

Legal update

Commerce and technology

IN THIS ISSUE

Limitation of liability
An update

The new advertising
Codes

Key changes in
the Codes for
non-broadcast and
broadcast advertising

What are you implying?
When may terms be
implied into a contract?

Too remote?
Clarification of the
principle of remoteness
of damages

PLUS...

News and views

Diary dates



Issue Number 61 Summer 2010

Newsletter

smart law[®]

Limitation of liability

An update

As we explored in July 2008's issue of SmartLaw, the ability of one party to use standard limitation of liability provisions to avoid liability for a breach has always been a tricky aspect of contract law. This article sets out some general principles and proceeds to examine some recent case law on the complex topic of the way in which liability can effectively be limited.

General principles

It is imperative that clauses which seek to limit liability are clearly drafted, or they risk being ineffective (*Ailsa Craig Fishing Co Ltd v Louis Dreyfus & Co* 1983 1 All ER 101).

The contra proferentum rule provides that where the meaning of such a clause is unclear or ambiguous it will be construed against the party who drafted it. Although the contra proferentum rule applies to all exemption clauses, the Courts are less stringent in applying the principle to those clauses which merely limit liability as opposed to those which seek to exclude liability in its entirety. This is founded on the notion that it is considered 'inherently improbable' that a party would agree to the total exclusion of another's liability, whereas "there is no such high degree of improbability that he would agree to a limitation of liability" (*Ailsa Craig*). But generally this rule is 'a rule of last resort' and is only applied where the clause does not have a clear meaning.

Exclusions in business-to-business contracts

What can and cannot be excluded will turn on the facts of each case; but relevant issues may include the legal and commercial background to the contract, whether the same terms are being used by other businesses, and whether the other party is a consumer.

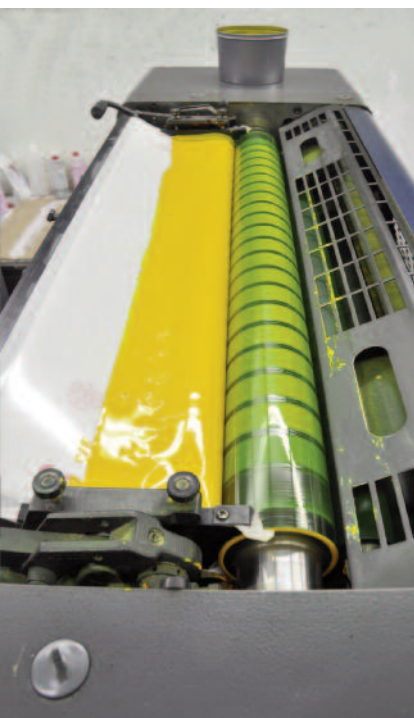
In business-to-business contracts it is not permissible to exclude liability for:

- death or personal injury caused by negligence;
- breach of the implied condition of good title and no encumbrances (s.12 Sale of Goods Act 1979); and
- fraud and/or fraudulent misrepresentation.

Subject to the 'reasonableness' test under the Unfair Contract Terms Act 1977 (UCTA), the following exclusions of liability may be permissible:

- negligence (excluding the scenarios listed above);
- breach of the implied conditions of fitness for purpose or correspondence with description or sample (ss 13-15 Sale of Goods Act 1979);
- breach of contract; or
- misrepresentation.

It is important to remember that if an exclusion clause is found to be unreasonable, it will be wholly unenforceable.



The concept of reasonableness in business-to-business contracts

UCTA provides that 'reasonableness' is decided by "having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". In the light of this, it is clear that the time for ascertaining whether or not an exclusion or limitation clause is reasonable is the point at which the contract was made and so factors such as the seriousness of the loss or damage caused are less relevant.

UCTA sets out five non-exhaustive guidelines for determining the reasonableness of a limitation of liability provision:

- the relative strengths of the bargaining positions of the parties;
- whether there was any inducement to accept the term, or whether there was the opportunity to enter into a similar contract with another, without such a term;
- whether the customer knew or ought reasonably to have known about the existence and the extent of the provision;
- where the exclusion applies if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; and
- whether the goods were manufactured/processed/adapted to the special order of the customer.

The recent case of *Lobster Group v Heidelberg Graphic Equipment* [2009] EWHC considered the concept of reasonableness and offers further clarification, although it has also raised a concern that exclusion clauses may be more vulnerable to being struck out than was previously thought.

The facts were as follows. The children's book publishers Lobster Group hired a printing press from Close Asset Finance and also entered into a warranty and a service agreement with the manufacturer of the press, Heidelberg Graphic. There were three contractual agreements in place:

1. a Hire Agreement between Lobster and Close Asset Finance under which Lobster hired the printing press from Close Asset Finance on Close Asset's standard terms;
2. a Warranty Agreement between Lobster and Heidelberg; and
3. a Service Agreement between Lobster and Heidelberg.

The parties accepted that the printing press was defective, but Close Asset and Heidelberg sought to rely on the exclusion clauses in the three contracts to avoid liability for the defect.

The UCTA reasonableness test applied because the three contracts each contained the defendants' standard terms and because the defendants were attempting to exclude the implied terms of satisfactory quality and fitness for purpose under the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. The judge reviewed each of the exclusion clauses in turn, assessing their reasonableness in the circumstances, and so the case provides useful guidance on the application of the reasonableness test. The Court held that:

- whilst it was reasonable for Heidelberg to exclude all liability other than the obligation to remedy defects, it was unreasonable to exclude damages for 'immediate loss' and for increased costs and expenses, because if Heidelberg failed to replace or repair a defective part then, at the very least, Lobster should be able to recover the cost of paying someone else to do this;
- it was reasonable to exclude insurable risks, but a complete exclusion of loss was unreasonable;
- both parties were substantial commercial entities and this consideration is usually to be borne in mind when the reasonableness test is applied.



The key message from the *Lobster Group* case is to give careful thought to the drafting and extent of a proposed exclusion clause and that all-encompassing, broad, or catch-all clauses should be avoided as they are at greatest risk of being struck out.

Another recent case worthy of review is *Internet Broadcasting Corporation Ltd (NetTV) v Mar LLC* EWHC 844 (2009) which illuminated many of the legal issues relating to exclusion clauses and also clarified the law in respect of deliberate wrongful repudiation.

NetTV provided interactive internet television platforms. Mar LLC provided information and services to hedge funds and arranged conferences for the hedge fund industry. The parties contracted for NetTV to set up and provide an internet television channel which would broadcast material agreed by Mar LLC. The agreement could not be terminated for three years, other than for a material breach that was not remedied within 30 days. NetTV wrongfully repudiated (ie committed a fundamental breach of) the agreement (which it accepted to be a wrongful repudiation) but sought to rely on an exclusion clause to protect it from a substantial liability for loss of profits arising from its wrongful repudiation. The exclusion clause provided that neither party would be liable to the other for various types of loss, including loss of profit. The precise wording of the clause was as follows:

"...neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage."

The Court stated that there is a rebuttable presumption that an exclusion clause cannot be relied upon where there has been a deliberate repudiatory breach of contract. The normal anticipation of the parties is that a party which repudiates its contractual obligations should be liable to compensate the other party for the loss. But the Court also affirmed that there is no general legal principle which prevents a party from profiting from its own wrong and so the case hinged on the construction of this clause.

It was held that a literal interpretation of the clause would create a "commercial absurdity". Explicit and strong language must be used if an exclusion clause was successfully to exclude the liabilities of both parties in the event of a deliberate repudiatory breach. In this case, the drafting contained no such clear strong language as to deliberate wrongdoing, let alone deliberate and repudiatory wrongdoing.

Significantly, it was also held that the agreement "being in the nature of a joint venture" would have had the object of mutual profit as its central tenet. A literal interpretation of the exclusion clause would enable either party to repudiate the contract deliberately without any liability for loss of profit, "even though loss of profit is likely to be the only serious consequence for either party of repudiation". So in a business context, the Courts are hostile to clauses that leave an innocent party without substantive redress; and because financial considerations underpin most commercial contracts, it should be carefully considered whether an exclusion clause which seeks to exclude all heads of financial loss will result in the innocent party being left with no meaningful redress in the event of a breach.

Whilst the *NetTV* case focuses on the specific instance of deliberate repudiatory breach, it has also reminded us of the most important aspects of an effective exclusion clause: clear, strong and precise language which is, in the specific context of the contract, reasonable.

The new advertising Codes

Key changes in the Codes for non-broadcast and broadcast advertising



The Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) launched new advertising Codes for non-broadcast and broadcast advertising on 16 March 2010. This followed extensive public consultation which started in March 2009 and generated approximately 30,000 responses. Although the Codes have been updated on a regular basis, it has been more than eight years since they were reviewed in their entirety, so this is a welcome and timely review. The new Codes will come into force on 1 September 2010. Key changes in the new Codes include stronger data protection rules and rules on undue pressure for marketing to children, greater consistency between the CAP and BCAP in areas such as misleading advertising, new guidance on the use of the word 'free' and the introduction of an overarching social responsibility clause. The new Codes are designed to be simpler, user friendly, proportionate, and effective, with consumer protection and social responsibility playing a key role. These Codes affect any organisation which produces advertising.

Why have the rules changed?

As Code owning bodies, CAP and BCAP are under an obligation to keep the Codes up to date, not only to ensure that the Codes reflect society's requirements, but also to ensure that they are in line with a number of new European Regulations. CAP and BCAP state that the existing Codes work well, but that as part of their commitment to ensure the highest standards in advertising, a thorough review was undertaken to ensure that the requirements are not falling behind

the rapid evolution of technology and the times. The new Codes address areas of public concern which were in need of review; for example addressing the environmental claims of advertisers, regulating the use of the word 'free' and tightening regulation of advertisements promoted at young children.

What's new?

Key changes to the format of the Codes include the creation of a single new broadcast Code for television and radio advertising in place of the existing four Codes. In addition, new Code sections will contain an overarching principle and a set of rules. Existing guidance has been incorporated into the rules or will be provided in separate documents which link to the new Codes. This will make the Codes far simpler to use and provide greater clarity for advertisers. There is also a more consistent approach between the new CAP and BCAP Codes and they now share many of the same rules, including misleading advertising, harm and offence.

There have also been some more substantive changes to the content of the Codes. These are summarised below.

Social responsibility

Under the current regime, only the CAP Code has a social responsibility clause. The introduction of an over-arching social responsibility clause for both Codes has closed this gap. The clause states that all advertisements must be prepared with a sense of responsibility to the audience and to society. At face value, this does not introduce anything drastically new, however, the essence of the new clause is that it grants the ASA a 'catch all' ability to ban advertisements that, while within the letter of the law, go against its spirit that all

... marketers targeting individuals who are in financial difficulty, for the purchase of products they cannot afford or where they are required to take out loans for such purchases, will be classed as socially irresponsible and outside the spirit of the law, despite the fact that they have not broken any rules.



advertisements should be legal, decent, honest and truthful. For example, marketers targeting individuals who are in financial difficulty, for the purchase of products they cannot afford or where they are required to take out loans for such purchases, will be classed as socially irresponsible and outside the spirit of the law, despite the fact that they have not broken any rules.

In conjunction with the concept of the principle of social responsibility, provisions on environmental claims by marketers and lottery advertisements have been introduced. The new CAP Code will also contain a specific requirement that advertisements providing debt advice should comply with guidance from the Office of Fair Trading.

Gambling

Although lotteries have their own regulatory regime under the Gambling Act 2005, CAP and BCAP consider that lottery advertising should be subject to the same social responsibility rules as other forms of advertising. The Codes now also reflect the requirements under the Gambling Act 2005, as the previous version of the Codes predated the Gambling Act 2005.

Greenwashing

There has been an increase in the number of companies making exaggerated environmental claims, a practice known as 'greenwashing'. In addition to the pressure on companies to be 'environmentally friendly', section 172 of the Companies Act 2006 provides a duty on directors to promote the success of companies, having regard to the impact of operations on the community and the environment.

The ASA has investigated and upheld many complaints against advertisers who have made unsubstantiated claims in this domain. To address this, an explicit rule will be introduced in the environmental section of the CAP Code to prevent marketers from exaggerating the environmental benefits of their products and equivalent new environmental claims section will be introduced to the BCAP Code.

Protecting children

A new scheduling rule for TV and radio keeps advertisements for age-restricted video games away from children's programming. This change brings the policy for video games advertising into line with that for films.

Data protection rules for children have also been strengthened to prevent marketers collecting data from under 12s without parental consent. A separate rule regulates the collection of such data from under 16s and other people.

The revised rules also clarify the ways in which advertisers may fall foul of the ban contained in the Consumer Protection from Unfair Trading Regulations 2008, which deals with advertisements encouraging a child to buy a product or persuading adults to buy a product for a child.

New rules will be introduced to comply with new legislation on the promotion of infant and follow-on formula milk.



Health

New rules are being introduced in several areas to incorporate European legislation on:

- The European Regulation on Health and Nutritional Claims (1924/2006/EC) which prevents misleading claims about food products; and
- Traditional herbal medicines (Directive 2004/24/EC) about advertising herbal remedies.

Use of the term 'free'

The misuse of this term is the source of hundreds of complaints to the ASA. Pricing structures in some sectors have become more sophisticated, making it difficult for consumers and regulators to tell what is included in the price and what is given as a free 'extra'. The new Codes include clarification that advertisements must not describe products as free if that element has already been included in the package price. In addition, the terms 'free trials' and 'buy one get one free' are not permitted to be used where a non-refundable purchase is required.

New rules are also being introduced to oblige marketers of prize promotions to be clear as to prizes available to win and those that are guaranteed to be won, as well as ensuring that recipients of 'instant wins' are able to claim and obtain their prize easily.

Charities

Charities may now use comparative advertising to demonstrate the proportion of their donations that directly help the cause in comparison to rival charities. This brings the

charity sector into line with others sectors, which are already permitted to undertake comparative advertising. This change has the ability to improve transparency by enabling donors to compare how donations are spent between charities with similar missions.

What has not been covered?

Although originally intended to form part of the new Codes, online advertising proved to be a contentious area during the consultation process.

The current CAP Code only regulates paid-for online marketing communications, such as pop-up and banner ads, paid-search, viral ads and sales promotions included on an advertiser's website. However, with more than 2,500 complaints made to the ASA last year alone about online advertising, the ASA and CAP are now consulting on whether it is possible to extend CAP's remit to online advertising. This would allow the Advertising Standards Authority to apply the CAP Code to online marketing communications that currently fall outside CAP's remit, for the benefit of consumers, children and industry.

However during this consultation period, there are a number of issues to be addressed and the ASA and CAP will have to look at the question of how marketing communications will be defined, the distinction between an editorial communications and marketing communications and how to deal with social networking sites, which are in a different category to paid marketing.

What next?

The existing rules will continue to apply until 1 September 2010, but advertisers and media owners should use the next 6 months to prepare and adjust their materials to ensure compliance with the new rules.

The new Codes provide a timely and welcome review and offer a more consistent approach with current legislation.

What are you implying?

When may terms be implied into a contract?

A contract is a written agreement which encompasses the oral and written negotiations and agreements of the parties. Provided that the necessary factors, such as offer and acceptance, consideration and intention to be contractually bound, are all present, a contract will be formed. Whilst the words, whether written or spoken, which the parties use in formulating the agreement are the express terms of the contract, it is important to bear in mind that these may not constitute the whole agreement. The parties to a contract cannot possibly contemplate every contingency and eventuality that may arise over the course of a contractual relationship. The result is that gaps are inevitably left in the express contractual terms. For this reason, the Courts are prepared to imply terms into a contract, either as a matter of custom, by statute or by common law.

Express terms

The express terms of a contract are those terms that have been specifically mentioned and agreed by both parties at the time the contract is made. They can either be oral or recorded in writing.

Implied terms

Inevitably the express terms of an agreement will set out the primary obligations of the parties. However, rarely will the express terms deal with all eventualities. It may be that a specific event did not occur to the parties at the time of drafting, or that the parties thought the matter was obvious and therefore they did not think it necessary to mention it.

Whatever the reason for the omission, additional terms may be implied into the contract to fill the gap where it is equitable and reasonable to do so. However, a term will not be implied if it would be inconsistent with the express wording of a contract. This article explores the principal factors which may determine whether a term will be implied into a contract.

Intention of the parties

The basic principle is that a term will be implied into a contract where it is necessary in order to reflect the intention of the parties. In other words, a Court will imply a term into a contract if, in the Court's opinion, it is apparent from the facts that the parties must have intended that term to form part of that contract.

The intention of the parties is ascertained from an objective viewpoint. In construing the parties' intentions, the Court will consider what a reasonable person would have understood the parties' intentions to be, given the background knowledge reasonably available to the parties at the time they entered the contract.

A useful test for determining the intention of the parties is the 'officious bystander' test. This holds that if, while the parties were making their bargain, an 'officious bystander' were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'oh, of course!'

Implying a term into a carefully drawn up contract to fill a gap for which the parties had inadvertently not provided is justified only in cases of necessity and only if certain other requirements are satisfied. The implied term, for example, should not be unreasonable or inequitable, should not be incapable of clear

For the Courts to imply a term, it is not enough that the term should have been reasonable; it must be both obvious and necessary.



expression and should not be contrary to the express terms. For the Courts to imply a term, it is not enough that the term should have been reasonable; it must be both obvious and necessary.

Usage or custom

In the event where a provision could be deemed to be 'notorious, certain and reasonable and not contrary to law', an implied term can arise. In other words, frequent usage between the parties or because of widespread custom may result in a term being implied; however this will only occur when it is considered necessary to do so. Such a term would not be implied if there was express wording to the contrary, for example an entire agreement clause.

Terms implied by statute

Sale of Goods Act 1979

The Sale of Goods Act 1979 (SGA) defines a contract for the sale of goods as "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price" (s.2(1)). The SGA imposes the following implied terms in contracts for the sale of goods:

- good title: it is implied that the seller has the right to sell the goods (s.12(1) SGA);
- no encumbrances and quiet possession: it is implied that the goods are free from charges or encumbrances and that the buyer will enjoy quiet possession of the goods (s.12 (2) and (3) SGA);

- correspondence with description: it is implied that, when goods are sold by description, they correspond with that description (s.13 SGA);

and perhaps the most significant implied term:

- satisfactory quality: it is implied that the goods are of a satisfactory quality (s. 14(2) SGA). The goods' quality will be ascertained by reflection on the following (s.14 (2B) SGA):
 - fitness for purpose;
 - appearance and finish;
 - freedom from minor defects;
 - safety; and
 - durability.
- Fitness for purpose: in the event that goods are sold in the course of a business and the buyer, whether expressly or by implication, makes it known to the seller the purpose for which the goods are being purchased, it will be an implied term that the goods will be reasonably fit for that purpose.

Excluding implied terms

Whether or not it is possible to exclude implied terms will depend on whether the contract is between businesses or a business and a consumer.

The Unfair Contract Terms Act 1977 (UCTA) prohibits exclusion of the implied term as to right to title under the SGA irrespective of whether or not the seller is dealing with a business or a consumer.

Where the seller is dealing with a consumer, it will be prohibited from excluding any of the implied terms listed above. A 'consumer' is defined under s.12 UCTA as follows:

- the consumer does not make the contract in the course of a business;
- the other party making the contract does so in the course of a business; and
- the goods being supplied are of a type ordinarily supplied for private use of consumption.

In the event that the buyer is not a consumer, but dealing in the course of a business, any attempts to exclude an implied term will be subject to the reasonableness test, which is examined in detail in the limitation of liability article.

In conclusion, when dealing in the course of a business with another business, it is infinitely preferable to rely on explicit express drafting in a contract as opposed to being in a position where terms can be implied by the Courts arising either from statute or from trade usage. Whilst implied terms will not be implied that do not reflect the intentions of the parties, it is clearly preferable to have express wording which reflects the parties' positions as opposed to the Court's interpretation of this. That said, it is extremely difficult to provide for each eventuality during the course of a contract and thus, at the very least, awareness of the potential burden of implied terms should be considered.

Supply of Goods and Services Act 1982

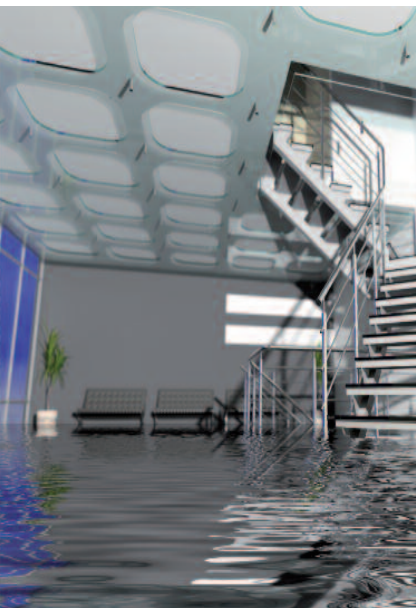
This Act (SGSA) governs contracts which relate to the supply of services as opposed to the sale of goods, although the terms implied under this Act are somewhat similar to those terms implied by the SGA. Under the SGSA the following terms will be implied into a contract for the supply of services:

- reasonable care and skill: it is an implied term that the service will be carried out with reasonable care and skill (s.13 SGSA);
- reasonable time: it is an implied term that the service will be conducted within a reasonable time frame (s.14 SGSA). What is deemed to be reasonable will hinge on the facts of each individual case; and
- reasonable charge: where consideration is not stipulated by the contract, it will be an implied term that the services will be priced 'at a reasonable charge' (s.15 SGSA).



Too remote?

Clarification of the principle of remoteness of damages



The principle of 'remoteness of damages' was articulated in *Hadley v Baxendale* [1843 All ER Rep 461] in 1853. It is a concept which has been widely debated, and to this day, remains somewhat ambiguous. However the recent case of *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 addresses the confusion surrounding the principle of remoteness of damages and has clarified the principles under current case law.

Background

As mentioned above, it is *Hadley v Baxendale* which established the remoteness of damages test in contractual disputes, a test which remains the principal tenet of the law on damages in England and Wales. Under this principle the claimant is permitted to recover the following in the event of a contractual breach:

- Losses arising naturally, according to the normal course of things, from the breach of contract itself (direct loss); or
- Such loss as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as a probable result of the breach (consequential loss).

In essence, direct loss does not require a claimant to establish special knowledge, whereas consequential loss does. This actual knowledge of special circumstances is applicable when the loss which flows from the breach is greater than or different from the consequence arising out of normal circumstances. If it is to be argued the defendant had actual knowledge of such an atypical outcome, it must be established that that special knowledge was held at or prior to the formation of the contract.

The 2008 case of *Transfield Shipping Inc v Mercator Shipping Inc* [2008 UKHL 58] compounded confusion in respect of the principle of remoteness of damages, as the judgment appeared to establish a new legal test for remoteness. This shipping industry case involved the late redelivery of a vessel by 9 days. The claim was for damages of US\$158,301.17. It was held that it would not have been the parties' intention that such a short delay would expose the charterers to such great pecuniary liability. The confusion arose from the varying approaches the judges took in formulating this judgment. In particular, Lord Hoffman and Lord Hope appeared to propose a new approach to the remoteness test, one which was intended to reflect the intentions of the contracting parties. In short, foreseeability was held not always to be, in isolation, an appropriate approach in ascertaining remoteness.

Transfield was subsequently considered by the Court Of Appeal in *Supershield Limited v Siemens Building technologies FE Limited* [2010] EWCA Civ 7 which involved liability for a flood which had damaged an office building. The case was dismissed on appeal, but the commentary on remoteness is illuminating. It was stated by Toulson LJ that *Hadley v Baxendale* remained the 'standard rule', but that there may be cases where the Court, having regard to the contract and the commercial background, may decide that the standard approach will not reflect the expectation or intention reasonably imputed to the parties.



He stated that:

“If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances”.

This concept is somewhat complex. The notion that something that would not occur in ordinary circumstances yet is held to be foreseeable leaves a potential defendant exposed to a wide range of eventualities.

Clarification

The recent case of *Sylvia* is widely considered to have clarified the law on remoteness of damages following these earlier cases.

By way of brief background, *Sylvia* was another shipping dispute which involved a claim for loss of profit on a cancelled sub charter. The case involved the appeal of a tribunal decision and the award arising thereunder.

Hamblen J addressed the confusion which shrouds the principle of remoteness of damages. He stated that it is important to make it clear that there is no new generally applicable legal test of remoteness in damages and that the orthodox approach under the first limb of *Hadley v Baxendale*, the direct loss approach, remains the general approach which will be applicable in the vast majority of cases and that it “works perfectly well”. Hamblen reiterated the conclusions of the seminal textbook, *Chitty on Contracts*, that “there will seldom be ‘any factual foundation for making a determination as to whether the defendant implicitly assumed responsibility for the risk in question’”.

Hamblen did confirm that there may be scope, in unusual cases, in which the context, surrounding circumstances or general understanding of the relevant market may render it necessary to consider whether there has been an assumption of responsibility. This would only occur in rare cases where the general test resulted in unquantifiable liability or liability which would be contrary to market expectations.

Conclusions

Save for these rare instances, it is clear that the rules under *Hadley v Baxendale* will continue to apply. What remains less certain is whether *Sylvia* has addressed once and for all the confusion endemic in the remoteness of damages principle. Only time and subsequent case law will reveal this.



News and views

Google Adwords

The long-awaited judgment in the Google Adwords infringement case was handed down on 23 March 2010 by the Court of Justice of the EU (CJEU, formerly the ECJ). Google's Adwords system controversially allows anyone to reserve as keywords registered trade marks owned by others without getting their consent. The result of this is that businesses are reserving their competitors' trade marks as keywords as a way of competing, by getting their products in front of their competitors' potential customers. The CJEU was asked to rule on whether this constitutes trade mark infringement under European law.

The CJEU held that by offering registered trade marks as keywords and displaying adverts in response to the keywords there was no actual use of the keywords by Google itself which could amount to trade mark infringement. Google was simply creating the online environment in which advertisers could operate. This part of the decision provides reassurance to other similar internet information providers that they are not liable for trade mark infringement in relation to any keywords they store or display on their websites that are identical/similar to a trade mark.

In relation to the liability of businesses buying keywords, the CJEU held that using keywords would be trade mark infringement if the sponsored link triggered by the keyword did not make it clear who the business was; therefore a trade mark owner is entitled to stop an advertiser from advertising where the advertisement does not enable an average internet user to clearly ascertain whether the goods or services originate from the trade mark owner or the business using the keywords.

Fines up to £500,000 for data protection violations

From April, companies which violate the Data Protection Act 1998 risk a maximum penalty of £500,000. The Information Commissioner's Office (ICO) has published guidance on when and how the fine may be imposed. When considering whether an organisation has violated the Act, the ICO will consider the circumstances, the seriousness of the contravention, the resulting damage or distress, whether the violation was deliberate, whether the organisation knew or ought to have known, and what reasonable steps it took to avoid the violation. Additional factors to consider will include the organisation's financial resources, sector, size, and the severity of the data breach.



News and views continued

Employee liability for breach of competition law

Safeway has brought a claim for damages against certain ex-directors and ex-employees whom, it alleges, breached their employment contracts and/or fiduciary duties to Safeway by participating in an illegal price fixing cartel in relation to the sale of dairy products. Safeway is seeking an indemnity from the ex-directors and ex-employees for the amount of the penalty already imposed by the Office of Fair Trading (OFT), and damages for the costs it incurred in the OFT investigation (around £200,000). On 15 January 2010, the High Court declined to dismiss the claims made against the former directors and employees and claimed that they were negligent in failing to report the cartel to their superiors or the boards of directors of any of the Safeway companies.

This decision demonstrates that the harder line being taken on individuals whose actions result in competition law infringements, and ensures that it is their interest to prevent such infringements where possible. Prior to the enactment of the Enterprise Act 2002, individuals were all but immune to legal consequences (beyond dismissal) of engaging their company in competition law infringement.

The Court acknowledged that the real target of the claim is not the assets of the ex-directors and ex-employees, but rather the directors' and officers' liability insurance available to them. Therefore this judgement is particularly significant in that it has the potential to re-allocate financial liability for competition law penalties from the infringing company to their insurers.

Carbon Reduction Commitment

The Carbon Reduction Commitment Energy Efficiency scheme (CRC) is a mandatory emissions trading scheme for non energy intensive businesses that is due to come into force in April 2010. The CRC applies to all public and private organisations who consume more than a certain specified amount of electricity. Broadly, the CRC will apply to any group that has a total energy bill of more than £500,000 per year. It is expected this will include more than 5,000 businesses.

Qualifying participants must register for the CRC between 1 April and 30 September 2010, or else risk civil penalties. The first 'compliance year' of the scheme begins on 1 April 2010 and is effectively a 'dry run', with no obligation to purchase allowances for that year. Allowances can, however, be bought during a month long sale window in April 2011 for the first annual reporting year, which begins on 1 April 2011. Allowances must be bought to cover the organisation's electricity usage and, up until 2013, can be bought for a fixed fee of £12 per tonne of CO₂. From 2013, the government will reduce the carbon volumes available and revert to an auction process – meaning prices are likely to rise.



Diary dates

1 June 2010

A new Vertical Agreements Block Exemption will come into force on 1 June 2010.

8 June 2010

The Digital Economy Act will largely come into force on 8 June 2010. This highly anticipated and controversial Act was rushed through Parliament ahead of the General Election. It imposes various obligations on internet service providers and extends Ofcom's role in relation to the internet.

30 September 2010

The Carbon Reduction Commitment (CRC) comes into force on 1 April 2010. Companies caught by the scheme must register as participants by 30 September 2010 or face fines for non-compliance.

October 2010

The Copyright (Permitted Acts) (Amendment) Regulations 2010 will come into force. These regulations will amend the rules in relation to the use of copyright material as part of educational and private study. They will also change current provisions regarding archiving and preservation of copyright works.

Forthcoming LG Events

The 2010 SmartLaw Seminar Series

Wednesday 19 May 2010
Limiting Liability

Wednesday 15 September 2010
A to Z of Contract Clauses

Friday 10 December 2010
Commercial Law Update

For further information relating to these or any other LG seminars, conferences and publications please see our website or contact info@lg-legal.com

Lawrence Graham LLP
4 More London Riverside
London SE1 2AU

T/ +44 20 7379 0000
F/ +44 20 7379 6854

Lawrence Graham LLP
PO Box 33090
8th Floor Convention Tower
Zabeel Road
Dubai UAE

T/ +971 4 329 2420
F/ +971 4 329 2430

Lawrence Graham
Est-Ouest
24 bd Princesse Charlotte
MC 98000 Monaco

T/ +377 93 10 55 10
F/ +377 93 10 55 11

Lawrence Graham (CIS) LLP
1-st Troitsky Pereulok 12/5
Moscow, 129090
Russia

T/ +7 495 799-5501
F/ +7 495 799-5502

info@lg-legal.com
www.lg-legal.com

Contact details



Jonathan Riley
Partner
T/ +44 20 7759 6540
E/ jonathan.riley@lg-legal.com



Rosemary Choueka
Lawyer
T/ +44 20 7759 6724
E/ rosemary.choueka@lg-legal.com



Lawyers.
Just different.

SmartLaw is not exhaustive and is not a substitute for obtaining legal advice in individual cases. © Lawrence Graham LLP 2010. All rights reserved.