

# Business Law Newsletter



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Professional Contract Drafting for Business

**2021 OMNIBUS EDITION**

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# Coronavirus

## GOVERNMENT-BACKED INSURANCE SCHEME TO GIVE BOOST TO EVENTS INDUSTRY

Rishi Sunak, the Chancellor of the Exchequer, has unveiled a government backed insurance scheme for the live events industry in a government partnership with Lloyd's of London. The world-leading scheme, worth over £750m, will assist the live events sector in planning future events in light of the coronavirus (COVID-19) pandemic. The government will be the reinsurer of the scheme and offer a guarantee, so insurers can offer the products that events companies will need. The scheme will be up and running by September 2021 and last until September 2022.

[Read more about it on the government website here.](#)

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## £1 BILLION GRANT SUPPORT PACKAGE

On 21st December, Chancellor Rishi Sunak announced a new £1 billion grant support package for those businesses most impacted by the Omicron COVID-19 variant.

New grants will be available to businesses in the hospitality and leisure sectors in England, such as pubs and restaurants, as well as additional support for all smaller businesses whose employees are absent for COVID-related reasons.

- ❖ One-off payments of up to £6,000 per premises to be available from an overall pot of £683 million.
- ❖ £102 million in discretionary funding through the Additional Restrictions Grant fund to be made available to English local authorities.
- ❖ A further £30 million in funding through the Cultural Recovery Fund to support theatres, museums and orchestras until March 2022.
- ❖ With effect from 21 December 2021, a temporary reintroduction of the [Statutory Sick Pay Rebate Scheme \(SSPRS\)](#), which ended on 30 September 2021, for employers in any sector with less than 250 employees on 30 November 2021.
  - This will reimburse eligible employers for up to two weeks SSP per employee for a COVID-related absence.
  - Retrospective claims can be made from mid-January 2022.
  - Employers must be UK based and have had a payroll system in place as of 30 November 2021.
- ✓ Businesses with a rateable value of £0-15,000 will get a grant of £2,700.
- ✓ Businesses with a rateable value of £15,000-51,000 will get a grant of £4,000.
- ✓ Businesses whose rateable value is over £51,000 will get a grant of £6,000.

Around 200,000 businesses will be eligible for the one-off hospitality and leisure grants which will be made available by local authorities in the next few weeks.

[Read more about the grant support package here](#)

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# Consumer Protection

## RESELLING TICKETS- TOUGHER RULES

The Competition and Markets Authority (CMA) has proposed stricter rules for online platforms reselling tickets to events. Its [published report \(link here\)](#) recommends that sales of tickets to live events, like music festivals, on platforms like viagogo and StubHub should be subject to stricter rules. This tackles the current system which prevents swift action being taken against professional resellers who bulk buy tickets and sell them at inflated prices.

The CMA's proposals include:

- banning platforms from allowing resellers to sell more tickets for an event than they can legally buy from the primary market;
- ensuring platforms take responsibility for incorrect information about tickets that are listed for sale on their websites; and
- introducing a system of licensing for platforms that sell secondary tickets, enabling authorities to act quickly and issue sanctions where necessary.

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## GROUPON

The Competition and Markets Authority (CMA) is calling on Groupon to make swift changes to how it treats customers to ensure that it is complying with consumer protection law. The CMA has begun a consultation with Groupon entities after possible breaches of consumer protection law. Groupon will be able to respond to the CMA's consultation letter and avoid court action by signing further undertakings. There have been concerns that Groupon is:

- failing to provide some customers with cash refunds,
- failing to deliver all products within advertised timeframes,
- failing to provide goods that are as advertised and are of satisfactory quality; and
- failing to provide customer service that is satisfactory when customers contact them about problems.

[Learn more about it on the government's website here.](#)

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## ADVERTISING, MARKETING AND SPONSORSHIP

The Committee of Advertising Practice (CAP) and Advertising Standards Authority (ASA) announce their work on Advertising Codes that ensures UK advertising is respectful of people's mental and emotional health. The ASA, whose work involves regulating content and preventing detrimental effects from advertising, is releasing guidance to help advertisers recognise their obligations surrounding mental health. The article states that the ASA is investigating further and will be ensuring that mental health issues are taken into consideration in the planning stages of project-based work. The ASA has said that it will be reviewing its complaints handling procedures to include those referring to mental health issues.

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## BUY NOW PAY LATER

The UK consumer champion Which? has published the results of an investigation of over 100 major retailers, which reveal that online shoppers are being 'bombarded' with buy now pay later (BNPL) payment options at the checkout, often with little or no information about late fees, credit checks and the risk of falling into debt.

[Read the Which? Report here](#)

## Contracts

### CONTRACTS- LIQUIDATED DAMAGES ARE ENFORCEABLE AFTER CONTRACT TERMINATION

The Supreme Court has confirmed that liquidated damages typically apply up to the point of contract termination, as the contrary view is inconsistent with commercial reality and the function of liquidated damages. The case involved a software development contract which provided for liquidated damages per day of delay 'from the due date for delivery up to the date PTT accepts such work'

The latest decision will give contracting parties, including those in the building and infrastructure industry, more certainty over the ability to recover liquidated damages if the contracted work is not completed before the contract is terminated.

The implications of this important decision are therefore seen as:

- i. Greater certainty for both employers and contractors in terms of liquidated damages. The return to status quo will be welcomed particularly in the construction sector where liquidated damages are a popular contractual mechanism.
- ii. Parties can contract with confidence knowing their liquidated damages clause will kick in to both offer the employer a remedy and restrict a contractor's exposure in respect of delay to completion.
- iii. Limitation of liability clauses should be considered in detail prior to inclusion in contracts. In particular, any carve-outs – especially where this relates to negligence, which under English law covers both tort and contractual obligations.

[Read the full commentary here](#)

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### BATTLE OF THE FORMS- WHO WINS?

So, it's not all over bar the shouting after all.

In a recently decided Court of Appeal case , the party firing the 'last' shot, i.e. the last party to send its standard terms to its counterparty before performance—will not always win the battle to determine which party's standard terms govern.

Instead, by carefully drafting its standard terms to prevent any other terms from applying, and crucially, securing the agreement of its counterparty to those terms at the outset, the party firing the 'first' shot can prevail.

[Read a summary of the case here](#)

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## SMART LEGAL CONTRACTS

First: what are smart contracts? (a clue- they're not contract templates)

*"Smart contracts are simply programs stored on a blockchain that run when predetermined conditions are met. They typically are used to automate the execution of an agreement so that all participants can be immediately certain of the outcome, without any intermediary's involvement or time loss. They can also automate a workflow, triggering the next action when conditions are met.*

*Smart contracts work by following simple "if/when...then..." statements that are written into code on a blockchain. A network of computers executes the actions when predetermined conditions have been met and verified. These actions could include releasing funds to the appropriate parties, registering a vehicle, sending notifications, or issuing a ticket. The blockchain is then updated when the transaction is completed. That means the transaction cannot be changed, and only parties who have been granted permission can see the results."* <https://www.ibm.com/topics/smart-contracts>

The Law Commission has confirmed that the law of England & Wales can accommodate smart legal contracts (i.e. broadly contracts that are self-executing and legally binding in which some or all of the contractual obligations are recorded in or performed by a computer programme), without the need for statutory law reform. However, the Law Commission has identified that conflict of laws (the law that determines where disputes should be adjudicated and the law applicable to those disputes) is an area where further work is required, as smart contracts can be linked to several different jurisdictions.

[Read more about the Law Commissions decision](#)

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## MANAGING INFLATION IN THE SUPPLY CHAIN

With inflation affecting many aspects of business supply chains, it's important to have some strategies for managing its effect on your business. Here are some tips on what chess can teach buyers about managing inflation from Supply Management

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## Contract Formation

### HIDING AWAY OF ONEROUS TERMS

In a recent Commercial Court case, it was decided that despite a customer having looked at the terms and conditions of the supplier, it was not bound by some onerous terms that were tucked away amongst a mass of wording that it was not reasonable to expect the customer have been able to find. In other words, the offending clause was not reasonably brought to the customer's attention. *Blu-Sky Solutions Ltd v Be Caring Ltd*- [commentary by New Square Chambers](#)

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## Data Protection

### DETAILS OF UK PRIVACY REGIME OVERHAUL LAY OUT LIKELY GDPR FLASHPOINTS FOR EU

Changes to UK privacy protections for automated personal data processing are but one of a flurry of proposals to revamp the country's post-Brexit privacy regime that may well alarm EU officials

negotiating the future position of data flows. The proposals were detailed in a consultation document published on 10 September 2021.

Read about it on the government website and [download the full consultation document here](#).

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## GOOGLE DODGES A CLASS ACTION BULLET

The Supreme Court has unanimously rejected an attempt to bring a class action claim against Google LLC under section 13 of the Data Protection Act 1998 (DPA 1998) for damages allegedly suffered by Apple iPhone users by misuse of their personal data in breach of the requirements of DPA 1998.

The question raised by the appeal was whether the claimant, Mr. Richard Lloyd (backed by a commercial litigation funder), can bring a claim against Google in a representative capacity seeking compensation under DPA 1998, s 13 for damage allegedly suffered by a class of Apple iPhone users as a result of unlawful processing by Google of their personal data in breach of the requirements of the DPA 1998. The claim was based on the factual allegation that, for several months in late 2011 and early 2012, Google secretly tracked the internet activity of some four million Apple iPhone users in England and Wales, and used the data collected without the users' knowledge or consent for commercial purposes (by enabling advertisers to target advertisements at users based on their browsing history).

[Read a case commentary here](#)

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## Employment Agencies

### GUIDANCE ON USING NON-TAX COMPLIANT UMBRELLA COMPANIES

HMRC have issued Guidance targeted at helping employment agencies and those using temporary labour reduce the risk of using a non-tax compliant umbrella company.

Their Guidance highlights some of the features of schemes that could fall foul of the disguised remuneration provisions. Such schemes could include the following payments that are said to be untaxed:

- loans
- grants
- salary advances
- capital payments
- credit facilities
- annuities
- profit shares
- shares and bonuses
- amounts held in a fiduciary capacity

In all cases, these schemes involve untaxed payments being made to workers by a non-compliant umbrella company to increase their take-home pay.

[Read the Guidance in full here and the potential consequences for your business](#)

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# Employer Bulletin from HMRC

## DECEMBER EDITION

This is a must read for employers to bring them up to date with the latest Guidance from HMRC on the following topics: PAYE, UK Transition, Covid-19, Tax updates and changes to guidance, general information and customer support:

[Read the Guidance here](#)

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## Environment

### THE ENVIRONMENT ACT

The Environment Bill received its Royal Assent on 9<sup>th</sup> November 2021, coming into law as the Environment Act 2021. It enshrines into law targets on nature, waste and recycling, water, and clean air, delivering, what the Secretary of State for Environment, Food and Rural Affairs, George Eustice, termed ‘the most ambitious environmental programme of any country on earth’. The Act, which includes provisions on waste & recycling, clean air, nature and water will, according to the Government’s press release, deliver:

- *Long-term targets to improve air quality, biodiversity, water, and waste reduction and resource efficiency*
- *A target on ambient PM2.5 concentrations, the most harmful pollutant to human health*
- *A target to halt the decline of nature by 2030*
- *Environmental Improvement Plans, including interim targets*
- *A cycle of environmental monitoring and reporting*
- *Environmental Principles embedded in domestic policy making*
- *Office for Environmental Protection to uphold environmental law”.*

[Read more about the Environment Act here](#)

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## HMRC

### INCREASE OF LATE PAYMENT INTEREST RATE

Following the Bank of England’s decision to increase the base rate, HMRC have announced that their late payment interest rate will increase by 0.25% to 2.85% from 4th January 2022. For companies in the Corporation Tax quarterly instalment payment regime, the change takes effect from 27th December 2022.

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## Hybrid Working

### CONSULTING AND PREPARING TO INTRODUCE HYBRID WORKING

ACAS has published [guidance on hybrid working](#). It recommends that employers should:

1. Explain what they are considering changing and why;
2. Invite their employees to suggest ideas and talk about their concerns;



3. Listen to their employees' concerns and consider their ideas; and
4. Do everything they can to resolve any concerns

The Guidance also includes sections on:

- [Considering hybrid working for your organisation](#)
- [Consulting and preparing to introduce hybrid working](#)
- [Creating a hybrid working policy](#)
- [Treating staff fairly in hybrid working](#)
- [Supporting and managing staff in hybrid working](#)

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## Inflation Looming- Future Proofing Contracts

### PRICE VARIATION IN COMMERCIAL CONTRACTS

With the spectre of rising costs in supply chains, there's a risk that businesses will face having to increase their prices for products and services. But how can businesses mitigate inflationary trends that threaten their bottom line.

A price variation clause can be included in commercial contracts to help guard against cost increases. A contractual price variation consists of agreeing a base price for the relevant goods or services under the contract, a published index to which a future price variation is to be linked, and a date or period against which the nominated index is applied to the base price.

It is usually much more difficult to argue for and obtain a price increase when there is no price adjustment provision built into a contract. So, if inflation is a concern, it's best to introduce a price increase clause into a commercial when it is signed.

There are a [range of indexes published by the Office of National Statistics](#) that can be used for pricing adjustment, including: the retail prices index (RPI), the consumer price index (CPI) and the consumer prices index including owner-occupier's housing costs (CPIH). Each index is compiled in a different way and will produce a different price adjustment outcome, so selecting one that is appropriate is important. There are also indexes that are sector specific, such as the [Services Producer Price Index](#) (SPPI) and [the Producer Price Indices](#) (PPI).

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## Innovation

### CBI LAUNCHES BIG FISH, LITTLE FISH

For many large companies, partnerships with start-ups and scale-ups are an increasingly important part of their innovation strategies. And for start-ups and scale-ups, innovation partnerships and contracts with large companies can be a vital stage in their development.

The Big Fish, Little Fish campaign addresses two questions, identified by CBI members, on innovation collaboration between large and small firms:

1. What is best practice for managing successful relationships?
2. How can firms be assisted in creating new commercial partnerships?

[Read more about the Big Fish, Little Fish initiative](#)

## Internet

### GOOGLE GUIDANCE ON REMOVING IMAGES OF CHILDREN ON IMAGE SEARCHES

Google has published guidance on the how under 18s can use a new tool which allows for the removal of images from its search results. With the newly implemented policy, anyone under the age of 18, or their parent or guardian, can now request the removal of their images from search results, following a few simple steps. This means these images won't appear in the Images tab or as thumbnails in any feature in Google Search. Google states it believes this change will support young people with 'more control over their digital footprint'.

[Read the guidance here](#)

## Phone Paid Services

### WHO KNEW THERE'S A PHONE-PAID SERVICES AUTHORITY?

There is one and this is what it does:

**[For Business](#)**- the PSA sets and maintains the regulatory framework for the phone-paid services market through our Code of Practice. Our strategic purpose is to build consumer trust in phone-paid services and ensure consumers are well-served through supporting a healthy market that is innovative and competitive.

**[For Consumers](#)**- the PSA helps to look after consumers' interests by setting and enforcing rules for providers of phone-paid services. It checks every issue that consumers report to it and takes action when it needs to. The information given to it helps the PSA to identify problems in the phone-paid services market.

The PSA has published a new Code of Practice (Code 15) and an accompanying statement. Code 15 will come into force on 5 April 2022 and establishes the standards and requirements that providers of phone-paid services must abide by. It will also enable a new approach to regulation that will raise regulatory standards, focus on preventing harm, be simpler to implement and comply with and be 'underpinned by smarter enforcement'.

Read the new [PSA Code here](#)

## Public Procurement for SMEs

### GOVERNMENT PUBLIC PROCUREMENT GUIDE FOR SMES PUBLISHED

The government has published a public procurement guide for SME to sell their goods and services more effectively to government. The guide highlights how to find contracts, join the supply chain and frameworks that allow access to differently sized contracts offered by government. The guide also covers requirements such as prompt payments, the public procurement review service, and the small business commission, whose role is to support SMEs in their payment disputes with larger businesses.

*"Contracts Finder is the government's single online portal on which contracts valued above £10,000 in central government and above £25,000 in the rest of the non-devolved public sector are listed. It's free*

to use to find opportunities: [www.gov.uk/contracts-finder](http://www.gov.uk/contracts-finder). You don't have to register, but if you do, you can set up an account to have new opportunities that suit your business emailed to you on a regular basis."

[Read the new Selling to Government Guide here](#)

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## Sale of Goods

A claim arose from the supply of 10,000 tonnes of aggregate. The High Court has held that a seller of goods with the benefit of a payment-in-full clause can obtain summary judgment for the price even where there is a dispute over whether the delivered goods meet the contractual specification. The court has further held that such a claim for the price is available even where title [ownership] never passes due to a retention of title clause and where payment was to follow delivery. The court's decision will be a welcome relief to sellers of goods with retention of title claims.

[Read more about the case here](#)

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## SCAM alert

### PREPOSTEROUS SCAMS

Which? reports on some of the more risible scams that have been doing the rounds this year: read about the *Iraqi Cave of Gold*, the *007 Impostor* and others [here](#).

## Social Media

### A NEW CODE OF CONDUCT FOR INFLUENCERS

The Incorporated Society of British Advertisers (ISBA) has introduced a Code of Conduct related to influencer marketing that aims to raise standards, smooth relationships between those in the industry, and provide transparency for consumers.

The Code has been created in an effort to recognise the negative issues related to influencer marketing and aims to become the industry standard that could be included in legal contracts. The Code also sits alongside the template contracts ISBA published in 2018, which have been updated in line with the Code of Conduct.

ISBA said the code would aim to:

- Deliver the transparency consumers expect and deserve – by being clear on the need to disclose when an ad is an ad (and how); by committing not to use photo filters and misleading editing techniques; and by meeting obligations to protect children and vulnerable groups
- Enable authentic and effective influencer marketing – by backing influencers to deliver their honest opinion on products; supporting their wellbeing, from mental to financial health; and always promoting diversity and inclusion, with zero tolerance for hateful content
- Improve brand/agency/talent relationships – by setting out how all participants will work collaboratively on campaigns; agencies committing to play a key role in aligning brands and talent; and with clarity from brands on KPIs and from influencers on helping to demonstrate ROI.

[Download the Influencer Marketing Code of Conduct here](#)

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## Telecommunications

### LATEST ON BROADBAND AND MOBILE NETWORK AVAILABILITY

Ofcom has released the latest figures for internet coverage in its connected nations update for summer 2021, saying that:

- Around a quarter of homes can now get full-fibre internet
- Millions upgrade to faster packages to support home working
- UK's average broadband speed up 20% since the coronavirus pandemic began

The Ofcom report asserts that nearly 12 million (40%) of UK homes can now get gigabit-capable broadband (able to deliver download speeds of up to 1 Gbit/s), which has increased from 37% in January. This includes full fibre and the fastest cable internet packages.

UK homes (96%) can get superfast broadband (download speeds of at least 30 Mbit/s), while almost all UK homes have access to a 'decent' connection (10 Mbit/s download and 1 Mbit/s upload) – enough to browse the internet, stream TV shows or make video calls, according to Ofcom

However, around 134,000 UK properties are still unable to get a decent connection. These properties could be eligible for an upgrade under the [broadband universal service](#).

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### RED PHONE BOXES FOR THE AXE?

[Ofcom](#) has launched a consultation on its plans to protect thousands of vital phone boxes around the UK from closure, in particular in areas with poor mobile signal or high accident rates. Due to the migration of the UK's telephone network to Internet Protocol and the old telephone network being switched off from December 2025, Ofcom is proposing to allow BT and KCOM to remove public call boxes that are no longer needed, but under stronger and clearer rules to safeguard phone boxes from removal. Four criteria are proposed by Ofcom, which, if they apply, will mean those phone boxes will not be removed, but instead will be upgraded to ensure they remain operational after the migration.

[Ofcom](#) proposes clearer, stronger rules to safeguard a phone box against removal, if any of four criteria applies:

- its location is not already covered by all four mobile networks; or
- it is located at an accident or suicide hotspot; or
- more than 52 calls have been made from it over the past 12 months; or
- exceptional circumstances mean there is a need for a public call box.

[Read about our red phone boxes](#)

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# Video Sharing Platforms

## GUIDANCE ON MEASURES TO PROTECT USERS FROM HARMFUL MATERIAL

Ofcom has published its final guidance for video-sharing platform providers on measures to protect users from harmful material. Ofcom provides an explanation of what content constitutes harmful material, the measures platforms can take to protect users, how these measures can be implemented effectively, the criteria that platforms should adopt when choosing measures, guidance on risk management processes and Ofcom's approach to monitoring and enforcement.

"The VSP Framework requires providers to take appropriate measures to protect:

a) the general public from "**relevant harmful material**". This includes:

- i) incitement to violence or hatred against particular groups
- ii) content which would be considered a criminal offence under laws relating to terrorism; child sexual abuse material; and racism and xenophobia

b) under-18s from "**restricted material**". This includes:

- i) material which has, or would likely be given, an R18 certificate
- ii) material which has been deemed, or would likely be deemed, unsuitable for classification (such as sadistic violence or torture)
- iii) other material which might impair the physical, mental or moral development of under-18s"

[Link to OFCOM'S Guidance](#)

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## Publisher's Notice:

*Publisher: Atkins-Shield Ltd: Company No. 11638521*

*Registered Office: 71-75, Shelton Street, Covent Garden, London, WC2H 9JQ*

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