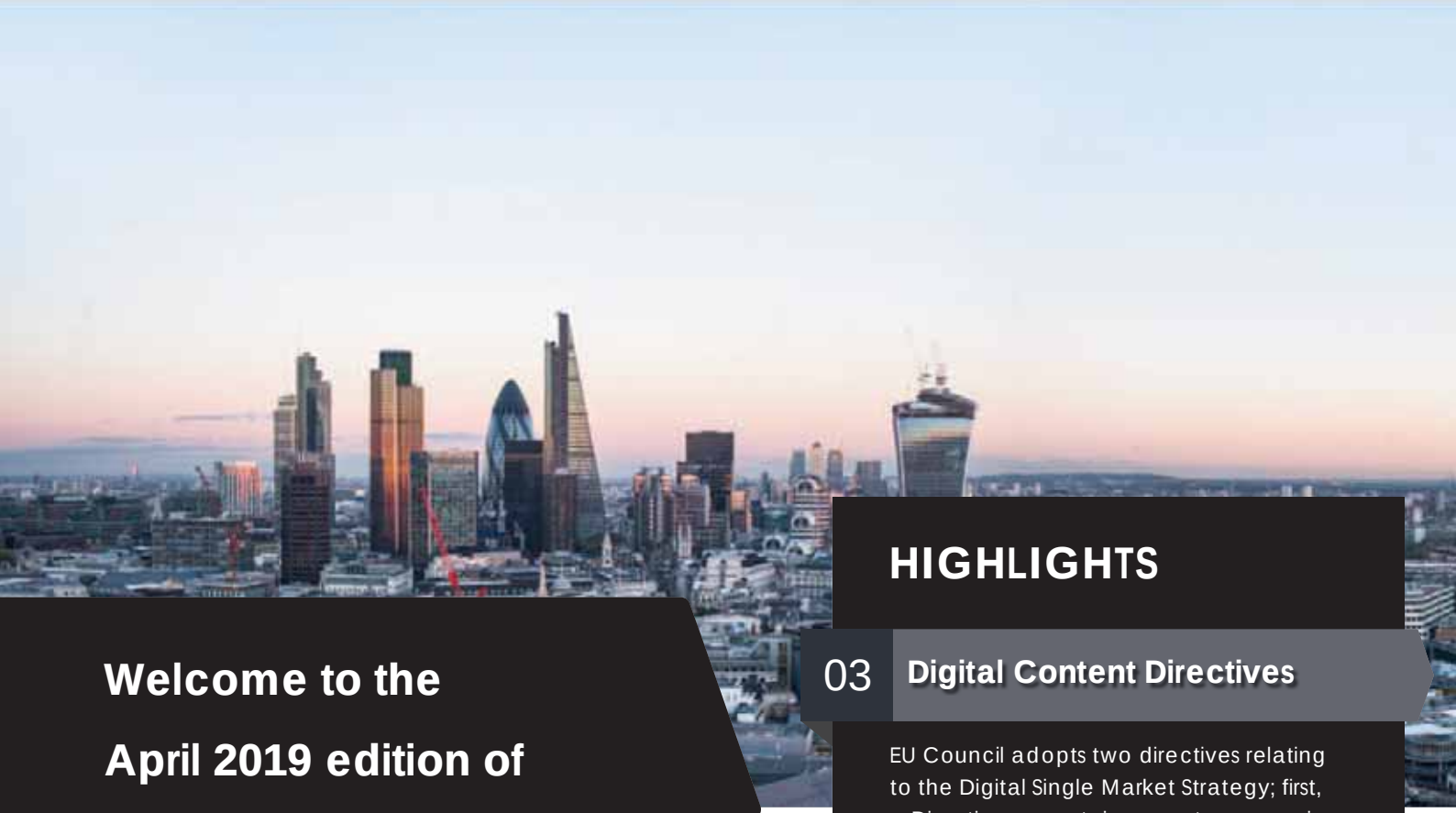
ISSUE 04 :: APRIL 2019

VALEMUS

THE BRIEF



Welcome to the April 2019 edition of Valemus Law's monthly news bulletin.

The Brief brings you topical legal updates affecting business as well as news of developments in Valemus Law's services.

Valemus Law is a full service, cost effective commercial law firm with nationwide coverage achieved through the use of modern technology.

Valemus Law's solicitors are senior commercial lawyers specifically selected for their exceptional strategic commercial knowledge and entrepreneurial spirit.

HIGHLIGHTS

WHO'S WHO AT VALEMUS LAW

Oliver Brice
Managing Director and Solicitor, Company Commercial and Corporate

Prior to founding VLAW Limited in April 2007, Oliver was the Group Legal Director of the Macmillan Publishing Group. A commercial solicitor, Oliver specialises in general commercial contracts; supply, distribution and agency agreements; asset/share sales and purchases; joint ventures; investments; and IP assignments.

James Hilsdon
Director and Solicitor, Commercial Litigation

James specialises in commercial litigation and contentious insolvency. He joined Virtual Law in November 2009 from City of London firm, DAC. He specialises in contract breaches, shareholder and director disputes and specialist insolvency measures.

COMPANY COMMERCIAL AND CORPORATE

OLIVER BRICE
Career History: Taylor Wessing

SUZANNE DIBBLE
Career History: DLA Piper

REBECCA POWELL
Career History: Garretts; DJ Freeman

TESS BEAUMONT
Career History: Olswang

SARAH HUGHES
Career History: Trowers & Hamlins

TRACEY BICHENO
Career History: Price Waterhouse; Norton Rose

EMMA NUTBEEN
Career History: Olswang

NEIL SIBLEY
Career History: Sibley Law

ALEX JOHNSTONE
Career History: Olswang

CHARU BABEL
Career History: Simmons & Simmons; Fieldfisher

COMMERCIAL LITIGATION

JAMES HILSDON
Career History: Clifford Chance; Harneys; Appleby Global; Davies Arnold Cooper

MICHAEL ENGLISH
Career History: Simmons & Simmons; Clyde & Co

PETER FITZPATRICK
Career History: Berrymans

EMPLOYMENT AND IMMIGRATION

MICHAEL ENGLISH
Career History: Simmons & Simmons; Clyde & Co

KATHERINE MUNN
Career History: Stephenson Harwood; Pinsent Masons; Maxine Cox

JANE MOORMAN
Career History: DJ Freeman; Pinsent Masons; Howard Kennedy

SUZANNE COE
Career History: Pinsent Masons; Andersen Legal

LARA AKINLUDE
Career History: Havillands Solicitors

COMMERCIAL PROPERTY

DAVID BARNES
Career History: Speechly Bircham; Lawrence Graham; Alsop Stevens

CHRISTOPHER PEDDER
Career History: Mace, Trowers & Hamlins

INTELLECTUAL PROPERTY

LIZ SPROSTON
Career History: Olswang; Rowe & Maw

TRACEY HUXLEY
Career History: Linklaters; Shoosmiths

JANE BUNCH
Career History: Olswang

EMMA NUTBEEN
Career History: Olswang

ALEX JOHNSTONE
Career History: Olswang

Digital Single Market Strategy: Council formally adopts proposed Sale of Goods and Supply of Digital Content Directives

On 15 April 2019, the Council formally adopted at first reading two directives relating to the Digital Single Market Strategy; first, a Directive on certain aspects concerning contracts for the supply of digital content and digital services and second, a Directive on certain aspects concerning contracts for the sale of goods.

Introduction

On 15 April 2019, the Council formally adopted the following two directives, which form part of the European Commission's Digital Single Market Strategy (DSM Strategy):

- Directive on certain aspects concerning contracts for the supply of digital content and digital services (Digital Content Directive). This Directive introduces high levels of protection for consumers that pay for digital content (computer programs, applications, video filters) and digital services (software-as-a-service (SaaS) including video and audio sharing files) but also to consumers that provide personal data in exchange for such content or services. In particular, the Directive provides that if it is not possible to fix defects within a reasonable amount of time, the consumer is entitled to a price reduction or full reimbursement.
- Directive on certain aspects concerning contracts for the sale of goods (Sale of Goods Directive). This Directive will apply to all goods, including products that come with a digital element (for example, smart fridges) and introduces a two-year minimum guarantee period (from the time the consumer receives the goods) and a one-year period for the reversed burden of proof in favour of the consumer.

The Council's adoption follows formal first reading adoption by the European Parliament on 26 March 2019 which reflected the informal trialogue reached on the text earlier this year.

Both Directives will now be published in the Official Journal and enter into force 20 days after publication. Member states will then have two years to transpose the Digital Content Directive, and two and a half years to transpose the Sale of Goods Directive, into national law.

Background

The DSM Strategy was published in May 2015 and is aimed at ensuring that Europe maintains its position as a world leader in the digital economy by helping European companies to grow globally.

On 9 December 2015, the Commission published the first set of legislative proposals to fulfil the DSM Strategy. This included two draft Directives to harmonise key aspects of the sale of digital content to consumers and goods, which ended up becoming the Digital Content Directive and the Sale of Goods Directive (note that when the Commission first proposed the draft Sale of Goods Directive, it was intended to cover only online sale of goods).

Current framework and previous harmonisation attempts

Both Directives are aimed at fully harmonising key aspects of the sale of digital content and goods to consumers. When the Commission introduced the draft

Single Digital Market ...continued

Directives, it reported that the discrepancies between consumer protection laws across member states were discouraging traders from offering their products cross-border, and consumers from making cross-border purchases. For example, with regard to digital content, some member states such as the UK and the Netherlands have adopted rules for the supply of digital content but the majority of member states have not done so.

The sale of goods to consumers is currently only subject to minimum harmonisation under the existing Sales and Guarantees Directive (1999/44/EC) which is implemented differently across member states. For example, some member states have introduced a time limit within which consumers must notify traders of defects in the goods, while others (including the UK) allow consumers to opt out to reject the goods without first seeking a repair or replacement.

Attempts to harmonise EU contract law is not a new initiative; early drafts of the Consumer Rights Directive (2011/83/EU) dealt with conformity with contract, unfair terms and consumer guarantees but its scope was substantially reduced in 2011. In 2011, the Common European Sales Law (CESL) were proposed. This comprised a set of stand-alone rules which traders and consumers (or SMEs) could opt to use when transacting cross-border within the EU but many member states (including the UK) opposed it on grounds including cost, anticipated low take-up and a perceived lack of legal certainty. CESL was subsequently abandoned in favour of what would become the Directives.

Approach in the Directives: maximum harmonisation
Both Directives are maximum harmonisation measures. This means that, once they come into effect, member states cannot give consumers greater or lesser protection in the relevant areas, unless the Directives expressly allow this.

The maximum harmonisation approach has already been taken in relation to pre-contract information, cancellation rights for distance and off-premises sales, and delivery, by way of the rules introduced in the Consumer Rights Directive, as implemented in the UK by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) and the Consumer Rights Act 2015 (CRA). The Unfair Commercial Practices Directive (2005/29/EC), as implemented by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), is another example of a maximum harmonisation measure.

If the UK is still an EU member state by the transposition deadlines (or is substantively treated as such by any transitional arrangements concluded with the EU), it will be required to transpose the rules into UK law. If the UK is no longer an EU member state by the transposition deadlines, it could still decide to adopt the Directives to ensure continued alignment with EU law.

Ensuring alignment with the maximum harmonisation measures of the Directives is likely to require a closer mirroring of their language, to avoid inconsistencies. Even where the provisions of the Directives contain the same broad rules and concepts as the CRA, the wording is generally less detailed.

Scope of the Directives

Goods
In relation to goods, the Sale of Goods Directive develops the rules contained in the Sales and Guarantees Directive as to the quality of goods, remedies for goods and consumer guarantees. The rules affect all business-to-consumer sales of goods, whether this happens physically (in shops), online or in any distance sale. Goods with a digital component (for example, a smart TV or watch) are also covered.

Digital content
In relation to digital content, the Digital Content Directive introduces rights closely comparable to those for goods, adapted to reflect the nature of digital content and the ways in which it may be provided. It covers business-to-consumer supply of digital content (such as computer programs, applications, video files or electronic books) and digital services (such as SaaS, including video and audio sharing and other forms of file hosting). It also extends to digital content or digital services provided in exchange for personal data from the consumer, whereas the Sale of Goods Directive applies only where a price is paid. The Digital Content Directive applies regardless of the method of sale, but there are some specific sectoral exemptions from the rules (such as for digital content contracts relating to financial or gambling services).

Main differences between Directives and current UK law
Digital Content Directive
This Directive contains rules on:

- The conformity of digital content or a digital service with the contract.
- Remedies in the event of a lack of conformity or a failure to supply, and the procedures for exercising these remedies.
- The modification of digital content or a digital service.

In UK law, these areas are currently addressed by Part 1 of the CRA.

Single Digital Market ...continued

The key differences between the Digital Content Directive and the CRA are highlighted below.

Concept of "digital service"
The Digital Content Directive introduces a new concept of "digital service", which would include SaaS, such as video and audio sharing and other forms of file hosting, word processing or games offered in the cloud computing environment and social media. The same quality requirements would apply to digital services as apply to digital content. As a result, consumers would have significantly more rights in respect of digital services than they have in respect of non-digital services.

Digital content supplied in exchange for personal data
Under the Digital Content Directive, digital content or digital services provided in exchange for personal data, or an undertaking to provide personal data, would also attract quality standards and remedies. This might cover situations where a consumer provides personal data to open a social media account, and that data is used by the trader for purposes other than supplying the digital content or service. This change, together with the new concept of digital services, will give consumers rights and remedies in respect of a significant new range of services. The CRA only applies quality standards and remedies for their breach to digital content provided for a price (or bundled with items provided for a price), but allows for an extension of scope if deemed necessary by the government.

Goods with digital elements are within scope of the Sale of Goods Directive
The Digital Content Directive introduces a new concept of "goods with digital elements", being goods inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions (for example, a smart watch or a smart television containing digital applications). Rights and remedies for such goods will be wholly regulated under the Sale of Goods Directive, which contains provisions dealing with, for example, functionality, compatibility, interoperability and updates.

Trader's obligation to supply updates
Whereas the CRA permits updates to digital content in certain circumstances, the Digital Content Directive imposes positive obligations on traders to supply the consumer with updates (including security updates), both as required under the contract and as necessary to keep the digital content and digital services in conformity with the quality requirements. Where the digital content or services are the subject of a continuous supply over a period of time (for example, social media services), such updates must be provided for the duration of the supply period. Where the digital content or digital services are the subject of individual acts of supply, the updates must be provided for the period that the consumer may reasonably expect. Traders are not responsible for non-conformity caused by consumers' failure to install, provided they tell consumers about the update and the consequences of non-installation.

Timing of supply
The trader must supply any digital content or services without undue delay after the contract is concluded, unless the parties agree otherwise. There is no corresponding time for performance in respect of digital content in the CRA. Traders are held to have supplied the digital content or services when they, or a suitable means for accessing or downloading them, have reached the consumer or a physical or virtual facility chosen by the consumer for that purpose, and no further action is required by the trader to enable use by the consumer in accordance with the contract.

Conformity: fitness for purpose
Under the Digital Content Directive, general fitness for purpose is expressly stated to be assessable against EU and national technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct. The Digital Content Directive also provides that digital content and digital services must be fit for any particular purpose made known to the trader by conclusion of the contract and in respect of which the trader has given acceptance. The CRA does not make acceptance by the trader a pre-condition for this quality requirement.

Express consent to defects
Under the CRA, a trader is not responsible for unsatisfactory quality if a defect is specifically drawn to the consumer's attention before the contract is made. Under the Digital Content Directive, traders must obtain consumers' express and separate acceptance of any deviations from the general quality requirements.

Integration with consumers' digital environment
Under the Digital Content Directive, digital content and digital services must integrate correctly with the consumer's digital environment, where integration is carried out by the trader or under its control, or integration is performed in accordance with the trader's instructions. Integration instructions will be insufficient if they are incomplete or lack clarity, making them difficult for the average consumer to use. There are no comparable requirements under the CRA.

Traders' obligations on termination
The Digital Content Directive introduces new

Single Digital Market ...continued

consequences for the termination of any contract for digital content or services. In particular, traders would have to make available (at the consumer's request) any digital content provided or created by the consumer when using the digital content or digital service (except personal data). Traders would then have to both cease using such digital content, and make it available to the consumer free of charge, within a reasonable time and in a commonly used and machine-readable format. Exceptions apply including when the content "has no utility outside the context of the digital content or digital service supplied by the trader", only relates to the consumer's activity when using the digital content or digital service supplied by the trader, or has been aggregated with other data by the trader and cannot be disaggregated without disproportionate effort. There are no corresponding provisions in the CRA.

Consumers' obligations on termination

The Digital Content Directive also imposes new obligations on consumers to stop using digital content or digital services post termination and to return tangible media on request. The CRA has no corresponding statutory obligations.

Traders' liability for failure to supply and non-conformity

Defects in digital content provided by way of individual acts of supply would benefit from a one-year presumption that the defect was present on delivery. Member states would need to ensure claims could be made for up to two years after delivery, but could allow longer. For digital content or digital services provided on a continuous basis, there would be a presumption that the defect was present for the duration of the supply period and member states would have to allow claims to be made for that period, although again they are free to provide for a longer limitation period.

Exception to trader's liability for non-conformity

Consumers would not be able to rely on the presumption of non-conformity if the trader proved that the consumer's digital environment is incompatible with the technical requirements of the digital content or services, and the trader had clearly informed the consumer of this pre-contract.

Modifications

Where digital content is supplied for a given period of time, the trader can modify it as long as the contract permits, the modification is made without additional cost, and the consumer is given reasonable advance notice and a right to terminate the contract within 30 days of notification. The consumer would have no right to terminate if the trader enabled the consumer to continue to use conforming digital content without the update.

Remedies

The remedies provided under the Digital Content Directive include remedies for failure to supply, failure to conform and minor defects. These remedies are broadly similar to those provided under the CRA, save that under the CRA:

- It is the consumer who chooses between repair or replacement, but the trader can opt to provide the other remedy if the one selected by the consumer is impossible or would require disproportionate effort compared to the other one.
- If a repair or replacement is impossible or is not carried out within a reasonable time and without significant inconvenience to the consumer, the consumer only has a right to a price reduction, not termination. However, the reduction may be the full amount of the price.
- The consumer is only entitled to a refund if the trader did not have the right to supply the digital content.

Sale of Goods Directive

This Directive contains rules on:

- The conformity of goods with the contract.
- Remedies in the event of a lack of conformity or a failure to supply, and the procedures for exercising these remedies.
- Additional durability guarantees for consumers.

In UK law, these areas are currently addressed by Part 1 of the CRA. The key differences between the Sale of Goods Directive and the CRA are highlighted below.

No short term right to reject

Under the CRA, the consumer has a short-term right to reject for a 30-day period after delivery or transfer of ownership to the consumer. Under the Sale of Goods Directive, there would be no short-term right to reject goods. Instead, consumers would have to request a repair or replacement and could only reject goods if these remedies failed, unless the seriousness of the non-conformity justifies immediate termination, the non-conformity cannot be fixed, or it is clear that it cannot be fixed within a reasonable time or without significant inconvenience to the consumer.

Right to a price reduction

Under the CRA, a consumer is only obliged to accept one attempt at either repair or replacement before moving to a price reduction, or the final right to reject. Under the Sale of Goods Directive, a consumer would not be able to request a refund or price reduction (or reject the goods) after just one failed attempt at repair or replacement. Assuming the trader was willing to attempt repair or replacement, it would only have to do so within a reasonable time and without causing significant inconvenience to the consumer.

Single Digital Market ...continued

Reverse burden of proof for defects in first year

Under the Sale of Goods Directive, goods that do not conform to the contract at any time within the period of one year from delivery will be taken to have not conformed to it on delivery, unless such a presumption is incompatible with the nature of the goods or how they fail to conform to the contract. Member states can, if desired, extend this reverse burden of proof to two years. Under the CRA, the reverse burden of proof only applies for six months from delivery.

Consumer's obligation to promptly notify defects

Member states can (but are not required to) introduce or maintain an obligation on consumers to notify of defects within a period of two months of the defect becoming apparent. There is no equivalent notification requirement in the CRA.

Two years minimum guarantee

Under the Sale of Goods Directive, consumers would only have a remedy for defects discovered within two years of when the goods are delivered. Where the contract is for goods with digital elements (for example, a smart TV) and the contract is longer than two years, the consumer would have a remedy for defects discovered during the time within which the digital content or digital services are supplied under the sales contract. Member states can introduce longer time limits, if desired. There would also be flexibility for consumers and traders to agree shorter time limits for second-hand goods.

Express consent to defects

Under the CRA, a trader is not responsible for unsatisfactory quality if a defect is specifically drawn to the consumer's attention before the contract is made. Under the Sale of Goods Directive, traders must obtain consumers' express and separate acceptance of any deviations from the general quality requirements.

Third party restrictions on use of the goods

If there are restrictions on the ability to use the goods pursuant to the contract because of third party rights (for example, intellectual property restrictions), a consumer would be entitled to seek remedies from the trader, unless national law provides for nullity or rescission of the sales contract in such cases.

Durability guarantees

Where a producer (a manufacturer or importer) gives a commercial guarantee for durability for certain goods for a certain period of time, the producer would be directly liable to the consumer during this period for repair and replacement on the same terms as the trader is required to offer repair and replacement under the Sale of Goods Directive. A producer could, however, offer more favourable conditions, if desired.

Next steps

The Directives will now be published in the Official Journal. They will enter into force 20 days after publication, after which member states will have two years to transpose the Digital Content Directive, and two and half years to transpose the Sale of Goods Directive, into national law.

As mentioned, whether the UK will be legally obliged to transpose these Directives into national law would depend on whether it is still an EU member state by the transposition deadlines.

Employment Law Round Up April 2019

Google walkout staff claim company is retaliating against them

Tens of thousands of Google employees took part in a mass walkout last November, protesting for an end to forced arbitration for sexual harassment claims amongst other things. Organisers are now claiming that Google has retaliated by impeding their work and creating an unwelcoming environment for them.

An internal letter from 12 Google employees details the various ways in which they have been made to feel that they should not have taken a stand against the multi-national company. Claire Stapleton, who has been at Google for 12 years, claims that before she hired a lawyer to take on her case, she was demoted. Even after her demotion was cancelled, she claims that "the environment remains hostile and I consider quitting nearly every day." There is concern that Google's behavior is part of a wider culture within the company whereby minorities are silenced when raising concern about the workplace.

New job support scheme for people with mental health conditions

In a scheme aimed at helping those with mental health issues return to work, within 5 years about 55,000 people per year could have access to the individual placement support (IPS) service.

The support service will enable patients to access advice from employment specialists, and may even enable them to have experts searching for jobs on their behalf. Dr Jed Boardman of the Royal College of Psychiatrists claims that those with mental health conditions are more likely to struggle to find employment, something which excludes them from "the benefits that a good job can offer for their personal recovery." It is hoped that the scheme will help to break that dangerous cycle.

Single union for all employees in the legal profession

A new union, Legal Sector Workers United (LSWU), has been formed in a bid to unite every person working in the legal profession. Its stated aims are to combat inequality in wages and to recover legal aid after austerity measures significantly reduced it.

The hope is that a single union will enable the legal profession to negotiate more effectively with the Ministry of Justice. This comes after a series of industrial actions regarding cuts to fees and legal aid.

Health Secretary pushes for end to NDAs in the NHS

Matt Hancock, health secretary, has pledged to end the use of non-disclosure agreements (NDAs) in the NHS. Hancock asserts that not only do NDAs undermine the right of employees to raise concerns, but they also puts patients at risk. This follows the case of Sue Allison, a radiographer at Morecambe Bay NHS Foundation Trust, who claimed she was bullied after raising concerns about missed cancer diagnosis and standards of care.

Push-back against NDAs comes at a time of growing scrutiny across sectors regarding the treatment of whistleblowers and their right to speak out (see Employment news round-up for week to 18 April 2019, City worker who wins £270,000 settlement in sexual harassment case not required to enter into NDA). In March the government announced stricter legal measures to ensure employees can always report illegal activity to the police.

Employment Round-up ...continued

Facebook post against LGBT teaching causes school assistant to lose job

A disciplinary panel has found that Kristie Higgs, a pastoral assistant at a Gloucestershire academy, has discriminated against its LGBT pupils, causing her to lose her job.

The disciplinary panel found her guilty of gross misconduct. The decision follows an anonymous complaint to the academy where she works, upon the discovery that she had shared on Facebook a petition against compulsory sex education in primary schools. The potential harm to the academy's reputation was central to the decision.

Higgs argues that her views stem from her Christian faith and are shared by hundreds of thousands of other parents. Supported by the Christian Legal Centre, Higgs has brought claims against the academy for unfair dismissal and discrimination.

Call for increased protection for female teachers from sexual harassment

One of the UK's main teaching unions, the NASUWT, has stated that the sexual harassment of female secondary school teachers must be taken more seriously.

The statement reflects growing concern about teachers being subject to digitally facilitated harassment, for example "upskirting" videos and faces being Photoshopped onto pornographic images. A legal action, which began after police discovered a memory stick containing upskirting images and videos of female teachers taken in 2015 and 2016, raised the profile of the potential harm to female teachers. The NASUWT claims that the Enniskillen Royal Grammar School did not handle the incident sufficiently, leaving employees traumatized. It argued that the rights of the pupils were prioritized over those of the teachers. It is worried that this reflects a wider trend of incidents reported being ignored, and teachers failing to report incidents as they believe nothing will be done.

Chris Keates, general secretary of the NASUWT, argues that laws regarding abusive images need to be unified across the UK to increase the base level of protection offered by the law against this type of sexual harassment.

Royal Statistical Society proposes 10 reforms of gender pay gap reporting

The Royal Statistical Society (RSS) has published a list of 10 recommendations in a bid to improve the accuracy and usefulness of gender pay gap reporting, calling the current system "flawed in principle". It noted that numerous employers are making mistakes when submitting gender pay gap data, with some employers reporting statistically impossible results. Some of the measures proposed by the RSS to directly tackle this are the implementation of an online calculator tool with in-built "sanity checks", improved employer guidance and improving statistical skills among HR professionals.

The RSS also proposes that pay gaps should be published in pounds and pence, rather than as a percentage. For example, it would be clearer to say: "For every £1 that the median man earned, the median woman earned 79p" (rather than, "Women's median hourly rate was 20.9% lower than men's"). Further recommendations were to publish each employer's annual results side-by-side to facilitate comparisons and the identification of trends, to flag employers with fewer than 100 women (or 100 men) where the statistics might be misleading and to keep the reporting threshold at 250 employees.

HMRC publishes guidance in preparation for changes to the off-payroll working rules (IR35)

HMRC has published new guidance to help organisations prepare for changes to the tax rules for engaging individuals through personal service companies. The new rules will come into force on 6 April 2020. The responsibility for deciding whether the amended off-payroll working rules apply will fall on the organisation receiving the individual's services. The guidance lays out the four key steps an organisation should take in order to ensure a smooth transition, including identifying affected individuals and implementing new processes to ensure the organisation is prepared.

Britain's average 42-hour week is longest in Europe

A TUC survey has found that the British work almost two hours more a week than their European counterparts. The average full-time week in Britain has reduced by 18 minutes over the past ten years, but it would still take 63 years to reach the level of free time enjoyed by those in the rest of Europe if the reduction continues at this rate. This is despite the lack of evidence to suggest that longer hours leads to higher productivity.

Frances O'Grady, TUC general secretary, stated that the long hours worked by Britons are depriving them of a fulfilled personal life. O'Grady argues that, as technology develops, "the benefits should be shared by working people."

Enforcement of contracts

by Chris Pedder, Commercial Property and Construction Lawyer, Valemus Law

To sign or not to sign

Over the years, I have regularly been contacted by clients looking for guidance on contract matters. I always ask two questions initially. The first question is whether they have a signed contract. More times than I wish the answer comes back that either (a) nothing in writing or (b) contract documents exist but they have not got around to signing the contract yet although works/services have commenced.

The second question relates to what documents have been included in the contract document pack. Has the sequence of contract documents (as defined in the contract terms) been followed? The answer to this can sometimes be no or, in the other extreme, that all procurement documents and tender responses have been attached.

These answers can provide clients with severe difficulties in enforcing contracts. Two recent court cases illustrate this perfectly and highlight why good contract management at the outset can save time and cost later on.

In *Anchor 2020 vs Midas Construction,* Anchor invited tenders to construct a retirement village. The contract was based on an amended JCT Design and Build contract with Anchor's design consultants being novated to the selected contractor. Anchor accepted a tender from Midas, the tendered price being £18.2m.

Anchor issued a letter of intent on 10 September 2013 as the parties were not able to agree on the contract although, eventually, five letters of intent were required covering the period up to 30 June 2014.

As part of the tender, Anchor asked bidders to submit a summary risk register so that potential risks were identified and contingency costs allocated to await further site surveys and design.

The risk register proved an issue. Anchor insisted that the nature of design and build is that the contractor assumes all risk whereas Midas countered that the register highlighted risks, which they confirmed were Anchor's risks as client.

Despite this, the Contract Sum Analysis and Contract Sum were agreed together with the Schedule of Amendments to the JCT D&B. Midas then put together a set of contracts documents and issued a signed contract to Anchor's Employer's Agent on 21 July 2014. During this period, the forms of novation were agreed between Anchor and Midas although not by the design consultants themselves.

Anchor's EA checked the contract documents and noted that superseded documents had been used and that three discrepancies were present but more importantly, that Midas had included the risk register. The EA disputed the inclusion and did not press Anchor to sign the contract.

Enforcement of contracts ...continued

Matters did not resolve themselves although Midas at all times progressed the works. Anchor then decided in January 2015 that it could accept the register being included and issued a set of signed contract documents. However, Midas had now decided that it could not live with the risk register being included and notified Anchor that its offered risk register was withdrawn and that it wanted to hold further discussions on works costs.

The works proceeded to completion but disputes arose during agreement of the final account and Anchor went to court to determine preliminary issues. Anchor claimed that a binding contract was entered into on 21 July 2014. Midas countered that no binding contract had been entered into and that it should be reimbursed its costs on a quantum meruit basis. Midas claimed £28m on a quantum meruit basis but that, if a contract did exist that included the risk register, then its claim would be £33m.

The judge agreed with Anchor that a contract was entered into on 21 July 2014. He cited several points that supported his decision but in particular he confirmed that the existence of a contract is a matter for the courts to decide objectively by considering the communications between the parties, either words or conduct, and whether that leads to a conclusion that the parties intended to create a legal relationship and had agreed all the terms that they regarded as essential.

Whilst Anchor were successful in that the courts agreed with its claim that a contract had been entered into, the case does highlight the need for contract documents to be agreed before works commence, and the contract to be signed, otherwise clients can find that their leverage to agree the documents is lost once the works have commenced – which client is going to remove a contractor after works commencement on the basis that the contract documents cannot be agreed. Where contracts are being decided on communications between the parties then other points can be brought into play as part of the dispute such as a party claiming that variations were agreed at meetings or orally agreed. This in all likelihood will be to the disadvantage of the client.

To be safe should I just include all documents?

The second case is *Clancy Docrwa vs E.ON.* In this case, E.ON subcontracted with Clancy Docrwa for trench excavation works in relation to a district heat network that E.ON were installing. An amended JCT Sub-Contract was used as the contract basis

As part of its tender submission, Clancy set out certain conditions that were not included in its tender including encountering adverse ground conditions. The contract defined the Sub-Contract Works as those works set out in the "Numbered Documents" attached to the Sub-Contract. These Numbered Documents included Clancy's tender submission and Post Tender meeting minutes (which also referred to Clancy's exclusions). During the works, adverse ground conditions were encountered. Clancy claimed additional costs that E.ON disputed. E.ON were successful at an initial adjudication but Clancy went to court to seek a declaration based on its understanding that it had excluded items in its tender.

At court, E.ON argued that the JCT Sub-Contract contained a precedence of documents clause (in the event of any conflict, the conditions of contract apply) that trumped any other argument. In addition, it also contained a provision that Clancy were not entitled to any time extension or additional payment due to failure to discover or foresee any risk or contingency including the existence of any adverse physical condition or artificial obstructions "influencing or affecting the Sub-Contract".

However, the court agreed with Clancy. Why? The Numbered Documents contained Clancy's tender submission and Post Tender meeting minutes that contained Clancy's exclusions to its tender. The Court held that the definition of "Sub-Contract Works" did not include the items excluded by Clancy. Therefore, the terms of the JCT Sub-Contract did not apply.

In this case the contract documents were agreed beforehand and the contract signed. However, the client included documentation that set out the contractors exclusions to its offer (the tender). Therefore, an inherent conflict was incorporated. Tender exclusions must be managed out before a contract is signed.

What are the take away points for clients from these cases?

- Ensure you are aware of what documents you are incorporating into the contract and their nature;
- Ensure contract is signed by both parties before works commence. I know this not always possible but the negative consequences of not doing so can be significant.
- Preferably engage lawyers to oversee this process but if using consultants challenge them on their advice over what documents to include

In my experience, housing providers often let themselves down in these areas and it is no surprise that one of these cases involved a housing association. Do not leave contracts in the in-tray or take the view that agreement on documents means the hard bit is over. Do not include all procurement documents simply in the belief that all bases must be covered. Procurement documents and tender responses should be analysed for inclusion and this process should start when the contract terms and conditions chosen as part of the procurement strategy.

Chris Pedder
Commercial Property and Construction
Valemus Law

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ISSUE 04 :: APRIL 2019

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FOR MORE INFORMATION, CONTACT US.

2nd Floor, 9 Savoy Street
London WC2E 7EG

+ 44 (0)330 100 0320

info@valemuslaw.com

www.valemuslaw.com