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The month's key commercial legal stories that could affect your business

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February 2017

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Corporate & Commercial

Consequential losses

The famous *Hadley v Baxendale* (1854) case determined that there are two types of losses. Direct losses – losses that arise in the ordinary course of things and Indirect or Consequential losses – losses that arise from the circumstances.

There has been considerable interpretation of what's included in these categories over the years but the case of *Star Polaris Llc v HHIC-Phil Inc* [2016] EWHC 2941 has reiterated that the court now adopts a more literal approach to the words in the contract.

The contract in this case (that concerned a ship engine that failed) excluded "consequential ... losses, damages or expenses". Here, the court decided it was clear that the contract excluded all consequential losses. The ship owner could recover the cost of the replacement engine and the repair costs of physical damage but nothing else.

Disability discrimination: Supreme Court partially allows wheelchair user's appeal

In *First Group plc v Pauley* [2017] All ER (D) 48 (Jan), [2017] UKSC 4, the Supreme Court [partially allowed](#) the claimant

wheelchair user's appeal against a finding by the Court of Appeal that although the defendant bus company's wheelchair user's policy, within the meaning of s 20(3) of the Equality Act 2010, put him at a substantial disadvantage compared with able-bodied passengers, it was not reasonable to require the defendant to compel non-disabled passengers to move from the wheelchair space or be removed from the bus. Nonetheless, it had not been enough for the defendant to have simply instructed its drivers to request non-wheelchair users to vacate the space and do nothing further if the request was rejected. Further reading: [Taking action against disability discrimination](#).

For background on the Court of Appeal decision, see: [Reasonable adjustments following Pauley](#). If you need to review your organisation's compliance with equality laws in providing services, see: [Equality Act 2010—discrimination in the provision of goods, services and facilities](#).

Misrepresentation: Damages for misrepresentation and efficacy of disclaimer notices

In news analysis [In brief: Damages for misrepresentation and efficacy of disclaimer notices](#), Gavin Hamilton, barrister at 3PB, considers the case of *Taberna Europe CDO II Plc v Selskabet AF* [2016] EWCA Civ 1262, in which the Court of Appeal overturned the trial judge's award for damages for misrepresentation. Although the respondent (Taberna) was entitled to rely on the statements made in a document, it was wrong not to give effect to the appellant's clear notices disclaiming duty or liability to any investor. In any event,

Taberna could not bring itself within section 2(1) of the Misrepresentation Act 1967 as there was no direct contact with the representor.

Further reading:

[What is misrepresentation and comparison with similar claims Damages as a remedy for misrepresentation](#)



Data Security

Recent ICO action: ICO issues more monetary penalty notices

The ICO has issued a [monetary penalty notice](#) of £50,000 to financial information supplier LAD Media, based in Greater Manchester, for instigating the sending of nearly 400,000 spam texts about debt. Further reading: [LNB News 24/01/2017 61](#).

Royal & Sun Alliance Insurance plc has also been issued with a [monetary penalty notice](#) of £150,000 by the ICO following the loss of the personal information of nearly 60,000 customers.

The ICO investigation concerned the theft of a hard drive device containing 59,592 customers' names, addresses and bank account details, including account numbers and sort codes. The device also held limited credit card details of 20,000 customers, although CVC numbers and expiry dates were not affected.

The ICO's enforcement officers found that RSA did not have adequate measures in place at its office to prevent the theft from happening, and subsequently to protect the financial information. The device had been stolen from company premises either by a member of staff or a contractor. The information on it was not encrypted and the device has never been recovered. Further reading: [LNB News 10/01/2017 122](#).

Tech company IT Protect Ltd has been issued with a [monetary penalty notice](#) of £40,000 by the ICO for breaching privacy law by calling people registered with the Telephone Preference Service (TPS). This was the first fine for nuisance calls issued by the ICO since it took over management of the TPS.

IT Protect had purchased a list of people and phone numbers, many of whom were elderly people, from another

organisation. It then made calls to these numbers to try to sell a call blocking device.

The ICO's investigation, which involved support from West Sussex Trading Standards, found IT Protect had not carried out sufficient checks to ensure that the people on the list had given consent to receive the calls. Further reading: [LNB News 17/01/2017 144](#). These cases show yet again that the ICO will take firm action against those who breach laws on direct marketing. Further reading: [Direct marketing, Electronic marketing emails, texts and faxes \(spamming\) and Cold calling and telemarketing rules](#).

GDPR & ePrivacy Regulation: ICO publishes guidance on what to expect regarding General Data Protection Regulation

An [update](#) setting out what guidance organisations can expect on the upcoming General Data Protection Regulation (GDPR) has been published by the ICO. The guidance includes an overview of the GDPR, as well as details of European-level guidance stemming from the Article 29 Working Party (WP29), of which the ICO is a member. Further reading: [LNB News 18/01/2017 93](#).

In addition, Elizabeth Denham delivered a [speech](#) on the GDPR at a lecture for the Institute of Chartered Accountants in England and Wales in London on 17 January. Further reading: [LNB News 18/01/2017 125](#).

Further reading:

[The General Data Protection Regulation](#)
[Data protection principles under the General Data Protection Regulation](#)

GDPR & ePrivacy Regulation: European Commission adopts e-privacy regulation

The European Commission's [draft Regulation on Privacy and Electronic Communications](#) has now been published. The European Commission's [stated aim](#) is to reinforce trust and security in the Digital Single Market by updating the legal framework on ePrivacy. The regulation contains more streamlined rules on cookies (the current rules have been heavily criticised), as well as new rules on spam.

Significantly, the new draft Regulation provides privacy rules that would apply to new electronic communications services companies, such as Whatsapp and Skype, to ensure they guarantee the same level of confidentiality

of communications as traditional telecoms operators. It also specifies that all people and businesses in the EU will enjoy the same level of protection of their electronic communications, with businesses benefitting from one single set of rules across the EU; privacy is guaranteed for communications content and metadata, ie time of a call and location, and once consent is given for communications data to be processed, traditional telecoms operators will have more opportunities to provide additional services and to develop their businesses.

See: [LNB News 10/01/2017 126](#) and [Data privacy and the new rules on electronic communications](#). To keep up-to-date with developments with the proposed Regulation, see [EU data protection reform—timeline](#) and [Data protection and privacy tracker](#).



Bribery & Corruption

Examining deferred prosecution agreements – SFO and Rolls-Royce

A deferred prosecution agreement has been reached between Rolls-Royce plc and the Serious Fraud Office, following approval by Sir Brian Leveson QC, President of the Queen’s Bench Division. Transparency International UK comments that while the deferred prosecution agreement will cause those undertaking bribery to think again about their actions, more should be done to ensure those involved are prosecuted individually. Edward Henry, barrister at QEB Hollis Whiteman Chambers, argues that a widespread move towards entering into deferred prosecution agreements could result in a shift away from trials and open justice, which, although ultimately sanctioned by a court, inevitably contain much that is concealed from the public. Further reading: [Examining deferred prosecution agreements – SFO and Rolls-Royce](#).

Boards need to be advised to be pro-active and dynamic in countering bribery and corruption. Prevention is the key word. Bribery and corruption risk management and prevention must, therefore, be the objective. The case reveals the continuing hazards posed by intermediaries who are not subject to effective and transparent compliance standards. In retrospect, clear policies, training, guidelines and the like on hospitality and gifts might not have made a difference, but would have demonstrated that Rolls-Royce plc was committed to a zero tolerance policy and had done all that it could, irrespective of the actions of employees and agents. Systems and processes are an imperative, but ultimately human nature will determine the outcome.

Further reading:
[Rolls-Royce – what price co-operation?](#)
[Deferred prosecution agreements.](#)



Employment

Cycle courier was a worker and entitled to holiday pay

In *Dewhurst v City Sprint (UK)*, [Central London ET Judgment – Jan 2017](#), a cycle courier engaged by a courier business under a contract entitled “Confirmation of Tender to Supply Courier Services to City Sprint (UK) Limited” was held to be a “worker”, and the respondent had unlawfully failed to pay her two days’ holiday pay.

The claimant’s status was that of a worker because, in reality, she personally performed work for the company and it was not a client of a business being run by her.

This judgment sets no precedent as it is at the level of an employment tribunal. However, it is still important as a further indication of the way in which so-called ‘gig economy’ cases may be decided following the decision in the recent tribunal proceedings involving Uber.

Further reading:
[Driving forward workers’ rights – Uber drivers prevail in holiday pay ruling](#)
[Cycle courier was a worker and entitled to holiday pay: Central London ET](#)
[Worker status](#)



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