Contents

Security breaches under the spotlight 04
Supreme Court reinforces the need to interpret clauses by the “natural meaning” of the words used 06
UK calling - Ofcom’s changes to calling non-geographic numbers 09
The European Commission announces plans to reduce barriers to online trade within the EU 10
What is the effect of the Insolvency (Protection of Essential Supplies) Order on the technology sector? 12
High Court quashes copyright exception for personal private use due to lack of compensation mechanism 14
High Court considers “serious harm” requirement under Defamation Act 2013 16
Film Tax Relief extended for British films 17
Sign up to stay informed 18
Upcoming events / Useful links 19
Security breaches under the spotlight

As the recent posting of almost 10gb of sensitive customer data belonging to the infidelity dating website Ashley Madison has shown, suffering a security breach has the potential to wreck untold havoc on a business’s brand, operations and finances and could lead to the capsizing of successful and profit making businesses in a maelstrom of reputational damage, regulatory fines and customer legal action.

As the Ashley Madison and other recent data exposures have shown, it is now increasingly important to consider the legal repercussions of a breach, as the clock can start ticking from the moment a breach is identified, to the threshold of a company’s reporting obligations. The Data Protection Act 1998 (“DPA”) and the Privacy and Communications (EC Directive) Regulations 2003 (“PECR”) impose responsibilities, obligations and duties on a company that has suffered an IT breach which has compromised the security of its customers’ personal data. It is imperative to appreciate what steps should be taken to mitigate legal and reputational risk after an IT security failure.

What?
Disclosing a breach
The most important obligation is for companies to disclose all “serious data security breaches” to the Information Commissioners Office (“ICO”), the UK’s privacy and information regulator. As a guide in analysing the seriousness of any breach, the ICO recommends that companies assess the likely detriment to the individuals affected by the breach (e.g. exposure to ID theft, information about their private lives etc.) as well as the sensitivity and volume of the data involved.

Where a company is a “telecoms or internet service provider” under PECR, (in practice this is complex, but is likely to include mobile phone network providers, Wi-Fi internet providers and potentially, even businesses which offer a public Wi-Fi network to customers (e.g. shopping centres)), it must notify the ICO within 24 hours of the breach being detected. Telecoms or internet service providers are also obliged to inform consumers of the breach if it is likely to cause them adverse harm.

Financial services providers should also be aware of their own particular reporting obligations. The Financial Conduct Authority expects providers to protect themselves and their customers against cyber threats and the punishments that can be imposed for a failure to meet these duties. The Financial Conduct Authority has recently imposed fines of over £3 million on three banking companies for failing to ensure that they had adequate systems to protect their customer’s confidential details from being compromised.

Loss of data and the ICO
A security breach can take many forms but a common factor is the stealing of customer records and data by a hacker or hackers. Companies to have suffered such breaches in the past five years include Bank of Scotland, Sony, and Staysure Insurance. The ICO can impose fines of up to £500,000 for such security breaches, together with publicly sanctioning companies it finds to be in breach of the security obligations under the DPA, bringing consumer scrutiny and reputational damage.

The breach of Sony’s PlayStation Network Platform in 2011 which led to a range of customer personal data being exposed warranted a fine of £250,000 from the ICO although this fine could potentially have been much larger if it were not for several mitigating factors in Sony’s defence which the ICO took into account.

Future plans
Companies should be aware that the penalties for breach of the data protection legislation, including loss of data, are likely to be increasingly severe in the future as the draft Data Protection Regulation (the “Regulation”) progresses through the EU Legislative process. The Regulation will be binding on all EU member states when it comes into force and will impact all organisations which process personal data. Whilst the Regulation is still in draft form (with the final form not expected to be agreed until the end of 2015/early 2016 and implementation in or around 2017/2018), it is currently proposed that companies in breach of data protection legislation will be subject to fines of up to between 2-5% of their global annual turnover up to specified caps – depending on whether the Commission, Council or Parliament view holds out.
Another key element of the Regulation is a duty on companies to report data security breaches to the regulator “without undue delay” and where feasible, within 72 hours of becoming aware of the breach, as well as a duty to inform the individuals affected. This will apply where the breach is likely to present a “high risk” for the rights/freedoms of the affected individuals, e.g. financial loss, identity theft and discrimination.

So what?
What can you do?
The ICO regularly publishes guidance on data security breach management which sets out the regulator’s expectations of the IT security measures it expects from companies under the DPA. This guidance together with the ICO’s reports of cases where it has found companies guilty of failing to comply with data protection legislation provide illuminating guidance of the approach that companies are expected to take and what the ICO considers to be best practice.

Companies are expected, not only to protect their personal data but also, as part of that, to maintain plans of how to deal with and respond to potential IT security breaches. They should adopt a proactive mindset, linking in with other crisis management protocols they may have and colleagues elsewhere in the organisation, such as legal, HR, and the PR/marketing team, to consider how they would be able to respond to breaches. In these scenarios, the ICO and other regulators will look at the methods and procedures that they have used in order to maintain strong, effective and regularly updated defences against data loss and misuse. This may include data management or protection policies which all staff handling personal data are aware of, appropriate record retention/destruction policies and processes, appropriate data categorisation, regular updating of IT security mechanisms and tools related to that categorisation, regular training and awareness raising, audits, and procedures and plans for dealing with IT security breaches so as to minimise loss from the breach.

For more information contact

Charlotte Walker-Osborn
Partner and Head of Technology, Media and Telecoms Sector
charlottewalker-osborn@eversheds.com

Contributors:

Edward Norris
Associate

Rebecca Sherry
Associate
Supreme Court reinforces the need to interpret clauses by the “natural meaning” of the words used

On 10 June 2015, the Supreme Court handed down its judgment in the case of Arnold v Britton and others [2015] UKSC 36, which concerned the interpretation of clauses relating to service charges. The judgment has wide application, but is of particular relevance to the Technology, Media and Telecoms sector. It is an important reminder of the risks created by, and the Court’s approach to resolving, ambiguity concerning how the cost of service charges will change over the course of a long-term contract. The judgment reaffirms the Court’s focus on an assessment of the natural meaning of the words used, even if it means the outcome is severe to one party.

What?
The case concerned the interpretation of a service charge contribution clause in a number of leases granted between 1977 and 1991. The majority of the leases provided that the tenant pay “…a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal… and the provision of services hereinafter set out the yearly sum of Ninety Pounds and Value Added Tax (if any) for the first Year of the term hereby granted increasing thereafter by Ten Pounds per hundred [sic] for every subsequent year or part thereof”.

The issue between the parties was whether the figure of £90 stated in the above clause was to be read as a fixed amount or cap. The landlord (Arnold) claimed that the clause provided for a fixed annual charge of £90 for the first year, increasing each subsequent year by 10% on a compound basis. The tenants (Britton and others) argued that the clause should be read as requiring them to pay a fair proportion of the landlord’s costs, subject to a maximum of £90 in the first year, which then increased every year by 10% on a compound basis. In other words, they argued that “up to” should be read into the clause between the words “the provision of services hereinafter set out” and “the yearly sum of Ninety Pounds…”.

Finding of the Supreme Court
The Supreme Court found in favour of the landlord’s interpretation, namely that the clause provided for a fixed annual charge of £90 for the first year, increasing each subsequent year by 10% on a compound basis.

The leading judgment was provided by Lord Neuberger who confirmed that service charge clauses were not subject to special rules of interpretation and therefore the general rules of contractual interpretation should apply. As for those general rules, the court reaffirmed that when interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean” and it does so by focusing on the words of the relevant provision in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the agreement; (iii) the overall purpose of the clause and the agreement; (iv) the facts and circumstances known or assumed by the parties at the time that the agreement was executed; (v) commercial common sense; but (vi) disregarding subjective evidence of any of the party’s intentions.

Lord Neuberger then emphasised several important factors when considering (i) to (v) above:

1. Reliance placed on commercial common sense and surrounding circumstances at the time the contract was formed should not be invoked to undervalue the importance of the language used. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader and that meaning is most obviously to be gleaned from the language of the provision which the parties had control over.

2. Commercial common sense should not to be applied retrospectively even if a contractual provision has worked out badly for a party, if interpreted according to its natural language. Similarly, a court should be very slow to reject the natural meaning of a provision simply because it appears to be a very imprudent term for one of the parties to have agreed. The purpose of interpretation was to
identify what the parties have agreed, not what the court thinks that they should have agreed and a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

3. When interpreting a contractual provision, only facts existing at the time that the contract was made, and which were known or reasonably available to both parties, should be taken into account.

4. In some cases, where an event occurs which was plainly not intended or contemplated by the parties judging from the language of their contract, if it is clear what the parties would have intended, then the court will give effect to that intention.

In considering the above factors, and despite the acknowledged unattractive consequences to the tenants, the Supreme Court was unconvinced by the tenant’s argument as it would have involved departing from the natural meaning of the clause and inserting words that were not there.

Lord Neuberger noted that in considering the words used by parties in a clause, interpretation should be based on what a reasonable person, with the benefit of relevant background knowledge, would understand the clause to mean. The question for the court was not whether a reasonable and properly informed tenant would enter into such an undertaking as that would involve the possibility of re-writing the parties’ bargain in the name of commercial good sense.

Dissenting judgment
There was one dissenting judgment (by Lord Carnwath) who referred to previous authorities which suggested that where a particular construction leads to a very unreasonable result, that should be a relevant consideration. It was clear to Lord Carnwath that something had gone wrong in the drafting of the service provision as, in his view, it was inconceivable that a potential purchaser would have been willing to accept a prediction of continuing inflation at that level for over 90 years, and to take that as a basis for undertaking a contractual obligation lasting for the rest of his life and beyond without any escape route.

However, if the tenants had understood the clause to be a “cap”, the agreement to this clause is understandable whereas the alternative would have seemed absurd and unreasonable to both.

In concluding the dissenting judgment, Lord Carnwath found that the consequences of the landlord’s interpretation were so commercially improbable that only the clearest words would justify the court in adopting it. He therefore disagreed with the majority judgment.

So what?
For any long-term contract, such as outsourcing agreements, the price to be paid in relation to service charges and how that may change over time is of fundamental economic importance. Ambiguity and the resulting mis-interpretation in relation to such mechanisms can result in severe commercial difficulties and will inevitably lead to disputes. The present case is another clear reminder of the importance of clarity. The Supreme Court has also provided a useful affirmation of the approach it will take to resolving such issues and provided valuable additional refinement.

It is interesting to note in this case that given the passage of time, the parties were unable to adduce evidence of the surrounding factual context or contemporaneous documentation. This may have restricted the breadth of the court’s assessment. It also prevented any argument as to common or unilateral mistake in relation to the drafting and precluded a possible remedy of rectification. This highlights the critical importance of systematic document retention.

Lastly, whilst the dissenting judgment offers some hope to parties seeking to rely on arguments around “commercial common sense” rather than literal interpretation, it seems clear that the preferred approach will always be for the court to interpret clauses according to the natural meaning of the words used, regardless of whether this results in a bad bargain for one of the parties.

For more information contact

James Hyde
Partner, Head of Technology, Media and Telecoms Disputes
jameshyde@eversheds.com

Mark Rhys-Jones
Partner
markrhys-jones@eversheds.com

Emma Cullen
Associate
emmacullen@eversheds.com
Effective from 1 July 2015, Ofcom has made various changes to the way charges for calling non-geographic numbers (numbers starting 084, 087, 09 or 118) are set out under the moniker ‘UK calling’, representing Ofcom’s clear aim to inspire greater consumer confidence in using non-geographic numbers.

What?
As of 1 July 2015, charges for calling non-geographic numbers are to be split into an “access charge” and a “service charge”. Both the access charge and service charge are required to be communicated to consumers by businesses that use non-geographic numbers. Ofcom has brought in the changes as a response to findings that consumers generally have poor awareness of prices and, as a result, are deterred from calling these numbers. Ofcom has found that there are many consumers who value calling organisations directly, despite various alternative contact methods like the internet, email, smartphone applications, and with the market not working well for them, has decided to intervene. Ofcom hopes that as the required changes are introduced, consumers will have greater transparency of the charges for calling non-geographic numbers which in turn will reinvigorate consumer confidence in using such numbers.

Most telephone companies have communicated their access charges to consumers via their various marketing avenues. Businesses are similarly required to clearly display the service charge in all communications where the business is promoting the use of a non-geographic number to the consumer to contact the business. These communications include advertising and marketing materials, press releases, websites, packaging, price lists, TV and radio advertisements and point of sale displays etc.

So what?
If they have not done so already, businesses need to contact their TCP as soon as possible to find out the service charges linked to each of the non-geographic numbers that they use. Businesses must then update all the relevant materials which promote and/or advertise the use of a non-geographic number and display this service charge prominently and in close proximity to the number itself. The suggested Ofcom wording to be clearly displayed is as follows:

“Calls cost xp [or xp per minutel plus your phone company’s access charge.”

Where a business fails to comply with these requirements relating to advertising and/or promoting of non-geographic numbers, Ofcom may use its statutory powers to bring civil proceedings for non-compliance. In practice, however, the UK calling website suggests that enforcement of compliance with these changes will sit with the Advertising Standards Authority and PhonepayPlus (where applicable). It is understood that the ASA may allow for a short delay in implementation of these new requirements if the relevant business is seen to be taking all steps to become compliant as soon as practicable. If this is not the case, the ASA’s primary sanction for non-compliance is to order that adverts do not appear again in their current form. The ASA also possesses more serious, highly restrictive sanctions for repeat offenders.

Businesses that use non-geographic numbers to enable consumers to contact them will need to ensure that the necessary changes to bring their promotion and/or advertising of non-geographic numbers in line with these changes are made as soon as possible considering the deadline for compliance has now passed.

For more information contact

Simon Cloke
Head of Telecoms
simoncloke@eversheds.com

Sukhbir Gill
Associate
sukhbirgill@eversheds.com
The European Commission announces plans to reduce barriers to online trade within the EU

The European Commission has announced measures to encourage cross-border e-commerce to unlock over €400 billion for Europe’s GDP.

What?
Over the last few decades, digital technology has transformed the way business is done. Each day, countless contracts are concluded over the internet and the advent of email has increased the pace of business significantly. Figures suggest that such technology is behind 30% of GDP growth in the EU from 2001-2011.

Despite the contribution of digital technology to economic growth across the member states, the EU is lagging behind other regions, namely the United States (where 55% of GDP growth in the decade leading up to 2011 has been attributed to digital technology).

Clearly, there is work to be done. Although the EU is stated to be a single market, a central tenet of which is the free movement of goods and services between its member states, this statement does not ring true where e-commerce is concerned.

There are various barriers to free movement of digital products that have been identified by the European Commission, such as a variation in e-commerce and copyright laws across the member states, complex VAT rules and postage charges, the common practice of denying individuals access to websites due to their location (known as geo-blocking), lack of consistency in the regulation of the telecoms market and lack of interoperability in digital technologies between the EU member states.

These barriers reduce consumer confidence and place significant burden upon businesses looking to become involved in cross-border e-commerce. A lot of work has been done to reduce barriers to cross-border trade generally and the European Commission has recognised that it is now time to do the same in relation to e-commerce. Consequently, the Commission has recently announced various schemes to cumulatively develop what is known as the “European Single Digital Market” to address those barriers.

There are three pillars to the European Single Digital Market, broadly incorporating the following:

1. Improving the accessibility of e-commerce

This pillar focuses on facilitating cross-border e-commerce and includes the following measures:

- standardising e-commerce rules across the member states (focusing in particular on remedies and guarantee periods)
- preventing the denial of access to websites based on location, where this is unjustified
- systems to be put in place to promote co-operation between enforcement authorities
- clarifying and simplifying the VAT rules
- clarifying/standardising parcel delivery costs across the EU

2. Implementing measures to enable digital networks to grow

This pillar centres upon the telecoms and media sectors and includes proposals to:

- harmonise telecoms rules across the EU, particularly in relation to issues such as net neutrality
- improve broadband access, particularly in rural areas
- review the legal framework governing audio-visual media with particular focus on advertising and child protection measures
- improving the regulatory framework governing social media, search engines and the like, in light of increasing concerns about their increasing influence within the market
- look at measures to improve cybersecurity
3. Making the most of growth opportunities within the digital economy

The proposals under this pillar focus on removing barriers to growth across all sectors and include:
– removal of unjustified barriers to the free flow of data between member states, in order to promote an open market in relation to data storage
– standardisation of technologies, including the introduction of 5G, cybersecurity and mobile payments
– interoperability between various sectors, including transport, health and energy

So what?
Although significant work will be required to finalise and implement the proposals, there is significant optimism as to their potential effect – it is estimated that improvements in the frameworks governing digital technology could add an additional €415 billion to the EU’s GDP. For businesses, the proposals will introduce new opportunities for growth and will facilitate access to a marketplace which consists of some 500 million people across the member states.

Whilst the bulk of the detail relating to the changes is yet to be finalised, Technology, Media and Telecoms businesses should expect a number of key European legislative and regulatory developments which could have far-reaching consequences on the sector, including:
– legislative proposals for the harmonisation of online purchasing rules across Europe by the end of 2015, including the introduction of mandatory EU contractual rights (such as legal guarantees and remedies for non-performance) for domestic and cross-border online sales of goods
– the express prohibition of unjustified geo-blocking through legislation proposed in the first half of 2016
– a Commission inquiry into the effectiveness of competition in the e-commerce sector
– legislative proposals for the harmonisation of copyright regimes within the EU to enable broader online access to copyrighted works across member states (such as requiring the ability to port legally acquired content) by the end of 2015
– legislative proposals in 2016 to address the tax treatment of cross-border sales
– reforming and revising the existing telecoms rules; and
– the adoption of the General Data Protection Regulation, which the EU institutions intend to have in agreed form by the end of 2015

With such wide-reaching legislative changes expected in the short to medium term and the prospect of cross-border sales boosting (or threatening) revenues across the sector, Technology, Media and Telecoms businesses should keep a close eye on developments relating to the digital single market to maximise the opportunities presented by the changes and avoid falling behind any astute competitors.

For more information contact

Charlotte Walker-Osborn
Partner and Head of Technology, Media and Telecoms Sector
charlottewalker-osborn@eversheds.com

James Ruane
Senior Associate
jamesruane@eversheds.com
What is the effect of the Insolvency (Protection of Essential Supplies) Order on the technology sector?

The Insolvency (Protection of Essential Supplies) Order 2015 which comes into force on 1 October 2015 significantly changes the options available for suppliers of IT services in relation to their rights against insolvent customers. Any IT supplier caught within the definition of the new legislation will need to beware that they can no longer insist on payment of outstanding invoices as a condition of continued supply to an insolvent business, nor rely on clauses applying automatic price rises upon insolvency of the customer.

IT suppliers have to date fallen outside of the provisions protecting the supply of essential services to insolvent businesses, which had previously been applicable to statutory suppliers of utilities only. In recognition of the necessity for continued supply of IT services to enable businesses to operate, from 1 October 2015 IT suppliers will be brought into the extended protection of the supply regime.

What?

The Enterprise and Regulatory Reform Act 2013 provided for the introduction of secondary legislation to enable additions to the existing Insolvency Act 1986 protections for essential supplies. The Insolvency (Protection of Essential Supplies) Order 2015 is the resulting secondary legislation which brings in additions to the present s233 and inserts a new s233A into the Insolvency Act 1986.

The new legislation is intended to recognise that modern businesses require IT services as much as they require continued supply of utilities in order to enable them to continue in business. To that extent a new list of suppliers is added to the list of essential suppliers in s233, including certain suppliers of IT services. This means that from 1 October 2015 suppliers of IT services will not be able to make payment of pre-insolvency invoices a condition of continued supply.

In addition, the insertion of the new s233A is intended to address concerns of insolvency practitioners that certain essential suppliers were charging higher prices post-insolvency than they had pre-insolvency. Essentially, the new s233A seeks to lock essential suppliers into their pre-insolvency contracts and remove the right to rely on an insolvency event as a trigger to charge higher prices. As this new provision impinges upon the freedom of suppliers to negotiate their own commercial terms (and so price risk), s233A will only apply to contracts entered into on or after 1 October 2015.

Safeguards are built into the legislation, mainly the ability to request a personal guarantee from the insolvency practitioner to pay for post insolvency services, the ability to terminate supply for non-payment of post insolvency invoices and to apply to the court for relief (failing agreement between the supplier and the insolvency practitioner). However, it is acknowledged that despite these safeguards IT suppliers are likely to face increased hardship caused by new legislation.
So what?
Suppliers of IT services should determine whether the services they supply fall within the new legislation. The legislation states that an IT supply falls within the regime if it is a supply for the purpose of enabling or facilitating anything to be done by electronic means, and then goes on to list data storage and processing, website hosting, computer hardware and software, assistance or advice in connection with IT and point of sale terminals. Except for the specific exclusion of merchant acquirers, this definition covers most IT supplies to businesses.

If suppliers fall within the definition, they should immediately take steps to review their existing customer supply contracts and insolvency procedures before 1 October 2015. It may be possible to better protect against the provisions of s233A if certain pre-insolvency triggers are included within supply contracts and by putting overarching framework agreements in place which will predate the changes on 1 October 2015 and so take the supply contract outside of the remit of s233A.

For more information contact

Paul Dutton  
Partner  
paulnsdutton@eversheds.com

James Williams  
Associate  
jameswilliams@eversheds.com
High Court quashes copyright exception for personal private use due to lack of compensation mechanism

The High Court has ruled that the new copyright exception that permits personal copies to be made for private use without a compensation scheme for rights-holders is unlawful (R (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills [2015] EWHC 2041 (Admin), 17 July 2015).

The applicants argued that section 28B of the Copyright Designs and Patents Act 1988 (“CDPA”) was incompatible with European law, which requires that if an exemption to allow copying for private use causes any harm then that harm must either be zero or minimal, or be compensated for by a fair and adequate compensation scheme for rights-holders (Article 5(2)(b) Directive 2001/29/EC (the “Copyright Directive”).

The High Court has now quashed the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361)(the “Regulations”) that amended the CDPA in this regard, with prospective effect.

What?

The British Academy of Songwriters, Composers and Authors (BASCA), the Musicians’ Union (MU) and UK Music sought judicial review of the exception arguing it was unlawful because it failed to provide fair compensation to rights-holders in line with European law. Section 28B of the CDPA was introduced in October 2014 to allow members of the public to copy for their own private use CDs and other materials subject to copyright, on the basis that it would cause no or minimal harm to rights-holders. The lawfulness of section 28B was dependant on whether there was evidence of harm beyond a minimal level. If there was harm beyond this level then there would need to be a mechanism for compensation.

The applicants estimated that the introduction of the exception, without the introduction of any mechanism for fair compensation for rights-holders, would cause a loss of £58 million per year for rights owners of the various intellectual property rights falling under the legislation.

The evidence asserted by the Secretary of State was found by the High Court to show that the harm caused by the private copying exception was not minimal and this was the only reason for which the Secretary of State could avoid the introduction of a fair compensation scheme. Its justification for not introducing the scheme was:

1. the only harm that would need to be compensated for was the risk to rights-holders of a loss of duplicate sales. The Secretary of State did not feel there was a direct correlation between the ability to make private copies and a loss of sales and therefore did not predict an impact on duplicate sales

2. sellers included an amount to take account of consumers making private copies in the price of first sale (the “Pricing-In Principle”) regardless of the legislation in place. The Secretary of State concluded that any harm would in future be compensated for by Sellers extending this principle to cover for any lost duplicate sales

The High Court found that, whilst there was reasonable literature to support the Secretary of State’s position in relation to the Pricing-In Principle, it still needed to provide evidence that the harm caused by the introduction of the exception would be none or minimal. The High Court found that the evidence relied upon by the Secretary of State did not support its conclusions, and therefore the introduction of the exception without the compensation mechanism was unlawful.
So what?
The High Court then ruled that the Regulations be quashed with prospective effect, and any private copying of copyright works in future would not benefit from the exception contained at sections 28B of the CDPA. It is once again the position that any copies of copyright works made for personal use will be infringing. No reference has been made to the European Court of Justice for consideration of the meaning of “harm” at this stage, but a final order has been made permitting a referral in future.

For more information contact

Neil Mohring
Partner and Head of Media
neilmohring@eversheds.com

Kathryn Dawson
Associate
kathryndawson@eversheds.com
The High Court has ruled that in defamation cases claimants will have to prove, on the balance of probabilities, that the statement complained of has caused, or will probably cause, serious harm to the reputation of the claimant (Lachaux v Independent Print Ltd [2015] EWHC 2242 (QB), 30 July 2015).

**What?**
This clarifies the construction of section 1(1) of the Defamation Act 2013, which states “a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.”

The Court stated that, when determining this point, it will not be confined to just the defamatory meaning of the words or the harmful tendency of that meaning, but will consider all relevant circumstances. This may include anything that has occurred post-publication. The Court acknowledged that this may result in a publication changing from non-defamatory to defamatory, and vice versa, depending on the actions taken following publication (for example, where a full retraction and apology is issued). This is a departure from the common law presumption of damage.

In addition, the Court gave guidance on the procedural issues of a defamation claim, and recommended that, where a defendant argues that the harm to reputation does not meet the required “serious harm” threshold, this point be treated as a preliminary issue alongside the question of meaning. The defendants will not be required to file a full defence before the preliminary issues are decided.

It is worth noting, however, that while the above decision clarifies the position in relation to individuals, entities that “trade for profit” are required to show that the harm to its reputation has caused or is likely to cause it serious financial loss (section 1(2) Defamation Act 2013). This point has not yet been clarified by the courts.
Film Tax Relief extended for British films

The Chancellor's plans to give additional tax breaks to film producers who make films in the UK have recently received EU state aid approval.

**What?**
As of 1 April 2015, the rate of Film Tax Relief available for UK tax resident Film Production Companies, has increased to 25% for all qualifying core expenditure on eligible film productions.

**So what?**
Previously, Film Tax Relief applied to eligible film productions at a rate of 25% for the first £20 million of qualifying core expenditure, and 20% thereafter, up to a maximum of 80% of the total film budget. The removal of the 20% rate of relief is intended to attract the 'big ticket' films, such as Gravity and Avatar, to the UK by increasing the value of the tax break applicable to their total budget. In order to benefit from the relief, a minimum of 10% of the total production costs must be spent on expenditure incurred on filming activities (pre-production, principal photography and post production) which take place within the UK.

Budgets for these large films can reach well over £100 million, and with no cap on the amount that can be claimed, the tax incentive can be significant. According to the Treasury, the film tax breaks have already funded £8 billion of production costs, with 222 films having received such support in 2014.

For more information contact

*Ben Jones*
Partner
benjones@eversheds.com
Last month, the Supreme Court heard the latest appeal in Cavendish Square Holding BV –v- Talal el Makdessi. Its decision, once published, is expected to review and clarify the law relating to penalty clauses, particularly whether the rule against penalties applies to commercial contracts between sophisticated parties. There is scope for the Supreme Court to hand down a landmark decision which might significantly impact or change the law in this area. Businesses may be given more freedom to structure agreed recovery provisions in their contracts and challenges to existing arrangements may need to be re-assessed. The consequences for businesses could be very far reaching.

Whilst the publication date for the judgment is not yet known, we are tracking the case and will keep you fully informed on the implications, no matter which way the court decides the matter. If the judgment changes the law in this area, we will make training available at the earliest possible opportunity.

To register your interest in future updates on this case or to be notified of the dates for any training, please click here.
Events

We are looking forward to the Technology, Media and Telecoms Annual Conference which will take place in Wood Street, London on the 24th September 2015. This year we have several highlights including a keynote from Sally Fuller, Head of Product at Vodafone and a panel session on the legal issues related to cyber-attacks with guest speaker James Hatch, Director of Cyber Security at BAE Systems Applied Intelligence.

We are almost at full capacity for this event and places are limited therefore, if you have not already done so, please email TMT@eversheds.com to reserve your place.

Useful links

- Eversheds website
- Find a contact
- Where we are
- Careers with Eversheds
- Services we provide
- Sectors we cater for
- Events and training
- E-briefings and articles