

Quorum

January 2012

Legal update on Commercial issues



Do you want to know a secret? Employer denied injunction to protect confidential information

It is common practice for employers to place express obligations of confidentiality on their employees in their contracts of employment which often expand upon the implied duty of confidentiality which exists in all employment relationships. The recent High Court decision in the case of *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2011] EWHC 3154 underlines the importance of making sure that employers clearly point out what is considered to be confidential information and that they are precise about the nature of the information which they are seeking to protect.

In this case the claimant, Mrs H, was employed by Caterpillar to manage their logistics centre. Her contract of employment did not contain any confidentiality provisions, but she signed a separate confidentiality agreement in which she gave a general undertaking not to use or divulge any trade secrets or confidential information about Caterpillar to third parties either during or after the termination of her employment.

Mrs H resigned from her employment and went to work for one of Caterpillar's clients. Shortly after starting her new job she received a letter from Caterpillar in which they threatened to take legal action against her for breach of her confidentiality agreement. They sought to argue that in her new role it was likely, if not inevitable, that she would disclose confidential information about Caterpillar.

Caterpillar applied to the High Court for, amongst other things, an injunction to restrain Mrs H from ever using or disclosing confidential information relating to Caterpillar. Their definition of confidential information in their application to the High Court was given in very generic terms and did not specify any particular documents or information which it considered to be worthy of protection by such an injunction.

The application for the injunction was unsuccessful. The High Court considered that the wording of the confidentiality agreement was too wide to be enforceable and that Caterpillar had not made it clear to Mrs H whilst she was working for them what type of information it considered to be confidential. The fact that Caterpillar had sought an injunction which was not limited in time was considered to be unreasonable and Caterpillar's failure to particularise the nature of the information which they were seeking to protect with the injunction also counted against them.

Caterpillar may have stood a better chance of obtaining the injunction if they had been clearer with Mrs H when she worked for them about what they considered to be confidential information. It would also have helped them if the confidentiality agreement which she had signed had been drafted more precisely. However, it appears from the judgement that it was the wide-ranging nature of the injunction which was sought which was their downfall.

This case serves as a useful reminder to employers of the need to think carefully about the nature of their business and the role which their employees are undertaking when drafting confidentiality clauses. Any particularly sensitive information in the workplace should be clearly marked as 'confidential' and, if appropriate, employees should be reminded of their confidentiality obligations from time to time. If employees (whether current or former) do breach their confidentiality obligations then employers must think carefully about the business interest which they are trying to protect and tailor any application for injunctive relief as precisely as they can to meet that need in order to stand a fair chance of obtaining the protection which is available through the courts.

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Employers' health & safety: Protecting your business

A key case from 2011 illustrates employers' duties to protect employees and non-employees, the need to assess and address risk, and criminal liability for failure to do so.

In *R v Tangerine and Veolia (2011)* (a joint appeal from two separate Crown Court cases) the Court of Appeal explained the law relating to two key health and safety provisions affecting all employers - sections 2 and 3 of the Health and Safety at Work Act 1974 (the Act) (set out in detail below) – and also helpfully pointed to the steps that a company, its managers and directors should take to meet their obligations under these sections.

Facts

In *Tangerine*, an operator was killed by the automatic loader of a factory machinery, which was not turned off during repair work. The Court rejected *Tangerine's* arguments that it was not foreseeable that instructions (in this case, the shouting and gesturing by colleagues to the employee, to turn off the loader) would not always be followed. The Court commented that a properly conducted risk assessment ought to have identified the danger that established procedures might be short-cut by employees; *Tangerine* had not done enough to protect its employees from potentially dangerous machinery.

In *Veolia*, a van driven by an employee killed an agency worker (non-employee) when it was hit from behind by a lorry on a main road. The van had been accompanying the agency worker who was litter picking on the verge but it was forced into the main road to avoid a post fixed at the roadside, collided with the lorry and then hit the agency worker. The van driver was also injured in the accident. The Court rejected *Veolia's* argument that the accident resulted from normal driving risks that it could do nothing about: it ruled that *Veolia's* activities created specific real risks which *Veolia* should have identified and dealt with.

Employer duties and criminal liability

Tangerine and *Veolia* (i.e. the companies) were convicted under section 2(1) of the Act, which provides:

It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

Veolia was also convicted under section 3(1) which provides:

It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

Section 2(1) creates an obligation on an employer towards employees wherever they are working and whatever that involves. Section 3(1) creates an obligation on an employer to non-employees who may be affected by the employer's business – for

example, agency workers (as in *Veolia*), contractors or employees of another business, visitors, customers, neighbours, etc.

Employers are criminally liable if they fail to ensure safety, whether or not an accident takes place (although an accident may prompt an investigation, provide evidence of such a failure, and affect any sentence, even if the accident was partly attributable to other dangers).

Showing you have done what is “reasonably practicable”

In order to avoid liability, it is vital that employers are able to show that they have considered the risks to which employees and others are exposed and that they have done all that is **reasonably practicable** to ensure their safety. In the event of a prosecution, section 40 of the Act places the onus on the employer (not the prosecution) to prove this.

Employers must first consider risks to safety as a result of their employment of staff or as a result of their business affecting non-employees. Employers are expected to think deliberately about risks which are not obvious. For example, employees' safety may be put at risk by the actions of other employees or non-employees, predictable carelessness or short-cutting, or locations in which they work.

Having identified all real risks, employers should document how they have taken all reasonably practicable steps to deal with such risks and ensure that records of such assessments, reviews and actions should be carefully preserved. Assessments must be regularly reviewed as understandings of risk often change over time.

The Court stressed that sections 2 and 3 should not impose wholly unreasonable burdens on employers. Fanciful or trivial risks may be discounted and the aim is not to create an environment that is entirely risk free. What is “reasonably practicable” will depend on factors such as how foreseeable a risk of injury is, the severity of the potential injury and the implications to the business of avoiding the risk.

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ICO publishes data privacy toolkit for organisations and information rights strategy

The Information Commissioner's Office has recently published two documents which offer guidance both on how the ICO operates and how businesses can optimise data protection compliance.

The "TH!NK PRIVACY" toolkit is aimed at businesses and organisations who want to improve their employees' awareness of data protection obligations in the workplace. The toolkit offers downloadable information as well as posters and related items to be put up in the office. In addition to this general toolkit, the ICO has produced a tailored toolkit for the not-for-profit sector.

The ICO has also published an information rights strategy designed to inform ICO staff and other organisations about how the ICO operates and how it aims to enforce data protection compliance.

Both documents are available from the ICO website at www.ico.gov.uk.

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Ambiguity in commercial contracts

The recent Supreme Court decision in *Rainy Sky SA and Others v Kookmin Bank* [2011] is the latest in a line of cases addressing ambiguous contractual provisions and sheds further light on how such provisions are likely to be construed by the Courts.

Background

In May 2007, Rainy Sky SA and Others (the Buyer) entered into ship building contracts with a ship builder. Under the contracts the Buyer was required to make payments by instalments to the ship builder. Payment of the first instalment was conditional upon the ship builder providing the Buyer with satisfactory refund guarantees (these were issued by Kookmin Bank). When the ship builder later suffered financial difficulties and became insolvent, the Buyer claimed under the refund guarantees. Kookmin Bank, however, argued that, properly interpreted, the guarantee obligations were not triggered by the ship builder's insolvency.

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The decision

In reaching his decision in favour of the Buyer, Lord Clarke considered the earlier Court of First Instance and Court of Appeal judgments as well as reviewing the relevant case law. Lord Clarke found that, unless the language was unambiguous, it is appropriate for the Court to adopt the interpretation most consistent with business common sense.

"The ultimate aim of interpreting a provision in the contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant."

It was common ground between the Buyer and Kookmin Bank that there were two arguable interpretations of the guarantee obligations. Using the above rationale, Lord Clarke found in favour of the Buyer holding that Kookmin Bank was required to repay the instalments as, in his opinion, Kookmin Bank's interpretation of the guarantee obligations led to the "surprising and uncommercial result of a guarantee not being available to meet the builder's repayment obligations in the event of insolvency."

The implications

Although this case revolved around the interpretation of guarantees and indemnities, it clarifies the courts' position on ambiguous clauses across all commercial contracts. Where the parties have used unambiguous language the courts must apply the wording as drafted. Where more than one interpretation is possible, the interpretation most consistent with business common sense will be applied. This case highlights the shift away from literal interpretation of drafting to one based on commercial common sense.

Practical tips

Ideally any contract should not allow for any ambiguity in its interpretation. From the outset, it is important to ensure that all drafting is as certain as possible. The contract recitals should clearly set out the parties' commercial intent and, most importantly, the contract should be thoroughly reviewed with "fresh eyes" before being entered into. However, if a clause is later deemed to be ambiguous, records kept of negotiations and points of interpretation may be of value.

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