SUMMER 2018

For Business

The power of NOM clauses

That four letter word. Again.
The evolutionary process of GDPR compliance.

You're too noisy!
What to do now that residents have the power to force you to reduce the noise your business makes.

How will the Digital Economy Act affect you?
Understanding the commitments, your rights and what you can do.

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“No Oral Modification” (NOM) clauses are binding

The Supreme Court recently decided that “No Oral Modification” clauses are binding, meaning that changes to a contract containing a NOM clause that are agreed orally will not be enforceable.

In order to offer some certainty, it is common to see clauses in all sorts of contracts stating that variations to the contract may only be made in writing, signed by the parties. There have been conflicting views about the effectiveness of NOM clauses. A common view has been that a variation resulting from a verbal agreement could itself be a contract, which is not required to be in writing in order to be binding. The new verbal contract has the effect of varying the old written contract, despite the NOM clause.

The case of Rock Advertising Ltd v MWB Business Exchange Centres Ltd suggests that there should be no doubt in future that the clauses are enforceable and that oral changes to the contract will not be effective.

Rock took a licence of offices in a building operated by MWB. The licence contained a NOM clause. When Rock fell into arrears, the owner had a conversation with an employee of MWB, to discuss rescheduling the overdue payments. Rock claimed that the MWB employee agreed his proposal. MWB changed the locks and excluded Rock from the premises, on the basis that its employee had not agreed to the rescheduled payments, and Rock was in breach of its licence by failing to pay on time.

A NOM clause can be considered to be an unfair clause...

MWB sued for the arrears and Rock counterclaimed for wrongful exclusion from the premises. The Judge in the County Court decided that the MWB employee had agreed the revised terms but they were not effective, because they were not in writing, as required by the NOM clause. The Court of Appeal disagreed, deciding that the oral agreement to revise the payments was also an agreement to dispense with the NOM clause, and binding on MWB.

The Supreme Court decided that the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation. Here, the NOM clause should be upheld and the lack of writing and signatures meant that the revised payment schedule was not binding on MWB, which was entitled to its arrears.

A party might still be prevented from relying on a NOM clause where their conduct has led the other party to act in a different way (a concept known as an ‘estoppel’), but more than the informal variation itself would be

After a flurry of activity around 25 May, when the General Data Protection Regulation and the Data Protection Act 2018 came into effect, I know a lot of businesses are hoping they never hear the “four letter word” GDPR again.

GDPR – What next?

It felt at times that the whole world was sending each other emails asking for consent to send marketing emails, updating their terms and conditions and threatening never to email you again.

BLHR and the Employment and Business teams have been very busy in the last 6 months working with businesses to deal with GDPR. We have been updating terms and conditions, website and cookie policies; drafting Privacy Notices and Privacy Policies and running numerous in house training sessions. However, it felt in May that many saw the implementation date as a deadline and

required to give rise to such a right. The position can be further complicated in consumer contracts. A NOM clause can be considered to be an unfair clause, and not enforceable under the consumer protection regulations, if the business routinely agrees variations with consumers orally. For business to business contracts, there is now a clear warning that oral changes to contracts with a NOM clause will not work.

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You're too noisy!

Are you concerned that your business is causing a nuisance which could lead to a complaint or action being taken against you?

With considerable pressure for new housing in the region, several of our clients, and businesses in general, have raised concerns over the potential impact that new housing close to their industrial or factory unit could cause.

Town centre businesses have also become concerned over the ability under the present planning regime for offices to be converted into flats. A flat or home owner could make a nuisance complaint to their local authority, or take action for a private nuisance claim against a business, even if that business has been operating on the same basis for decades before the residential occupier moved in. The local authority must investigate any complaint, and if they decide that a nuisance does exist, or is likely to occur or recur, they must serve an abatement notice on the business to remedy that nuisance.

In the old days, the business could rely on a legal doctrine that the person complaining had 'come to the nuisance'. Now-a-days that defence is rejected by the courts.

The development control regime and the 'agent of change' principle places responsibility on the promoter of a new noise-sensitive development to ensure occupants will not be adversely affected by existing noisy adjacent use. However, if a residential developer satisfies the local planning authority that it has developed in accordance with imposed mitigation measures, that will not entirely eliminate the risk that a resident will not experience some form of nuisance and bring a nuisance claim.

Expert legal advice can assist in looking at the issues and possible solutions, to ensure that your business can continue to operate as it wishes.

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worried that compliance was required by that date and that nothing needed to be done following it.

I have some words of reassurance and some words of warning on that.

By way of reassurance, I confirm that the Information Commissioner's Office approach to start with is likely to be light touch. The ICO is consulting at the moment on its draft Regulatory Action Policy to gather views on the way it plans to regulate the new laws. Once the consultation is complete, the policy will be subject to final approval. My view is that once that approval is given, we will have a much clearer idea of how the ICO will enforce the new rules.

By way of warning, organisations need to realise that GDPR compliance did not end on 25 May. Compliance is an "evolutionary process for organisations – no business, industry sector or technology stands still. Organisations must continue to identify and address emerging privacy and security risks in the weeks, months and years beyond 2018." (Elizabeth Denham 23/5/18).

In conclusion, I advise all businesses to continue to review their approaches to Data Protection and to continue to review the ICO website for updates. Compliance is a continuing process. What is required from individuals and businesses alike is a culture change. We will all need to accept that the way we have collected, distributed, used, shared, stored and destroyed personal data has to change and we must work hard over the coming months and years to address that. We at Birkett Long will of course be happy to assist, in any way we can, to help our clients manage those changes.

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The Digital Economy Act

At the end of 2017, the Digital Economy Act 2017 came into force, impacting upon all land connected with electronic communication networks. The Act itself considers the rights of service operators, such as BT or EE, over all land that holds, for example, masts, wires, cabling or, as the Act broadly describes, any structure or thing that is designed to be used for electronic communication networks. The Act calls these 'apparatus'.

If any of these electronic communication apparatus, or something similar, is situated within your property, then the Act will affect it; the question is: how much?

If you have an agreement in place prior to 28 December 2017:

- By and large, you are not significantly affected yet, as there are few retrospective changes to the rights that you or an operator had over your land;
- You are still entitled to terminate the agreement in the same way and can still be entitled to compensation that recognises that the land is part of the communications network; however
- Should your agreement expire or terminate, any new written agreement will fall within the scope of the Act.

If you have made an agreement after 28 December 2017 or have no written agreement in place:

- These are governed by the Act – you cannot opt out of it;
- Your operator is entitled to install, inspect, maintain, alter or repair the apparatus, amongst others, as and when is necessary – these are their Code Rights;
- Your operator is entitled to enter the land to do the above and, further, has the right to interfere or block access within, to or from the land and even cut back vegetation that may interfere with the apparatus;
- If you do not have an agreement in place yet, an operator may approach you to enter into an agreement. If you do not agree within 28 days, the operator may apply to court to impose an agreement and its terms upon you; and
- Depending on the circumstances, the operator can even circumvent that 28 day period if the agreement is urgent.

What can you do?

- You can respond in a timely manner to ensure that court proceedings are avoided and you can influence the terms of the agreement with your operator;
- Whilst you cannot limit the operator's Code Rights, you can negotiate an agreement that manages the Code Rights in a way that suits you; and
- You can consider redevelopment of your land that would remove or affect the apparatus and its functioning.

We are able to consider any current or prospective agreement and advise you on the best approach. If you would like to discuss the way the Digital Economy Act could affect your property in more detail, or are concerned about the effects the Digital Economy Act could have on any agreement in the future, please contact Daniel Sturman on 01245 453811.

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