

This is our summary of some of the key legal developments across a range of sectors for the week of 14 June 2010. 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

Costs Saving Measures and the DCMS

Last week's Need to Know introduced the Secretary of State for Culture, Olympics, Media and Sport and the Government's priorities for the media sector. This week the focus is on the cuts that the Government will be making to the media sector - savings of £73 million have been announced. Projects for which funding is being cancelled include the British Film Institute (BFI) Film Centre. The Government is still funding the building of a new film store to safeguard the National Film Archive and, although it said the BFI's digital access project is not affordable at the present time, it is looking for the BFI to examine alternative methods of support and delivery. Further, the Government announced it has decided not to pursue the £2 million (per annum) spending commitments set out in the Public Library Modernisation Review Policy statement, which was published in March 2010. These commitments included free internet access in all libraries and the promotion of library membership as an entitlement from birth. It also included extending the Public Lending Right to non-print format books, estimated at £300,000 - this has been suspended and will be considered as part of spending review in the Autumn. (*DCMS News Release 066/10, 17 June 2010*).

BIS' Beginners Guide to State Aid

The Department for Business Innovation and Skills (BIS) has published a useful beginner's guide to state aid, which sets out what it is, how and why it is applied for and the conditions under which it may be granted. It also summarises the consequences of making an error in applying for or granting State Aid - it notes, "In recent years the Commission has given increasing priority to applying state aid rules more rigorously. It is therefore extremely important to establish whether a project or policy proposal constitutes State aid and, if so, how they be taken forward in compliance with the State aid rules - whether they require notification to the Commission, or do they fit within an existing approved". See <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/10-951-state-aid-beginners-guide> for details.

BIS Report on the OFT, The Enterprise Act and Market Investigations

The BIS has also published a report looking at the impact of the provisions in the Enterprise Act 2002, which allow the Office of Fair Trading (OFT) to carry out market studies and investigations and, where necessary, refer markets to the Competition Commission for further investigation. The independently prepared Evaluation of the Impact of the Enterprise Act 2002 Provisions Covering Market Studies and Market Investigations Report presents findings in relation to the impact of the regime to date and lessons for improving its effectiveness. The Report emphasises that the OFT, when assessing the cost impact of a study/investigation or recommendation for change, needs to consider the costs to businesses in complying with investigation processes and regulations. See <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/10-921-evaluation-impact-of-enterprise-act> for the Report.

Damages for Use of Confidential Information - Discretion to Choose Grounds for Claiming Damages

The claimants had identified a business opportunity to acquire companies and released confidential information to the first defendant under contracts defining the duty of confidentiality. The first defendant and other defendants used the confidential information and proceeded with the acquisition of the target companies without involving the claimants. At issue was whether the claimants were entitled to damages for breach of confidence and whether the claimants were entitled to choose between damages assessed by reference to loss of notional transaction to buy release from rights concerning the confidential information and damages based on account of profits. The court noted where the parties to a contract had negotiated and agreed the terms governing how confidential information

might be used, their respective rights and obligations were then governed by the contract and in the ordinary case there was no wider set of obligations imposed by the general law of confidence - in this case, the defendants were liable for the breach of the obligation of confidentiality. Further, there was no complete discretion to choose between claiming compensation assessed by reference to the loss of the notional transaction to buy release from the claimants' rights concerning the confidential information and claiming an account of profits. The court said it was settled law that, in relation to a breach of confidence claim, there were circumstances in which the claimant would not be allowed to choose a remedy in the form of an account of profits, and might be confined to an award of damages, which would often be assessed by reference to the value of a notional reasonable agreement to buy release from the claimant's rights. Damages would be assessed and awarded accordingly. (*Vercoe & Ors v Rutland Fund Management Ltd & Ors* [2010] EWHC 424 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/424.html> for the judgment).

New Legislation - Secretary of State for Culture, Olympics, Media and Sport Order

The Secretary of State for Culture, Olympics, Media and Sport Order 2010, SI 2010/1551 comes into force on 7 July 2010. The Order makes arrangements for the establishment of the Office of the Secretary of State for Culture, Olympics, Media and Sport and transfers the functions of the Secretary of State to that office and makes consequential amendments. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101551_en.pdf for details.

Commission Adopts Draft Terrorist Finance Tracking Programme Agreement with US

In February 2010, the European Parliament rejected an agreement between the European Council and the US Department for Homeland Security (DHSS) for the transfer of financial messaging data because, among other things, the concluded agreement lacked provisions that would safeguard the personal data of EU citizens from unauthorised access. Three months later, the Commission adopted a mandate that would allow it to open negotiations on an "umbrella" data protection agreement governing the sharing of personal data between the EU and the US for the purposes of law enforcement and the fight against terrorism. The European Commission has now announced that it has adopted a draft agreement between the EU and the US on the processing and transfer of banking data for the purposes of the US Terrorist Finance Tracking Programme (TFTP). The draft agreement is said to significantly strengthen data-protection guarantees concerning transparency, rights of access, rectification and the erasure of inaccurate data. The agreement ensures that any person whose data is processed under the agreement will have rights to seek judicial redress in the US from any adverse administrative action. The agreement further acknowledges that the principle of proportionality is a guiding principle for application of the agreement. However, the draft agreement still requires the approval of the Council and the consent of the European Parliament. Although the Commission believes that the draft agreement is a "substantial improvement" on the interim agreement, large amounts of EU citizens' data will be transferred to the US and commentators have already noted that it is unclear whether Parliament will actually consent to the draft agreement. (*EC Press Release IP/10/735, 15 June 2010*).

ICO Begins Enforcement Action Against IPCC for FOI Failures

The Information Commissioner's Office (ICO) has announced that it has taken enforcement action under section 52 of the Freedom of Information Act 2000 against the Independent Police Complaints Commission (IPCC) for failing to respond to Freedom of Information (FOI) requests within the 20 day time limit. The action was prompted by a letter from the IPCC, which stated it was experiencing difficulties in responding to requests for information under section 1(1) of the Act. The IPCC confirmed it had a backlog of 72 requests, 69 of which were "out of time". See http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/ipcc_enforcement_notice.pdf for the Enforcement Notice, which sets out the steps that the IPCC must take in order to comply with the requirements of the Act.

Broadcasting

Commission Invites Comment on Proposed Comcast/NBCU Acquisition

The European Commission has published in OJEC a notification of a proposed concentration pursuant to article 4 of the Merger Regulation 139/2004 in respect of the acquisition by Comcast Corporation, within the meaning of article 3(1)(b) of the Merger Regulation, of the whole of the undertaking NBC Universal, Inc by way of a share purchase. Comcast operates cable systems in the US, produces and licenses TV content and channels and operates websites. NBCU is a global media and entertainment company, active in the development, production, marketing and worldwide distribution of entertainment, news, and information. The Commission said that it believes that the transaction could fall within the scope of the Merger Regulation although it has reserved its decision on this point - comments are invited. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:157:0020:0020:EN:PDF> for the OJEC notice.

Corporate

Application to Replace Liquidator for Failing to Appeal Revenue Assessment

The applicants were directors of company which was trading in duty suspended goods. Revenue and Customs Commissioners applied to wind up the company following an assessment of excise duty in which they had concluded that the company owed a significant sum to the Revenue. It was alleged that the applicants had acted dishonestly, recklessly or negligently in respect of the transactions and a trial for breach of fiduciary duty was fixed. The application before the court was for an order removing the respondent as liquidator under section 172 of the Insolvency Act 1986 on the basis that a liquidator acting reasonably would have opposed the assessment. Alternatively, the applicants sought an order, under sections 167(3) and 168 (5) of the Act that the respondent should give conduct of the appeal to the First Tier Tax Tribunal. The court ruled that the application to replace the liquidator would be dismissed as it could not be said that the liquidator had been unreasonable in deciding not to appeal the findings on an assessment for excise duty made by the Revenue and Customs Commissioners - it said it could not be said that the only reasonable course of action was for the liquidator to appeal the decision. The liquidator could reasonably have been satisfied for the matter to be heard at trial. The applicants could have opposed the winding-up petition but had decided not to oppose it, and had given no evidence and it was only much later that they sought to put forward evidence. Further, the jurisdiction of the tribunal was such that the compensation sought could not be given by the tribunal. (*Re Abbey Forwarding Ltd [2010] All ER (D) 86 (Jun)* - only a digest of the case is available, via LexisNexis).

Whether Director of LLP Personally Liable for Guarantee Given by LLP

The claimant had entered into an oral supply agreement with the agent of limited liability company. However, the claimant was unaware that the agreement had been made with limited liability company. The company went into administration and the claimant sought to recover the debt from the director of the company and obtain judgment in default against the director. Judgment to that effect was made and the director appealed. At issue was whether the director should be held personally liable in circumstances where the agreement being made was between the company and the claimant. The Court of Appeal, Civil Division, ruled that the judgment in default obtained by the claimant against the director should be set aside as the agreement had been made between the claimant and the company and not between the claimant and the director. It had not been incumbent on the director to have informed the claimant and any other suppliers of the fact that it was dealing with a limited liability company. (*Pershore Produce (Fruit and Vegetables) Ltd v Reed (trading as Westcote Inn Ltd) [2010] All ER (D) 91 (Jun)*).

Insolvency Service Warning on Hiding Assets by Potential Bankrupts

Can you honestly say that you are surprised to hear that the Insolvency Service has given a warning as the number of investigations into potential bankrupts who have tried to hide their assets from the Official Receiver has risen to more than 200 already this year, compared with just 28 in 2008-09? Bankrupts are required disclose all assets or potentially face a penalty which could include a custodial sentence, financial sanctions or having their period of bankruptcy restrictions increased by up to 15 years instead of the usual 12 months. (*News Distribution Service for the Government and Public Service, 15 June 2010*).

Articles - Exiting Directors Duties

Two articles in the latest Company Secretary's Review look at the issue of the duties owed by a departing director to their former company in terms of the statutory duties which are owed and the specific duty of not competing by means of setting up a similar enterprise after a director leaves. The first article looks at the procedures under the Companies Act 2006, which leaving directors must comply with when they resign their position or are otherwise removed. The second article considers the exiting duties of directors the context of the decision in *Thermascan Limited v Norman* [2009] EWHC 3694 (Ch), which is described as the first reported case in England and Wales to address the conflict of interest provisions of the Companies Act 2006, and specifically the appropriation by directors of their company's business opportunities. (*"The Exiting Director's Dilemma"* (2010) 34 CSR 4, 25 and *"Statutory Procedures"* (2010) 34 CSR 4, 32 - these articles are available via LexisNexis).

Gaming & Betting

I Bet That Movie Will be a Huge Hit...

An entertainment industry coalition of Hollywood studios is reported to be urging US Congress to finalise a ban on futures trading on movie revenues after the Commodity Futures Trading Commission (CFTC) approved the proposed futures contracts for the new Trend Exchange which allows for betting on motion picture box-office numbers. Despite opposition from the Directors Guild of America (DGA), the Independent Film and Television Alliance (IFTA), the International Alliance of Theatrical Stage Employees (IATSE), the Motion Picture Association of America (MPAA) and its member companies and the National Association of Theatre Owners (NATO), the CFTC approved a request from Media Derivatives Inc to create a designated contract market for the trading of financial derivatives based on box-office number futures. The proposed futures contracts were approved by a vote of three to two and movie futures trading is expected to begin during the third quarter of 2010.

Litigation

Terms of Protection from Harassment Order - Naming of Defendants

The applicant pharmaceutical and chemical companies applied for final orders in proceedings they had brought for injunctions against the respondent animal rights activists. The applicants had sought injunctions against the respondents under section 3 of the Protection from Harassment Act 1997. Draft orders were prepared and each order included a paragraph providing that the definition of "defendant" for the purposes of section 3(6) of the 1997 Act included protestors, thereby making them guilty of an offence if they did, without reasonable excuse, anything which they were prohibited from doing by the injunction. The applicant submitted that the insertion of section 3A into the Act by the Serious Organised Crime and Police Act 2005 extended the meaning of "defendant" in section 3(6) of the Act to include protestors who were not named defendants. At issue for the court was the terms of the Order and whether the definition of "defendant" for the purposes of section 3(6) of the Act included unnamed protestors. The court ruled that section 3A of the Protection from Harassment Act 1997 widened the scope of the Act to encompass non-parties but not to the extent of allowing, without the court's permission, enforcement of an injunction against protestors who were not named defendants in the order. The court said therefore that it was appropriate to make the order in the terms of the proposed draft, subject to amendments and the removal of passages which referred to the definition of "defendant" for the purposes of section 3(6) of the 1997 Act as including protestors. (*AGC Chemicals Europe Ltd v Stop Huntingdon Animals Cruelty, Unreported, QBD, 10 June 2010 - the judgment is available from Lawtel*).

Strike Out Application - Method of Calculating Loss for Misuse of Confidential Information

Another dispute involving the use of confidential information. In this case, the first defendant applied to strike out the further particulars pleaded by the claimant for summary judgment. The parties were competitors in the dairy business. The claimant had alleged that the second defendant, who was a former employee, had taken confidential information in the form of weekly invoices and supplied it to the first defendant, which then used it to poach the claimant's customers. Because the claimant was having difficulty quantifying its alleged loss of profit, it pleaded in further particulars its loss on the basis of the value of the information that it alleged had been taken. The first defendant submitted that a calculation of loss based on the market value of the information was available only where a claimant would have sold or licensed the information rather than used it itself, which was not the case. The court dismissed the application. It said was at least arguable that what the claimant had lost could encompass the value of the information allegedly taken, and an appropriate starting point would be what it would sell for on the open market. An appropriate case for that method of calculation could include one where the claimant had difficulty proving loss of profit. (*JN Dairies v Johal Dairies Ltd*, Unreported, Ch D, 15 June 2010 - a summary of the case is available from Lawtel).

Publishing

Meaning of Comment About Author's Work Methods - Whether Defamatory

The applicant newspaper applied for summary judgment of an action for libel which had been brought against it by the respondent book author. In the course of researching her book, the respondent had conducted several interviews. The applicant had published an unfavourable review of the book, in which it stated among other things that the respondent had given her interviewees the right to read what she proposed to say about them and alter it, which was known by journalists as "copy approval" and which was very much disapproved of by them. The respondent considered the paper's statement to be defamatory and suggested a second defamatory meaning, namely that she had shown herself to be untrustworthy and fatally lacking in integrity and credibility as a researcher and writer. The court was required to determine, for the purposes of both CPR Rule 24.2 and CPR PD 53 4.1(2), whether the respondent had a real prospect of establishing that the relevant words were defamatory of her. The court said that in the context of defamation, the position of professional writers could be compared to the position of professional sportsmen in *Dee v Telegraph Media Group Ltd* (2010) EWHC 924 (QB); writers were free to direct different products to different readerships or markets. As long as the true position was made clear by the writer to the prospective reading public, the standards to which a writer wrote were simply a matter of choice of one product over another and therefore to impute to a writer that they wrote to one standard rather than another could not of itself be defamatory. Further, the court accepted that the definition of defamation should be qualified to exclude trivial claims and must include a qualification or threshold of seriousness. It said "The publication of which he complains may be defamatory of him because it [substantially] affects in an adverse manner the attitude of other people towards him, or has a tendency so to do". Accordingly, the application for summary judgment was granted. (*Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/1414.html> for the judgment - commentators have described this ruling as "redefining the meaning of defamation").

Sport

The Dangers of Ambush Marketing Revealed (Or the Danger of Wearing Orange)

According to reports, Fifa are considering legal action against Dutch brewery Bavaria, which it accused of using women supporters to advertise its beer through ambush marketing. Stewards apparently ejected 36 women during the second half of the Netherlands-Denmark game. All the women were "dressed identically in tightly hugging short orange dresses, sold as part of a gift pack". The eviction was intended to protect the investment of the World Cup's authorised beer sponsor, Budweiser. Bavaria said in response to the eviction, "Fifa does not have the monopoly on orange and people have the freedom to wear what they want" (and given the well-known dedication of the Dutch fans and their particular fondness for the colour orange, might they have a point?).

FAPL to Defend Challenge to Football Creditors Rule

The Football Association Premier League (FAPL) has said that it will "robustly defend" a challenge to its Football Creditors rule, which requires debts within football to be settled in full in the event of a club's insolvency. HMRC filed a writ with the High Court in May this year and the Premier League has until 17 June to respond.

New Legislation - Blackpool Football Club Seating Order

The Football Spectators (Seating) Order 2010, SI 2010/1584 comes into force on 23 July 2010. The Order directs the Football Licensing Authority to include in any licence to admit spectators to Blackpool Football Club's Bloomfield Road Stadium a condition imposing the requirements that only seated accommodation is to be provided for spectators at designated football matches and that spectators shall only be admitted to watch such a match from seated accommodation. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101584_en.pdf for details.

European Parliament Passes Resolution on Players' Agents in Sports

The European Parliament has adopted a resolution asking for the introduction of a European licensing system for agents - the Motion for a Resolution on Players' Agents in Sports calls on the Commission to "support the football governing bodies' efforts to regulate players' agents, if necessary by presenting a proposal for a directive concerning such agents". It also notes that the Parliament is "particularly concerned" about the recently published findings of the "Study on sports agents in the European Union" commissioned by the European Commission with regard to criminal activities carried out in connection with sport citing episodes where sport is affected by organised crime with links to players' agents activities. The Parliament said they believe this development is "detrimental to the image of sport, its integrity and ultimately to its role in society" and highlight the findings of the study which states that "sport agents are central in the financial streams which are often not transparent, and which make them prone to illegal activities". The Motion repeats the calls of the Parliament for an EU initiative concerning the activities of players' agents, which they say should aim at achieving strict standards and examination criteria before anyone can operate as a players' agent, transparency in agents' transactions, a prohibition for remuneration to players agents related to the transfer of minors, minimum harmonised standards for agents' contracts and an efficient monitoring and disciplinary system amongst other things. See <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2010-0343&language=EN> for the Resolution.

Consultations & Reports

Ofcom Statement - Statement on Content Management on the HD Freeview Platform - http://www.ofcom.org.uk/consult/condocs/content_mngt/statement/statement.pdf (the Statement sets out Ofcom's decision on a proposal from BBC Free to View Ltd to vary the terms of its multiplex licence for Multiplex B. Under the BBC's proposals, its licence would be varied to allow it to restrict access to broadcast Electronic Programme Guide (EPG) data to only those High Definition (HD) Digital Terrestrial (DTT) receivers which include content management technology, which would enable broadcasters to control the multiple unauthorised copying of broadcast HD content and its retransmission over the internet).

Ofcom and ATVOD Joint Statement - Regulatory Fees for Video On Demand Services for the period up to 31 March 2011 - http://www.ofcom.org.uk/consult/condocs/vod_proposals/statement/VOD_Fees_Statement.pdf (Ofcom and ATVOD's (the Association for Television On Demand) Joint Statement sets out details of the fees which are to be paid by the regulated UK-based video on demand (VOD) services. Providers of the services must pay to ATVOD an annual regulatory fee of £2,900 for each service for 2010-11).