

This is our summary of some of the key legal developments across a range of sectors for the week of 3 August 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

Commission Publishes Digital Competitiveness Study

The European Commission has published a Communication, which outlines, in the form of a digital competitiveness study, the main achievements of the Commission's i2010 strategy for 2005 - 2009. The Commission presented the i2010 strategy in 2005 to "boost Europe's lead in ICT and to unlock the benefits of the information society for European growth and jobs". The Commission said the strategy "described the overall thrust of policy to promote an open and competitive digital economy across Europe and it underlined for the first time the importance of ICT to improve the quality of life. Its ultimate goal is to complete the single market for ICT products and services to benefit European consumers, businesses and administrations". The Communication said the overall achievements of i2010 could best be assessed by comparing them to the objectives set in 2005 for the three strategic pillars of the initiative: boosting the Single Market for European businesses and users. The first was the creation of a single European Information Space offering affordable and secure high bandwidth communications, rich and diverse content and digital services. The Communication said the "reform of the e-communications framework, due to be adopted shortly, will further improve the single market in a number of ways ... it will give consumers more choice and improve transparency, protecting them better against security and personal data breaches and spam by encouraging competition in new networks. A new regulatory body at European level should help ensure fair competition and more consistency of national regulation. At the same time, national regulators will gain greater independence"; further, television has been supported with the promotion of digital broadcasting and mobile television and the European film industry has been supported by the EU MEDIA programme. The second objective was achieving world-class performance in research and innovation in ICT by closing the gap with Europe's leading competitors. Here the Communication noted Europe's adoption of its largest ever budget for ICT research and innovation and cited the EU as a potential leader in the future Internet. The third objective was the creation of an Information Society that was inclusive, provided high quality public services and promoted quality of life. Here the Communication mentioned advances with eHealth, eGovernment and the launch of the eInclusion! Initiative. The Communication also called on Member States and stakeholders to actively co-operate to draft a new digital agenda. See http://ec.europa.eu/information_society/eeurope/i2010/docs/annual_report/2009/com_2009_390_en.pdf for the Communication. Of perhaps even more interest is the accompanying Commission Working Document to the Communication, which contains some very useful information and statistics about the background to the Communication on issues such as: the broadband economy (with 114 million subscribers, the EU is the largest world market and shows fast growth in penetration rates); progress made in reducing disparities in the level of regular internet use and digital skills across socio-economic groups and countries (the main reported reasons for households not to have an Internet/broadband connection relates to a perceived lack of need, costs, and lack of skills); the impact of ICT on social capital, which was described as the norms and social relations embedded in the social structures of societies (contrary to previous predictions, Internet use is positively associated with social capital. In general Internet users are more likely to be active in social organisations and are more active in social leisure activities. They also exhibit higher levels of trust); the Internet as a communication tool (there is an evident, profound break with previous generations in the attitude towards the use of Internet services. In the most advanced countries, around 90% of young people connect on a daily basis. However, across all EU Member States, use of advanced services is significantly higher among the young); the use of the Internet for entertainment purposes and its impact on content markets (Consumers expect easy access and cross-platform availability, including across borders. Their willingness to pay for legal online offerings and to accept limitations to the availability of content is depending essentially on an accurate pricing, but also on how they can use legally acquired content, including copying it); ICT uptake by businesses and productivity impacts; developments in national ICT policies; and the impact of the economic downturn on ICT policies. See http://ec.europa.eu/information_society/eeurope/i2010/docs/annual_report/2009/sec_2009_1060_vol_1.pdf for details. The Commission also launched its consultation on the post-i2010 priorities for new strategy for European information society (for 2010 - 2015). (*EC Press Release IP/09/1221, 4 August 2009 - the Press Release picks up on some of the statistics regarding Internet usage and the willingness to pay for content - see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1221&format=HTML&aged=0&language=EN&quiLanguae=nl> for details*).

New Legislation - Revision of Trade Marks and Patents Fees and Charges

The Trade Marks and Trade Marks and Patents (Fees) (Amendment) Rules 2009, SI 2009/2089 has been made. The main body of the Rules come into force on 1 October 2009, with the remainder coming into force on 4 October 2009. The Rules

amend the Trade Marks Rules 2008, SI 2008/1797, the Trade Marks (Fees) Rules 2008, SI 2008/1958 and the Patents (Fees) Rules 2007, SI 2007/3292 in order to revise some of the fees and services that the Intellectual Property Office charge and offer in relation to its trade mark and patent registration functions. See http://www.opsi.gov.uk/si/si2009/pdf/ukjsi_20092089_en.pdf for details.

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 1.3 (inappropriate scheduling), 1.14 (the most offensive language must not be broadcast pre-watershed), 2.1 (generally accepted standards), 2.2 (factual programmes must not mislead viewers), 2.3 (offensive material must be justified by the context), 2.22 (competitions should be conducted fairly), 5.11 (due impartiality on matters of major political or industrial controversy or public policy), 5.12 (due weight given to wide range of views on matters of major political or industrial controversy or public policy), 6.1 (impartiality during elections) and 6.2 (equal weight to covering major parties during elections) of the Broadcasting Code; none of the complaints regarding unfair treatment or unwarranted infringement of privacy were upheld. Ofcom also recorded breaches of TLCS Licence Conditions in relation to the use of PRS for competitions and voting in programmes. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb139/Issue139.pdf for the Bulletin.

Corporate

Council Adopts Directive on Mergers and Divisions of EU companies - Simplification of Requirements

The Council of the European Union has announced that it has accepted, by qualified majority, a directive simplifying the rules on reporting and documentation requirements in the event of mergers and divisions of EU companies, following agreement with the European Parliament. According to the Council, "The directive is aimed at reducing costs relating to mergers or divisions by limiting detailed reporting requirements, as well as by allowing companies to provide the necessary information to shareholders or third parties by electronic means, instead of convening general meetings. It modifies Directive 78/855/EEC on mergers (3rd Company Law Directive) and Directive 82/891/EEC on divisions of companies (6th Company Law Directive)". Member States have until 30 June 2011 to implement the Directive. The Council said the Commission will review its functioning five years after that date and, in particular, its effects on the reduction of administrative burdens on companies in the light of experience acquired in their application. (*Council of the European Union Press Release 12353/09 (Presse 228), 27 July 2009*).

BIS Guidance on Company Constitutional Documents

The BIS has published draft non-statutory guidance on the implementation of the Companies Act 2006 and what it means for a company's constitutional documents, including model articles. Prior to 1 October 2009, companies were required to have a memorandum of association and articles of association (the Table A articles, which will remain in force for companies incorporated under the 1985 Act that adopted Table A (or to which Table A applies by default) until they choose to change their articles) - companies incorporated under the 2006 Act, on or after 1 October 2009, are required to have a memorandum of association and articles of association but the prescribed form of the new memorandum is in the Companies (Registration) Regulations 2008, SI 2008/3014 and The Companies (Model Articles) Regulations 2008, SI 2008/3229 prescribe model articles for the three most common types of company: private companies limited by shares; private companies limited by guarantee; and public companies. See <http://www.berr.gov.uk/files/file52470.pdf> for the guidance, which attempts to summarise the practical effects of the changes and what a company formed under the Companies Act 2006 on or after 1 October 2009 will need to do as well as providing guidance for existing companies. It notes that directors and members of existing companies are not required to make any changes to their constitutional documents as a result of the final sections of the Companies Act 2006 coming into force on 1 October 2009 however, it highlights points to note in terms of provisions that become effective when existing companies do make changes on or after 1 October 2009. PLC have also helpfully summarised some of the key provisions from the guidance - see <http://corporate.practicallaw.com/7-387-4934> for details.

Consultation on Proposals to Amend Details Relating to Disclosure of Loans to Directors

The BIS is also consulting on proposals to amend section 413 of the Companies Act 2006, which deals with disclosures in the notes to company accounts of advances, credits and guarantees for the benefit of directors. The section, which came into force in April 2008, specifies the information relating to advances, credits and guarantees for the benefit of directors that must be disclosed in the notes to a company's individual accounts. See <http://www.berr.gov.uk/files/file52466.pdf> for details.

FRC Update on Review of Combined Code on Corporate Governance

The Financial Reporting Council (FRC) has published a progress report on its review of the effectiveness of the Combined Code on Corporate Governance, which it began in March 2009. The Report notes that "There is a recognition that the quality of corporate governance ultimately depends on behaviour not process, with the result that there is a limit to the extent to which any regulatory framework can deliver good governance" and it found that "Market participants have expressed a strong preference for retaining the current approach of 'soft law' underpinned by some regulation, rather than moving to one more reliant on legislation and regulation". The FRC will issue a final report before the end of the year and has said that any proposed changes to the Combined Code will be subject to a separate consultation. See http://www.frc.org.uk/images/uploaded/documents/Combined_Code_review_progress_report_July_20091.pdf for the Report.

Sole Controlling Mind and Application of *Ex Turpi Causa* - Whether Claim Should be Struck Out

The House of Lords, in one of their final rulings has held that a company whose sole director, shareholder and controlling mind was that of a fraudulent individual, who had used the company as a vehicle for committing frauds on banks, was barred by the principle of *ex turpi causa non oritur action* (an action does not arise from a base cause) from bringing an action against their auditors (the respondents) for failing to take reasonable care to detect the fraud which had been perpetrated by the controlling mind and had resulted in losses to the banks (who successfully brought an action against the appellant company and the fraudster and were awarded damages in excess of \$94 million. Neither defendant could satisfy the judgment. The liquidators then started the action in the name of the appellant company in an attempt to recover damages for the benefit of the appellant company's creditors, ie, the defrauded banks). At issue for the Law Lords was whether the claim should be struck out. The Lords noted that where the directing mind and will of the company was also its owner, and his fraudulent conduct was to be treated as the conduct of the company, *ex turpi causa* would defeat a claim by the company against the auditors. The question of whether *ex turpi causa* would bar a claim by a company with independent shareholders where those shareholders had been unaware that the directing mind and will of the company had been involving the company in fraud would be decided on another occasion. (*Moore Stephens (a firm) (Respondents) v Stone Rolls Limited (in liquidation) (Appellants)* [2009] UKHL 39 - see <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090730/moore.pdf> for the Law Lords Opinion).

Breach of Fiduciary Duty - Lawful Extent of Preparations to Establish New Competitive Company

The claimant, a publishing company, brought an action for breach of fiduciary duty against the defendants after they had launched a rival publishing company and diverted parts of the claimant's business to the new company. The defendants had become the employees of the new company. They had made use of the claimant's confidential information, corporate opportunities and customers. The court noted that the law was clear - "A director ... is subject to a fundamental duty of loyalty, which requires him to act in what he in good faith considers to be the best interests of his company. He should not undermine the company of which is a director by competing with it. It is contrary to his duty of loyalty for a director to (1) act contrary to the best interests of his company; (2) seek to make a profit for himself through the use of his company's corporate assets, information, or maturing business opportunities; or (3) solicit or procure his existing company's staff to work for his new company". The defendants had argued that their activities to establish the new company whilst they were still working for the claimant were lawful however the court said "when drawing the line between legitimate preparation for future competition and undertaking illegitimate competitive activity before an employee has left his employment, the law regards it as unlawful to undertake the following: (1) working for a competitor while still employed; (2) personally competing while still employed; (3) concealing or diverting matured or maturing business opportunities; (4) misusing the employer's property, including confidential information and assets; and (5) taking the steps necessary to establish a competing business so that it is 'up and running' or 'ready to go' as soon as the employee leaves his employment". On the facts, the defendants had crossed the line beyond which preparations for the establishment of a competing business by a director and employees of the existing business became unlawful. The court ordered an assessment of damages. (*Berryland Books Ltd v BK Books Ltd & Ors* [2009] EWHC 1877 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1877.html> for the judgment).

Court Considers Meaning of "Subsidiary"

In the trial of a preliminary issue, the High Court has considered the meaning of "subsidiary" in a charterparty which included a cross reference to section 736 of the Companies Act 1985. Section 736 is reproduced in section 1159 (which defines a subsidiary and related expressions) of and Schedule 6 to the Companies Act 2006 (which explains expressions used in section 1159 and otherwise supplement that section). The parties to the charterparty chose to cross-refer to section 736 of the Companies Act 1985 - the court held that the effect of the cross-reference was that section 736 had to be treated as set out in the charterparty and had to be construed in that context. On the construction of the charterparty, the contractor was an "affiliate" (which definition incorporated section 736) of the charterer, despite the fact that their parent company had "pledged" the contractor's shares as security to the bank and the bank's nominee was registered as the member in the contractor's register of members. Further, the court noted that the extended meaning of "subsidiary" under sections 736 and 736A depended on the context and the purpose for which the question was raised and one needed to look at the context in which the definition is to operate. (*Enviroco Ltd v Farstad Supply A/S* [2009] EWHC 906 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/906.html> for the judgment, which contains a very useful comparative chart setting out the relevant sections of the 1985 and 2006 Acts next to each other).

Film & TV

Government Review into Children in Entertainment Industry

The Government is reported to be undertaking a major review of the participation of child contestants in entertainment shows, modelling, and stage and film industries. The review is, according to comment, being conducted because "current regulations date back 40 years and do not adequately reflect modern entertainment formats". This review was first mooted in June 2009 (and see the Need to Know of 8 June 2009 for details) however, the DCSF have confirmed that the consultation document will not be published until early Autumn 2009.

Gambling

US Bill to Regulate Online Poker Introduced to the Senate

A draft Bill (entitled S.8309, the Internet Poker and Games of Skill Regulation, Consumer Protection, and Enforcement Act) which seeks to amend title 31, United States Code, to provide for the licensing by the Secretary of the Treasury of Internet poker and other games that are predominantly of skill, provide for consumer protections on the Internet, enforce the tax code and other related purposes, has been introduced to the Senate. The Bill suggests that the hosting by Internet operators of games predominantly determined by the skill of players and in which wagers can be made between the participants should be controlled by a strict Federal licensing and regulatory framework to prevent underage wagering and otherwise to protect vulnerable individuals, ensure the games are fair and address the concerns of law enforcement. In addition to proposing a new regulatory framework, the Bill also aims to put in place certain consumer protections such as enforcing age restrictions and identifying addictive behaviour. Reports indicate that the Bill is likely to receive wide support.

Litigation

Whether Malicious Falsehood and Defamation Complained Of Must Refer Directly to Claimant

The High Court has considered the question of to what extent is it an essential element of the cause of action of malicious falsehood that the words complained of actually refer to the claimant. This arose in the context of an application by the defendants for certain orders in proceedings against them for defamation and malicious falsehood, which had arisen as a result of a circular letter being sent by the defendants to members of the first claimant. The letter alleged that the claimant could not look after the members' financial interests. The letter had not referred to the second claimant. The court dismissed the application. It noted that the law required that there would have to be some reference, direct or indirect, in the words complained of, to a claimant or to his business, property or other economic interests, though it would not be necessary to go further and establish identification of the claimant in the minds of the publishers - although the second claimant had not been referred to directly in the letter, its business was the management of mutual protection funds, and in particular, the first claimant's funds. The court said it was arguable that those funds could be viewed as the subject-matter or materials of its business, standing in a position in relation to second claimant closely analogous to the goods of a manufacturer or the properties of a landowner. If so, an attack on them might therefore also be an attack on the second claimant's business. It was a possibility that both sets of words complained of here, relating as they did to allegedly serious commercial problems within a mutual fund claimed by the second claimant to be managed by it as part of its own business, might thus sufficiently refer to the second claimant's own business to bring it within the wide reference limits applicable to malicious falsehood. (*Marathon Mutual Ltd & Anor v Waters & Anor [2009] All ER (D) 06 (Aug)* - the judgment is available via LexisNexis).

Application to Strike Out Claim for Slander and Harassment - Grounds for Striking Out

The first defendant, a listing officer and the second defendant, the Ministry of Justice, applied to strike out claims issued by the claimant, alleging slander and harassment following dealings by the respondent with the County Court. The claimant alleged that the defendants had amongst other things made disparaging remarks about him when ejecting him from the court and the investigation, which followed resulted in the claim for slander. The defendants argued that, in respect of the slander claim, some of the allegations complained of were not actionable without proof of special damage, which was not pleaded, and that the limited allegations which remained, published only to the claimant's solicitor, should be struck out and dismissed as an abuse of process. The court noted that in slander, as opposed to libel, spoken words were generally actionable only on proof of some special damage, generally a specific pecuniary loss, attributable to the words. There were, however, some established exceptions to that principle, including where the words imputed guilt of a crime punishable by imprisonment. Accordingly, the slander action based solely on an allegation of benefit fraud was not an abuse of process and would be allowed to proceed. However, the remaining parts of the claimant's slander claim would be struck out as an abuse of process. In respect of the harassment action, the court recognised that it had to be careful not to trespass into fact-sensitive areas in an interim application. The claimant had a sufficiently good prospect of establishing at trial that at least two of the incidents complained of could be linked to a course of conduct and it would therefore be wrong to strike out or dismiss the claim at this stage. (*Sanders v Percy & Anor [2009] EWHC 1870 (QB)* - the judgment is available via Lawtel).

Application to Strike Out Claims for Libel and Slander and Injurious Falsehood

The claimant brought a claim against the first defendant, the former wife of the Sultan of Brunei, and an associate solicitor (the second defendant) with the firm of solicitors, which acted on the first defendant's behalf. A second action was brought against the solicitors and a partner in the firm, who handled the claimant's affairs and had supervisory responsibility for the first defendant. Both actions were founded upon claims for defamation and injurious falsehood following the publication of an article about a lost diamond bracelet and its return and subsequent discussions about the publication of the article (although the article itself was not sued upon). The defendants argued that the claimant had no reasonable grounds for seeking relief and/or that the claims were bound to fail and/or that the proceedings represented an abuse of process. The court allowed the application to strike out the actions, noting that there was a plain defence of qualified privilege in respect of the second defendant's conversation with the author of the article, since there had been a legitimate common and corresponding interest in the subject-matter and there was no basis for pleading malice against either of the defendants in the first action and no reason to suppose, in the light of the evidence, that it was going to be possible to prove malice if the matter was allowed to proceed to trial. (*Khader v Aziz & Anor; Khader v Davenport Lyons & Anor* [2009] EWHC 2027 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2027.html> for the judgment).

Setting Aside Witness Summons in Arbitration Proceedings

The defendant football agent had represented a well-known premiership football player for Tottenham Hotspur football club. In due course the player purported to terminate the agency agreement with the defendant. The defendant subsequently informed the player that he was entitled to represent himself, in accordance with the FA Football Agents Regulations. At issue before the court was whether the material sought by means of the witness summonses could be properly characterised as necessary and relevant for the purposes of the arbitration proceedings. The claimants sought to have the witness summonses, which had been granted by the High Court to enable the disclosure of information, in the form of an itemised phone bill, be set aside. The issue was whether the material sought by means of the witness summons was necessary and relevant for the purpose of the arbitration proceedings - the court found it was not and dismissed the application. It noted where personal information was in issue what had to be considered was whether the inevitable intrusion into the private affairs of individuals was proportionate and/or necessary to achieve the objective sought. It said the witness summonses requiring information relating to phone calls between the player and another agent and individual were necessary and relevant to determining the question of who had negotiated the transfer agreement. (*Peters & Anor v Andrew* [2009] All ER (D) 40 (Aug) - the judgment is available via LexisNexis).

Music

HSE Says it's Not Taking the Fun Out of Live Concerts

The Health and Safety Executive (HSE) has published its "Myth of the Month", which confirms that concert goers do not have to wear ear plugs and states that it's the audiences choice to be in a noisy environment. The HSE says the law is intended to protect those employees who work in the noisy environments and "not take the fun out of concerts". It's even published a poster to that effect (see <http://www.hse.gov.uk/myth/aug09.pdf> for details).

Publishing

PCC Clears Use of Subterfuge by Journalist to Get Material for Article

The Press Complaints Commission (PCC) has rejected a complaint by the mother of a convicted murderer that the Daily Mirror had used subterfuge in breach of Clause 10 (Clandestine devices and subterfuge) of the editors' Code of Practice - complaints were also made about breaches of Clauses 1 (Accuracy), 3 (Privacy) and 9 (Reporting of crime) of the Code. The PCC said although it was clear that the journalist had used some subterfuge to obtain the interview with the complainant's son, the Code made it clear that it can be acceptable for journalists to use misrepresentation if there is a public interest and the material cannot be obtained by other means. In this case, the journalist had not misrepresented his identity, only how the article would be presented, and the information that was obtained was "significant and new". The PCC said it was satisfied that the subterfuge employed by the reporter, without which the interview would not have been agreed to, had been fully justified by the reporter's objective of discovering further information about another unsolved murder. (*Mrs Jean Bellfield v Daily Mirror*, PCC Adjudication Report 79 - see <http://www.pcc.org.uk/news/index.html?article=NTg0Nw==> for the adjudication).

PCC to Undertake Independent Review of Governance Arrangements

The PCC has announced that it will be commissioning an independent review of its governance arrangements - according to the PCC, "The review group will examine the operation of the PCC board, sub-committees and secretariat; how transparency in the system can be enhanced; whether the independent systems of accountability - the Charter Commissioner and Charter Compliance Panel - can be improved; and the PCC's Articles of Association". The review group

will report in Spring 2010 (although who will actually be on the review group is still to be decided and the appointments will undoubtedly be watched with interest). (*PCC Press Release, 6 August 2009*).

Technology

ICANN Study Finds No Current Evidence of Domain Name Front Running

The Internet Corporation for Assigned Names and Numbers (ICANN) has published the results of a study it commissioned into the occurrence of domain name front running (which is described as "an opportunity for a party to obtain some form of insider information regarding an Internet user's preference for registering a domain name and to use this opportunity to pre-emptively register that domain name" - the insider information is information gathered from the monitoring of one or more attempts by an Internet user to check the availability of a domain name). ICANN said that there had been expressions of concern raised about the level of domain name front running. The tests involved forming a previously unregistered .com, .info, or .net domain name with plausible value to an ordinary registrant. The results showed no evidence of front running (although the point was made that this was not conclusive evidence that front running was not taking place or has taken place in the past) - see <http://www.icann.org/en/compliance/edelman-frontrunning-study-16jun09-en.pdf> for details.

Consultations & Reports

Ofcom Research Document - Communications Market Report 2009 - <http://www.ofcom.org.uk/research/cm/cmr09/cmr09.pdf> (Ofcom's sixth annual Communications Market Report provides data and statistical analysis of the UK television, radio and telecoms markets and also focuses on relevant trends and developments in adjacent industries such as music and gaming)