

Edition 9

Focus

on Manufacturing



Where's the warehousing?

Is planning overlooking spaces for employment?

Ratcheting down your risk

Why you need a risk management policy

The purple wrapper battle

Cadbury's trademark struggle

Plus:

Outlook for M&A
Brexit, extensions and exports
Sexual harassment and the workplace

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Welcome...

...to the latest edition of **Focus on Manufacturing**

The drive for any manufacturer lies in creating a product which meets, or even surpasses, their customer's expectations. But it's important to remember there are other key aspects of your business which contribute to the running of a successful and profitable enterprise.

In this edition, we look at the need to think about a manufacturing business holistically. Marketing is an important aspect of any business – it's how you get your product noticed by your chosen market. You may remember the European 'horsemeat scandal' of 2013, but chances are you'll be less aware of 'fish fraud'. On page 24, we look at how rogue restaurants and their independent suppliers are passing off cheaper species of fish as more expensive ones, and what this means for manufacturers. Packaging problems are also unwrapped on page 6, where we consider the struggles of one of the UK's most-loved confectioners, Cadbury, in trademarking their famous purple colour.

You may have seen a recent social experiment on the BBC highlighting the issues of sexual harassment

Dorrien Peters
National Head of Manufacturing

in the workplace. We analyse the findings on page 10, and explain how you can raise awareness among your staff of what constitutes sexual harassment.

There are multiple challenges in running a successful business. A failure in cyber security is just one example of the "creeping risks" a business may face. On page 8, you can find out more about how implementing a risk management policy can help reduce any potential uncertainties and manage the promotion of a company's success.

Also in the issue, we look at the ever-growing need for housing in the UK, and what this means for warehousing prices. You'll also find an update on recent M&A activity in manufacturing on page 18.

Finally, we take a look at the outcomes of our new UK Powerhouse report, which was published alongside the Centre for Economics and Business Research (Cebr).

The report analyses the latest Brexit developments and maps out challenges and opportunities for businesses like yours. This issue takes a look at some of the key sectors that will be affected, with a particular focus on automotive industry.

We hope you find this issue an interesting read. As always, if you need support with any aspect of your business, please do get in touch.



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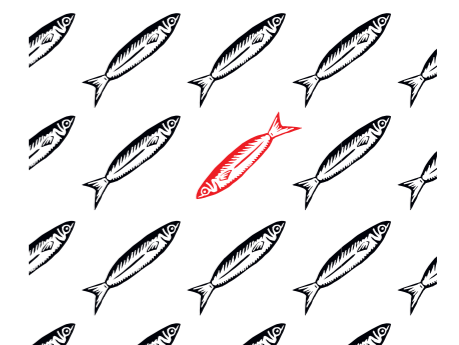
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The purple wrapper

battle

The design of a product's packaging has a huge impact on sales within the confectionery sector. Our expert Amy Au provides an update on the long-running saga for Cadbury and the colour purple.



Amy Au
Associate Solicitor, Litigation

For many, a milk chocolate bar in purple packaging conjures up just one image: Cadbury.

Since 1995 Cadbury have had registered trade mark protection for the colour purple – pantone shade 2685C to be precise, most notably used on their Dairy Milk chocolate bar. That is, until now.

The 1995 trade mark registration covered the colour's use on the whole or a predominant part of the packaging of chocolate in bar form only. In 2004, Cadbury looked to develop their range. They sought to register an additional colour mark, with the same purple colour and description but in respect of a much wider specification. This was met with fierce opposition from rivals Nestlé.

In 2013, Nestlé succeeded in the Court of Appeal. It was held that Cadbury's description of the purple colour mark was too broad. The registration failed, lacking precision and clarity in respect of the monopoly sought by Cadbury.

Cadbury, realising they'd exposed themselves to challenges of invalidity, then sought to remove the "predominant part of the packaging" wording from the 1995 mark. The company tried to claim the 1995 registration was in fact a series of two marks, with the colour either on all of the packaging, or on a predominant part of the packaging.

In December 2018, this argument failed. The Court of Appeal said the mark description constituted a range of options relating to the use of purple on Cadbury's chocolate bar packaging. Cadbury filed one mark, and not a series of marks. If Cadbury intended to register the mark as a series they would and should have done so.

In February 2019, Cadbury had to accept defeat. It's now left with a very limited and partially invalid trade mark registration in relation to the shade of purple the company has fought so long and hard to protect.

Regardless of the Court of Appeal outcome, this doesn't open the door for other businesses to use the shade of purple which we're all familiar with as the Cadbury Dairy Milk purple whenever and however they want.

Cadbury has developed a great deal of goodwill and distinctiveness in its use of that shade of purple in relation to chocolate. The loss of its trade mark registration doesn't give other businesses free rein to use that colour in relation to chocolate and other related products, in circumstances and in a manner which is likely to make consumers believe Cadbury is responsible for those products.

Any misrepresentative use of the colour purple in that context would amount to passing-off in the UK. It'd also very likely breach unfair competition laws in other jurisdictions where Cadbury has established purple as a distinctive identifier of its products.

So while Cadbury have seemingly had a bad run with the justice system, it's not over yet. It remains to be seen whether Cadbury will make any further attempts to register the colour purple with a narrower description – or whether anyone else will be brazen enough to attempt to use the colour.

For now, though, as a nation of chocolate lovers, we'll more than likely assist Cadbury in meeting the bar for a passing-off claim if its competitors push their luck too far.

Our experts regularly advise manufacturers on trade mark law – get in touch now to find out how they can help you.

Ratcheting down your risk

The benefits of a risk management policy – and why all manufacturers should have one



Implementing an effective risk management policy could be a crucial investment in promoting the success of a company.

Risk management is not designed to totally eliminate risk from operations, but to mitigate it. Good risk management allows for calculated risk-taking, where appropriate.

Planning for calculated risk is essential for company directors, whose key duties are to grow the business and increase profit – as well as to act in a way that best promotes the success of the company for the benefit of its shareholders.

A thorough understanding of a business's position in the market – and its exposure to risk – is vital for day-to-day management and for future strategic planning.

Good risk management policies provide for the monitoring of risk. This helps businesses identify the development of risks, and consequently supports decision-making.

Threats and opportunities

A risk profile is highly individual to each business. It should cover matters relating to both the commercial operations (the business carried on by the company) and corporate functionality (the structure and stability of the company itself).

Commercial risk considerations may include:

- Raw material prices
- Reliability of the business's current customer base
- Pipeline of future sales
- Relationships with suppliers
- Potential disruptions to distributors
- Availability of employees with the appropriate skillsets
- Any potential disputes arising from the trading history of the business.

Businesses trading internationally may be particularly focussed on potential changes to export controls, tariffs and competition regulation.

With regard to corporate matters, the risk profile may include:

- The company's financial position (such as credit, liquidity and cashflow risk)
- Ownership of shares in the company and the nature of any current or prospective investment
- The company's banking arrangements and any consequential charges over assets
- The stability and appropriateness of the premises used by the company.

There's no standard risk register for manufacturing companies. Each business should carefully consider the factors that may impact on their future operations.

The main risk for any company is that it will become insolvent. While the key red flags for impending insolvency are financial, maintaining a risk register may highlight potential problems before they become irreparable.

Critical problems may be identified immediately, such as matters relating to health and safety compliance. An accident, and subsequent health and safety investigation, could severely disrupt the operation of the business. While accidents can't always be avoided, the likelihood and severity of potential accidents can be mitigated with appropriate planning.

For example, reviewing relevant product safety regulations can allow required alterations to be made to product designs before incurring production costs. Including the matter on a risk register may prompt the business to review the position on a regular basis, and avoid being caught out by regulatory changes.

Risk registers are also designed to address "creeping" risks, such as:

- Failure of succession planning
- Cyber vulnerability
- Long-term capital maintenance.

Where "creeping" risks are addressed early, their impact can be significantly reduced. For example, cybersecurity systems may be appropriate at the time of their implementation, but might become inadequate over time, due to software development and new threats.

Managing risk effectively

Directors owe a statutory duty to exercise reasonable care, skill and diligence in carrying out their functions within a company. Effectively managing risk will help directors to fulfil these duties.

In the event that the company does face difficulties, implementing an effective risk management policy will help directors to demonstrate that they've seriously considered the management of risk. In turn, this will help to mitigate individual responsibility for the company's shortcomings.

Ultimately, an effective risk management policy should assist a company in achieving its objectives. More importantly, it should allow directors to continue developing the business, without spending excessive time on risk analysis or managing problems that could have been avoided.

We're specialists in helping manufacturers manage their risks – get in touch today to find out about the expert advice we can offer.



Laurence Gavin
Partner, Commercial

Sexual harassment and the workplace

A recent BBC experiment suggests a worrying lack of awareness



“Is this sexual harassment?”

That’s the title of a social experiment aired by the BBC, where a group of 20 people aged 18-30 were invited to discuss whether a woman was subjected to sexual harassment at work.

Unaware of the legal definition of sexual harassment, the group were shown a video and discussed amongst themselves at various points what had happened, before deciding whether the woman had been harassed by her colleague.

After being told what legally constituted sexual harassment, a lot of the group changed their minds. Does this display a lack of awareness amongst the general public?

Kat and Ryan

The video focussed on bar duty managers Kat and Ryan. Over the course of several weeks, Ryan has a number of interactions with Kat, including:

- Leaning over Kat when she’s on the computer (ostensibly to help her)
- Complimenting her on her perfume
- Referring to him as being “the brains” and her “the beauty”
- Encouraging her to drink after work
- Putting his hands on her back and moving them down to her waist
- Trying to kiss her after work, then within minutes of being rejected contacting HR to inform them of problems with her work which lead to her dismissal.

The fictional tribunal accepted that Kat has been sexually harassed. They said that Ryan created an unwanted atmosphere and had the purpose or effect of violating her dignity or creating an environment that is intimidating, degrading, hostile or humiliating or offensive to Kat.

The statutory defence

Employers can avoid liability by demonstrating all reasonable steps have been taken to prevent harassment or discrimination. These steps must include:

- Having a policy that staff know about and have received training on
- Dealing effectively with complaints
- Taking appropriate disciplinary action against perpetrators.

Although the experiment didn’t address this, it was interesting to hear the comments made by the discussion group. Many initially viewed the issue through the prism of what they think is acceptable on a night out, rather than what’s acceptable in the workplace, with a couple of the men saying it was okay to “test the waters” to see if their colleague was interested in them sexually.

If we go back to our steps necessary to avoid liability, these comments suggest that they haven’t received adequate training about workplace harassment. If they had behaved in the same way as Ryan, which some of them thought was perfectly reasonable, their employers would not be able to rely on the statutory defence.

We can help

We deliver practical and interactive training to help your staff understand what is and isn’t acceptable behaviour in the workplace.

Please contact Kirsty Ayre to find out how we can help your organisation.



Kirsty Ayre
Partner, Employment

Where's the warehousing?

Are we so focussed on building houses that we're forgetting to create places for employment and services?



Stuart Tym
Senior Associate, Planning

The need for housing in the UK has never been greater, according to a recent report by the Industrial Committee of the BPF and planning consultant Turley. The knock-on effect to this is that the need for land for logistics is being pushed further down the agenda.

Whilst this happens, the UK will need to provide jobs and services for all of the government's planned 300,000 new houses a year. Logistics should be a central consideration when planning for sustainable communities. To achieve this, the planning system needs to plan holistically.

More houses, more problems

Turley's report says that there's currently 69 sq ft of warehouse floorspace for every home in England. If this ratio of warehouse space to homes were to continue, we'd need 21 million sq ft of additional warehouse floorspace each year to match the government's annual target of new homes.

It's worth bearing in mind that the distribution of housing and warehousing isn't uniform. The West Midlands delivered over 1 million sq ft more of warehouse floorspace than its ratio would suggest, reflecting its role as a location for national logistics functions. The South East also delivered around double its ratio.

The government failed to meet its new homes target over 2017/18, when just 222,190 new homes were delivered across England. According to the report, this resulted in a ratio of 69 sq ft of warehouse space per dwelling. If the government was to continue to build at this rate, the report concludes that we'd require 15.2 million sq ft of warehouse floorspace. But it's simplistic to think that there's a linear relationship between current logistics floorspace per home and the floorspace needed for new homes. Building homes doesn't itself increase the population, but provides for their housing needs. The current population, and their spending power, already exist. As logistics become more efficient, the same floorspace may cater for a greater catchment. But where that space needs to be provided may be affected.

Securing more space

Developers and strategic land promoters will typically wait longer to see investment returns than occupiers.

When considering investment decisions, some developers consider what's in the housing pipeline within a 45-minute drive, whilst others will specifically consider where new affordable housing will be, as this can strengthen the labour force in the future.

In the report, the BPF Industrial Committee made recommendations to secure the strategic promotion of more logistics space. It says:

1. National planning policy should fully consider logistics requirements to support housing growth. It should set out robust mechanisms so policy makers can holistically plan for logistics needs.

This statement might sound obvious, but the newest iteration of the National Planning Policy Framework (NPPF) doesn't even mention the word "logistics," – and "warehouse" is only brought up in a retail context (warehouse-clubs).

2. The National Planning Practice Guidance (NPPG) on assessing Housing and Economic Need should specifically require Local Planning Authorities to consider the location, as well as the site needs of the different components of the sector.

At present, uses are generically described at national and local allocation levels, such as the very broad "employment need" or "employment zones." This generally covers all of the many different B use classes (as well as a collection of undefined sui generis uses).

Most manufacturing spaces will be some form of B1(c) or B2 (B3 – B7), and could benefit from this more structured approach. It would also highlight that once something is manufactured it needs to be transported to the end user. The need for both facilities to be properly planned in conjunction with each other is high.

3. A need for greater application of the Duty to Cooperate in Local Plan making between local authorities.

There's a call for a standardised approach, given that the research shows large regional areas to be meeting or failing their overall requirement. The NPPG acknowledges that functional economic market areas can overlap several administrative areas.

The government has recently launched standard method guidance for assessing local housing need – could the same be adopted in respect of employment and logistics floor space? Or does this all repeat an argument for reflecting back to regional plan making?

The construction of floor space is only half the equation: we need to look at what happens to the floor space it replaces and what is lost. For instance, permitted development rights to convert into housing mean that some logistics floor space has been lost to residential uses. When large suppliers consolidate their national distribution system, they'll usually do it by building enormous warehouses. This isn't necessarily new space or a net increase until the end use of the redundant warehouses (being consolidated) is considered.

4. Customer parcel collection points should be planned into urban areas and town centres, recognising the role logistics can play in supporting vibrant and viable high streets.

This isn't just about the proper planning of logistics but also about the revitalisation of our town centres. The research suggests that where click-and-collect functions are hosted in-store, the knock-on effect is more purchases. Is this a business diversification idea for those with trade-counters?

Overall, there's a clear need for those in logistics, as well as those who occupy land for employment uses, to be heard. We also need to plan holistically so we can ensure that we're servicing the needs of the communities we're creating when building new houses.

The Irwin Mitchell Planning team can advise on all aspects of the manufacturing pipeline, from creation of a product until its arrival with the end user. Get in touch to find out more.





Are you ready for the next

Industrial Revolution?

Technologies such as 3D printing, virtual reality and robotics are transforming UK businesses. Our exclusive report, with YouGov and the Centre for Economics and Business Research, offers some key points to consider for manufacturers looking to take advantage – download it now to find out more.

irwinmitchell.com/manufacturing

Look out for our next report, focussing on industrial data, later this year.

Run different cybersecurity scenarios and make sure you're protected. Don't assume that you aren't a target.

Assess whether you have a skills gap and take action to close it by identifying your needs now.

Run an Intellectual Property health check to ensure you're protected.

Speak to banks and other lenders about access to funding and look to see how you can take advantage of current interest rates.

Outlook for M&A activity

Our Corporate partner Adam Kaucher reflects on the current trends in manufacturing M&A, and looks ahead to future opportunities.



Adam Kaucher
Partner, Corporate



The manufacturing sector continues to paint a mixed picture in terms of its current performance and its expectations for the future.

The latest IHS Markit Manufacturing Purchasing Managers Index (PMI) hit 55.1 in March, which marked a 13-month high and a significant improvement on February's poor performance.

According to most analysts, this seemingly positive result should be attributed to a so-called 'Brexit buffer' – in other words, the effect of businesses increasing their inventories of purchases and finished goods in anticipation of the UK's departure from the EU.

The same survey also revealed that nearly half of businesses in the sector were more optimistic about the future. To continue the theme of uncertainty, though, the CBI has reported that business optimism in the first quarter of 2019 was at its lowest since mid-2016, with exporters being particularly downbeat.

Brexit caution

Concerns over a disorderly exit from the EU are weighing on managers of many businesses, particularly exporters and those with substantial international inputs.

We might expect, then, that the medium-term appetite for deals from UK trade buyers will be suppressed, with management likely to be focussed on operational matters.

However, the overall number of deals in the sector in the second half of 2018 was very slightly up on the same period in the previous year, with multiples also said to be edging higher.

The cheaper pound continues to generate interest from inbound acquirers. According to the latest data, there were 15 manufacturing deals in Q1 involving US buyers targeting UK businesses.

Sector opportunities

Although M&A activity on the whole is said to follow the business cycle, we might expect a level of defensive activity and distressed transactions in sectors which are suffering some of the worst headlines, such as automotive.

Even here, where the reductions in demand, the switch from diesel and the inherent supply chain worries are causing real concern, there'll likely be opportunity for developers of new technologies and local suppliers to improve their fortunes, with attendant interest from investors and acquirers.

Food and drink is another sector which has seen a level of recent activity which perhaps might surprise some. According to the latest Experian MarketIQ data, there were approximately 40 deals in this area in the first quarter of 2019 alone. Brewers feature markedly, from Lion's acquisition of Magic Rock Brewing to Asahi's takeover of Fuller's beer business.

Innovation and disruption

Across the manufacturing spectrum, the adoption and development of Industry 4.0 technologies can also be expected to lead to increased deal activity. Corporate buyers will be looking to enhance their technical capabilities, and private equity investors – who still have plenty of dry powder in reserve – will be looking to support innovators and disruptors.

We're certainly seeing an increase in enquiries in this area at the moment, and the team expects that this will continue.

Despite very real concerns from many areas of UK manufacturing about the obstacles the sector will need to overcome, and a prevailing caution, change often leads to opportunity. With continuing low interest rates and availability of both debt and equity funding, we think mid-market M&A activity is likely to remain steady for the remainder of the year.

Brexit,

extensions and exports

Unsurprisingly, the ongoing uncertainty is having an impact on the sector

If Brexit had gone according to Theresa May's plan, the UK would have exited from the EU and we would now have entered a transition period, with more negotiations over the specifics of the final agreement.

But three years since the referendum, the UK is still part of the EU. This will prolong the period of uncertainty until at least the end of October, and will have a negative impact on businesses across industries.

Our latest UK Powerhouse report highlights how some of the key sectors will be affected by Brexit.

New UK Powerhouse findings

The report finds that UK manufacturing production contracted on an annual basis for four consecutive months between October 2018 and January 2019. The industry has been suffering in the lead-up to Brexit, with uncertainty surrounding the future of trade agreements and regulation outside of the EU. While growth returned to positive territory in February, it's unlikely that we'll see a significant improvement in output with the period of Brexit uncertainty extended to October.

Automotive imports and exports

One manufacturing sub-sector set to be particularly affected by Brexit is automotive production.

According to the European Automobile Manufacturers' Association, 51% of all exported UK-built cars were bought by customers in the EU in 2018. Furthermore, 80% of UK-imported

automotive components came from the EU27 last year. This highlights the extent to which the UK is integrated in supply chains with the rest of the EU, which will be affected by changing trade policy post-Brexit.

The Centre for Economics & Business Research (Cebr) have analysed what's in store for rest of the year. They expect to see an annual contraction in manufacturing sector output over the course of 2019.

They say that because a significant proportion of manufacturing goods are exported, trade relationships are important to the industry. Whilst UK trade with other countries will be affected by Brexit, protectionism between the EU and US while we remain in the EU is possible after the US proposed targeting a list of \$11 billion (£8.3 billion) worth of EU products for tariffs. The products range from large aircraft to dairy products and wine.

The full version of our latest UK Powerhouse can be downloaded at irwinmitchell.com/ukpowerhouse



Disputes and internal communications

What happens in the boardroom stays in the boardroom. Or does it?

Litigation privilege

When any document or communication within or between a business, its lawyer and any third party is protected under law from being used in court if its sole purpose is to discuss the litigation.

It's always been assumed that internal communications within a corporate body would be covered by freestanding privilege. But that's no longer the case.

A decision by the Court of Appeal in **WH Holding Ltd and another company v E20 Stadium LLP** has significant implications for commercial claims, particularly ones where board minutes or other internal communications are key to the issues being disputed.

The case concerned West Ham FC and its landlord, E20, and the number of seats that the football club was entitled to use in its stadium, the London Olympic Stadium.

In January 2017, E20 announced that, despite the stadium having more capacity than expected and contrary to previous indications, West Ham wouldn't be allowed to use any more seats.

In the lead-up to their announcement, E20's board members held meetings, and exchanged emails, about the number of seats available, and discussed a commercial proposal for the settlement of the dispute with the football club. The emails and minutes from the meetings were either heavily edited or not disclosed to West Ham.

E20 claimed that these communications were protected by litigation privilege as they were connected to the conduct of the litigation. West Ham, on the other hand, applied to the High Court for their disclosure.

A privileged decision

The High Court agreed with E20 that the Court of Appeal in a previous case (**Director of the Serious Fraud Office v Eurasian Natural Resources Corporate Ltd (2018)**), had extended the scope of litigation privilege. It said that it should include communications about the conduct of litigation, and that this would include efforts to avoid or settle litigation.

In the case of E20 and West Ham, the Court of Appeal disagreed. It said that the documents didn't fall within the scope of litigation privilege:

"... [we] cannot see any justification for covering all internal corporate communications with a blanket of litigation privilege. Quite apart from anything else we do not see why corporations should have greater protection than, say, partners or bodies of trustees who in practice are equally likely to discuss matters among themselves..."

What does this mean for you?

The key is that litigation privilege only applies if the purpose of the communication is to obtain information or provide advice on the dispute.

It's not sufficient for a business to say that its communications were simply about the conduct of the litigation. This point had previously been unclear from the case law.

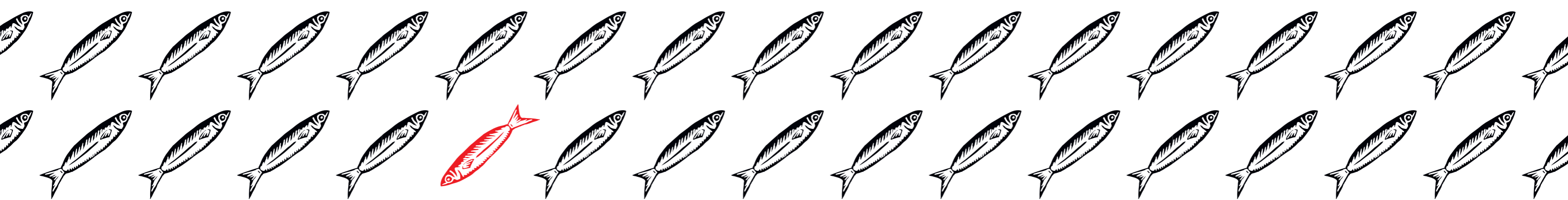
If the communications contain information or advice already obtained for the conduct of the litigation then the court said that they "cannot be disentangled" and will still be covered by litigation privilege. That said, this case could cause real practical difficulties with identifying the application of litigation privilege.

It serves as a reminder that businesses should think carefully before creating any documents which contain discussions about a claim or dispute. If in doubt, businesses should consult their lawyers about what will and won't be privileged before putting anything in writing.



Stephanie Reeves
Associate Solicitor, Litigation

If you'd like more information on the implications of this decision on your business, please contact our litigation team on **+44 (0)370 1500 100**.



Something fishy about your fish?

The fishing industry is suffering from fraud – and that’s a concern for consumers and manufacturers alike



John Davies
Solicitor, Regulatory & Criminal Investigations



Food mislabelling hit the headlines again towards the end of 2018, with food experts warning us about ‘fish fraud’ – rogue restaurants passing off different species as others.

According to a BBC report, 91 fish samples were submitted to the Food Standards Agency (FSA) in England, Wales and Northern Ireland in 2017. Approximately 7.7% of these, all from small independent businesses such as retailers and restaurants, were found to be cheaper substituted fish. This is a 1% increase on failed fish samples taken in 2016. An FSA report from 2016 suggested that ‘fish fraud’ is most prevalent in North East England, in particular around the major fishing ports in Humberside.

These concerns are nothing new. Back in July 2011, researchers from University College Dublin (UCD) found consumers in the UK and Ireland were being duped by mislabelled cod.

In the UCD study, on a base of 226 samples, it was found that 28% of cod products tested in Ireland and 7% in the UK were either cheaper species of whitefish (such as haddock, saithe or pollock), or were falsely presented as ‘sustainably-sourced’ seafood which turned out to be endangered Atlantic cod. In the latest figures from 2017, there are also examples of catfish, whiting and haddock being passed off as cod.

Fish is growing in its importance as a food source on a global scale, says a 2013 Lloyds Register review. The risk of suppliers looking to pass off easier-to-source catches as something they aren’t is therefore likely to increase.

The most recent BBC report appears to play down the effects of these untoward practices as consumers simply being misled or defrauded. The UCD report went further though, stating that there might be human health risks, economic losses, and environmental impacts ranging from over-consumption to species depletion.

There are some well-intentioned consumers who are conscious of the problems facing fish stocks and choose to eat sustainable fish. They may well find that this isn’t the case, so they’re being cheated in a different way.

A global scandal

Of course, food mislabelling hit the public domain in spectacular fashion in 2013, when horse DNA was found in processed beef products across Europe. This shows that these problems are not restricted to the UK and Ireland.

With regard to the fish industry specifically, one of the most well-known tests in recent years was carried out by Oceana, who conducted 280 DNA tests on fish at restaurants across Brussels. The results were staggering. One fish dish in every three was found to be mislabelled, and the problem went across a number of species.

Hake was found to be saithe, while swordfish was one of a number of substitutes for bluefin tuna, where only 5% of those dishes were found to be genuine.

Another Oceana study in the USA showed that 40% of salmon samples taken from retailers and restaurants had been mislabelled. Two thirds of the mislabelled fish were being sold as wild when they were actually farmed, proven by DNA results.

Health risks have also been identified in previous studies, where fish with high mercury levels are being passed off as low mercury-level fish. There have even been instances of the highly toxic pufferfish being used as a substitute for monkfish.

The horsemeat scandal led to the Elliott Review, which made recommendations including improved food testing and carrying out 'spot checks' in the food supply chain. The main suggestion, though, was the establishment of a 'Food Crime Unit' to crack down on criminal activity in the food industry.

Testing isn't a straightforward process. Once a fish is filleted, the only way to identify its species is to perform DNA tests on it.

Once tested, the results are forwarded by local authorities to the FSA, where findings are recorded in the UK Food Surveillance System. This is a centralised database used to collect food results, and identify trends within the food industry.

Of the samples tested by the UCD in 2011, the mislabelling found was most prevalent in fish that had been smoked, breaded or battered. Processing treatments can further conceal the appearance of fish flesh, and obfuscate the original species yet further.

Testing times

The Elliott Review sought more regular spot checks, but there are still too few random tests of seafood. Current testing strategies are believed to be intelligence led by following up reported suspicions.

There may also be greater focus on testing for harmful bacteria, rather than food authenticity and traceability. There are fears, then, that rogue restaurants are continuing to get away with the passing-off of less expensive species to customers. The problem could be

much wider than the testing results suggest.

There are fears that the regulators are over-stretched, and that the rogue traders are tarring the compliant operators with the same brush. The FSA has thrown down the gauntlet to local authorities, who are responsible for developing and implementing their own food sampling policies and procedures.

A new strategic surveillance approach is being planned at FSA level, which will provide the agency with more data and intelligence. It's intended that the FSA will provide greater support to local authorities with the planning, sampling and analysis of fish.

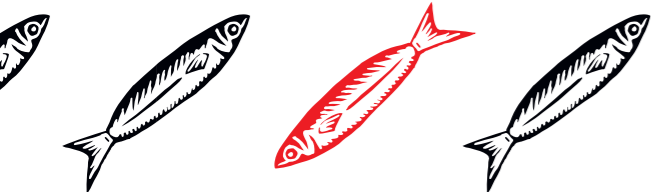
What manufacturers should consider

The threat from fraud represents a very real reputational risk to all those involved in the seafood industry. Regulators will be looking to tackle the issue – but it will take a concerted effort from companies and organisations working across the sector to mitigate the risks.

There are ways that businesses can help to protect their customers – and their reputation – from unnecessary harm:

- Buying certified fish can give strong assurances about a company's provenance and product quality. The Marine Stewardship Council (MSC) Sustainable Fish label is the most highly regarded seal of quality and sustainability, and has a transparent chain of custody which traces certified fish from sea to table.
- Keeping records of purchases made.
- Considering a third party specialist for a spot check inspection of stocks and also, via contractual arrangements, supplier's sites. These inspections can give an overview of the business further down the supply chain, whilst also providing an opportunity for identified issues to be addressed.

Our lawyers offer expert advice on best practice and the latest regulatory rulings – get in touch today to learn how they can help your business.



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