

Business Law Newsletter



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Professional Contract Drafting for Business

Autumn '22 Edition

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Editorial

This Newsletter is being finalised on the day that a new Prime Minister is appointed. The third PM we have had in as many months, which seems a bizarre thing to be writing, almost other worldly.

The reality is that the country is facing a severe economic shock. This means SMEs are going to have to look sharp and be alive to doing things that they may not have thought necessary in better times.

Whether you are in the services or product sector, there are things that you can do to help ride out the storm. We have therefore offered some [Autumnal Contract Tips](#) that we hope will help spur you into some reflective and productive action.

At contracts-direct.com, we are trimming our own sails in recognition of the new paradigm.

From November, we are making available an enhanced [EasyPay](#) service for both new and existing customers to help them pay their bills.

We really hope this will benefit those who use our services for their contracts.

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Companies House

REGISTER OF OVERSEAS ENTITIES

Companies House has [published a blog 'Explaining the secondary legislation for the Register of Overseas Entities- part 1'](#), which follows its joint blog post with the UK land registries (published in April 2022) which gave an update on the progress of the Register of Overseas Entities. The blog piece discusses the newly introduced statutory instrument which focuses on electronic delivery of documents, protection of information and registrable beneficial owners in advance of the register going live this summer.

Under the new Economic Crime (Transparency and Enforcement) Act, a new [Register of Overseas Entities](#) is being created and will be held by Companies House. This new register forms part of the government's strategy to combat economic crime, while making sure that legitimate businesses continue to see the UK as a great place to invest.

Companies House has also published guidance on how to add an overseas entity and its registrable beneficial owners and managing officers to the register of overseas entities. The guidance includes an overview of what the register is, what information needs to be submitted, what verification checks are required and what information is made public. Companies House launched the register on 1 August 2022.

[Read about the registration process here](#)

The Department for Business, Energy & Industrial Strategy (BEIS) has published technical, non-statutory guidance (Guidance) to assist understanding of the register of overseas entities and the requirements that the Economic Crime (Transparency and Enforcement)

Act 2022 places on those overseas entities that own, or seek to own, land in the UK. In particular, BEIS describes the process by which these requirements can be satisfied, including guidance on the verification mechanism.

[Read the guidance here](#)

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Confidential Information

OVERHEARING PRIVATE BUSINESS CONVERSATIONS

In a recent case, the High Court decided that an interim injunction (a non-disclosure order) should be made to restrain a defendant from disclosure of information he had heard through an office wall of a private conversation held during business negotiations.

In order to succeed with a claim for breach of confidence, a claimant has to establish that the content of the discussions (i) has the necessary quality of confidence, (ii) that the defendant came to know of what was being said in circumstances importing an obligation of confidence and (iii) that there had been unauthorised use or a threat to use that information to the detriment of the owner of the information.

[Read about the case here](#)

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Contracts

HEADS OF TERMS

In a £56.4m breach of contract claim the court agreed with the Defendant that a document entitled '*Heads of Terms of Proposed Agreement*' was not a binding and enforceable contract, other than in respect of a time-limited lockout provision which prevented either party from negotiating with anyone else. Documents labelled '*Heads of Terms*' or various other names such as '*letters of intent*', '*heads of agreement*' or documents headed '*intention to proceed*' are commonly entered into during negotiations and disputes frequently arise over the whether such documents are legally binding. The case considered the legal principles relevant to determining whether such a document is legally binding.

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CANCELLING YOUR FERARI SALE- OR NOT?

In a case that involved the sale of a Ferrari race car, the seller who tried to withdraw from the sale after the buyer had paid a Euro 50,000 deposit, was held not to have done so because he continued to correspond with the buyer trying to encourage performance of the purchaser.

The Court held that if a default by one party to a contract triggers a right of withdrawal or termination by the other party, and the other party, without making an express election, acts in a manner which is consistent with affirming the contract, then the other party will be held to have waived its right to withdraw. The judge found that the seller had lost the

right to withdraw from the contract as he had not exercised the right in a reasonable period of time.

[Read more about the case here.](#)

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Contract Tips for Autumn

Tip#1 Changing your pricing

In these time financially stressed times, it's not a surprise that many businesses are looking to change their pricing policy.

Where there's a contract in place with a fixed price for a service or product, it's usually necessary to agree a price change with the customer. If you're the supplier, that is usually going to be a price increase or an improvement in payment terms, such as shortening a credit period.

An existing contract may be varied in writing, provided that the variation satisfies the usual requirements for the creation of a binding agreement—i.e. offer, acceptance, consideration and contractual intention of the parties.

Consideration can take a number of forms, such as payment of a nominal sum to the customer. But that is not always possible or appropriate. So, other valuable consideration has to be given, such as the abandonment of a legal right, like not pursuing a debt. Where there is no obvious benefit to be given, the contract may need to be varied under a deed.

[Read more about contract variations here.](#)

Tip#2 Sort out your terms of business

Now is the time to batten down the hatches and get ready for the long haul through the winter.

This means taking some time to check that the right sort of agreements are in place to support your business and give it the best chance of surviving and thriving.

Some examples of what to look out for:

1. Are your written contracts up to date with the commercial terms you are trying to agree with your customers?
2. Check if contracts are coming to an end and if they are renewable or lapse?
3. If renewable, can their terms be improved?
4. Can better terms be obtained by engaging with others?
5. Are your payment terms as tight as the need to be?
6. Have you made sure that you have protected your intellectual property rights?
7. Do you need shorter or longer term agreements?
8. Can you place more responsibility and risk on to your customers?
9. Can you improve your pricing by increasing some of the risk you take?

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Tip#3 Communicate

This is less contractual and more business sense. But at times of stress and uncertainty, it's best to stay in touch with customers and prospects.

They need to know you are there for them and aware they could be struggling with some very real problems.

Communications are outgoing (yours) and incoming (theirs) and listening ought to take up no less than 50% of your communication time.

Your outgoing messages will help reassure that you are open and ready to adapt if the need arises and they will mean there are no unwelcome surprises for your customers.

Tip#4 Collaborate

We have said this before and we're saying it again.

Find kindred or complementary businesses and people that will help sustain you and your business and reinforce and improve your offering.

It is not an admission of weakness and need not lead to a loss of control if you look to collaborate with others.

There are plenty of ways to have a successful teaming-up, and a first step is to actually consider reaching-out to others to discuss the possibility and explore what might be gained.

One of the main benefits of a JV is to add much needed resources or capacity to your business at much reduced and affordable cost and to spread risk.

There is always some give and take in a successful JV, but the right combinations should be an overall plus to both sides.

[Read more about business collaborations \(joint ventures\) here.](#)

Tip#5 Don't procrastinate

For this Autumnal tip, we look to business mentor and author, [Tara Jackson](#), who offers these helpful prompts to counter the old mantra "*he or she who hesitates is lost!*" in her excellent book "Embodied Business" (available through Amazon UK):

- ✓ *"What are you putting off doing?"*
- ✓ *"What are you afraid of happening if you do take action?"*
- ✓ *"What are you afraid of happening if you don't?"*
- ✓ *"Is it something you really want to do? Why?"*
- ✓ *"What do you need to support you and how can you give it to yourself?"*
- ✓ *"Do you still want to take the action now?"*

The long and short of these prompts is not to permit the mantra "*time waits for no man or woman*" overtake you making and taking key decisions and actions.

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Tip#6 Cash flow management (Don't panic. Plan it.)

Most, but not all business owners, know that cash and cash flow is a key component to survival and success.

[Steve Jebson of Business Doctors](#), discusses the steps to be taken in managing cash at times of stress.

We first published this article in April 2020 in response to the COVID pandemic and it is no less relevant today.

Here is just one screen grab from the article [Managing Cashflow](#);

Survival		Control the controllables
Focus	Strategy	Action / Tip
Cash Flow Forecasting	Actively manage your cash balance: <ul style="list-style-type: none">Finalise a 12 week rolling cash flow forecastInclude all budget holdersReview all revenue, by customer. What is the confidence level against each customers numbers?Instigate a daily cash meeting, hold people to accountShare this with your accountant, banks and other key stakeholders – this demonstrates your level of business controlBe proactive when asking for payments	For business with stock <ul style="list-style-type: none">Lower stock levels (don't automatically replace what you sell)Reduce to clear old stock (and don't replace)Can you buy from a supplier with longer payment terms (this could be at a higher price?)Can you buy from a supplier with lower minimum order quantity or ask your current supplier to reduce MOQ's to reduce outgoings (this could be at a higher price?) Maximising the cash in the business <ul style="list-style-type: none">Review all customers orders, positions and likely future ordersChase all outstanding cash balances – talk to your customers, check they are going to pay, what is your confidence judgement?Shorten payment days for customers – think about potential early payment discounts?Consider other forms of financing – such as invoice discounting etcSpeak to creditors about payment holidays or deferment (HMRC, banks, landlords, suppliers, etc)Limit or freeze all business expenses – develop a simple approval system and limitsAre there any assets which you can sell or lease?What government relief / grants can you apply for? ASK ALL STAKEHOLDERS TO HELP – THEY TOO WILL HAVE ISSUES AND HELPING OTHERS CREATES GREAT FUTURE RELATIONSHIPS

Don't panic. Plan it.



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E-commerce

DIGITAL MARKETS

The government is proposing to legislate on a range of things affecting digital markets, with a view to establishing a new pro-competition regime.

The proposed measures to be introduced include:

- the ability for the newly established Digital Markets Unit (DMU) to specify specific conduct requirements for firms with SMS depending on their specific situation;
- a broad discretion to be given to the DMU to design and implement remedies for those who have suffered competitive harm;
- the power for the DMU to impose financial penalties of up to 10% of a firm's global turnover for regulatory breaches;
- the power for the DMU to apply to the court for directors of businesses in breach of regulations to be disqualified;

- a requirement for SMS forms to report merger transactions to the Competition and Markets Authority prior to completion; and
- the introduction of a minimum revenue threshold for to help determine firms with Strategic Market Status ('SMS')

[Read about the new regime for digital markets here](#)

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Economic Crimes

The much-anticipated economic crime bill has now become law. Its full title is the Economic Crime (Transparency and Enforcement) Act 2022 (EC(TE)A 2022), or Economic Crime Act. Some of the key features of the new law include:

- **A new Register of Overseas Entities**, requiring those behind foreign companies which own UK property to reveal their identities, will also be created under the act. Entities who refuse to reveal their 'beneficial owner' will face tough restrictions on selling the property and those who break the rules could face a fine of up to £2,500 per day or up to 5 years in prison; and
- **Reforms to Unexplained Wealth Orders (UWOs)** to remove key barriers to their use increasing time available to law enforcement to review material provided in response to a UWO and protecting them from incurring substantial legal costs if they act reasonably in a case that is ultimately unsuccessful. UWOs will be more effective against those who hold property in the UK via trusts and other complex ownership structures.

[Read more about the Economic Crime Act here](#)

See also [Companies House](#) above

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Information Technology

DDAT PLAYBOOK

The government has released its Digital, Data and Technology (DDaT) Playbook, setting out its guidance on getting DDaT projects and programmes right. The government's Playbook says:

"The UK tech sector is world leading and growing at 2.5 times the rate of the rest of the economy. It contributes £149 billion to the UK and supports almost three million jobs, making the sector a pivotal part of our future growth. Our relationship with industry is a key part of how the digital transformation of our public services will contribute to delivering skilled jobs across the country to level-up the economy and achieve our 2050 net zero emissions goal."

Key policies covered by the Playbook include for:

- Commercial pipelines
- Market health and capability assessments

- Delivery model assessments
- Cyber security
- Effective contracting
- Assessing the economic and financial standing of suppliers

[Read about the Playbook here](#)

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The Internet

DECLARATION FOR THE FUTURE OF THE INTERNET

The UK, European Union, the United States, amongst other countries have proposed a Declaration for the Future of the Internet, setting out the vision and principles of a trusted Internet.

*“The partners in the Declaration affirm that the Internet must reinforce **core democratic principles, fundamental freedoms and human rights** as reflected in the Universal Declaration of Human Rights. They share the belief that the Internet should operate as a single, decentralised network of networks, where digital technologies are used in a **trustworthy way**, avoiding unfair discrimination between individuals and allowing for **contestability of online platforms**, and for **fair competition among businesses**.”* From [EU announcement 28th April 2022](#)

[The Declaration’s 60+ signatories can be found here](#)

[A Factsheet on the Declaration can be downloaded here](#)

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Media

ONLINE SAFETY- OFFENCES FACTSHEET

The Department for Digital, Culture, Media & Sport (DCMS) has recently published a new communications offences factsheet which provides a series of case studies regarding harmful communications, false communications and threatening communications proposed by the Law Commission and included within the Online Safety Bill. The factsheet sets out example communications and assesses whether they meet the criminal threshold under the proposed revised offences. These new offences aim to ensure that criminal law is focused on the most harmful behaviour online, while protecting free expression.

[Access the Factsheet here](#)

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BROADCASTING REFORMS

The Department for Digital, Culture, Media & Sport (DCMS) has published a white paper setting out the government’s vision for the future of the broadcasting sector. The government plans to overhaul and simplify old broadcasting laws, more notably by

affording public service broadcasters greater freedom to fulfil their public service obligations by showing content via online platforms and not solely on their main channels. The government confirms it is proceeding with plans to move Channel 4 out of public ownership in an effort to diversify its revenue streams by producing and selling its own content. The white paper confirms the TV licence fee will be frozen at £159 for two years and other proposals include plans to better protect viewers of video-on-demand services from harmful content with Ofcom to be given new regulatory enforcement powers to this effect, as well as reforms to the listed events regime which would allow the public to view sporting events of national significance free on digital platforms.

Some of the other key proposals in the white paper are:

- Increase the BBC's commercial borrowing limit from £350 million to £750 million;
- Bring larger TV-like video-on-demand providers that are not currently regulated in the UK but who target and profit from UK audiences under Ofcom jurisdiction;
- Make the importance of programmes broadcast in the UK's indigenous regional and minority languages clear in legislation;
- Give public service broadcasters greater flexibility in how they deliver their remits.

[Read more about the proposed reforms here](#)

[The White Paper in full can be found here](#)

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Public Procurement

The Cabinet Office released the government's response to its consultation with stakeholders on its Green Paper- Transforming Public Procurement issued in December 2020. The government response outlines various amendments to the initial proposals for new legislation as well as further detail on what can be expected to be included within the new regime.

The Cabinet Office intends to give six months' notice before any new procurement regime goes 'live' and that the new regime is unlikely to come into force until 2023, at the earliest.

[Read the government's response to its public procurement consultation here](#)

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Note: This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. The information contained in this document is intended to be for informational purposes and general interest only.

E&OE

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