Directive (Directive 2006/46) by requiring filing at Companies House of, and an auditor's report on, corporate governance statements of publicly traded companies where the corporate governance statements are not included in the directors' report. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091581_en.pdf for details.

New Legislation - Companies Shareholders' Rights Regulations

The Companies (Shareholders' Rights) Regulations 2009, SI 2009/1632 have been published. The Regulations come into force on 3 August 2009 and implement Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies so far as it is not already given effect in UK law. They also make minor amendments to Part 13 the Companies Act 2006 (Resolutions and meetings) as a result of the implementation of the Directive. The Directive is intended to help facilitate the exercise of basic shareholders' rights and solve problems in the cross-border exercise of such rights, particularly voting rights, in respect of companies traded on regulated markets. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091632_en.pdf for details.

Gambling

RGA Report on Money Laundering Risks in Online Gambling

The Remote Gambling Association have published details about a report they commissioned from MHA Consulting on the threat of money laundering and terrorist financing through the online gambling industry. The Report found that · the absence of cases and examples of money laundering and terrorist financing within the remote gambling industry appear to indicate that the risks are low

noted that there "appears to be a strong commitment across the industry to prevent and detect money laundering and terrorist financing, to comply with the various legislative and regulatory requirements and to co-operate with the authorities".

http://www.rga.eu.com/shopping/images/RGA_ML_PR_-_july.doc

Litigation

Application for Disclosure of Legal Advice - Whether Privilege Waived

In a judgment given during an ongoing trial concerning the various defendants' telecommunications networks in the Caribbean, the court has ruled on an application by the claimants for disclosure of legal advice which was relied on by the defendants. The claimants sought an order that the defendants disclose and allow the inspection of documents constituting or evidencing legal advice that had been given to or had been received by the defendants regarding the lawfulness or otherwise of their actions. The claimants sought to argue that the pleadings and evidence of the defendants referring to their beliefs as to the lawfulness of their conduct had resulted in a waiver of legal professional privilege in any legal advice given in that regard. The court refused the application. It said that the defendants had not waived legal professional privilege in respect of that advice - legal advice privilege was an extremely important protection and waiver was not easily established. The answer to the question of whether waiver had occurred or not depended upon considering both what had been disclosed and the circumstances in which disclosure had occurred, with particular reference to the degree and extent of reliance placed on the disclosed material. The reference to the advice did not amount to reliance on the contents of the advice as distinct from the fact of the advice or possibly the effect of the advice. Here, the contents of the legal advice had not been deployed in such a way as to lead to a waiver of the privilege in the advice. (*Digicel (St Lucia) Ltd & Ors v Cable and Wireless plc & Ors [2009] EWHC 1437 (Ch) - see http://www.bailii.org/ew/cases/EWHC/Ch/2009/1437.html for the judgment*).

New Legislation - Supreme Court Rules 2009

The Supreme Court Rules 2009, SI 2009/1603 come into force on 1 October 2009. The Supreme Court will become operational in October 2009, and upon its opening will need Rules of Court to allow it to function properly. The Rules apply to civil and criminal appeals to the Supreme Court and to appeals and references under the Court's devolution jurisdiction and are intended to ensure that Court is accessible, fair and efficient. The Rules state that the Court must interpret and apply the Rules with a view to securing that the Court is "accessible, fair and efficient and that unnecessary disputes over procedural matters are discouraged". See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091603_en.pdf for details.

Music

French Senate Passes Amended Three Strikes Bill

The French Senate has passed the Creation et L'Internet bill, which gives a state agency powers to warn, warn again and then disconnect illegal file-sharers. The Bill had previously been rejected by the Constitutional Court on the grounds it was incompatible with France's constitution - the state agency (Hadopi), would have cut off Internet access for up to a year without any court order however, in the amended draft, the responsibility for cutting off Internet access moved from the agency to the courts and on the third "strike", illegal downloaders will be reported by Hadopi to a judge who will have the choice of ordering internet disconnection, a €300,000 fine (£258,000) or a two-year jail sentence. However, the National Assembly must still formally adopt the Bill.

Publishing

PCC Statement on Phone Tapping

In the wake of the recent allegations of wide scale phone tapping the Press Complaints Commission (PCC) have issued a statement, reiterating their previous statements about the practice ("it finds the practice of phone message tapping deplorable") and stating that any further transgressions which have occurred since its investigation in 2007 will be investigated without delay. The PCC conducted the investigation following allegations about the use of subterfuge by journalists and made specific recommendations to publishers to ensure that phone message tapping - where it had taken place - was eliminated, and that steps were taken to familiarise journalists with the rules on using subterfuge in the law and the press Code of Practice. Clause 10 of the Code bans the practice of intercepting phone calls and messages, unless there is a strong public interest.

PCC Upholds Complaint Over Article About Dunblane Survivors

The parents of three children who survived the Dunblane massacre complained to the Press Complaints Commission about an article published in the Scottish Sunday Express, which they said breached clause 3 (privacy) of the Editors Code of Practice. The article referred to the survivors behaviour, as described on social networking sites, which the parents said invaded their sons' privacy by criticising them and unnecessarily drawing attention to them as Dunblane survivors – including by publishing photographs of them – when they had previously been shielded from public view. The PCC upheld their complaint. It said the complaint represented the "latest example of newspapers using material that has been uploaded by members of the public on to social networking sites". It also noted that while "it can be acceptable in some circumstances for the press to publish information taken from such websites, even if the material was originally intended for a small group of acquaintances rather than a mass audience" this was normally however, only when the individual concerned had come to public attention as a result of their own actions, or were otherwise relevant to an incident currently in the news when they may expect to be the subject of some media scrutiny. In this instance, while the children had been in the public eye in 1996, they had subsequently grown up in privacy and were not "public figures in any meaningful sense". They had "done nothing to warrant media scrutiny, and the images appeared to have been taken out of context and presented in a way that was designed to humiliate or embarrass them". Accordingly, the publication "represented a fundamental failure to respect their private lives. Publication represented a serious error of judgement on the part of the newspaper" and the PCC went so far as to say that it was so serious a breach that it could not be remedied by an apology. See http://www.pcc.org.uk/news/index.html?article=NTc5Mw==?oxid=d7b3fff2daef5f9a9af10cf69f2c4368 for the ruling.

PCC Guidance on Payments to Parents for Material About Children

The PCC has published new guidance on the issue of paying parents for material involving their children's welfare as a result of the furore earlier in the year following the publication of a story about a child, her infant and the prospective teenage fathers (and see the Need to Know of 18 May 2009 for details). When the story was first published the PCC said it would undertake an investigation into whether the payments to the families complied with Clause 6 (iv) of the Code of Practice, and undertook to make a public ruling in due course. Clause 6 says "Minors must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interests". The PCC states "The public interest section of the Code refers to the need for editors, if the Code is breached in cases involving children under 16, to 'demonstrate an exceptional public interest to override the normally paramount interests of the child'". See http://www.pcc.org.uk/news/index.html?article=NTc4Nw== for details.

Libel Action – Whether Defence of Qualified Privilege Available

The claimant brought libel proceedings against the council and an employee of the council following what can only be described as a Kafka-esque attempt to report anti-social behaviour to a council employee, which, according to the court "did not go well" and resulted in her being investigated, her complaint about the council employee being dismissed and her being included on the council's Violent Persons Register (against which there is no right of appeal). An email was then sent to a range of staff and partner organisations about her inclusion on the list. At issue was whether the defence of

qualified privilege was available to the defendants and whether the council had to demonstrate that it had complied with its public law duties under the Human Rights Act 1998 and the Data Protection Act 1998 if it was to be able to assert that it had the interest or duty required at common law for there to be a defence of qualified privilege. The claimant accepted the submissions that there was a legitimate aim and that inclusion of a person's name in the Register was rationally connected to that but submitted that the issue was on questions of proportionality and fairness, both generally and, in particular, in relation to the partner organisations. The court noted that this was not the first occasion upon which the question of the relationship between the common law defence of qualified privilege to libel, and the duties imposed by public law, including HRA has come before the courts. In a lengthy and detailed ruling it said that reputation was a right under Article 8 of the ECHR. Physical and psychological integrity could also be included in Article 8, at least where there was a real risk of physical assault. Where there was no such risk, notably in employee reference cases, the rights of the publishees of the warning or reference would not be engaged and the Article 8 rights of the subject had to be expected to prevail. Further, in relation to common law qualified privilege, it could no longer be said that a person giving a reference or reporting crime need not act responsibly because his communication would be privileged subject only to relevance and malice. (*Clift v Slough Borough Council & Anor [2009] EWHC 1550 (QB) – see http://www.bailii.org/ew/cases/EWHC/QB/2009/1550.html for the judgment - in the end, the jury awarded damages of £12,000 to the claimant, rejecting the defence of justification but also the allegation of malice – it doesn't say whether the claimant is still on the Register however…*).

Multiple Libel Claim – Defences Available and Damages Assessed

The High Court has ruled on as assessment of damages in a libel claim, which arose out of the circumstances surrounding the acquisition of Leeds United Football Club by the defendant's consortium. Following disagreements about the precise terms of, and the claimant's financial obligations under, the purchase agreement for the club, the defendant wrote and published several articles in the club's programmes and in a letter to the club's members, which contained negative references to and about the claimant. The claimant alleged the articles contained four separate libels. The claimant issued proceedings against the defendant in respect of the four libels, seeking awards of compensatory and aggravated damages of between £35,000 and £75,000. The defendant admitted that he was the author of the publications complained of and that the passages in question would have been understood to refer to the claimant but relied on three defences, namely, common law qualified privilege, justification and fair comment. The court was asked to rule on the meanings of the words complained of, whether the publications or any of them took place on occasions of qualified privilege, whether the publications complained of were substantially true and whether any of the defences were successful. The court found that the meanings borne by the words complained of were as pleaded by the claimant. On the facts, the defendant was entitled to rely on the defence of common law qualified privilege in respect of the fourth libel but not in respect of the first three. The defence of justification failed entirely, since the defendant had failed to prove the truth of any of the statements in question. The defence of fair comment also failed, since what the defendant had written was "riddled with material inaccuracies". Damages were assessed at £50,000 – the libels were serious, had been repeated over a period of time and the publishees were persons whose esteem the claimant had valued. (*Levi v Bates [2009] EWHC 1495 (QB) – see http://www.bailii.org/ew/cases/EWHC/QB/2009/1495.html for the judgment*).

Sport

DCMS Consult on Establishment of NADO

At present, UK Sport is responsible for delivering the UK's anti-doping policy – in February this year the Minister for Sport confirmed that the Government would be establishing a new body to deliver the UK's anti-doping policy (and see http://www.uksport.gov.uk/assets/File/Generic_Template_Documents/Drug_Free_Sport/policy_160505.pdf for the current policy). The DCMS is now consulting on the establishment of a "modernised UK anti-doping organisation", which will "take on existing testing and education responsibilities from UK Sport, whilst also having significant new powers to ensure Britain is best-placed to tackle doping in sport in the run-up to London 2012 and beyond". The Government is inviting comment about the policy and statutory framework for establishing the New Anti-Doping Organisation (NADO), its information sharing powers and funding. The consultation includes the draft of the new anti-doping policy, which was written to meet the UK's commitments to the World Anti-Doping Code and the UNESCO International Convention against Doping in Sport, which was ratified in April 2006. See http://www.culture.gov.uk/images/consultations/NADO_consultation.pdf for the consultation.

Consultations & Reports

Information Commissioner's Office Annual Report 2008/9 - http://www.ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/annual_report_2009.pdf (the report reviews progress made against the aims set out at the beginning of the year in the ICO's three-year Corporate Plan for 2008 to 2011 – it highlights developments in the areas of education and the development of good practice (influence), resolving problems, enforcement action and developing and improving its own role)

Ofcom Annual Report 2008/9 - http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0809/annrep0809full.pdf (Ofcom's Annual Report and Accounts for the period 1 April 2008 to 31 March 2009; Ofcom also published its section 400 accounts covering spectrum, TV and radio licence fee payments as well as financial penalties)

Ofcom Report - Television Broadcast Licensing Update June 2009 - http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/200906 (details the television licences handed back or revoked or transferred and service name changes in June 2009)

Ofcom Consultation – Promoting Equality and Diversity - http://www.ofcom.org.uk/consult/condocs/promoting_equality_diversity/main.pdf (consultation on proposals for Ofcom's Single Equality Scheme (SES), to promote equality in its dual roles as a significant employer and as regulator)

Ofcom Consultation - Mostly Mobile – Ofcom's Mobile Sector Assessment - Second Consultation - http://www.ofcom.org.uk/consult/condocs/msa/msa.pdf (Ofcom's consultation outlines three strategic principles that will inform its approach to the mobile sector in future - relying on market forces to deliver its vision for the mobile sector, responding to risks of market failure and consumer protection needs with focused intervention and widening the focus of its attention to reflect a changing world; the consultation also identifies six core areas of work – benefits of competition, informed consumers, access, coverage, spectrum and termination)