

Business Law Newsletter

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Professional Contract Drafting for Business



Summer '23 Edition



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Editorial

This Newsletter is packed with great information and useful contract tips for SME owners directors and managers.

AI is already playing an important role in business, so we have included more information in AI Corner, which we featured in the Spring.

We have two guest contributors for the first time from [Nick White](#), who has provided an excellent piece on copyright issues affecting AI and [Mary Bagnall](#), who writes about legal protection for computer programs .

We generated this bucolic alternative image of summer using the AI platform Stability.ai and happily publish it in the safe knowledge that we own the copyright because the app's terms and conditions say so!



Our AI prompt for the above image: *“A celebration of an English summer at the seaside”*

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AI Corner

CHAT ABOUT CHATGPT

OpenAI has launched the most recent version of ChatGPT, ChatGPT-4. Unlike ChatGPT-3.5 which is free, ChatGPT-4 is a subscription based model and aims to be more creative and collaborative, as well as have greater general knowledge and problem solving abilities.

It is also capable of handling over 25,000 words of text. However, the same flaws in terms of social bias and hallucination remain.

[Read about it here](#)

USER BEWARE

There are no contracts or indemnities associated with the free use of ChatGPT and, as such, users rely on and use the output at their own risk. For example, it is unlikely that the terms of use for such large language models will include reassurances about the training data, in particular that appropriate permissions have been obtained from rightsholders. The user makes use of the output at its own risk and must make their own judgment as to its perceived value and legitimacy.

IN WORK USAGE OF AI

AI is being used in the workplace and by all sorts of workers with a variety of roles and specialisms for a smorgasbord of reasons. Some may use it more covertly than others.

AI looks like it's here to stay and, increasingly, as its applications expand, businesses must be aware of how it and its outputs are used.

AI is not itself regulated- laws seldom keep pace with technology development- and therefore it's going to be down to businesses to determine their own ground rules for its use.

Because generative AI that is trained on pre-existing training data its outputs will be based on that data. It is known that biases in the training data can be represented in AI outputs, which poses unquantified risks to businesses who use AI.

Given AI's novelty, what might an AI employment policy include?

Here are some suggestions:

- AI tools approved for use in the workplace
- Employees who are approved to use AI tools at work
- Approved use of AI tools
- Fact checking and output content controls
- AI transparency declarations for outputs (internal and external)
- Compliance with confidentiality requirements and intellectual property rights
- Compliance with laws and regulations i.e. data protection
- Misuse sanctions

COPYRIGHT AND AI

Concerns are being raised in a number of quarters, including the UK, over the implications for copyright by training ChatGPT and other generative AI tools on data scraped from the internet.

Is copyright being infringed by the AI developers and who owns the copyright in the output of AI platforms?

Amid the theorising that's going on, we do need some court cases to be tried to see where the judicial gavel lands.

Specialist IP lawyers are now focussing their eagle eyes on this emerging technology and trying to get to grips with its implications.

Nick White, partner in Charles Russell Speechlys, has recently published a thought provoking article pointing out that AI could result in 'input' copyright infringement resulting from training AI systems. He points out that:

"A possible copyright infringement may occur where copyright protected material is used to train an AI and, crucially, use of that material is without permission of the copyright owner. If permission not been sought from the copyright owner in respect of a work and licences or terms and conditions do not provide permission, it is quite possible to see, absent a defence or exception, how copyright could be infringed by an exercise where large datasets are compiled by scraping websites or otherwise, analysed or "mined" and then processed by an AI." [Copyright and AI: Part 1 – Teaching the machine](#)

Companies

TRADING NAMES

How often does an idea for a new business crop up when you're already running one?

Using trade names is a useful way to run more than one business under single corporate roof.

Trade names are just that- a name that is associated with a trade or business. They are different from a company name, which identifies a specific legal entity and is registered at Companies House in a public register.

For example, [contracts-direct.com](#) is the trade name for a business owned and run by a company called Atkins-Shield Ltd, the publisher of this Newsletter.

Trade names can be identified by a trade mark or logo, which are owned by the company running the business.

These may be protected against being copied by others by [registration as trade-marks](#), as long as they qualify for registration.

One big advantage of a company running more than one business is that it offers flexibility and diversity and means that separate companies don't have to be set up and administered, with all the administrative requirements that involves.

One disadvantage is that multiple businesses under one roof can lead to a dilution of effort and a cross-subsidy of one business by another, leading to lack of financial clarity.

Computer Programs

CAN THEY BE PATENTED?

Mary Bagnall, [Head of Intellectual Property](#) at CharlesRussell Speechlys, explains how in this extract from her article “*Protecting Software and Apps- the Legal Do’s and Don’t’s*”:

In exchange for making the invention available in a patent, the owner is granted a monopoly right over that invention for a period of 20 years. This means that the owner can prevent all others from making, using or selling that invention without their permission, including where they may have independently created the same technology or advancement.

In the UK, you can protect an invention as a patent where it is new, involves an inventive step, is capable of industrial or technical application and does not fall within any of the exclusions provided for by the relevant legislation.

The challenge for computer program and app inventors is that the legislation states that a computer program is excluded from patent protection to the extent that it relates to the program “as such”.

In recent years, the UK Intellectual Property Office (UKIPO) and European Patent Office (EPO) have taken the “as such” principle to mean that software is only patentable if it produces a technical effect or contribution. In other words, software must have a technical purpose to be patentable.

Take Apple’s iPhone. Apple had to develop a solution which allowed the iPhone’s touch-sensitive screen to respond to simultaneous touches. The UK courts recognised that the software designed provided a technical solution to a technical problem and caused the iPhone to operate in a new and improved way. Apple’s method of improvement was therefore granted patent protection.

On a practical note, it is important to bear in mind that obtaining patent protection can be an expensive and lengthy process, both of which may make it an uncommercial option. If you do want to obtain patent protection, then it is vital that you do not disclose the invention and that it is kept confidential until an application is filed.

Read Mary Bagnall’s full article [here](#).

Contracts

HEADS OF TERMS

At Contracts-Direct, we are often faced with a business either receiving or wanting to send a document that outlines the basis of a deal. Questions arise straight away as to whether this is going to be a document that's contractually binding on the parties, or not.

Heads of Terms (sometimes called a MoU- memorandum of understanding-), are a useful way to set out the broad outlines of a proposed commercial transaction in order to make sure the parties are '*on the same page*' and can move forwards with negotiating the details.

For example, the Heads of Terms might typically identify the parties, the key components of the proposed transaction, such as what is to be bought and sold, where and when the sale is to take place, the basis for reaching an agreed price and when payment is to be made.

Whether Heads of Terms are legally binding is a matter of construction and will depend on the intention of the parties. They are therefore commonly stated to be non-binding and "*subject to contract*", save perhaps for certain provisions that are expressed to have legal effect (e.g. provisions in respect of exclusivity, confidentiality, non-solicitation, termination, announcements and the usual boilerplate, including costs, jurisdiction and governing law). This is to ensure that neither party is bound by the key commercial terms until a formal contract is signed.

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Contract Tips for Summer

Tip#1 Prepare and Research:

Before entering into any negotiation, thorough preparation and research are essential. Familiarise yourself with the relevant laws, regulations, and industry practices that may impact the contract. Understand your own objectives, priorities, and limits, as well as those of the other party. Gathering information about the market conditions, the other party's reputation, and their past contracts can give you a competitive edge during negotiations.

Tip#2 Define Objectives and Priorities:

Clearly define your objectives and priorities for the contract negotiation. Identify the key terms and conditions that are crucial to your business and consider your long-term goals. Clarity will help you to remain focused during negotiations and make informed decisions about which terms you can be flexible on and which are non-negotiable.

Tip#3 Build Strong Relationships:

Building a constructive relationship with the other party is critical during negotiations. Establishing trust and rapport can lead to better communication and increased cooperation. Try to find common ground and areas of mutual interest to build on. Listen actively and try to understand the other party's needs and concerns. Building relationships can also help in resolving disagreements and disputes that may arise during the contract term.

Tip#4 Establish a Timeline and Deadlines:

Setting a timeline and deadlines can create a sense of urgency and focus during negotiations. Agree on a timeframe for completing the deal and adhere to it as closely as possible. Deadlines can help avoid unnecessary delays and prevent the other party from exploring alternative options. However, it is important to balance the use of deadlines to maintain a cooperative and collaborative atmosphere during negotiations.

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Data Protection- GDPR

WHY IS GDPR IMPORTANT FOR SMALL BUSINESSES

We can do no better than to redirect to a very useful recent article by [Rapid Formations](#), the company formation specialists. Their 5 top reasons for complying with GDPR are:

Avoiding penalties, compensation claims, and being named and shamed, showing compliance and improving data security.

Dividends

DIVIDEND TAX ALLOWANCE REDUCED FROM APRIL '23

At present, the dividend allowance (i.e. the tax-free allowance for dividend income) is set at £2,000.

From 6th April this year, the allowance is going to be reduced to £1,000. And there's more to come; from 6th April 2024, the allowance is being halved again to £500.

If you receive dividends above the £1,000 allowance (or £500 allowance for 2024/5), there is no change to the amount of tax payable on the dividend income, which depends on the income tax band you fall into.

The dividend tax rate (once you go over the allowance) is:

- 8.75% if your income tax band is **the basic rate**
- 33.75% if your income tax band is **the higher rate**
- 39.35% if your income tax band is **the additional rate**

To calculate your tax band, you need to add the dividend total to any other income that you may have.

Dividend tax is charged at lower rates to the regular income tax rate. This is because dividends are distributed from a company's retained profits after companies have already been charged the current 19% Corporation Tax on those earnings.

DIVIDEND REFRESHER

A dividend is a way of taking out profits from a company limited by shares. When a company generates profit and has retained earnings, the directors can reward eligible shareholders with financial pay-outs in the form of cash dividends.

In most small companies, dividends are issued on a regular basis. This provides shareholders with a steady stream of income on their investment in the company's shares.

The amount that is paid out in dividends will depend on how much profit is available to distribute at the time and what percentage of shareholdings each member has.

For example:

- If you are the only shareholder and you own one ordinary share with a right to dividends, that share entitles you to 100% of available profits in the form of dividend payments;
- If your company has 4 shareholders with each owning one ordinary dividend yielding share, each shareholder is entitled to 25% of available profits in the form of dividend payments.

These are very basic examples, but profit distribution in small companies is often quite straightforward.

There is no strict timetable for issuing dividends. The frequency of distributions varies from company to company and is at the discretion of the directors. Many smaller companies decide to pay dividends on a monthly basis to provide their shareholders with regular income. Others may only pay dividends at irregular intervals and when the company has profits available to distribute.

In some companies, different types of shares carry different dividend rights and some shares may carry no dividend rights.

Employment

IMPORTANT CHANGES IN THE LAW

- The minimum wage is increased to £10.42 per hour from 1st April for those aged 23 and over. Lower rates apply for younger workers, and apprentices will get £5.28 per hour.
- Maternity, paternity, adoption, shared parental and parental bereavement pay is being increased to £172.48 per week.
- Statutory sick pay is being increased to £109.40 per week.
- Employees will be able to request flexible working from their first day of employment, and employers will have to respond within two months of a request.

IR35

HOW THE IR₃₅ RULES APPLY TO PARTNERSHIPS

Gary Lineker has won a victory against HMRC. He had provided his services to the BBC through a partnership, and then as a sole trader. The BBC had insisted that its contractual counterparty be a general partnership. Lineker and his then wife, Danielle Bux, duly formed a partnership, which traded as Gary Lineker Media (**GLM**). GLM contracted with the BBC and also with BT Sport, for the provision of Lineker's services as a television

presenter and commentator. He then signed the contracts in his capacity as a partner in GLM.

The First-tier Tribunal held that the IR35 rules did not apply because there was a 'direct contract' between Lineker and the broadcasters, rather than through Lineker's partnership. The FTT confirmed that IR35 applies to general partnerships.

Late payments

With reports suggesting that as much as 65% of all invoices owed to small businesses are late, now is the time to take stock of what can be done to help get paid on time.

TIPS TO AVOID LATE PAYMENTS

[Enterprise Nation: How small business owners are dealing with late payment](#)

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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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