

BUSINESS BRIDGE

NEWS AND VIEWS

for growing businesses and their owners

SUMMER 2019

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THE LIFE OF A CONTRACT – SMOOTH RIDE OR BUMPS IN THE ROAD?

When entering into contracts one hopes for a smooth ride, but sometimes it turns into a bumpy one! In this article, we signpost common problem areas to help you navigate around, or avoid, some of the larger potholes that businesses can encounter.

The paperwork

You would be surprised how often we come across contracts that are not signed or are incomplete, with missing dates or schedules. Not having a properly executed contract does not mean that a contract doesn't exist, but it may be much harder to rely on its provisions if the other party is arguing it was never agreed. This also applies to variations, which either have not been fully documented, or need to be in writing and signed by both parties to be valid under the terms of the contract itself.

This can also be a problem if you are working on the basis that your standard terms apply. To avoid any issues, standard terms should always be clearly accepted by the other party by being signed, or agreed by email, or by an "I agree" online acceptance mechanism. Parties often get into difficulties where both sides are seeking to incorporate their own standard terms – the so called "battle of the forms". It can frequently be unclear whose terms apply, which may mean that neither set does.

The product

Problems can arise where there is a lack of clarity over what goods or services are being purchased. Typically this is because the definitions of the goods or services are vague, especially with more complex services such as IT. Customers should engage with suppliers to iron out details before the contract is entered into; what is inside and outside of the scope?

Managing performance

Some services need oversight so customers can ensure any problems are corrected. It can be helpful to include provisions around service levels and remedies, such as pre-defined service credits payable by suppliers to customers if service levels are not met. Careful thought should be given to the mechanisms used to measure performance – does it work in practice and is it straightforward enough to not add unnecessary administration and expense?

Termination

Contract expiry dates should be carefully monitored to avoid issues with auto-renewal provisions and long notice periods. If you believe a contract ends on its stated expiry date, double check to ensure that the term doesn't automatically extend for a further period unless notice to terminate is given in a particular way/at a particular time.

You may be able to terminate a contract if the other party has breached its terms. However, you should check the contractual termination rights carefully to ensure you can terminate and the process to follow. There is often a right to terminate for "material breach", but what does this mean?

Caution is needed if there are multiple potential grounds for termination. In a recent case, one party was unable to claim "loss of bargain" damages because it had terminated the contract in sole reliance on a contractual right to terminate for insolvency, not because of the other party's

breach. It is important to identify and select the correct ground of termination and clearly communicate it to the other party.

Brexit...

Finally, we can't possibly talk about bumps in the road without mentioning Brexit, which has the potential to affect many commercial contracts. It may cause delays and/or make some contractual arrangements no longer commercially viable for one or more of the parties.

A solution to the uncertainty for some contracting parties has been to include material adverse change clauses that give renegotiation or termination rights. In each case, you should consider the circumstances and the outcome you are trying to achieve. Customers in particular should make sure they understand the effect of Brexit clauses proposed by suppliers.



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A WORD FROM THE EDITORS

Welcome to the fifth edition of Business Bridge. Within our previous editions, we have traversed topics from starting up your business, to scaling it up and finally to exiting! In this edition, with a backdrop of the wheels of Brexit continuing to turn with little certainty as to what the road ahead looks like for businesses (or individuals for that matter), we decided to broach the less glamorous subject of what to do when things go awry.

We hope that this edition provides you with the insight into facing challenges that arise with increased confidence. We have travelled the firm (and beyond) to seek out helpful hints and tips to support you when the road becomes bumpy or potholes appear!

In our 'Ask the Advisor' sections, we have ventured out to ask our contacts to explain how they can help you too. Paul Davies of Menzies (a turnaround professional) provides insight into how he helps struggling businesses restructure (pages 4-5) and Sean Daniels of Vail Williams (a chartered building surveyor) provides an informative narrative on the arcane and obscure minefield that is dilapidations (pages 8-9). To conclude the line-up, our

bumps in the road edition would not be complete without some guidance from our commercial litigation team (which is relevant irrespective of whether a dispute has arisen or not)!

We know that running your own business is not always a bed of roses; problems cannot always be avoided. As a litigator, Katie has seen it all: from fallouts with a contractual counterparty, employee, fellow shareholder or partner, through to the impact on businesses as they face unprecedented financial pressure and are forced to look at possible restructuring or refinancing solutions. We are here to help you navigate around the potholes and manage the bumps that you encounter.

As always, we are eager to hear your feedback on Business Bridge and, in particular, what you might like to read about in future issues. If you have any comments or ideas for future content, please get in touch.

Happy reading!

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TALKINGHEADS



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In this edition of Business Bridge, we interview **Hollie Ryan**, a senior associate in S&B's employment, immigration and pensions group.

Hollie advises corporates, owner managers and senior executives on a wide range of contentious and non-contentious employment matters.

Can you give us an overview of S&B's employment, immigration and pensions group?

There are 16 lawyers in the group, 12 of whom are in the employment team, which is top-ranked by Chambers and The Legal 500 legal directories.

The team covers the full range of employment matters, from drafting contractual documentation to providing day-to-day advisory support. We also regularly deal with litigation in the Employment Tribunal and, in relation to restrictive covenant issues, the High Court.

The wider group advises on business and individual immigration matters (including the possible impact of Brexit), and a broad range of pension issues.

What kind of work has been keeping you busy recently?

I have been drafting and advising on template employment contracts for a growing start-up, focusing on the confidential information and restrictive covenant provisions to better protect the company's business and customer base. The length and scope of restrictions is key to their enforceability.

I have also been advising on the employment aspects of the acquisition of a business, ensuring that the business complies with its TUPE obligations to consult with employees regarding the transfer of their employment.

What do you think are the main challenges facing entrepreneurs and owner managers from an employment perspective?

Employment law is often unfairly viewed as a minefield but with some care it can be navigated without too many problems.

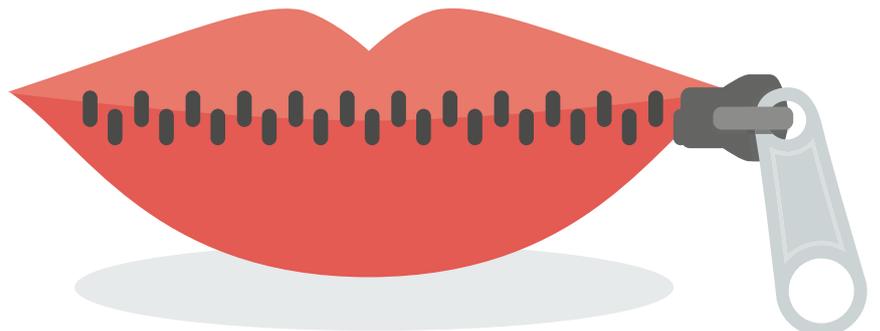
The main challenges I see are:

- Attracting and retaining the right staff, particularly with the uncertainty surrounding Brexit and the growing skills shortage.
- Protecting confidential information and business relationships to avoid departing employees setting up in competition and damaging the business.
- Avoiding abrupt exits which can leave the business exposed if there is no succession plan in place.
- Poorly drafted employment contracts (or none at all), as this can give rise to difficult disputes, particularly around bonus and commission entitlements.

How can entrepreneurs/owner managers overcome the most common employee-related challenges?

My top 3 tips are to:

1. Keep your house in order – ensure that you have appropriate documentation in place at the earliest opportunity, including contracts of employment, bonus schemes and key policies (such as equal opportunity, health and safety and disciplinary and grievance policies).
2. Invest in your people – consider offering benefits to staff, such as employee share or bonus schemes. If this isn't feasible, or if you wish to set your business apart from your competitors, be innovative – consider providing attractive but less costly perks to staff, such as flexible working arrangements, mental health days or wellbeing support.
3. Plan ahead – while the day-to-day running of the business is important, give thought to future proofing your business, particularly employee development and succession planning.



Ask the Advisor



Paul Davies, Director
Menzies LLP

Typically, every business has financial pinch-points, either on a temporary or more permanent basis, and often requires some form of financing in the short or longer term. This could range from simple bank loans or alternative lender solutions (including invoice discounting), through to equity investment/purchase by one of the specialist distressed private equity funds.

A turnaround or debt advisory practice can provide a life-line to a struggling business by helping to source the appropriate funding to turn around its fortunes (literally).

Partner and co-head of S&B's restructuring and insolvency team, Tim Carter, talks to Paul Davies, a director in the business recovery and turnaround team at Menzies LLP, a top 20 firm of accountants, finance, business and private client advisors. They discuss how Paul's team has assisted (and can assist) distressed businesses, what those early warning signs could look like, and the challenges facing businesses (and particular sectors) given the current political and economic uncertainty.

MENZIES
BRIGHTER THINKING

Please could you briefly describe your professional background and your role within the turnaround/debt advisory team at Menzies?

My move into the world of turnaround began at a boutique insolvency firm, following a short career at a top UK bank. Since then, I have gained almost 20 years' experience advising businesses across a variety of sectors and in 2017, I was named Turnaround Professional of the Year at the TRI Awards. As a director in Menzies' turnaround team, I use my knowledge and experience in risk banking, formal insolvency, distressed investments and insolvency to provide practical solutions to businesses' financial issues.

What does the turnaround/debt advisory team do?

In a nutshell, my team supports businesses experiencing distress by helping them to turn their financial fortunes around. While the exact steps taken to achieve this will vary from business to business, some common strategies include finding alternative lenders who have more appetite for risk than the usual high street banks, advising Boards and finance teams on cash flow management, managing stakeholders on behalf of the company and seeking a suitable experienced investor or purchaser for the business. It is critical for us to understand which firms may be interested in purchasing or investing in distressed businesses at relatively short notice. A detailed understanding of the distressed private equity and finance market is essential for this.

Can you give us 3 examples of businesses who you have helped?

EXAMPLE 1: LOAN INVESTMENT

I was introduced to a company with a £40m turnover, operating in the food wholesale sector. While the business had an invoice discounting facility, provided by a high street lender, and some short-term financing in place, its forecasts had identified a £1m future cash flow gap.

After thoroughly reviewing the company's current funding structure, we advised the

Board that this shortfall could be covered by switching the provider of its invoice financing facility from the traditional bank to a more flexible, independent lender. The new funding provider was able to leverage more debt against the company's assets, resulting in an £8m facility for the company.

EXAMPLE 2: EQUITY/CAPITAL INVESTMENT

Following his meeting with the directors of a struggling food manufacturing company, Tim Carter sought my help in identifying a way of saving it, without the need for insolvency. I met with the company's directors on a Monday and after carefully considering all aspects of the business, came to the conclusion that it was a business that could be sold to a distressed investor. On Wednesday of the same week, I approached the distressed investor market, and had received two offers of investment by the following Monday. An investment was completed the following week, allowing around 80 jobs to be saved and a £10m turnover business to continue trading.

EXAMPLE 3: ENTERING INTO AN INSOLVENCY PROCESS

A bank approached me about a company which was experiencing financial difficulties and was under a significant amount of creditor pressure. After reviewing the company's position, it was clear that the only way to restructure the business, and save employee jobs, was by undergoing a formal insolvency process.

The company's business and assets were consequently listed for sale, and a number of offers were received. After considering which offer provided the best value for shareholders, one was accepted, allowing the business to continue trading, the lender to be repaid in full, all employees to be retained and a dividend to be paid to unsecured creditors.

What trends (if any) are you seeing in the market place?

The beginning of the year saw the restructuring market pick up – a positive development for the sector, but certainly less so for the UK economy as a whole! The struggles facing UK retailers have



been well-reported, with casualties such as Debenhams seeming to be an almost daily occurrence. Other struggling sectors include construction and the automotive industry, which is feeling the effects of Brexit uncertainty on cross-border supply chains.

What should management look out for in terms of warning signs indicating the need for loan or capital investment?

It is important for directors to heed triggers and red flags that could be a sign of wider financial issues. This will allow them to implement appropriate mitigation strategies in good time. While cash flow is vital to maintaining a strong financial position, it is often overlooked, and should be monitored closely to prevent organisations falling into financial difficulties.

Moreover, sector and regulatory changes may require some financial planning. For example, in the construction sector, the new VAT reverse charge is likely to impact the working capital of a number of businesses, so it is essential that they plan ahead and carefully consider any impact on their funding requirements. Similarly, businesses undertaking stockpiling activity to protect against supply shortages after Brexit should think carefully about how this will affect their working capital, and ensure they have the right funding solutions in place.

Where funding is not available, investment can allow businesses to improve their financial position by taking advantage of market opportunities. It's important to bear in mind that debt isn't always the best option.

What are the common mistakes you see business owners or management teams making when faced with financial difficulties and what steps can be taken to avoid these mistakes?

Every good business owner knows that cash is king, however, many still fail to prioritise cash flow management. To enable companies to plan ahead and spot any impending difficulties, it's worth producing 13-week cash flow forecasts, in addition to longer-term predictions. These insights into the business' future cash position will help business owners to keep their options open, allowing enough time to seek expert advice and consider a number of strategies for improving the company's financial situation. There is no point being a profitable business if you run out of cash!

In terms of the current challenges arising from the well-publicised economic and political uncertainties, how do you see the future for UK businesses in the medium to longer term?

The UK has always enjoyed a fairly robust economy, and while it's too early to say for sure, the initial outlook for UK businesses remains hopeful. Despite Brexit uncertainty, an initial drop in currency has had the effect of encouraging investment into the UK. However, the coming months will bring challenges for certain sectors and a prevailing attitude of caution is still making organisations reluctant to invest. Ultimately, increased certainty over the UK's position outside of the EU, as and when that happens, is needed to allow companies to plan ahead and aid the recovery of the UK economy.



DEALING WITH FINANCIAL ISSUES WHEN THEY ARISE

As we have seen from the Ask the Advisor with Paul Davies, sadly, not all business ventures go to plan. Fortunately, there are actions owner managers can take to mitigate or avoid such headaches. In this article, we highlight some key points aimed at helping you to reduce the risk of financial problems at various stages.

In the beginning:

- Keep your options open to allow for growth and changes in direction. Avoid tying yourself to long leases and negotiate contractual payment deadlines to aid cash flow.
- Explore all funding options, and be wary of giving personal guarantees or accepting ancillary funding products such as interest rate swaps.
- Consider the business structure carefully – for example, with a private limited company you should not be responsible for your business' liabilities provided you do not breach your directors' duties, personally guarantee the company's debts, or grant security over your personal assets to secure its obligations.

During the life of the business:

- Keep accurate accounts and records of key decisions. Never use the business' money for personal use or for purposes unconnected to the business.
- Don't forget to pay your taxes; HMRC is often the first creditor to take action in troubled times.
- Counter-intuitive though it may sound, maintain good competitor relationships;

even in economic downturns, there may be opportunities to explore mutually beneficial arrangements with a competitor.

- Keep an eye open for financial warning signs for yourself and those you contract with (see our Insolvency Warning Signs article in the Winter 2018 edition of Business Bridge).

When troubles arise:

- Be mindful of any director duties you owe under the Companies Act 2006. These include a duty to promote the success of the company for the benefit of its members as a whole; to exercise reasonable care, skill and diligence; and to avoid conflicts of interests.
- If the company is insolvent or approaching insolvency, the duty to promote the success of the company for the benefit of its members as a whole shifts so that it is owed instead to its creditors. Paying a dividend, repaying a director's loan, or paying one creditor in priority to another, for example, could all be construed as breaches of duty in such circumstances.
- If there is no reasonable prospect of the company avoiding an insolvent liquidation, take steps to minimise losses to creditors and avoid the risk of wrongfully trading.

When should I seek advice?

- Seek advice as soon as you are concerned about your business' ability to continue trading. The earlier any issues are addressed, the greater the opportunity to fix them.
- Early advice on restructuring options and obtaining further investment could result in the business continuing to trade safely.
- Early advice can also help you to understand your duties as a director, including any steps you would be required to take, and potentially mitigate the risk of personal liability (including for wrongful trading).



Matthew Padian

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S&B'S ENTREPRENEUR UPDATE

As you may be aware from previous issues of Business Bridge, Stevens & Bolton supports a number of scale-up initiatives, including Guildford Business Growth, SETsquared Surrey and S100 Club. We are delighted to report on yet another initiative to support entrepreneurs.

Together with accountancy and tax advisory firm Smith & Williamson, we will be exploring some of the key challenges faced by businesses when trying to grow, through a series of thought provoking 'Scaling up for Success' seminars, to help fuel the ambition of every business that dares to dream bigger.

Each seminar will focus on one of the key areas of challenge for the UK economy in enabling high-growth companies to scale-up. These are:

- Transact to scale – delivering exponential growth through acquisition or investment
- Markets to scale – expanding internationally with precision and confidence
- Finance to scale – securing funding to accelerate growth
- Talent to scale – optimising reward and retention
- Professionalise to scale – enhancing leadership, operations and processes

We co-hosted our first seminar in the series, Transact to scale, on 22 May, with contributions from Amanda Phillips of Smith & Williamson, Richard Baxter of S&B and long-standing client Michael Loftus, former CEO of Office Gold.

Nick Atkins, Head of Entrepreneurs at S&B, commented "We are very pleased to be co-hosting this series of seminars with Smith & Williamson, who have played an active role in research and support for the ScaleUp Institute. The first seminar was a great success and we look forward to co-hosting the rest of the series."

Check out our 'dates for your diary' for our upcoming events and if you would like to receive any further details about any of the events listed or any of our scale-up initiatives, please email Laura Reynolds on laura.reynolds@stevens-bolton.com

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 **Smith & Williamson**

DATES FOR YOUR DIARY

Thursday 4 July 2019
Scaling up for Success seminar – Reach Further: Markets to Scale
8am to 11am
Stevens & Bolton, Guildford

Thursday 24 October
Scaling up for Success seminar – Raising Finance – Finance to Scale
8am to 11am
Smith & Williamson, Guildford

January 2020
Scaling up for Success seminar – Aim Higher – Talent to Scale
8am to 11am
Stevens & Bolton, Guildford

April 2020
Scaling up for Success seminar – Work Smarter – Professionalise to Scale
8am to 11am
Smith & Williamson, Guildford



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Ask the Advisor



Sean Daniels, Chartered Building Surveyor
Vail Williams LLP

There are an abundance of issues that a business will need advice on along the road. One of these issues, often underestimated by those with little or no prior property experience, is dilapidations.

Dilapidations is a rather arcane and obscure area of law and can leave an unwary business with potentially very burdensome obligations and liabilities.

Chartered surveyors and lawyers well versed in the art of dilapidations can offer occupiers of property invaluable practical and legal advice to help their business deal with any potential problems or claims arising over the life of the lease.

To help demystify the subject, one of our resident dilapidations experts, Markus Klempa, a managing associate in S&B's real estate disputes team, speaks to Sean Daniels, a chartered building surveyor at Vail Williams LLP, one of the largest independent providers of commercial and residential property advice in the UK.

Please could you briefly describe your professional background and your role within the building consultancy team at Vail Williams?

I'm a chartered building surveyor, and deal primarily with dilapidations and property due diligence work. I carry out pre-acquisition surveys and schedules of condition to ensure that property transactions run smoothly and to clients' expectations. I'm also responsible for the management of fit out and construction projects on behalf of my clients.

What are dilapidations and why do entrepreneurs need to know about them?

The term 'dilapidations' generally refers to the process of dealing with a landlord's claim for alleged breaches, of certain obligations in a lease in relation to the condition of a property.

The majority of entrepreneurs will enter into a commercial property lease at some point in their business' lifecycle. Often leases require the tenant to keep the property in good repair; failure to do so can have major cost implications on exiting the property.

What are the key stages in the lifecycle of a lease where dilapidations should be considered and what steps should be taken?

Negotiating the lease

The precise requirements of a tenant will be set out in the lease. It is crucial to understand precisely what your obligations are when negotiating the lease, in particular around:

- the repair of the building;
- any requirement to redecorate; and
- any obligation to remove any alterations made to the property over the course of the lease.

If you don't comply with such terms, the landlord may bring a dilapidations claim.

A prior inspection by a Chartered Building Surveyor experienced in dilapidations will help identify the condition of the premises, including any existing items of disrepair

which you will inherit, and your responsibilities as tenant in the context of the proposed lease. Be aware that while some leases will require you to "put and keep the property in repair", and some will simply require you to "keep the property in repair", both requirements place an obligation on you to first put the property in repair.

An inspection can also assist in identifying the suitability for adaptation and fit out of the premises for your needs and, taking a long-term view, the future reinstatement obligations associated with any fit-out work you are considering. This survey can also address the likely budget for dilapidations going forward so that you can make appropriate provision for this throughout the term of the lease.

It is possible to mitigate future exposure by:

- limiting your obligations via a Schedule of Condition;
- allowing for fair wear and tear; and/or
- excluding certain parts of the property from your obligations (or perhaps all repairs in the case of a very short lease).

Be aware that you remain responsible for rectifying any further deterioration, which may then necessitate repair or replacement.

Often the tenant's obligations to redecorate within the lease are not made subject to the Schedule of Condition; you would then remain responsible for redecoration, effectively circumventing the limits agreed in the schedule. This is to be avoided.

During the term of the lease

A landlord may have the right under a lease to require you to carry out specified works within a fixed period during the term of the lease. Failure to comply with a repair notice served by the landlord could result in the landlord entering the premises, completing the required works and recovering the cost of the work (and costs of appointed consultants) as a debt. If you receive a repair notice from your landlord, we recommend seeking immediate advice to ensure the notice is valid and that works are indeed required pursuant to your obligations in the lease.

Commercial leases are also likely to contain clauses requiring compliance with statute. Whilst these are not necessarily specific around what should be provided, it is





normal for landlords to ask for copies of mechanical and electrical test certificates, risk assessments, asbestos surveys/ asbestos management plans and maintenance records. It is important you maintain such records and, if relevant, have proper maintenance contracts in place throughout the lease which will assist you in meeting any statutory obligations.

Expiry of the lease

Understanding the landlord's intentions for the premises at the end of the lease can help reduce any dilapidations payments. If significant refurbishment or redevelopment is being considered, this can substantially reduce, if not negate, a dilapidations claim. Equally, if a landlord has someone interested in taking the property, and the new tenant is happy to lease the premises in its current configuration/state of fit out, a claim for reinstatement can be resisted.

If you receive a Schedule of Dilapidations in advance of the lease expiry (which the landlord is not obliged to provide), you may choose to complete some or all the work identified. A chartered building surveyor will be able to help identify the actual work required under the lease, as opposed to work the landlord would like completed. It is not unusual for a landlord to seek more than they are entitled to, so do be wary!

The advantage of performing the repairs yourself is that you remain in control of the scope, cost and programme of work. Conversely, repairs must be completed prior to the end of the lease; often this means you

will need to move out early and cover rent for two buildings for the duration of the work.

An alternative is to negotiate a cash settlement with the landlord (often through surveyors for each party), avoiding the additional costs associated with completing the repairs. If a financial settlement is agreed, we recommend a formal Deed of Release is prepared by solicitors. Ideally, this should ensure that any payment to the landlord is in full and final settlement of all liabilities under the lease.

If you are looking to renew your lease and remain in occupation, it is important to consider any accrued liabilities and factor these into discussions. Simply postponing the inevitable and 'rolling them forward' might not be the best outcome from negotiations.

What would a dilapidations claim normally include and how quickly can it be resolved?

If dilapidations do become an issue between you and your landlord, you can expect that a typical claim will be for the costs of:

- the work;
- the production of a Schedule of Dilapidations;
- specialist investigations, surveys and access; and
- consultants' fees for the procurement and management of the work.

You may also be liable for the landlord's legal fees for service of a dilapidations claim, and, where specified in the lease, the landlord's surveyor fees.

Landlords will often seek to claim loss of rent if they undertake work once the tenant has vacated the premises. Whilst, in our experience, a loss of rent claim can be difficult to prove, the sum sought for this can be significant due to the time taken to identify, tender and complete the repairs required.

It is often difficult to predict how long a dilapidations claim will take to resolve. Simple claims may be settled quickly; larger, more complex, claims can take months, or even years, to be determined. Reducing a landlord's claim by 50% or more is not unusual and, while the outcome might be satisfactory, the time and cost to get there can be significant. Seeking early advice in these situations is therefore advisable.





DEALING WITH DISPUTES

Any business owner will be extremely fortunate to avoid the potentially damaging, disruptive and costly consequences of a legal dispute at some stage during the life of their business. Whether the dispute is with a customer, supplier or someone else, here we offer some tips on how to achieve a few marginal gains if that day arrives.



Helpful contractual provisions

Not all disputes will be about a contract, but the majority will. We mentioned in the first article the need to ensure your contractual terms and conditions are clear, whether through standard terms or within the negotiated express terms of the contract.

The potential value of including suitable exclusions of liability (including a cap) in your favour within a contract, is obvious. Less obviously beneficial, is a clause conferring exclusive jurisdiction on the English Courts, or applying English law. Without these, if you are trading beyond the UK, there is a significant risk of having to conduct litigation in a foreign court or according to foreign law. The ability to fall back on these provisions will be all the more important in a no-deal Brexit scenario.

Early advice

Almost invariably, some degree of compromise will be justified in order to resolve a dispute before its negative consequences for your business can take hold. That does not mean that it will always be sensible to engage with the other party without first having sought legal advice.



“**Early advice can help ensure the elimination of mistakes which could prove expensive in the long run.**”

Even initial, high-level legal advice will frequently be of real value in helping you understand the strengths and weaknesses of your position, advising what not to say, and assisting with the formulation of a negotiation strategy. Early advice can help ensure the elimination of mistakes which could prove expensive in the long run.

Document creation

Unless a dispute is resolved between the parties, through mediation, arbitration or otherwise, it may need to be determined in Court.

A Court will ascertain the facts of a matter, to then apply the relevant law. It will rely on witness evidence and, critically, any relevant documents. As a general rule, all relevant documents, whether helpful or harmful, will need to be disclosed.

Avoiding the creation of documents, which may ultimately support the other party's case, is crucial. To that end, as soon as a dispute appears likely, steps should be taken to ensure that all relevant staff cease, so far as possible, from sending emails and messages (including on social media platforms) in which they state facts

or share opinions which may ultimately prove unhelpful.

Document retention

If Court proceedings become necessary, all relevant documents will need to be reviewed by your legal team in order to provide informed advice on the merits of the dispute, and to ensure compliance with the disclosure process which will be ordered by the Court.

Early identification of those employees who were involved in the events giving rise to the dispute, and ensuring that relevant emails and other documents are isolated and preserved, is crucial. If the onset of a dispute coincides with a key employee leaving, it will be important to record as much information relating to the dispute as they have before they leave, and to identify and retain any documents they hold on private devices.

Preservation of privilege

You will not need to provide copies to your opponent of documents which are created for the purpose of obtaining or giving legal advice or, once Court proceedings are

contemplated, assisting in the conduct of those proceedings. However, this “privilege” will be lost if communications to or from legal advisors are shared too widely within the business. It is important to restrict communications to the key people with the responsibility for working with your legal team and/or acting on its advice.

With appropriate planning, it may be possible to ensure that the majority of internal communications, which touch on matters relevant to the dispute, will meet the “assisting with the conduct of the proceedings” test and maintain your privilege in them.



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NIP PROBLEMS IN THE BUD

Fast-growing businesses have many competing demands on their valuable time and (often limited) resources. It isn't surprising therefore, that developing an intellectual property (IP) strategy and investing in IP protection is often put off to another day.



IP is frequently a company's most valuable asset, and failing to look after it early on can give rise to problems as a business grows. In this article, we look at three of the most common pitfalls.

Protecting your brand

Coming up with a company or product name is a key consideration for a nascent business. Once decided upon, you should consider commissioning proper clearance searches for existing trademarks that might conflict with it. This is not an expensive process and drastically reduces the risk of future infringement actions as the business expands and is noticed by competitors.

Registering your brand name as a trademark in key jurisdictions not only gives the company leverage to use against would-be imitators, but creates an identifiable asset on which to "hang" brand value.

IP ownership

For most start-ups, work is often done by friends, contractors and employees on an informal or even voluntary basis. When an employee creates IP in the course of their employment, it will usually vest with the employer. However, businesses are often caught out when consultants, founders, freelancers or contractors create IP without any formal agreement in place.

This can lead to disputes over IP ownership and issues as to whether further payment is required for the company to own it. Even if the individual is willing to assign the IP to the company, this still requires a retrospective written agreement. It is far better to ensure agreements are in place in advance with anyone creating IP for the benefit of the company.

Employees leaving with your ideas

Confidential information and know-how can be key assets. Departing employees taking what they have learnt in the company's early days to a competitor, or setting up a competing business of their own, can be hugely damaging.

The misuse of confidential information is usually expressly forbidden by employment contracts, and employees also owe their employers an equitable duty of confidence. However, it is harder to protect information after employment has ended, unless it is a trade secret which the company has taken clear steps to protect.

You should take time to identify what information you consider to be genuinely confidential and limit access to this information to key employees. Not everyone needs access to business plans, customer lists and pricing strategy information.

Careful thought about employee notice periods and tailoring post-termination restrictive covenants to an employee's role can also pay huge dividends.

Conclusion

Even when money's too tight to mention there are things that can be done to protect the long-term future of the business. It might sound trite to say that an ounce of prevention is worth a pound of cure, but where IP is concerned, this is most certainly the case.



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We welcome feedback, so please do get in touch if you have any comments or ideas for topics you would like us to explore in future issues.

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