

This is our summary of some of the key legal developments across a range of sectors for the week of 13 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

Government Response to Consultation on Commission's Consumer Rights Directive Proposals

The BIS has published the Government's response to the consultation on the European Commission's proposals for a Consumer Rights Directive, which would consolidate a number of the eight separate directives dealing with consumer issues in a single Directive. The Doorstep Selling, Unfair Contract Terms, Distance Selling and Sale of Goods and Associated Guarantees Directives would all be consolidated - timeshare and package travel issues will continue to be covered by separate vertical Directives as they deal with specific issues. The Injunctions and Unit Prices Directives were not included in the proposals for the new Directive as they were not concerned with consumer contract law. The Government said that while it was supportive of full harmonisation, this could not be at the expense of "important consumer protections" and it was concerned that the Directive, as drafted, would be likely to result in a reduction of consumer protection for consumers in the UK. It was also concerned that the proposals on consumer remedies for faulty goods, as drafted, would result in a significant reduction in consumer protection and it said it would work to ensure that the "right to reject" was retained - according to the Government, this right was "clearly the most appropriate remedy, for example, where the consumer has lost faith in the product or trader or where the good is not fit for a particular purpose". Also of note was the Government's statement that it was "disappointed that the Commission has not taken this opportunity to provide consumer remedies for unsatisfactory services and, in particular, digital products". It said it believed there were strong grounds for including services, mixed products and digital products within the scope of the proposed Directive (although the drafting in the response document was slightly confusing on this point). See <http://www.berr.gov.uk/files/file52168.pdf> for details. At the same time, the House of Lords European Union Committee has published its report on the proposed Directive. The Committee called on the Government to refuse to accede to the proposed Directive as drafted, outlining its concerns that the proposal would not only fail to deliver the desired increase in trade across borders but also that it may, in some instances, "reduce the overall level of protection currently afforded to consumers". See <http://www.parliament.the-stationery-office.co.uk/pa/ld200809/ldselect/ldeucom/126/126i.pdf> for the Report.

Whether Duty of Care Owed for Statements on Website - Relationship of Parties Using Website

The claimants appealed a decision of the Birmingham County Court, which dismissed their claim and held that the defendant association had not owed them a duty of care when making certain statements on its website. The defendant's website contained details of installers of swimming pools who were members and associate members of the association - the claimants used one of the listed companies however, the claimants alleged the work was not completed as the company ceased trading and they then suffered financial loss in having the work completed - the company they had selected was not a member of the defendant association. At issue in the appeal before the Court of Appeal was whether the defendants owed the claimants a duty of care when making representations on its website, knowing they would be relied on. The court dismissed the appeal and held that in all the circumstances the defendant had not owed the claimants a duty of care. It could not fairly be held that the defendant had assumed a legal responsibility to the claimants for the accuracy of the statement in the website without the claimants undertaking any further enquiry, which the website had urged. If the claimants had asked for and had obtained an information pack, they would have learnt that the company selected was only an affiliate member and had not been the subject of the checks referred to and its customers would not have the benefit of the association's bond or warranty. The precise relationship between the defendant and the claimants was simply that the defendant had produced its website for people like the claimants but they had not been in a relationship of advisor and advisee. (*Patchett & Anor v Swimming Pool & Allied Trades Association Ltd* [2009] EWCA Civ 717 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/717.html> for the judgment).

Article - Signing Deeds - A Review of Recent Case Law

A very useful article in the latest Construction Law journal looks at recent case law to warn against taking a "lax approach to the formalities of signing deeds". The article considered *R (on the application of Mercury Tax Group) v HM Revenue &*

Customs Commissioners [2008] EWHC 2721 (Admin), which held that the transfer of signature pages from an incomplete version of a deed to a later, complete and amended version was not effective (the court also doubted that this procedure could be effective for a contract which was not a deed) and *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2009] EWCA Civ 26, where the parties had agreed that a contract would be in agreement with industry standard terms and conditions but never signed a contract, leading the court to rule that a term in the standard contract prevented a any contract coming into existence until the parties entered into a written agreement and that no contract had come into existence after the expiry of the letter of intent. The article said that the "often lax approach" to the execution and finalisation of deeds and documents (in this case in the construction industry but the same approach can be found elsewhere), "cannot continue in the light of recent case law". Any failure to observe the formalities may render a deed void and unenforceable. It notes the administrative burden of getting documents signed up will be increased, particularly in transactional work or where the parties are at a distance. ("*The Formalities of Signing Deeds - A Warning*" (2009) 20 5 *Cons Law* 23 - the article is available via LexisNexis).

Broadcasting

Commission Consults on "Digital Dividend"

The European Commission has published its consultation document on transforming the digital dividend opportunity into social benefits and economic growth in Europe. In its 2007 communication on the subject the Commission had said the switchover from analogue to digital terrestrial TV by the end of 2012 would free up an unprecedented amount of spectrum in Europe as a result of the superior transmission efficiency of digital technology. This spectrum was referred to as the "digital dividend". The Commission further noted that this opened up "sufficient spectrum for broadcasters to significantly develop and expand their services while at the same time ensuring that other important social and economic uses, such as broadband applications to overcome the 'digital divide', have access to this valuable resource". The Commission has said that it is now appropriate to take steps towards a common approach to the use of the digital dividend in Europe. The consultation contains details of a proposed EU roadmap, in the form of a set of common, co-ordinated actions to ensure a consistent regulatory approach is applied. In addition, the Commission included details of two tasks which it said should be completed urgently - Member States which have not yet completed the digital switchover would be requested to reaffirm their commitment to the EU target date for the effective switch-off of analogue TV broadcasting by 1 January 2012, and to complete all required preparatory measures necessary in 2011 at the latest in order to meet this deadline; the Commission also said it would be taking steps towards the opening of the 800 MHz band for electronic communications services by adopting harmonised technical conditions of use in Europe. See http://ec.europa.eu/information_society/policy/ecomm/radio_spectrum/_document_storage/consultations/2009_digital_dividend/2009_0710_0904_digitaldividendconsultation.pdf for the Consultation. The Commission said that the main elements of the proposals would eventually be incorporated into the wider spectrum action programme that is to be submitted at the beginning of 2010 to the European Parliament and the Council for adoption. (*EC Press Release, IP/09/1112, 10 July 2009*).

Amendment to Code on the Scheduling of Television Advertising

Ofcom has announced that it has made a drafting amendment to the Code on the Scheduling of Television Advertising. The Code sets out the rules with which television broadcasters licensed by Ofcom must comply when carrying and scheduling advertising. The amendment relates to point four, which limits the amount of advertising and teleshopping spots on any channel in any one hour to 12 minutes and also provides that on public service channels time devoted to television advertising and teleshopping spots must not exceed an average of 7 minutes per hour for every hour in the broadcasting day and an average of 8 minutes an hour between 6pm and 11pm. See http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode_072009.pdf for the latest version of the Code.

BBC Application to Broadcast Group B Listed Event Highlights

The BBC has applied to Ofcom for consent to broadcast exclusive live coverage of the Open Golf Championship on BBC1 and BBC2 in July 2009, as a result of Setanta going into administration. Setanta had previously acquired the rights to broadcast highlights or deferred coverage of the event, which is a Group B Listed Event, which means that the rights to broadcast highlights or deferred coverage must have been offered to both of the categories of broadcasters specified in the Broadcasting Act 1996 - those providing services which are free to air with national coverage (BBC1, BBC2, ITV1, Channel 4 and Channel 5) and those providing all other television services. Ofcom said, in light of the "exceptional" circumstances, and as the BBC was still airing the live event on a free to air basis, it would give its consent to the coverage.

Corporate

Directive on Exercise of Certain Shareholders Rights in Listed Companies

The European Commission has published Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies in OJEC. The Commission had said that current legislation was not sufficient to ensure that certain minimum

standards applied to shares to protect investors and promote the smooth and effective exercise of shareholder rights attaching to voting shares. The Directive, which enters into force, 20 days after publication, establishes requirements in relation to the exercise of certain shareholder rights attaching to voting shares for the purpose of general meetings of companies which have their registered office in a Member State and whose shares are admitted to trading on a regulated market situated in or operating within a Member State. Member States have until 3 August 2009 to ensure that their national legislation is compliant with the requirements of the Directive. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:184:0017:0024:EN:PDF> for details.

Law Society Practice Note on New Article of Association

The Law Society has published a Practice Note on articles of association, which will apply by default to all new companies incorporated on or after 1 October 2009 unless they register Articles of Association of their own with Companies House. The very useful Practice Note highlights the changes and how they apply to both new and existing companies. See <http://www.lawsociety.org.uk/productsandservices/practicenotes/modelarticles/3156.article> for the Note.

New Legislation - Registrar of Companies and Applications for Striking Off Regulations

The Registrar of Companies and Applications for Striking Off Regulations 2009, SI 2009/1803 have been published and come into force on 1 October 2009. The Regulations make provision relating to the functions of the registrar of companies under Part 35 of the Companies Act 2006 and the delivery of documents to the registrar under the Act and other enactments. They also make provision relating to applications for striking a company's name off the register under Part 31 of the Act. Part 35 contains rules about the language in which documents can be drawn up and delivered to the registrar under companies and insolvency legislation. It also provides new powers and duties for the registrar to maintain the register, including a power for the Secretary of State to make regulations requiring the registrar to remove from the register, on application, material that derives from anything invalid or ineffective or that was done without the company's authority, or that is factually inaccurate or derived from something factually inaccurate or forged. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091803_en.pdf for details.

New Legislation - Overseas Companies Regulations

The Overseas Companies Regulations 2009, SI 2009/1801 come into force on 1 October 2009. The Regulations introduce a single regime for registration and filing requirements for companies incorporated outside the UK (ie, overseas companies) that open an establishment, whether a place of business or a branch, in the UK. Every company incorporated outside the UK that operates its business in the United Kingdom through at least one establishment (either a branch or a place of business that is not a branch) and is not a UK-incorporated subsidiary company, must register its particulars with the Registrar of Companies. The Regulations are intended to replace the requirements in Part 23 and Schedules 21A - D of the Companies Act 1985 (the Government having described the regime under the 1985 Act as being "overly complex"). See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091801_en.pdf for the Regulations. Separate regulations relating to the registration of charges created by, and the execution of documents by, overseas companies are still to follow.

New Legislation - Companies Act 2006 (Part 35) (Consequential Amendments, Transitional Provisions and Savings) Order

The Companies Act 2006 (Part 35) (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1802 comes into force on 1 October 2009. The Order amends Part 35 of the Companies Act 2006, which deals with the functions of the registrar of companies and material delivered to and registered by the registrar. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091802_en.pdf for details.

New Legislation - LLPs and the Companies Act 2009

The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009/1804 has been published. The main provisions of the Regulations come into force on 1 October 2009, save for certain regulation making powers which will come into force on the day after the Regulations are made. The Regulations replace provisions of the Limited Liability Partnerships Regulations 2001, SI 2001/1090 which apply provisions of the Companies Act 1985 and the Companies (Northern Ireland) Order 1986 to LLPs and apply instead provisions of the Companies Act 2006. By applying the Companies Act 2006 to LLPs, the Government sought to ensure that LLPs would be able to "take advantage of the benefits to business of modernising and simplifying company law, thereby ensuring that LLPs remain an attractive corporate vehicle for businesses, whilst retaining their distinctive characteristics". See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091804_en.pdf for the Regulations and http://www.opsi.gov.uk/si/si2009/em/uksiem_20091804_en.pdf for the accompanying Explanatory Memorandum, which contains a useful summary of how the Regulations apply the Act to LLPs. Note however that the Regulations do not apply the accounts and audit provisions of the Act, which are the subject of the separate Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008, SI 2008/1911, which came into force on 1 October 2008, and apply to LLPs' financial years beginning on or after that date.

Private Members Bill - Companies Remuneration Reports Bill

The Private Members Bill to make provision about remuneration reports in public quoted company accounts and reports has had its Third Reading in the House of Lords. The Companies Remuneration Reports Bill was passed without amendment and was sent to the Commons. (*Lords Hansard, 13 July 2009, Column 939*).

Film & TV

Interpretation of Agreement for Royalties for Repeat Broadcast Transmission

The High Court has ruled in a claim by Excelsior Group Productions Limited, which made a number of television series for Yorkshire Television Limited (ITV) about the fees which should be paid for repeat transmissions. Included in the terms of the agreements were provisions for a flat fee for broadcasts of repeats from certain sources and also provisions for a percentage of income to be paid from transmission by other methods of exploitation. The claimant argued that the repeats of the programmes on the ITV2 and ITV3 digital channels should attract flat rate fee payments (resulting in a higher fee) as opposed to the "other method" of transmission fee. The court held that the digital channel repeats did not attract residual flat-rate fees, but only the lower percentage-rate royalty due for other methods of exploitation. It noted that in the broadcast industry, the fees paid to rights-holders for broadcasts on Channel 3 (that is, ITV) were always fixed fees or flat-rate fees, known in the entertainment industry as "residuals". However, onward sales of programmes to third parties such as overseas broadcasters or cable channels, attracted percentage payments in the form of royalties. This system of payment applied widely across the entertainment industry. The distinction was reflected in the two clauses in dispute. The court also spent some time considering the extent to which it could take into account the position at the time each of the agreements were made, accepting the background knowledge reasonably available to the parties in the situation in which they were at the time each agreement (over the period 1990 - 2000, during which time there was considerable change in the broadcasting industry), which provides an interesting summary of how the commercial and technological changes impact on drafting. (*Excelsior Group Productions Limited v Yorkshire Television Limited [2009] EWHC 1751* - see <http://www.bailii.org/ew/cases/EWHC/Comm/2009/1751.html> for the judgment).

Digital Britain Final Report and Calls for Action on Orphan Works

Calls by the Film Council and the British Screen Advisory Council to allow the showing of orphaned works including documentaries, short and full-length feature films without the threat of infringing copyright or the imposition of criminal sanctions have been reported in The Times. The Councils also suggested that a commercial licensing scheme should be created to regulate their distribution and viewing. This follows closely the proposals or dealing with orphan works in the recently published Digital Britain Final Report. The Digital Britain Report acknowledged the problem and suggested a legislative response to allow the use of all orphan works on a commercial basis - although details were minimal, the Report suggested permitting the use of a particular piece of work as a result of permission being granted by the Government, once certain key requirements had been satisfied (it suggested making searches for original owners and making provision for the reimbursement of the owners who were subsequently found and who then claimed for their works - see the Digital Britain Final Report, Chapter 4, paragraph 43 et seq for details). The Times article suggests however that the legislative intent to deal with the vast amount of orphan works (which extends to as much as 40% of the British Library archives and around 1 million hours of BBC programming) may not be there, meaning vast numbers of significant works will remain out of the public domain.

Gambling

Finance Bill Amendment on Bingo Tax Rejected

MPs have voted against an amendment to the draft Finance Bill, which proposed returning bingo to parity with other forms of gambling and retain the 15% rate as opposed to an increased rate of 22%. Despite arguments about the social importance of bingo in certain areas and the difficulties bingo clubs were facing (31 clubs having closed in 2008/2009), the proposed amendment was "overwhelmingly" rejected. Of interest is the recent research by specialist research group Mintel, whose recent study into online bingo in the UK has shown that in the last ten years, players under 45 years of age make up to 62% percent of those playing and that players aged 18 to 24 now make up 700 000 of Britain's 3.5 million bingo players. The study also showed that 20% of bingo's turnover in Britain now comes from online play.

Belgian Gaming Act Approved by Chamber of Representatives

The Belgian Chamber of Representatives has approved draft legislation for a new Gaming Act, which would allow only licensed land-based casinos to apply for an online gaming license to provide poker and casino games via the Internet and impose a duty on Belgian internet service providers to block access by their customers to online gaming sites which are not authorised under the new licensing regime and strengthen measures in the current 1999 Act to restrict access to foreign gaming providers. Although the Chamber approved the draft, the concerns raised by the European Commission will still need to be addressed - the European Commission sent the Belgian Government its detailed opinion on its draft law on regulating Internet gaming and betting in June this year. The opinion extended the standstill period for the

notification until 30 July 2009, by which time the Belgian Government had to have addressed the areas in the proposal that the European Commission considered to be too restrictive and violated EU law.

Litigation

Grounds for Setting Aside Judgment in Default in Libel Proceedings

The claimant, a Russian national, issued libel proceedings in respect of a television broadcast which he alleged contained statements to the effect that he had been granted asylum on a false basis and in the light of evidence obtained by threats and/or by drugging a relevant witness and that he had been a party to the plot to murder Alexander Litvinenko in November 2006. The second defendant did not file an acknowledgement of service and the claimant subsequently obtained judgment in default of acknowledgement of service. The second defendant applied to have the judgment set aside. At issue was whether the defendant had a real prospect of successfully defending the claim and whether there were any other good reasons as to why the judgment should be set aside. The court allowed the appeal to set the judgment aside. It noted its discretion to set aside judgment under CPR Rule 13.3 was a broad one, which could be exercised if there was considered to be "some other good reason why ... the defendant should be allowed to defend the claim". The court said it was "important to remember that the primary object of most libel actions is to achieve vindication of the relevant claimant's reputation". It said it was in the interests of both sides that the proposed plea of justification, so far as it went, should be properly addressed. However, it also made the point that it would be incumbent on the second defendant to defend the proceedings with reasonable promptitude, since in all the circumstances the further progress of the litigation had to be approached with a sense of urgency and that the court would not indulge further delay or procrastination. (*Berezovsky v The Russian Television and Radio Broadcasting Company & Anor* [2009] EWHC 1733 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/1733.html> for the judgment).

Libel and Malicious Falsehood - Application of Single Meaning Rule

The court has issued its ruling in the trial of a preliminary issue as to the meaning of certain words complained of (and see the Need to Know of 6 April 2009 for background details) - the claimant had contended that words in an advertisement about the product aspartame, in addition to words contained in a particular email to its suppliers, constituted a malicious falsehood about the product and its dangers. A question arose as to whether or not the rule, known in defamation as the single meaning rule, also applied to the tort of malicious falsehood. The court said if it did apply to malicious falsehood, then only one answer may be given to the question posed in the Order and if it did not apply to malicious falsehood, then the answer may be either one meaning, or two or more different meanings. The court held that where a claimant faced a choice between pursuing a claim in defamation or in malicious falsehood, it was in the interests of legal consistency and freedom of expression that the same rule of interpretation should apply to both torts. The single meaning rule could be adapted to the tort of malicious falsehood where there were two meanings, both reasonably possible, but in one it was said that the statement was false and in the other that it was not, by adopting the former. (*Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 1717 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/1717.html> for the judgment).

Music

Private Members Bill - Live Music Bill

A Private Members Bill to exempt a range of small gigs from the application of the Licensing Act 2003 has had its First Reading in the House of Lords. In announcing the Bill Liberal Democrat Peer Lord Clement-Jones had said, 'I ... intend to introduce a Private Member's Bill that will provide a conditional exemption for live music in small venues licensed under the Licensing Act 2003. This exemption will be conditional on section 177 [which applies to venues up to 200 capacity], which will be triggered so that a licence for live music can be reviewed, and if complaints by local residents are made, then there can be a full, proper hearing. The second element of the Private Member's Bill will be to reintroduce the two-in-a-bar rule so that any performance of unamplified live music by up to two people will be exempt from the need for a licence. Thirdly, the Private Member's Bill will provide a total exemption for hospitals, schools and colleges from the requirement to obtain a licence for live music when providing entertainment where alcohol is not sold and the entertainment involves no more than 200 people'. The Bill was read and ordered to be printed. The Second Reading and debate is still to be scheduled. (*Lords Hansard, 15 July 2009, Column 1116 - a copy of the Bill as printed is not available at this stage*).

Publishing

Statement in Open Court - Allegations About Heartbreak Over Film Role

The claimant, a well-known actress, brought libel proceedings against the publisher of the Daily Express following the publication of an article which claimed that she was "heartbroken" to have been passed over for a particular film role. The defendant accepted that the claims were entirely false and that the claimant had never been considered for the role.

nor had she wanted it. The allegations caused the claimant professional embarrassment as it implied that her career was in decline. The defendant apologised, undertook not to repeat the claims and publish an apology. The defendant also agreed to pay substantial damages and legal costs. (*Beckinsale v Express Newspapers, Unreported, QBD, 9 July 2009*).

Technology

One Teen's Take on Media and Technology

Much comment has already been generated by the report prepared by a 15 years (and seven months) summer work intern with Morgan Stanley on how teenagers "consume" media. The report is a very brief snapshot of one teenager's views on the consumption of media - radio, television, film, music, newspapers, gaming, the Internet, directories, devices and viral/outdoor marketing (and perhaps it should be remembered that it is *one* teenager's views). Morgan Stanley said that the report provided "one of the clearest and most thought provoking insights" they had seen - in one sense the report said nothing too unexpected - teenagers were consuming more media, but in a number of different ways and were almost certainly not prepared to pay for it (the report gave a figure of eight in ten having downloaded illegally) but the responses from other teenagers have been interesting, disputing statements that radio, television and newspapers were not significant. There did seem to be some agreement about Twitter however - one comment was quite acerbic: "the only people that use Twitter are celebrities with nothing else to do and bored old people who think they're connecting with the younger generation" (in November 2008, the Pew Internet and American Life Project found the median age of Twitter users in the US was 31, higher than 26 for Facebook and 27 for MySpace and in April this year, web metrics firm comScore reported that the majority of Twitter's users (over 10 million of them) were over 35). Sarah Brown twitters ... See <http://media.ft.com/cms/c3852b2e-6f9a-11de-bfc5-00144feabdc0.pdf> for the report.

Consultations & Reports

Ofcom Consultation - Release of the 59 - 64 GHz Band - A Consultation on a Licence Exempt Approach for Fixed Wireless Systems in the 60 GHz Band - http://www.ofcom.org.uk/consult/condocs/59_64ghz/condoc.pdf (sets out details of Ofcom's proposals to open spectrum in the 59 - 64 GHz band, which is currently not available for commercial use, for Fixed Wireless applications and to combine this with the existing 57 - 59 GHz band under one overall licence exempt authorisation approach for Fixed Wireless Systems using the whole 60 GHz band)

Ofcom Regulatory Statement - Decision to Make the Wireless Telegraphy (Short Range Devices) (Exemption) Regulations 2009 - <http://www.ofcom.org.uk/consult/condocs/shortrange09/statement/statement.pdf> (confirms that, following formal consultation, the Wireless Telegraphy (Short Range Devices) (Exemption) Regulations 2009, SI 2009/1812 were made by on 7 July 2009 and came into force on 17 July 2009 - the Regulations exempt the establishment, installation and use of wireless telegraphy equipment within specified frequency bands, from the requirement to be licensed under section 8(1) of the Wireless Telegraphy Act 2006 - see http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091812_en.pdf for the Regulations)