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Competition Law

OFT seeks wider powers to ban directors who fail to prevent competition law breaches...

The Office of Fair Trading has commenced a consultation on proposed changes to its guidelines which would allow it to ban directors who 'ought to have known' about and acted to prevent anti-competitive behaviour. Currently, the OFT has the power to disqualify directors who have been directly involved in competition law breaches, for up to 15 years. Under its proposals, that power would be extended to directors who could or should have done more to prevent anti-competitive activity, significantly increasing directors' potential exposure to disqualification for cartel activities. The OFT regards Competitive Disqualification Orders as an important tool in deterring directors from engaging in anti-competitive behaviour, because the sanction affects an individual or the individuals responsible for the breach. However, at present, the OFT is concerned that the powers do not go far enough to sufficiently encourage directors to take positive steps to uncover breaches of competition law and monitor their organisation's compliance. In its proposal, the OFT said that it expected every director of every company to know that price fixing, market sharing and big-rigging agreements are likely to breach competition law.

Court of Appeal backs racecourses' joint venture to distribute media rights – Bookmakers' Afternoon Greyhound Services v Amalgamated Racing, Court of Appeal...

The Court of Appeal has backed a ruling by the High Court that the creation of a second distributor in the market for racecourse media rights did not have an anti-competitive object or effect. The case was brought by an organisation representing the interests of bookmakers operating licensed betting offices. In the past, the betting offices had paid a sole distributor ('S') for the right to broadcast live pictures of horse racing. S then made payments to the racecourses for those media rights. Approximately half of the racecourses - unhappy with the payments they received from S - set up a joint venture creating a new distributor, Amalgamated Racing Limited ('A'), to which they could license their media rights. Other racecourses continued to license their media rights to S at a reduced price. However, the racecourses participating in the joint venture licensed their media rights to A at a higher price and consequently the betting offices had to pay high prices for the services shown in their premises relating to those racecourses. The betting offices claimed that the joint venture was anti-competitive as it had the object of fixing prices or restricting competition. The High Court rejected that claim and found that the arrangements between the racecourses and A had neither the object nor effect of restricting competition.

The Court of Appeal dismissed the betting offices' appeal and ruled that the objective of the arrangements was to sponsor the entry of A into the market and that they did not have an anti-competitive effect. One fundamental question considered by the Court of Appeal was whether or not the racecourses which formed the joint venture competed with each other for the sale of media rights. The Court of Appeal ruled that, whilst the racecourses competed with one another for horses that ran at their courses, sponsorship, spectators and other non-racing events, they did not compete when it came to the sale of their media rights. This was because races were deliberately scheduled to take place at different times to ensure that they did not coincide. Betting offices therefore had an incentive to show as many different live races as possible throughout the day to maximise their betting turnover. In considering whether the arrangements between the racecourses had an anti-competitive effect, the Court of Appeal considered that no racecourse could have achieved entry into the market for the distribution of media rights to betting offices alone. In order to establish a rival broadcaster to S, at least two racecourses would need to licence their rights to A. The Court of Appeal ruled that, to challenge S's monopoly, it was necessary for any new entrant to the market to be promoted by, or be in association with, a number of racecourses. It was acknowledged by the Court of Appeal, however, that once A was established within the market as a viable undertaking the position may be different as A would no longer require the same protection that was necessary to secure its entry to the market.

Contracts

English law contract must be construed in accordance with English law despite being in US form – Seadrill Management Services v OAO Gazprom, High Court...

The High Court has ruled that where a contract is expressed to be governed by English law, the contract must be construed in accordance with English law principles of contract construction despite the contract being in US form. In this case, Seadrill owned and managed a jack-up drilling rig and Gazprom specialised in the exploration for, and exploitation of, gas deposits. The parties entered into a contract for the hire by Gazprom of a rig to drill a well in the Bay of Bengal, and the contract was expressed to be governed by English law. Provisions of the contract sought to allocate risk and liability for losses incurred in

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connection with the activities to be performed under the contract to Gazprom unless a provision of the contract expressly allocated it to Seadrill. It was not disputed that Seadrill's rigmaster had been negligent during pre-loading operations and as a result the rig was damaged. Gazprom sought to terminate the contract on the grounds of Seadrill's negligence. Seadrill rejected Gazprom's purported termination, served its own notice of termination and subsequently brought proceedings against Gazprom to recover unpaid hire fees and other costs. Gazprom counterclaimed on the basis that Seadrill's negligence was a breach of its implied obligation under English law to operate the rig with reasonable skill and care which gave rise to a right for Seadrill to terminate the contract.

Seadrill sought to argue that, because the contract was drafted on the basis of a US form, conventional English law construction of the contract was inappropriate as it was contrary to the intent and correct construction of the contract. The High Court rejected this argument and ruled that the starting point for an English law contract was that the court must construe the contract in accordance with established English law principles of construction. Under English law, clear words are required to exclude the common law rights or remedies of a party to a contract. The High Court found that the contractual provisions in the contract in question were not sufficiently clear and unequivocal to amount to an exclusive code of risk allocation and therefore Seadrill's common law duty to use reasonable skill and care was not excluded. However, on the facts, the High Court concluded that Seadrill's negligence did not amount to a repudiatory breach entitling Gazprom to terminate the contract. As a result of Gazprom's wrongful termination and repudiation of the contract, Seadrill was entitled to accept that the contract had come to an end.

Samantha Lloyd, assistant editor of Upload-IT, comments: 'Parties to a contract should not assume that a contract drafted in US form will be construed in accordance with US case law. English courts will apply English law principles to a contract governed by English law notwithstanding the form of the contract. The case also confirms that any purported exclusion of common law or statutory rights must be drafted in express, clear and unequivocal language.'

High Court rules on reasonableness of exclusion clauses – Lobster Group v Heidelberg, High Court...

The High Court has ruled on the reasonableness of exclusion clauses included in various agreements relating to the hire of a printing press. Lobster Group originally entered into a contract with Heidelberg for the purchase of a printing press, but the contract was never performed. Lobster Group subsequently entered into an agreement for the hire of a printing press from Close Asset Finance ('Hire Agreement') and two separate agreements with Heidelberg - a warranty agreement ('Warranty Agreement') and a service agreement ('Service Agreement') - for the printing press. Each of the agreements contained exclusion clauses:

- The Hire Agreement contained a provision excluding any express or implied term, condition, warranty or stipulation. It also excluded liability for any loss or damage suffered by Lobster Group whether or not caused by the negligence of Close Asset Finance.
- Under the Warranty Agreement, Heidelberg guaranteed the printing press for 12 months from the date of installation. The guarantee was limited to replacement or repair at Heidelberg's option of the defective part and the repair of any damage to the equipment arising from the failure of that part. The Warranty Agreement excluded liability regarding fitness and purpose, satisfactory quality or merchantability of the goods and for any increased costs and expenses, losses or damages suffered as a result of the supply of goods and services by Heidelberg.
- The Service Agreement for the maintenance of the printing press required Heidelberg to exercise reasonable care and skill in providing the maintenance services but excluded liability for any increased costs and expenses, losses or damages arising from the provision of the services and limited Heidelberg's liability to the aggregate of payments received from Lobster Group under the Service Agreement.

All three parties accepted that the printing press was defective. Lobster Group stopped paying the hire charges to Close Asset Finance and claimed damages for its losses suffered arising out of the defect. Close Asset Finance counterclaimed for the outstanding hire charges and sum due on early termination of the hire. Close Asset Finance and Heidelberg sought to rely on their exclusion clauses to avoid liability for the defect.

The High Court ruled that Close Asset Finance could not, in the Hire Agreement, exclude its liability under the term as to satisfactory quality implied by the Supply of Goods and Services Act. To do so would be unreasonable as Lobster Group would be left without the obligations which would have been implied into a contract for the sale of the printing press pursuant to the Sale of Goods Act. Furthermore, the Warranty Agreement and the Service Agreement only provided a limited remedy in circumstances where the printing press contained components which were not of satisfactory quality rather than the press as a whole. The High Court also found that a complete exclusion by Close Asset Finance of all loss or damage suffered by Lobster Group was unreasonable in the situation where the press failed to perform properly because it was not of satisfactory quality. The High Court did, however, acknowledge that an exclusion limited to loss of profits and consequential losses would have been reasonable, because these were losses which Lobster Group could have insured against.

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The High Court found that the combined effect of the provisions contained in the Warranty Agreement was to exclude all liability for damage. The High Court found that given Heidelberg's obligations were limited to replace or repair, the exclusion of any other liability was reasonable. The High Court took into account the following factors: Lobster Group and Heidelberg were both reasonably substantial commercial entities experienced in the printing industry; they had both previously been involved in the provision of the printing press; if the Warranty Agreement did not exist, Heidelberg would not be contractually liable for defects; and Lobster Group would be best placed to know what losses it might suffer in the event of problems with the printing press. However, the High Court found that Heidelberg's exclusion of liability for damages for direct loss was unreasonable because if Heidelberg failed to replace or repair a defective part then at the very least Lobster Group should be able to recover damages for breach of contract to cover such losses. Whilst the High Court did not consider the limitation of liability in the Service Agreement to be unreasonable, it did find that the exclusion of liability for increased costs and expenses was unreasonable in circumstances where Heidelberg failed to remedy defects.

Samantha Lloyd, assistant editor of Upload IT, comments: 'The decision of the High Court is a reminder that exclusion clauses should be carefully drafted. A party seeking to include an exclusion clause in a contract should consider each head of loss separately to ensure that the clause meets the test of reasonableness.'

Copyright and Database Rights

Government makes dramatic U-turn on measures to tackle Internet pirates ...

The UK government has made a dramatic U-turn on proposed measures to tackle Internet pirates who illegally download films and music from the net. In an amendment to the Digital Britain report, the government has indicated that greater powers would be granted to regulator Ofcom to take action against repeat infringers and technical measures are likely to include the suspension of accounts of 'hardcore copyright pirates'. This is a significant U-turn by the government, which made clear in the original report that it was not in favour of a policy that would see accounts suspended or cut off given that Internet access was now seen as being as valuable as other utilities such as water and electricity. Now it seems that the government intends to require Internet service providers to take action against repeat infringers with the cost of policing the web being borne equally by ISPs and rights holders. The Internet Service Providers' Association was said to be disappointed by the proposal to force ISPs to suspend their customers' accounts.

A suspension policy raises a number of issues and could have serious ramifications for some. For example, those who work from home could find themselves without Internet access if their children engage in infringing activity in the evenings. In Europe, politicians have ruled that disconnecting a user's Internet connection could potentially be a breach of their human rights. The ruling was made in response to a challenge to new legislation passed in France to implement a 'three strikes law', so called because it would involve ISPs terminating persistent net pirates' Internet connections if they ignored two official warning letters.

Procol Harum's former organist reclaims rights to copyright in 1960s hit 'A Whiter Shade of Pale' – Matthew Fisher v Brooker and Onward Music, House of Lords...

The former organist of Procol Harum, Matthew Fisher, has won his appeal in the House of Lords to reclaim 40 per cent of the royalties to the musical copyright in the classic 1960s hit 'A Whiter Shade of Pale'. Fisher, a classically trained musician, was a member of Procol Harum from 1967 to 1969. He had been recruited to contribute solo sections on the organ. Fisher's claim, first made in 2005, was that the organ part of the song was wholly his invention and that he was, therefore, joint owner of the copyright of the work and entitled to a share in the authorship of the overall work. Brooker had composed the music and Onward Music Ltd had acquired the copyright to the words and music of the song in 1967.

The House of Lords found that Fisher's interest in the music copyright could have only been impliedly assigned to Onward Music if it had been obvious to both parties at the time that Fisher's interest was being assigned or if the commercial relationship between them could not sensibly have functioned without such an assignment. These requirements could not be demonstrated as there was no evidence that Fisher knew that the song in its original form had been assigned to Onward Music prior to the addition of the solo sections on the organ. In any event, it was also unlikely that any implied contract would have been for an outright free assignment of Fisher's interest without any payment for the assignment. The House of Lords found that the Court of Appeal's decision deprived Fisher of the ability to seek both injunctive relief and claim any royalties in respect of the exploitation of the music of which he owned 40% of the musical copyright.

The House of Lords ruled that a court could not accept that Fisher had 40% of musical copyright in the song but then refuse on equitable grounds to grant declaratory relief. The mere passage of time – in this case 38 years – could not itself undermine Fisher's claim said the House of Lords. To bar Fisher's claim Brooker and Onward Music would need to rely on 'laches': an equitable defence that Fisher was no longer entitled to his original claim because of his delay in bringing it. However, the defence of laches could only bar equitable relief and not a declaration of the existence of a long term property right recognised by statute. The House of Lords concluded that Brooker and Onward Music could not show any prejudice had resulted from the

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delay and, even if they could, the benefit they had obtained from the delay would outweigh any such prejudice. The House of Lords concluded by reinstating the declarations made by the High Court that Fisher was co-author of the music, he was the joint owner of the musical copyright in the work, his share was assessed at 40 per cent, and his licence for Onward Music to exploit the work had been revoked in 2005 when he staked his claim. He had therefore been entitled to royalties from that point onwards.

Samantha Lloyd, assistant editor of Upload IT, comments: 'This case illustrates just how important it is for record companies and artists to ensure that any contract assigning musical copyright covers both the original composition and any subsequent variations that may attract separate rights.'

Data Protection/Privacy/Confidentiality

Trade association promises to improve data security following loss of personal data relating to 37,000 people...

Repair Management Services of Blackburn, a trade association representing car repair companies, has signed a formal undertaking with the Information Commissioner's Office promising to improve data security measures by March 2010. The ICO – the regulator in charge of enforcing data protection law in the UK - took action against RMS following the theft of an unencrypted laptop from a locked car. The laptop contained the personal details of 36,800 people and information on 1,900 driving convictions. The ICO found that, although the laptop was password protected, RMS had failed to protect the data using a minimum standard of encryption. As a result, the security measures used by RMS were insufficient to prevent the unauthorised or unlawful processing of the data in question. The ICO also took into account the fact that data relating to criminal convictions, if accessed, could potentially result in distress being caused to the individuals concerned. RMS must now take steps to encrypt all of its machines which carry personal data and to train its staff in its information policies and procedures to prevent a repeat of the incident in the future.

ICO serves Enforcement Notices on 14 construction firms in the wake of the construction workers' 'blacklist' scandal...

The Information Commissioner's Office has served Enforcement Notices on 14 construction firms for their part in the construction worker 'blacklist' scandal. Each of the organisations had been found to have paid the firm Consulting Association, run by Ian Kerr, to obtain sensitive personal data about prospective employees without their knowledge. The data obtained included information such as workers' personal relationships, trade union activity and employment history. By using personal data to covertly vet workers for employment, the construction firms breached the Data Protection Act. The Enforcement Notices prohibit the organisations from using the personal information supplied to them by Ian Kerr and oblige them to be completely open with future job applicants if they obtain personal information from third parties as part of the employment process.

The ICO - the regulator in charge of enforcing data protection law in the UK - has sought to send a strong message that the requirements of the Data Protection Act must be taken very seriously. Deputy Information Commissioner, David Smith, said: 'The individuals were denied the opportunity of explaining or correcting what may have been inaccurate personal information about them and which could have jeopardised their employment prospects in the construction industry. We have used the maximum powers available to use.' Failure to comply with an Enforcement Notice is a criminal offence. Ian Kerr was fined £5,000 for failing to notify (or 'register') with the ICO to process data as required by the Act – the only sanction available for the creation of the blacklist.

IT and Internet Use

YouTube launches Partner Program to share video profits with individuals...

YouTube – the popular video-sharing site – is to launch a new Partner Program to share profits with individuals who post popular videos. YouTube will identify the most popular videos and then notify individual users who have posted them to let them know that they may become advertising partners. The scheme is inspired by the new 'viral video' trend where users upload their own videos. If a video is particularly entertaining it will often be posted in many other places over the Internet and as result get an increased number of hits. YouTube has already begun contacting a number of individuals who regularly post extremely popular videos to invite them to join the partnering scheme, but now YouTube is looking to track the rising popularity of one-off viral videos. Owners of copyright material which is frequently uploaded onto the site already receive a share of the advertising revenues generated by their videos. The new scheme for individuals will be launched in the US initially, with plans for an international version in the near future.

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Misleading Advertising

Failure to identify the promoter of gambling advertisement could mislead consumers, rules ASA...

The Advertising Standards Authority has ruled that a gambling company's failure to identify itself as the promoter of an advertising campaign could mislead consumers. Prime Table, a company which invents and promotes casino table games, placed an advert in a magazine asking readers to 'terminate the terminals'. The advert claimed that fixed-odds betting machines located in betting shops were wholly unfair when compared to their casino equivalents, because there was a higher probability that players would lose their money in a session. The ASA found that Prime Table might derive commercial benefit from support given to the campaign. It ruled that consumers have a right to know who is responsible for the messages that they are exposed to. However, because it was not clear from the advert who was behind the claims, the ASA ruled that it could mislead consumers and ordered Prime Table not to repeat the advert.

As well as falling foul of the ASA rules, Prime Table may have also breached The Consumer Protection from Unfair Trading Regulations in its failure to identify itself as the organisation behind the advert. The Regulations require marketing and advertising to be clear, fair and responsible and commercial practices must be fair. Identification of the advertiser is crucial to this. The Regulations provide that a commercial practice is a misleading omission if it omits material information and as a result the average consumer takes a transactional decision which he would not otherwise have taken.

ASA bans local car dealership ad for use of Volvo logo...

The Advertising Standards Authority has banned an advert placed by a local car dealership which used the Volvo logo because the advertiser was not an official Volvo dealer. Alongside the Volvo logo, the advert stated 'Volvo Value...ANY MODEL OF NEW/USED VOLVO SUPPLIED...Mount Automotive Solutions, The Volvo Centre...' A Volvo dealer complained that the advert was misleading because it implied that the advertiser – Mount Automotive Solutions – was an official Volvo dealer. MAS told the ASA that the use of the Volvo logo was a mistake on the part of their advertising agent and admitted that it should not have been used. The ASA concluded that the use of the logo could mislead readers into the believing that MAS was an official Volvo dealership when it was not and therefore the advert breached the CAP Code. MAS was ordered not to repeat the advert. The CAP Code is a code of practice governing the content of adverts and marketing communications. Although the Code does not have legal force, it is best practice to comply with it, as failure to do so can result in bad publicity and ultimately an inability to obtain advertising space.

Patents

German manufacturer guilty of making groundless threats of patent infringement to Boots – Zeno Corporation v BSM-Bionic Solutions, High Court...

A German company has been found guilty of making groundless threats of patent infringement to Boots by the High Court. Riemser Arzneimittel made and sold a machine that applies heat for a specified period of time to treat insect bites. Boots stocked a similar timed heat device, manufactured by Zeno Corporation, for treating acne. RA's German lawyers wrote to a large number of Boots stores asking them to explain why Boots did not need to consider RA's patent when marketing the Zeno product. The High Court ruled that RA had not proved infringement of its patent by Zeno and that under the Patents Act, Zeno qualified as a 'person aggrieved' by the threat. The Patents Act prohibits businesses from making 'unjustified threats' of patent infringement. A communication in itself will not be regarded as a threat provided it makes enquiries of the third party for the sole purpose of discovering whether, or by whom, the patent has been infringed.

The High Court found that, as the packaging of the Zeno product displayed the name and address of the manufacturer in Texas and its UK distributor, RA knew who had manufactured and imported the Zeno device and who was offering it for sale. Given this knowledge, the purpose of the letter could not have been to discover who was infringing the patent. The High Court concluded that the sole purpose for sending the letter to the Boots stores must have been to persuade them to stop selling the Zeno device. The question to be asked was not how Boots understood the letter but how a reasonable person in the position of Boots would have understood it. The High Court ruled that in the circumstances the letter amounted to a veiled threat of infringement proceedings.

Samantha Lloyd, assistant editor of Upload-IT, comments: 'Intellectual property owners must be absolutely certain that they have grounds for making enquiries of retailers before they send any communication to them regarding patented products. Any question of patent infringement should be thoroughly explored before any action is taken. Letters must be drafted in a careful way when alleging intellectual property infringement. If the purpose for contacting the retailer is to persuade them to remove the product from sale, then the IP owner must be in no doubt that its patent has been infringed.'

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Trade Marks and Passing Off

Lego persuades spoof rock band to remove Lego figures from tour DVD...

Lego has managed to dissuade Spinal Tap – the spoof rock band – from using stage footage of its tour which included a stop motion animation film featuring Lego figures representing the band, crowd and instruments. The band projected the film - made by a 14-year-old boy to accompany Spinal Tap's song 'Tonight I'm gonna rock you tonight' – onto the stage during its concerts. However, Lego objected to the use of the stage footage in the band's DVD of the tour due to its inappropriate language and tone, which Lego said was not appropriate for its target audience of children aged six to 12.

Whether or not brand owners have the right to make these sorts of demands in the UK is unclear. The European Court of Justice has ruled that where a trade mark is used in a way which is incidental in a film, then arguably the use of the mark does not affect its 'essential function'. Following that ruling, the Football Association failed to enforce its trade mark rights against Trebor Bassett, who included a card with its sweets with a photo of an England footballer wearing the team's three lions logo on his shirt. On the other hand, brand owners could say that the public are alive to the concept of 'product placement' in films. Prominent use of a trade mark in a film could potentially mislead the public into believing that the use is authorised by the trade mark owner. If the brand or product are a central feature of the film, brand owners may also be able to take action for infringement of copyright. For example, in a claim by the Football Association against Panini – the football sticker company – the Court ruled that, without including the team badges, the Panini stickers would not have the same value to Panini or its collectors.

Fake Nokia phones in transit were not 'counterfeit', rules High Court – Nokia v HMRC, High Court...

The High Court has ruled that fake Nokia mobile phones being shipped from Hong Kong to Colombia, which were stopped in the UK by Her Majesty's Revenue and Customs, did not fall within the definition of 'counterfeit goods' for the purposes of the Counterfeit Goods Regulation. HMRC sent samples of the mobile phones, which bore Nokia's trade marks, to Nokia for inspection after stopping the consignment of 400 handsets at Heathrow. Nokia confirmed to HMRC that they were fakes and asked it to seize the goods pursuant to its powers under the Counterfeit Goods Regulations. HMRC refused, stating that it had no power to continue to detain or suspend the release of the mobiles in the absence of any evidence that they would be released on to the market in the EU.

Nokia applied for judicial review of HMRC's decision, which was rejected by the High Court. It found that HMRC could only take action against goods in transit if they were counterfeit goods, pirate goods or otherwise infringing an intellectual property right. In reaching its decision, the High Court ruled that the definition of 'counterfeit goods' was intrinsically linked to the notion that the goods must infringe a trade mark. For a product bearing a trade mark to be deemed to be counterfeit it must infringe someone's trade mark in the territory in question, and for a trade mark to be infringed the goods must be placed on the market there. If goods are in transit and subject to suspensive customs procedures they do not, without more, satisfy this requirement. A mere risk that the goods may be diverted onto the EU market was not enough to justify a conclusion that the goods had been or would be placed on the market. The High Court concluded that, as the mobile phones had not been placed on the UK market, they were not counterfeit within the meaning of the Regulation.

Whirlpool fails to take Kenwood out of the mix – Whirlpool v Kenwood, Court of Appeal...

Whirlpool has failed to take Kenwood's new kMix out of the market with its claims of trade mark infringement and passing off. Whirlpool brought proceedings against Kenwood after it launched its new kMix mixer in July 2007. Whirlpool alleged that the shape of Kenwood's new mixer infringed its Community Trade Mark for the three-dimensional shape of its mixer 'KitchenAid'. It argued that Kenwood's new mixer had impacted on Whirlpool's trade and Kenwood had obtained a competitive advantage as a result of the similarity between the mixers. This, said Whirlpool, was evidence that Kenwood had secured an unfair advantage of the distinctive character or repute of Whirlpool's CTM. The High Court had found that although there was a degree of similarity between the mixers, there was no likelihood of confusion in the mind of consumers as to their origin or potential for damage to the distinctive character or repute of Whirlpool's mark.

The Court of Appeal stated that this was not a case where Kenwood had clearly intended to take advantage of the distinctive character and repute of Whirlpool's marks. Indeed, Whirlpool had not made any relevant allegation of Kenwood's intention. The fact that Kenwood had planned its entry into a market in which it knew that Whirlpool's KitchenAid had a monopoly was not in itself sinister. The Court of Appeal found that Kenwood had already established its own goodwill in kitchen appliances and took the view that Kenwood would not have wanted people to think it was copying Whirlpool's design. The Court of Appeal ruled that, even if Whirlpool could show that Kenwood had obtained an advantage, this was not sufficient. For the advantage to be categorised as unfair, there must be some added factor which might be shown by something other than intention. The Court of Appeal concluded that there was no advantage obtained by Kenwood and, to the extent that there was, it was not unfair.

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The case suggests that it will be difficult to show that unfair advantage of a mark's distinctive character or repute has been taken. The Court of Appeal did also not address what factors, other than clear intention, will categorise the advantage as being unfair.

If you would like further information on any of the items in this month's newsletter or anything else related to Commercial/IP/IT issues, please contact:

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