Commercial Brief

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GDPR – a Double Edged Sword

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It is nearly six months since the General Data Protection Regulation ("GDPR") came into force but whether any business could achieve full compliance is still uncertain. Is it possible that efforts to comply are being drowned in a sea of Data Subject Access Requests ("DSARs")?

We believe full compliance is almost impossible. In part because GDPR needs to be interpreted, rather than read literally, and businesses are therefore heavily reliant on guidance from the Information Commissioner's Office ("ICO"). Significant guidance is still awaited. For example, current guidance indicates that it would be impossible to put an employee's name and contact details on a business website without breaching the rules on international transfers of data.

Guidance changes; so businesses that consider themselves compliant today may not be tomorrow. Unless, that is, they want to challenge the guidance in the Courts. The fact that they could do that may discourage the ICO from bringing enforcement action unless the breach is self-evident and its effect serious.

Within hours of GDPR coming into force pressure groups had made official complaints about some of the FAANGs (Facebook, Apple, Amazon, Netflix and Google). We suspect they were gratefully received as they give the authorities the opportunity to investigate. That sort of complaint is likely to be their focus; if you are trying to comply, the ICO are unlikely to make an example of you.

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Changes to Entrepreneurs Relief

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The Chancellor announced two significant changes in his autumn budget to the qualifying conditions required to claim Entrepreneurs' Relief (ER).

ER is an important tax relief for many of our clients because it may be applied to reduce the rate of capital gains tax from 20% to 10% on up to £10 million of capital gains arising on the sale of their shares in a trading company. Previously this required the seller to hold at least 5% of the voting rights and at least 5% of the ordinary share capital in the company for the year prior to sale.

Qualifying Share Ownership

The first change, effective from 29 October 2018, is that the seller must also be entitled to at least 5% of the company's distributable profits and net assets to satisfy the conditions required for ER. This is intended to deal with a perceived abuse of the system where a shareholder could meet the existing 5% holding requirements without actually being entitled to 5% of the value of the shares in the company at the time of an exit or winding up. Shareholders in companies with a single class of ordinary shares with straightforward Articles of Association should not be affected by this change.

Timing is everything

The second change, effective from 6 April 2019, is to increase the holding period of shares prior to disposal from one year to two years and, throughout this time, the qualifying conditions must be satisfied. This will affect existing shareholders and also holders of EMI options over shares who could also currently qualify for ER if they sell their shares at least one year after their option is granted.

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Company Voluntary Agreements in commercial property

In recent months, there has been a growing trend in the way commercial tenants are using a particular type of insolvency prevention procedure, known as a Company Voluntary Agreement, to reduce the amount they are paying to their landlords.

What are Company Voluntary Agreements?

Company Voluntary Agreements (CVAs) are an arrangement used by companies in debt or if they are facing insolvency. It is a voluntary agreement between a business and its' unsecured creditors, providing a framework in which all or part of the debt is repaid over a fixed period of time.

Companies can arrange a CVA through an insolvency practitioner, who will negotiate the amount to be repaid and the period of time over which it will be paid. However, their proposal must be received positively by creditors who are owed a minimum of 75% of the debt. The business's shareholders must also approve the measures by a simple majority.

How are CVAs being used in commercial property?

Over the last few years, CVAs have become a popular means by tenants of reducing costs in the retail industry in particular, which has led to criticism from property owners and landlords. A number of high-profile retailers, including BHS, New Look and Jamie's Italian, have used CVAs to drastically reduce rents.

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GDPR – Much Ado about Nothing?

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GDPR has been effective for almost six months now and the Information Commissioner's Office ("ICO") has prosecuted or taken other enforcement action (and imposed monetary penalties, enforcement notices, or demanded undertakings) against 21 organisations so far.

Enforcement action is likely to follow a breach of data privacy laws. Organisations have an obligation to report data breaches (a loss of personal data which may indicate non-compliance with data laws) to the ICO and aggrieved individuals can make complaints to the ICO directly and completely bypass the organisation.

Unfortunately, the ICO's website does not offer any guidance on this for organisations, but we have been informed that the following process is likely to be adopted when a direct complaint is made;

- The case officer considers whether there is any evidence to prove the alleged breach.
- If not, the complainant is asked to provide additional information or documentation.
- The case officer notifies the organisation of the alleged breach and seeks their initial response and any supporting documentation.

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Commercial Property Standard Enquiries - the truth, the whole truth and nothing but the truth

If you have bought, sold or rented commercial property, then you may have heard your legal adviser refer to Commercial Property Standard Enquiries, or more commonly known CPSE. Whilst "standard" the questions are complex and full of legal jargon. Faced with them, it is not uncommon for a seller or landlord to put 'N/A' in response to any questions that they do not fully understand. This temptation should be resisted or it could result in a costly misrepresentation claim.

CPSE misrepresentation claims

CPSE reports are there to assist the tenant or buyer of a commercial property to understand the premises inside and out, and they therefore are entitled to rely on the information given in the replies; any misleading information given by the landlord or seller could lead to a misrepresentation claim.

The recent Court of Appeal case, *First Tower Trustees Ltd. & Another vs. CDS (Superstores International) Ltd* is a reminder to commercial property landlords and sellers of the importance of completing these enquiries to the best of their knowledge, and being accurate in their responses.

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What is the Executive Pay Ratio Report?

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The requirement for companies with over 250 employees to annually produce a Gender Pay Gap Report came into force this year, with much publicity around its implementation and subsequent results. The same attention has not been given yet however to the Executive Pay Ratio report, which is due to come into force from 1st January 2019.

The Companies (Miscellaneous Reporting) Regulations 2018 was published in July this year following parliamentary approval, and requires UK quoted companies with more than 250 employees to publish the ratio between their CEO's total remuneration and employees' pay and benefits. According to CIPD, the average pay ratio between a FTSE 100 CEO and the average worker's salary was 129:1 in 2016 and 148:1 in 2015. The aim of the legislation is therefore to provide greater transparency and accountability, calling on companies to justify the difference in pay between their top executives and their average workforce.

What will be covered in the executive pay ratio report?

The requirement will become law on 1st January 2019 with the first publication of the report depending on the financial year of the company; if the financial year runs from 1st January to 31st December, the first report would cover the financial year ending 31st December 2019. If the financial year runs from 1st April to 31st March, the first report would cover the financial year ending 31st March 2020.

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In Brief…

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In each issue of our Commercial Brief, we will bring you brief references to recent legal developments that could be of interest to you, our readers.

This issue of the In Brief includes the following topics:

- **Morrisons supermarket liable for rogue employee's disclosure of co-workers' personal data online**
- **When does an individual seller become a trader in the online market place?**
- **Counter claim for loss of bargain dismissed on grounds of not terminating the Contract on the correct grounds**
- **The need to be specific when making an application for non-party disclosure**

To read more on these topics, simply click here.

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