

This is our summary of some of the key legal developments across a range of sectors for the week of 12 July 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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ISPs Seek Judicial Review of Digital Economy Act

Readers will recall that while the draft Digital Economy Bill was being pushed through the previous Parliament it was the subject of considerable comment and concern - now, two ISPs, Talk Talk and BT, have filed an application with the High Court for a judicial review to clarify the legality of the recently passed Act. Not surprisingly, given the fact that the previous Government used the "wash up" procedure to pass the Bill, the ISPs have said the law was "rushed through" with "insufficient scrutiny" and that they are asking the court to clarify whether the Act conflicts with Europe's e-commerce Directive, which limits liability of offences committed by ISP subscribers, giving protection similar to the "safe harbour" provisions of the US Digital Millennium Copyright Act. Talk Talk said that "clarity" was needed before the industry incurred considerable costs implementing unenforceable legislation. Readers might also recall the comments made by Nick Clegg about the Act shortly before the election? Watch this space...

Law Commissions Consult on Post-Contract Duty of Good Faith During Life of Contract

A joint Law Commission and Scottish Law Commission consultation has been published, inviting comments about insurance policyholders' post-contract duty of good faith during the life of a contract. Focusing on the law of fraudulent claims, and in particular the remedies which should be available to the insurer if a policyholder makes a fraudulent claim, the consultation aims to clarify the law which the Commissions say is currently "unnecessarily confused". The duty to act in good faith is codified in section 17 of the Marine Insurance Act 1906, which states "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party". According to the Commissions, the "main problem is that section 17 specifies only one remedy - that the insurer may avoid the contract from the start. This means that insurers could require policyholders to repay all claims made under the policy, including perfectly genuine claims which were finalised and paid before the fraud arose. The courts have struggled against such a conclusion, holding instead that a fraudulent policyholder should forfeit the fraudulent claim, leaving the rest of the contract unaffected. We think this is the right policy, but unfortunately it is incompatible with section 17". The Commissions said "We think that the common law rule is the correct approach: a policyholder who acts fraudulently in connection with a claim should forfeit the whole claim. However, it would be wrong to deny the reality of the insurance contract as a whole, or for the fraudulent claim to affect other claims". Accordingly, the Commissions tentatively conclude that there is a need for legislation to amend section 17. See http://www.lawcom.gov.uk/docs/issues7_duty-of-good-faith.pdf for the Commissions' joint Issues Paper. The Commissions have said that they will use the responses in their work on producing a full consultation on the subject in 2011.

Consumer Rights Directive - Allowing Contingent or Ancillary Charges to be Assessed for Unfairness

Still on the subject of consumer contracts, the Department for Business, Innovation and Skills is inviting comment on a number of specific issues which they say will help inform the development of the UK Government's negotiating position in advance of discussions in the EU's Council of Ministers later this year. The Consumer Rights Directive is currently being negotiated and will replace four existing Directives including the Unfair Contract Terms Directive, which forms the basis for the relevant UK law on unfair contract terms, the Unfair Terms in Consumer Contracts Regulations 1999. The call for evidence follows the Supreme Court judgement in *OFT v Abbey National Plc* [2009] UKSC 6 (SC), which led to uncertainty as to how UK legislation on unfair terms in consumer contracts applies to charges that are "contingent", or "ancillary" to the core of the contract. The Government has said it "believes in principle that an economic case may exist to regulate charges which, from the consumer's perspective, do not form part of the 'essential bargain' between the trader and the consumer. If such charges are not actively considered by the consumer when electing to enter into a contract, they will not be subject to normal competitive pressures, even if they are formally referred to in the contract. It could be argued, therefore, that the level of these charges should be able to be assessed for unfairness under the relevant law". See <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1030-contingent-charges-call-for-evidence.pdf> for details.

Data Protection Working Party Report on Compliance with Data Retention Directive

The Article 29 Data Protection Working Party has adopted a report on an enforcement action it established to investigate compliance by Member States and electronic communications and Internet Service Providers with the provisions of the Data Retention Directive 2006/24/EC. The Working Party found there were "significant discrepancies as for the retention of Internet services traffic data categories, and the retention periods are also found to vary significantly in the individual Member States". The report makes a number of recommendations including, among others, that the list of traffic data to be retained under the Directive should be regarded as exclusive, so that Member States could not impose additional data retention obligations; there should be a single shorter retention period than the 24 months currently permitted; service providers should be required to adopt common technical and organisational security measures; and standardised procedures for handing data over to enforcement authorities should be adopted. The Commission is required to carry out its first assessment of the Directive by 15 September 2010 - see http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2010/wp172_en.pdf for the Working Party's report.

Government Announces Review of Controversial Security Legislation

Welcome news - the Government has announced that it will be reviewing certain controversial aspects of the current counter terrorism and security legislation. Two of the areas the review will be specifically looking at are section 44 of the Terrorism Act 2000, which deals with stop-and-search powers and the use of terrorism legislation in relation to photography and the use of the Regulation of Investigatory Powers Act 2000 by local authorities and access to communications data more generally. In announcing the review the Home Secretary said "the first duty of Government is to protect the public, but that duty must never be used as a reason to ride roughshod over our civil liberties-and that is what the previous Government did on far too many occasions". The Home Secretary said the Government would be "happy" to hear from photographers about how badly they had been affected by the legislation. (*House of Commons Hansard, 13 July 2010, Column 797*).

Broadcasting

Appeal Against Ofcom Finding of Breach of Broadcasting Code and Claim of Article 10 Infringement

The claimant, a radio broadcaster, claimed in judicial review proceedings that a finding of the defendant, Ofcom, that a broadcast radio interview conducted by him had breached Rules 2.1 and 2.3 of the Broadcasting Code was a "disproportionate interference with his freedom of expression and an infringement of his rights under Article 10 of the European Convention on Human Rights". His claim was supported by Liberty, the Intervener. The interview in question related to the use by local councils of foster parents who smoked and saw the broadcaster expressing what were very forceful and opinionated views about the attitudes of the council (the court noted that "within 10 minutes of the end of the interview, the claimant apologised to the listeners (but not to Mr Stark [the interviewee]) accepting that he did not hold it together. He had been, he said, unprofessional and lost his rag". The Divisional Court held that in the context of broadcasting, "generally accepted standards" had to be regarded as elusive, and the concept of "harmful and/or offensive material" had to be moderated in the light of Article 10 of the European Convention on Human Rights and the domestic and Strasbourg case law. The court found, on the facts, that the defendant regulator had been justified to conclude that the claimant broadcaster had breached provisions of the Broadcasting Code on account of his actions in the live interview. The broadcast had been highly offensive to the Cabinet Minister and was well capable of offending the broadcast audience. The essential point was that the offensive and abusive nature of the broadcast was gratuitous, having no factual content or justification. (*Gaunt v Ofcom; Liberty Intervener [2010] EWHC 1756 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/1756.html> for the judgment; Ofcom noted "Parliament has given Ofcom the duty of applying generally accepted standards to television and radio services, which we always aim to do in a way that respects the important principles of freedom of expression whilst at the same time protecting audiences from unjustified offensive and harmful material" and said that it welcomed the ruling, saying that it was pleased that the court had accepted their ruling on what had been a "difficult" case).

Welsh Assembly Government Announces Broadband Support Scheme

The Welsh Assembly Government has announced the establishment of the Broadband Support Scheme, which will enable individuals and rural communities in Wales' remaining broadband "not-spots" to approach service providers directly, with support of Assembly Government funding. Support will be available for up to a maximum of £1,000 for individual premises. The Scheme is expected to start in the Summer - details about the application process are still to be published. (*Welsh Assembly Government News Release, 9 July 2010*).

Corporate

Commission Regulation on Presenting Key Investor Information

Commission Regulation 583/2010 of 1 July 2010 implementing Directive 2009/65/EC on key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website has been published in OJEC. The Regulation specifies the content of the information on investment objectives and the investment policy of undertakings for collective investment in transferable securities (UCITS) so that investors can easily see whether or not a fund is likely to be suitable for their needs. Detailed rules are laid down regarding the presentation of the risk and reward profile of the investment and the presentation and explanation of charges, including relevant warnings. The Regulation applies from 1 July 2011. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:176:0001:0015:EN:PDF> for details.

Film & TV

Claim for Damages for Breach of Contract to Exploit Film - Failure to Give Proper Account of Figures

The claimant company had entered into a contract with defendant company in order to exploit the film "3000 Miles" in various countries. The contract required the defendant to give a proper account and explanation of relevant sales figures. The film sold fewer units in US than had been expected by claimant and the claimant said the defendant had failed to provide a proper account - the claimant was wholly dependent on the defendant to provide the figures. At issue for the court was whether the defendant was in breach of marketing and other terms of the contract and whether the defendant had failed to give proper account to claimant and in consequence, whether the claimant was entitled to damages for breach of contract. The court found that the claimant could not say or begin to prove what the damages or loss would have been had the film been properly marketed and there were a number of reasons why a film failed to sell despite its apparent promise, none of which necessarily implied fault on the part of those responsible for marketing or distribution. However, on the facts, the defendant had been under an obligation to provide royalty statements that were reasonably accurate and capable of being understood by the person for whom they were intended. The accounts had to show the relevant territory, the gross receipts, the deduction of the distribution fee and the distribution and marketing costs supported, at least initially by the principal documents showing the main paper trail. They also had to specify the number of 'home video units shipped' if they wished to establish the reserve agreed. However, the defendant had been in breach of the terms of the deal memo as regards its royalty statement obligations in all the respects complained of and the claimant was therefore entitled to the return of the copy tapes that the defendant had and the account and enquiry sought. (*Gumball 3000 Films v Revolver Films Ltd [2010] [2010] All ER (D) 122 (Jul)* - only a digest of the case is available, via LexisNexis).

Gambling & Betting

French Regulatory Authority Moves Against Online Gambling Operators

The French regulatory authority ARJEL has sent 19 formal notices to illegal operators to cease their activities in France or face having access to their websites blocked by the Paris High Court. According to reports, ARJEL said that unless the websites took the necessary steps to ensure their legal operation, it would seek a court order for ISPs and hosting companies to block users' access to them - the operators' details were not disclosed at the time of writing.

New Legislation - Pool Betting Duty Regulations

The Pool Betting Duty (Application of General Betting Duty Provisions) Regulations 2010, SI 2010/1783 come into force on 26 September 2010. The Regulations amend the General Betting Duty Regulations 2001, SI2001/3088 so that the existing provisions for general betting duty about furnishing returns, paying the duty and changing between monthly and quarterly accounting periods are modified to apply to pool betting duty as well. The Regulations also repeal current provisions about the payment of pool betting duty. The effect of the Regulations is to make pool betting duty subject to the existing provisions for general betting duty (modified as appropriate) about returns, payment of duty, and changing between monthly and quarterly accounting periods. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101783_en.pdf for details.

RGA's Guidelines on Money Laundering for Online Gambling Industry

The Remote Gambling Association (RGA) has issued practical guidelines to help companies in the online gambling industry combat money laundering. The RGA said there had been continued speculation about the level of money laundering involving online gambling and the risk it presents as the industry evolves. It said in an attempt to bring some objectivity to these issues it commissioned in 2009 a report from MHA Consulting, which concluded that "a combination of statutory and self regulation had effectively reduced the risk of money laundering through online gambling and that there were almost no examples of money laundering in licensed jurisdictions" - the guidelines were developed in the light of this report and are "intended to highlight the importance of operators being in compliance with these national requirements, having regard to the wider international context". See http://www.rga.eu.com/data/files/rga_aml_guidance_2010.pdf for the guidelines and http://www.rga.eu.com/data/files/final_mha_report_june_2009.pdf for the MHA report (the RGA made the point that "Although many of these guidelines are specific to countries in the European Union (EU) and the regulatory and legislative structures within EU Member States, the principles and many of the suggestions for good practice will have a wider geographical application").

Litigation

Publication of Article on Website - Qualified Privilege Ruling Protecting Article and Reynolds Defence

The appellant police officer appealed a decision that the publication of a defamatory article by the respondent newspaper was protected by the defence of qualified privilege. The respondent cross-appealed a decision that the continued publication of the article on its website was not protected. The article which was the subject of the dispute related to police bribes and included a press statement from the police and named the appellant as an officer under investigation. It also set out the details of what had been alleged, and stated that the allegations were supported by a dossier of information. However, the dossier did not name a specific police officer. The appellant brought proceedings for libel. An internal police investigation was launched, which concluded that there was no evidence that the appellant had acted improperly or accepted bribes, however, despite being informed of the outcome of the investigation, the article was not removed from its website. One of the judges made the comment that the appeal "raises once again the difficult task of balancing freedom of expression against the right to reputation". The Court of Appeal allowed the appeal and dismissed the cross appeal and noted the appeal involved in deciding whether the *Reynolds* defence applied to a defamatory statement was a matter of judgment which raised a question of law to which there was only one right answer. It was not an exercise of discretion, and could therefore be a matter for an appellate court. Both limbs of the *Reynolds* privilege were based on the public interest: journalists should be relatively free to report matters which it was in the public interest to place in the public domain, but they should take reasonable care to verify the accuracy of stories which might damage reputations. The question of whether the *Reynolds* privilege applied to the detailed allegations upon which a police investigation was based was to be judged by applying the established requirements of that privilege to the reported allegations. It would be illogical and unfair if publication of the allegations could attract privilege simply because section 15 of the Defamation Act 1996 permitted the publication of a police statement concerning an investigation which happened to be based on those allegations. The allegations were serious, and by publishing them in detail, the paper must have realised that the story would have greater impact and a greater effect on the appellant's reputation. The respondent did not seem to have done much to satisfy itself that the allegations were true. At the time of publication they were no more than unsubstantiated, unchecked accusations from an unknown source, coupled with speculation. (*Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/804.html> for the judgment - the Court of Appeal made the point that "Lest it be thought that the conclusion of this court impedes attempts to add interest and colour to a story, the newspapers and their readers have only themselves to blame. That a person is accused is generally of far greater interest than his or her subsequent triumphant acquittal. Once an accusation is dismissed, the blaring headline of accusation on page 1 becomes a tepid reference in the graveyard of page 2" - commentators have already said that *The Times* is expected to appeal the decision to the Supreme Court).

Music

PRS for Music Issues Paper Proposes Market-Based Solutions for Internet File Sharing Damage

PRS for Music have published an Issues Paper outlining their proposals for "moving Digital Britain forward without leaving Creative Britain behind". The Paper suggests, "the answer to this question requires two simple yet significant admissions. First, the Internet has fundamentally and permanently changed the nature of media broadcasting and distribution. How we experience, produce, transmit, and discover recorded media is forever changed. These changes significantly affect the structure of the market in ways that impact all stakeholders, whether nascent or incumbent. Second, alongside the market change for recorded media, society's demand for

music and moving pictures remains strong. Our innate desire for what is communicated through recorded media has not shifted one iota. In fact, if this demand has shifted, we now demand access to more not less media". Two solutions are suggested - "A dynamic compensation model, akin to the 'cap and trade' market for carbon emissions ... Operators would face a fee for the transmission of unlicensed media on their networks, though that fee would be reduced in line with reductions in the volume of unlicensed media transmitted..." or "Alternatively, there is the 'positive spillover' approach, one that converts infringing media to non-infringing by way of a legal agreement ... Network operators would pay ... a fee, and determine for themselves how best to capture the raw value of media on network". The Paper suggests that "Conditions now appear to exist which might support the development of novel, market-based solutions to the harm caused by illegal file sharing over the Internet". See [http://www.prsformusic.com/creators/news/research/Documents/Wiil%20Page%20and%20David%20Touve%20\(2010\)%20Moving%20Digital%20Britain%20Forward%20without%20leaving%20Creative%20Britain%20behind.pdf](http://www.prsformusic.com/creators/news/research/Documents/Wiil%20Page%20and%20David%20Touve%20(2010)%20Moving%20Digital%20Britain%20Forward%20without%20leaving%20Creative%20Britain%20behind.pdf) for details.

Consultations & Reports

Ofcom Report - Public Service Broadcasting Annual Report 2010 - <http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/psb-review/psb2010/psbreport.pdf> (Ofcom's annual report on PSBs for 2010 sets out details about how they have all met their public service obligations in terms of spending and development - the report shows that spending on first-run, UK made programmes continues to fall and that across the PSB channels spending on new UK programmes fell by 6% between 2008 and 2009).

Ofcom Consultation - Local commercial analogue radio licence durations - Consultation on proposed changes to Ofcom's policy - <http://stakeholders.ofcom.org.uk/binaries/consultations/local-licence-duration/summary/local-licence-duration.pdf> (Ofcom's consultation sets out details of its proposals for the duration of local commercial analogue radio licences - its preferred option is to set the licence renewal periods for seven years, which "provides an appropriate balance between the benefits of shorter or longer licence durations. It retains an element of flexibility by not licensing stations far into the future". Ofcom said "a seven year option would retain incentives for stations to continue to operate DAB services. Seven years matches the maximum period of newly offered renewals. Stations eligible for renewal would be able to choose between re-advertising their licence (with the risk of competition for the licence) or renewing it (and continuing to provide a DAB service), receiving the same licence length in either case").

Ofcom Consultation - Section 400 Licence Fees and Penalties Account: Year ended 31 March 2010 - <http://www.ofcom.org.uk/files/2010/07/Ofcom-S400-2009-10-accounts.pdf> (Under section 400 of the Communications Act 2003, Ofcom is required to collect fees and payments. The revenue collected is from three sources: the Wireless Telegraphy Act licence fees; additional payments from television and radio licensees; and financial penalties - Ofcom passed £192.7 million to the Revenue which comprised £165.9 million from licences, £26.5 million from additional payments and £0.4 million from financial penalties).

BIS Discussion Paper - Broadband Deployment and Sharing Other Utilities' Infrastructure - <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/b/10-1046-broadband-deployment-discussion-paper.pdf> - (the Department for Business, Innovation and Skills is inviting on the benefits and problems associated with sharing non-telecommunications utilities infrastructure, as a means of facilitating the deployment of broadband networks in order to meet the Government's commitment to the rapid roll out of superfast broadband nationwide).