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# Businessfirst

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# Taking the positive approach

– Facing up to the challenges of recession

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# Taking the positive approach

**It is inevitable that, in times like these, much of the focus for this issue of Business First is on facing up to the very real challenges that recession brings with it.**

Where we have tried to be a little different from other magazines, though, is by providing detailed advice with a practical legal slant on how to cope with the downturn without inflicting lasting damage on your business.

So we focus on redundancy issues – but in a positive way. What are the alternatives? How do you keep your staff happy and motivated during such an uncertain period? What can you do to avoid the pitfalls that lie in wait for the unwary?

On other downturn-related matters, we show you how to cope with the failure of a major customer, what you can do to reduce the debt burden on your business, how to escape an unprofitable contract and more.

Life (and business) goes on, though, and we also turn to the positive side of enterprise, with advice on launching a new venture and winning new business.

After all, it is being positive and practical about economic realities that will see us all work together to bring this recession to an end in the shortest possible time.

**David Wilford**
**Editor**

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**Contact details:**
LawNet 01926 886990
Impact Journals (production) 01225 481800
Editor: David Wilford, email: david.wilford@impactpublishing.co.uk

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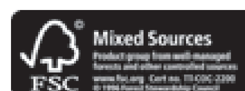


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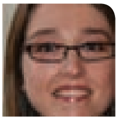
# What are the alternatives to redundancy?

**Making people redundant can be bad for business in many ways, says Bethan Southcombe. Here she explains some of the other options that may be open to you.**

**"Redundancies have a major negative effect on staff morale."**



**In the current financial climate, many employers are inevitably considering making redundancies. Many should be aware, though, that this may not be the only available option, and should be looking now at their business before it becomes necessary to take this drastic step.**

Redundancies have a major negative effect on staff morale, as well as laying the business open to the risk of losing some of its most valuable employees.

**Viable alternatives**

Two viable alternatives to redundancy are lay-off and short-time working. Being laid off is a term often mistakenly used as a synonym for being dismissed. However, the legal meaning of a lay-off relates to employee rights under the Employment Rights Act 1996. It can take place when an employee, whose contractual remuneration depends on being provided with work of the specific type they are employed to perform, does not receive such work. The result is that they are not entitled to any remuneration for that week or until there is a return of the kind of work they do.

The related concept of short-time working occurs when there is a reduction in the work the employer provides. This can result in any week's actual remuneration becoming less than half a week's pay.

While temporarily laying off staff or putting them on short-time working may be an attractive option to an employer who is facing a reduced cash flow, a number of legal considerations must be born in mind.

**Legal considerations**

First, the employer must have the contractual authority to withhold remuneration if there is no work or a reduced demand for work. Without this authority, laying off an employee or putting them on to short-time work is likely to amount to a fundamental breach of contract. In addition, a statutory scheme exists under which an employee who is laid off or put on short-time working can claim a redundancy payment.

Second, it is of course possible for a company to consider reducing the number of temporary staff or restricting the use of overtime. Any employer wishing to reduce hours, pay or benefits would need to be careful however, as they could find themselves in breach of employment law regulations.

So before making any changes to an employment relationship, it is

important first to identify the terms of the employment contract. Remember, a contract of employment does not have to be in writing – it can be 'implied terms' for example, where a firm precedent is set through custom and practice.

It is important to note that, under section 1 of the Employment Rights Act 1996, employers need to give those employees whose employment is to continue for more than one month a written statement of certain terms of their employment. These are called 'the required statutory particulars'. The written statement that contains them is often referred to as the 'section 1 statement' (or 'principal statement'), and must be given to employees no later than two months after their employment begins. It is also important to check any workplace rules, policies and procedures.

**Further measures**
Other measures that a company may wish to consider include taking a tougher line on absence management. It is important, however, to make sure that this is not discriminatory and applies across the board.

It is also sensible to look at expenditure other than on salaries, from providing Christmas parties right down to biscuits for meetings.

Ideally, any significant changes should be agreed in advance with employees. If the business recognises trade unions, then any proposed changes must be discussed with them as well.

It is advisable to speak with an employment law solicitor to ensure that you comply with these and other complex employment law regulations.

In Short

- **Consider alternatives, like lay offs and short-time working.**
- **Pay attention to the legal requirements of your employment contracts.**
- **Check specific workplace rules, policies and procedures.**
- **Consider non-salary related savings.**

# Avoid expensive **redundancy mistakes**

**Like any other important change in your business, a redundancy programme requires careful planning. Neil Dwyer has advice on how to get it right.**

**"You may not unfairly include unpopular or difficult employees in a redundancy process."**

**Like any other important change in your business, a redundancy programme requires careful planning. Neil Dwyer has advice on how to get it right.**

Recent research shows that more than 60% of small and medium-sized businesses are already suffering financially from the Credit Crunch and recession. Many others are having to rely on savings and overdraft facilities to fund cash flow.

As is widely reported, redundancies are inevitably on the rise, and increasing numbers of employers are requiring advice and support in carrying out what can be a complex and emotive process.

**Plan the journey**

Much like Sat Nav, the best journey involving redundancies is one where the traveller has plotted each milestone in the journey and knows where the road ends. Potential problems that might damage future milestones need to be addressed at the outset, so that the whole process can be well thought-out, objective and successful.

At the outset a business should calculate the total bill for statutory and contractual payments – statutory redundancy pay and any payment for notice if the employee is not required to work the notice. It is important to ensure that this obligatory bill does not increase two or threefold through expensive mistakes in the journey, resulting in additional compensation payments.

Here we list some of the most important actions that you must undertake correctly at the outset of redundancy procedures.

**Follow the rules**

First, you must inform employees ahead of any necessary period of consultation about any redundancy proposals. You must also ensure they understand that these are mere proposals at this stage and not final decisions.

Next, when more than 20 employees are to be made redundant, you have to allow a 30-day consultation period before any notice of redundancy is given.

You need to avoid drawing the 'pool' for selection too narrowly. You cannot keep staff out of such a pool just by reference to job title, and you must conduct a comprehensive analysis of their duties. In order to ensure that the selection criteria are not discriminatory, you need to be able to demonstrate that they are objective

and verifiable. You can do this by reference to data such as records of attendance and efficiency.

**Do not discriminate**
Remember, you may not unfairly include unpopular or difficult employees in a redundancy process, and using 'last in, first out' as a basis for selection can discriminate against staff by reason of their age or sex.

You also need to take particular care with employees who are on maternity leave. Not including them in the pool could be prejudicial to those you do select for redundancy. Selecting them because they are pregnant, have given birth or are on maternity leave, meanwhile, would make the dismissal automatically unfair and amount to sex discrimination.

There are several actions which you must take in advance of any final meeting where dismissal will be considered, including the provision of written notice of the meeting. You also need to provide provisional scoring for redundancy selection, together with evidence that it can be objectively justified.

Finally, every selected employee must have the opportunity to state their case before any final decision is made, followed by a right of appeal.

In Short

- **Plan your redundancy programme in detail.**
- **Calculate in advance the obligatory payments involved.**
- **Ensure you understand and follow the rules.**
- **Make sure the selection process is objective.**

# Managing the **emotional impact** of redundancy

**It is important not to overlook the needs of people who survive the redundancy process. Morag Dalziel has some practical advice on keeping them motivated.**

**"Employers must give serious thought to those employees who are left in the business."**

**As the Credit Crunch continues to grip the country, all economic predictions suggest that the number of redundancies throughout the UK will continue to rise sharply during 2009.**

Indeed, one particular CBI estimate which has been picked up in the media, suggests that nationwide, an average of 1600 employees per day are likely to find themselves facing the news that they have been selected for redundancy.

It is understandable that the majority of employers in any redundancy situation will tend to focus on ensuring the fair and sensitive treatment of employees who are losing their job. Poor redundancy handling is, after all, extremely bad for any employer's business and longer-term reputation.

However, it is crucial that employers do not lose sight of the fact that redundancy also affects those employees who survive the process. If businesses are to move forward successfully in the aftermath of a round of redundancies, employers must give serious thought to those employees who are left in the business.

In particular, they must consider both how to motivate and reassure them in order to minimise any adverse effect on future organisational performance moving forward.

It is inevitable that redundancy will have an adverse effect on the psyche of the majority of those who survive the process. Although relieved not to be out of work, most will feel guilty at having escaped the proverbial axe. They may well also feel disenchanted and pessimistic about the future. A demoralised workforce, fearful for job security, is unlikely to display enthusiasm, commitment or initiative. If not carefully managed, this can lead to increased levels of absenteeism, a decline in productivity or a drop in the standards of customer service.

It is therefore vital that employers take the time to communicate a clear and positive vision for the business. They should stress that the business both values and relies upon the commitment and skills of its remaining employees. It is utterly crucial that employees are able to see just how important their particular contribution is and how they fit into this vision as individuals. It may be easier to reassure some than others of their value and place in the organisation, meaning it may

well be that a bespoke, one-to-one approach is necessary to achieve this.

Managers and supervisors should therefore be trained in how best to tackle delicate and often emotional situations, while keeping team work and morale at the highest possible level.

It is equally important that managers are careful when redistributing former colleagues' work among employees following the redundancy process. While there may be a temptation simply to ask them to pick up their departed colleagues' workloads, this could have a number of undesirable results. These might include increased stress levels, complaints of overwork and possible breach of contract claims. At worst, if left unaddressed, it might lead to resignations and subsequent claims of constructive dismissal.

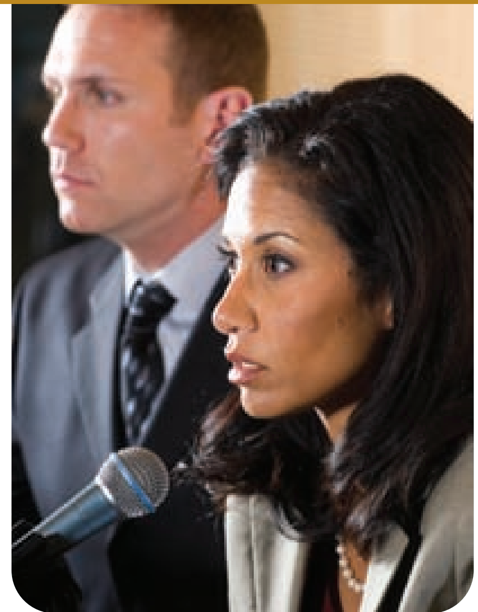
It is therefore prudent for managers to meet regularly with employees, to discuss how they are coping and check that they do not feel under any undue and avoidable work-related pressure.

That said, balance is always key. It is still important to stretch individuals in a positive way, and give them access to developmental opportunities which will ensure that the workforce develops and remains motivated and engaged. This will undoubtedly place organisations in a stronger position as the economy recovers, which we can only hope will be sooner rather than later.

### In Short

- **Consider carefully how to reassure and motivate remaining employees.**
- **Train managers to cope with sensitive situations.**
- **Take care not to generate undue stress when redistributing work.**
- **Continue to stretch and develop people in a positive way.**

# Important **new procedures** for employers



**The new ACAS Code of Practice comes into force this spring. Sarah Hall explains some of the consequences for employers and employees.**

**"Employers who are unfamiliar with the principles are likely to face expensive Tribunal claims."**

**The statutory three-step grievance and disciplinary procedures, familiar to so many businesses over recent years, ceased to apply on 6 April 2009.**

In its place, ACAS (the independent Advisory, Conciliation and Arbitration Service) has produced a revised Code of Practice to help all parties deal in future with disciplinary or grievance matters.

This is supported by guidance intended to help employers understand what is required of them. The Code and guidance amount to a major revision of the way in which disciplinary and grievance matters are dealt with in the workplace.

**Major changes**

Unlike the former statutory procedures, a failure to follow the new Code will not result in a finding of 'automatic' unfair dismissal. However, Tribunals will take the Code into account, and may increase or decrease an award by up to 25% if they find that either party has acted 'unreasonably' in failing to follow it. Tribunals will need to interpret the many principles set out in the Code and apply them to the facts of any particular case. Employers who are unfamiliar with the principles are likely to face expensive Tribunal claims.

The Code requires that, where disciplinary or grievance procedures are being followed, employers should:

- deal with issues promptly
- act consistently
- carry out necessary investigations to establish the facts
- explain the issue to the employee and allow them to respond before making any decision
- allow the employee to be accompanied at meetings.

The Code also provides more specific guidance on handling disciplinary issues. For example, employers must:

- inform the employee of the problem in writing in 'sufficient' detail
- allow reasonable time to prepare
- hold a meeting to discuss the problem and the 'evidence'
- allow the employee to ask questions, present evidence and call witnesses
- provide the employee with an opportunity to appeal.

In respect of grievances, employers must:

- hold a meeting to discuss the problem
- consider adjourning for investigation
- decide on appropriate action and confirm in writing
- allow the employee to appeal.

**Increased claim numbers**

It is no longer necessary for an employee to pursue a grievance before submitting a claim to a Tribunal, which could result in an increase in the number of claims issued.

Employers should therefore familiarise themselves as soon as they can with the requirements of the new Code, and identify any changes to existing procedures.

**In Short**

- **Familiarise yourself with this major revision to disciplinary procedures.**
- **Not following the Code could result in greater costs for businesses.**
- **Employees can submit a Tribunal claim without pursuing a grievance.**
- **Tribunal claim numbers could increase.**

# Getting out of an **unprofitable contract**

**If a contract is binding, you cannot get out of it – or can you? It all depends on what is actually in it, says Samantha Lloyd.**

**"If a contract is wrongfully terminated, the other party may attempt to sue for damages."**

**The effects of the Credit Crunch are starting to be felt more deeply. Many businesses are vigorously reviewing all areas of their organisations to protect profitability. Critically, decision-makers are being forced to reflect on agreements that simply do not make sense anymore.**

However, it is one thing to recognise where savings could be made, quite another to achieve them.

Say that you are a business with a five-year software agreement with a supplier in the US. Three years on, as a result of currency fluctuations, the price you are now paying in US dollars has turned the contract from a good deal into a bad one. To top this off, sales going forward remain uncertain. You are facing tough business decisions, and this is one contract you could certainly do without.

But it is a binding contract. You cannot get out of it. Or can you?

**Try renegotiation**

As a first step, it may be best to try to renegotiate. In the current climate, a supplier may be willing to consider amending the terms to re-address the imbalance as an alternative to losing the contract altogether. If you do that, any change must be made "by deed".

A deed is a legal instrument used to grant a right. A simple contract is only valid where both parties agree to do or not to do something. However, when amending a contract in this context, it is likely that the supplier will not be getting anything in return for the variation. The problem caused by this so-called "lack of consideration" is overcome by introducing a degree of formality and documenting the agreement in a deed.

The document must state that it is a deed and be signed as one. Your lawyer will be able to ensure that this is done correctly.

An agreement to terminate the contract may also be an attractive proposition for a supplier. Any negotiations should be broached carefully following a full evaluation of your commercial and legal position, especially if it appears there is

a deal to be struck. Where constructive negotiations are out of the question, however, you will need to consider other options.

Your right to terminate the contract will depend on its terms. Where these are in writing, it is much easier to assess the rights of each party. This is because a written contract may contain a number of provisions that deal with termination. You should carefully consider any rights or methods of termination provided in the contract before you take any action.

**Early termination**

You may be entitled to terminate without cause, simply by serving a written notice on the other party. In a long-term contract, doing this may be subject to an early termination charge, which is likely to represent some form of compensation for lost costs which the supplier will be prevented from recovering. In such a case, do the maths.

The contract may allow termination of the contract when one party has persistently breached a particular term.

People rarely follow every provision of a contract, and although you may have previously been willing to overlook a shortcoming, its persistence may now offer you a way out.

It is also usual for a contract to provide a right to terminate in the event of a material breach which is not corrected or capable of being remedied. What 'material' actually means is subjective, and there is a wide scope for dispute over whether any particular breach is either material, remediable or both.

**Significant change**
Another common provision allows termination in a case of insolvency or change of control, which can come into play when there is a significant change in the actual or practical identity or status of the other party.

You may now be thinking, “That’s all well and good, but what if I’m unable to rely on any of these contractual rights? My contract doesn’t provide me with any express rights to terminate.”

This is when you will need to find out whether the law can come to your rescue.

The legal rules of ‘frustration’ allow a contract to be automatically discharged when a supervening event occurs (something that prevents either party from performing their obligations under the contract). Such a termination requires a court decision, although courts have little sympathy where a good bargain has gone bad. However, a fundamental breach – something that is a breach of a vital term going to the root of the contract – allows the innocent party to choose to terminate the contract.

Alternatively, if you cannot cite an event that occurred after the contract was agreed, what about what went on before? If the contract turns out to be unprofitable because you were induced into entering into it by a fraudulent or negligent statement or representation made by the other party, you may be entitled to have it set aside. This would put you back into the position where you were before the contract was made and give you the right to claim damages.

However, the decision to terminate should not be taken lightly. If a contract is wrongfully terminated, the other party may attempt to sue for damages. There may also be other significant consequences, all of which you should thoroughly consider before taking any steps to terminate.

In Short

- **First, consider renegotiating the contract.**
- **Examine the contract carefully to see if any contractual rights for termination are available.**
- **Establish whether any non-contractual rights of termination may assist you.**
- **Never take the decision to terminate lightly.**

# What do you do if a **customer goes bust?**

**How do you keep afloat if your customer sinks? Richard Phillips has some of the answers.**

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**“The better prepared you are the more chance you have of overcoming adversity.”**

**Monday morning. Trains were late. More cold weather. You have been at work for an hour and already your PA has called in sick and the email system is down. Just when you think things really cannot get any worse, you take a call informing you that one of your major customers has gone bust.**

Sadly, such a call is an increasingly common event in these times of uncertainty – and if you are owed money, it is probably already too late to hold out a realistic prospect of being paid in full. Almost certainly, the significance of the call will depend entirely on how you have prepared your business to deal with the risk. Encouragingly, it need not actually be the disaster it sounds.

**Take action**

Prepared or not, and if monies are owed to you, there are several immediate steps you can take.

First, get in touch immediately with an insolvency expert to determine what you might be able to do and how strong your position is. If you are a major creditor, you may be able to leverage yourself into a prominent position to have some say on the appointment of an administrator or liquidator, so gaining some control over the process.

This is unlikely, however, if there is money owed to banks. It would also be the exception rather than the rule to have security such as a debenture (which would give you preferential rights) as part of a typical trading relationship.

Next, make yourself known to the customer’s administrator or liquidator. It is important to ensure you are on the radar.

Be sure to submit your claim even if you haven’t been asked to provide a formal proof of the debt owed to you. This will ensure you are in line for a proportion of any sums which may trickle down to unsecured creditors.

If you think you have a claim for retention of title over goods you have supplied to the customer that have not yet been paid for, put this in writing. In addition, keep hold of anything belonging to the customer – you might have tooling or plans, for example – which might be used as a bargaining tool at a very practical level.

Make sure you instruct your team not to supply the customer with any further goods or services. It may be that the administrator would like you to so he can keep the business running with a view to selling it. Before agreeing to this, get written confirmation that you will be paid out of the administration – ideally in cash on delivery.

**Managing the situation**

Irrespective of whether or not the customer owed you money, the consequences can potentially be more damaging than the dead debt alone. How important is the customer to you? Did it represent a sizable percentage of your turnover? If so, the vaccuum created could have a serious knock-on effect which you need to manage.

You need to do what you can in advance to prepare for any eventuality. In that way, you may continue to flourish without the customer. Here are eight strategies for survival:

- Where possible, proactively broaden your spread of customers so that if any existing customers do go into liquidation it will not seriously damage your business
- Understand any flexibility in employment or consultancy contracts to reduce hours and the likely cost of redundancies. In this climate, decisive action is not a luxury – you need to plan and adapt

- When taking people on, consider short-term contracts or consultancy relationships to give you flexibility

- Review and understand your terms and conditions of business. They should be fit for purpose, to maximise rights in the event of a customer failure. Perhaps the most common example is a carefully drafted retention of title to goods which have not been paid for, as outlined above

- Try to negotiate some flexibility into your premises requirements – agreeing short-term space and less rent up front are both examples that can aid cashflow. Such approaches are possibly easier now than they have been in the past

- Thoroughly review your credit control procedures to manage the payment of debts. Ideally, do not let them arise in the first place, by securing the money in advance (but this is not always practical)

- Factoring your debts can remove a large element of risk

- You should explore credit insurance.

If you are prepared, you will be able to act rationally and proactively when you get that call. Think outside the box, and consider how to turn problems to commercial advantage. For example, could you broker an opportunity for another customer or contact who might be interested in acquiring the failed customer's business? Why not acquire that business yourself and broaden your base? The customer might have failed, but not because its business was inherently bad. Monitor the destiny of the failed customer. Freed of its historical impediments and with fresh backing, it could become a larger and more stable customer of the future.

Remember, just as with the Monday morning blues, the better prepared you are the more chance you have of overcoming adversity. The late train was not crucial because you had papers and were able to brief yourself for the Board meeting that evening. Your manager's PA had been trained to cover your work effortlessly. The emails were sorted within an hour as a result of the tight service level contract your lawyers drafted for you.

Expect problems, plan and overcome them.

### In Short

- **Contact an insolvency practitioner and the administrator straightaway.**
- **Be sure to cease providing products or services to the customer.**
- **Protect your business with flexible contracts.**
- **Consider innovative solutions to a short-term problem.**

# The **legalities** of launching your **own business**

**Getting the legal side of a new business right from day one will save much stress (and money) in the long run, writes Douglas Campbell.**

**"Bootstrapping the company with personal savings, credit cards and long-suffering family will only take you so far."**

**With all the doom and gloom surrounding the business world at present, you might be forgiven for believing that people are keeping their heads down, reducing their risk profile and shelving any plans for world-domination.**

However, providing you take account of certain factors, launching your business during a recession can be a great move.

It is, of course, fair to say that banks – often the first port of call for an aspiring businessman or woman with a well-thumbed business plan – have taken quite a battering in recent times. Yet the funding of early-stage companies has always been critically important. Leaner times should not change the basic formula that businesses with a solid foundation, and a product or service that can continue to return profits in expanding markets, has great opportunities.

**Choose your business vehicle**

There is no magic formula that guarantees success, but it is always essential to ensure that any venture is well-planned. Start by choosing an appropriate business vehicle – operating as a partnership or a sole trader may be easier initially, but the

flexibility of a limited company makes it the vehicle of choice for most businesses with growth ambitions.

It is often assumed that the limited company's main advantage is the limited personal liability it gives those running the company. Be aware, however, that this will count for little if a bank required directors to grant personal guarantees to protect their loans.

The obligations imposed on directors in terms of conduct and in submitting regular information to the public records at Companies House, though, often give the venture credibility in the eyes of potential customers and suppliers. Owning a limited company will often make it easier to obtain equity investment, and gives directors the ability to secure debt funding by granting a floating charge or debenture to a bank.

**Establish a strong constitution**
While surveys show that entrepreneurs tend to have many positive traits in common, you should not let your natural optimism override any detailed consideration of various worst case scenarios.

You will achieve significant long-term cost savings from having mechanisms in place from the start that deal with issues that can paralyse a business. These might include a voting deadlock at board level and the question of who may transfer shares in the company.

It is therefore advisable to build these either into the Articles of Association (the company's public constitution) or a separate Shareholders' Agreement. You can save much vital management time and cost further down the line if you have previously agreed, for example, that a disgruntled employee must transfer his shares among the existing shareholders at a pre-agreed price if he leaves the organisation.

It is essential to identify where the value of the company will be as it grows and to protect this by whatever means possible. Some businesses are more reliant than others on Intellectual Property (IP). At the very least, though, you will want to secure elements such as your domain name and, where possible, register any trademarks, distinctive words or logos that are to be associated with the business.

**Making your mark**
Ensure that your company's stationery, emails and website include its full name and number of the company and the address of the registered office. Make sure you include the names either of all the directors or of none of them.

The website will be an essential part of the branding package, and you should seek to secure an appropriate Internet address, preferably incorporating your company's name, as soon as possible. People who use the website should be directed to your company's privacy policy (how you will use their personal data) and terms and conditions (essential if you trade through the website itself).

If you are selling branded products or services, you should secure web addresses incorporating their names as well.

**Doing the business**
You will also need to decide how you are actually going to do business – you may have the best product in the world, but if it fails to get money in the bank, the business itself is going to be short-lived.

It is essential that every company understands the basic contractual relationships it intends to enter with its customers and suppliers. Strong business foundations include a standard set of terms and conditions of trading, which clearly define the rights and obligations on either side (including when you get paid). It is sensible also to use a non-disclosure agreement if you are entering into discussions with a commercial partner which contain any risk that confidential information may be disclosed.

Preparing such documents before you start trading gives you a couple of advantages. First, if you produce them at the outset of negotiations, they are more likely to be used. Second, they will contain provisions that are more likely to support your commercial interests than those in a contract produced by another party. All businesses, in fact, should consider keeping a comprehensive electronic database containing scanned copies of all signed agreements. Having a contractual paper trail only a mouse-click away can save valuable time.

**Focus on the money**

Finally, always look to the future. 'Bootstrapping' the company with personal savings, credit cards and long-suffering family will only take you so far. Banks may provide you with loans, but these will always be at the expense of your balance sheet.

Investment is often crucial to development, and it is never too early to start looking. If you find yourself in the so-called "equity gap" (too much for a casual punt, too little for a 'corporate' investment), business angels occupy an essential role throughout the UK. Ignore the entertainment value of Dragons' Den, which has popularised the role of the angels, and remember that much of the benefit they offer comes from so-called 'smart money' – investors who can add experience and contacts to help accelerate the growth of the business from a standing start.

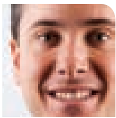
In Short

- **Do not be put off exploring new ventures.**
- **Build in the organisational strength you need from day one.**
- **Clarify your terms and conditions.**
- **Ensure you have access to the money you need.**

# Who owns the copyright in work you have paid for?

**It is easy to assume that you own what you pay for – but if you use a freelancer, they retain the copyright. So be clear about what you are buying, says Paul Gershlick.**

**"It is quite possible that something you have paid for might be legitimately sold to someone else."**



**You are a company director. You have a relatively successful business. (Or at least you did until the Credit Crunch started to bite.) You have had to face some tough choices, including making some members of staff redundant – not a decision you wanted to make, but at least you can keep giving them work on a freelance basis as and when you need them.**

Then there is another way of looking at it. The Credit Crunch has given you an opportunity to make some people redundant – people you were happy to let go. You have managed to replace them with contractors whom you only need to call on when your business demands it.

So, not a bad result all round. You have no ties and no on-going obligations to employ and pay, but you can call on trusted people from time to time, knowing that the chances of losing them to full-time employment are slim at the moment.

Let's say you are a greetings card business. You may hire freelance designers in the lead-up to your print deadlines for key annual events such as Valentine's Day, Mother's Day or Christmas. You have paid them for their efforts.

**Infringing your rights?**
So how is it that you have just discovered the design you paid them to create being sold by a rival company? Surely you own the copyright in the designs, so the actions of the freelancer and rival business have to be an infringement of your copyright? Surely!?

Well, not exactly. If you employ someone, whatever they create in the course of their employment belongs to you, the employer. However, if you engage a contractor to do some work for you in a freelance capacity – even in a quasi-employment situation – the starting point is that the copyright belongs to them. Theoretically, in fact, this could mean you may be stopped from using the design at any time and you must only use it in the way the contractor permits.

**Implied terms**
Even if you engage the freelancer on an informal, non-written basis, a contract will actually exist between the two of you. Terms can be implied into that contract, where necessary, to give it so-called 'business efficacy' (that is, the authority required for it to have the intended result). Since you have paid for the work to be created, and depending on what else you have agreed with the freelancer, a term will probably be implied in your contract that allows you to use what you have paid for. It is questionable, however, how long this right might last for and whether the freelancer has a right to choose to terminate it.

If this sounds somewhat 'up in the air', that is because it is. Everything depends on deciding what both parties intended when entering the contract. If you engaged the contractor informally, it is of course hard later to establish precisely what you both intended at the time.

The courts have ruled on plenty of cases like this, and the results vary. In some

cases, such as one relating to a newly designed company logo, the courts have found that while the freelancer owned the copyright ‘at law’, this was effectively ‘on trust’ for the party that commissioned it and the ‘commissioner’ could call for an assignment of the copyright at any point.

**Exclusive and other licences**

In other cases, the courts have said that an implied term entitled the commissioner to an exclusive licence. This means that, while the commissioner did not own the copyright and could not call for a transfer of ownership, they still had the right both to use it and to stop the freelancer doing anything else with it.

In other situations, a non-exclusive licence might be implied. This means that while the freelancer retains ownership, the commissioner has a licence to use it. The freelancer cannot be stopped from licensing the copyright to someone else, however.

The courts have said that implied terms such as these must go no further than necessary, and must be for the shortest term that the circumstances demand. Applying what actually happens will largely depend on the particular facts of each case and what is commercially workable between the parties.

**Uncertain rights**

If you are the commissioner, therefore, your rights are uncertain. It is quite possible that something you have paid for might be legitimately sold to someone else, which could eat into your profits.

Even if the freelancer is deemed to hold the copyright work on trust for you, getting a court to state that you are entitled to the copyright may involve a costly and protracted legal battle.

In Short

- **Copyright in work commissioned from a freelancer remains theirs.**
- **An informal, unwritten contract is hard to interpret later.**
- **In a copyright dispute, it is hard to predict what a court may decide.**
- **Ensure you have a properly drafted, written contract at the outset.**

# Keep the sales tap running!

**Economic slowdown may make winning new business more difficult – but it is far from impossible. Dave Richardson shares his tips for winning new business in a tough market**

“You can ease the pain by becoming proactive, but it will mean leaving your desk and pressing the flesh.”

**Having been involved in business development for many years, I am still amazed at many people’s lack of business acumen when it comes to winning new opportunities.**

I have seen countless SME owners just sitting tight, with that ‘rabbit in the headlights’ look about them, wondering where the next order is coming from.

Well, you can ease the pain by becoming proactive, but it will mean leaving your desk and pressing the flesh. So here are my top tips for winning new business.

Start with your existing clients. It’s easier and cheaper to generate new business from them, as they know and trust you. As a rule of thumb, once you have sold them one product or service, consider what else they could use that you provide. Understanding their business will be an advantage, giving you the edge by identifying further business opportunities.

**React to opportunities**
Next, never forget that good account management is the key to winning repeat business. Again, because you understand your clients’ business you will be well placed to react when the opportunity rises.

Be sure to keep an eye on your client retention levels. Compare your top accounts from 2007 against 2008 and see who you are still dealing with. Hopefully you will have maintained at least 90% of your clients. Anything less and you need to identify why so many are leaving. Use these levels as a benchmark to improve your retention rates – every client you save means you do not have to spend to win a new one, which will ultimately improve your bottom line.

Ensure you understand how much it costs to win a new client. That way, you will appreciate how important it is to keep them to gain repeat business. It is quite possible that the cost of acquisitions will eat up any profit on that first order.

Clearly, not all new business comes from existing clients. It can come from many sources, so it is vital to build and maintain your network of contacts and constantly be on the lookout for new opportunities. Follow up leads that are gained from referrers, networking events and the press.

**Getting better known**
Similarly, network, network and network again. It can be even more difficult to win new business if your company is not well known – word of mouth and referrals can often generate invitations to pitch.

On the same principle, make sure you have an effective PR strategy. Do you know your local business editor? Meet them periodically, find out what they are planning to feature over the next few months and how you can contribute. This raises your business's profile and identifies you as the experts on the subject. It will also please your existing clients to see you mentioned in the media.

When dealing with existing clients, never be afraid to ask for more business. What is the worst that can happen? They may say no. Or they may say, "Actually you've just reminded me that I need to get this sorted."

**Taking the holistic view**
When you do receive an order from a new client, do not look upon it as just a one-off opportunity. By understanding their business, you can take the holistic view and offer other products or services to help them meet their own business objectives.

Housekeeping is vitally important. Maintain your client database by conducting and gathering relevant research and intelligence. While a friendly call is seldom enough to persuade a company to change its supplier, one that coincides with that company's annual review of its supply chain could be another matter.

Above all, be interested first – and then be interesting. Meeting a potential client for the first time is a bit like going on a first date. Listen to what they say, remember it, feed back something relevant and you might get a second date. The trick is to be open and transparent at all times, as many potential clients can feel intimidated by 'the sales approach' and will want you to make them feel at ease.

In Short

- **Treat existing clients as your top priority.**
- **Understand your client retention levels.**
- **Never be afraid of asking for new business.**
- **Keep your client database up-to-date.**

# Why **go it alone...?**

**The joint venture can be a flexible and comparatively secure way of getting a new business off the ground. But make sure you choose the right structure for your needs, says Bonnie Thomson.**

**"Unlike shareholders in a limited company, each partner is liable for all of the debts of the partnership."**

**In the current economic conditions, launching a new business venture can be even more risk-laden than usual. For this reason, would-be entrepreneurs might be wise to consider the joint venture (JV) business model, because it allows you to pool risk, resources and market share.**

Particularly during this period of reduced bank lending and low interest rates, getting a sleeping partner on board provides you with access to precious capital as well as offering a higher return for investors jaded by traditional bank savings.

**Choosing the right structure**

The term 'joint venture' has no fixed legal definition and can be used to describe any relationship where there is collaboration between parties and sharing of related profits. But what form should your collaboration take? There are several options to consider.

First, there is the limited company. This has its own legal personality, distinct from its members. It is run according to its Articles of Association and can be quick and cheap to set up. A limited company must submit annual accounts and returns to the Registrar of Companies, which are available to view by the general public.

Choosing this structure gives you considerable flexibility. Profits can either be shared in proportion to shareholdings or varied by issuing different classes of shares. Control can also be shared since each party can appoint directors to the board that manages the company.

Limitation of personal liability means that shareholders are usually not liable to pay the debts of the company on winding up, and this is often cited as a benefit of choosing a limited company. While it may appear to be an attractive benefit, care should be taken in the early stages of the company's life – it may not have an impressive balance sheet, and creditors may insist on personal guarantees from shareholders to secure lending.

**The partnership option**

Unlike a limited company, a partnership does not need to be incorporated.

Instead, it comes into effect automatically when two or more people (or companies) carry out business with a view to making a profit. Most partnerships, however, ask a solicitor to draw up a partnership agreement governing how the business will be run. This is because there are default regulations that apply in the absence of an agreement, and these may not always suit the interests of all parties.

Partnerships are often chosen for tax reasons. Each partner is responsible for the tax arising on their share of the profits. Where the business makes a loss in its early years, corporate partners may be able to offset these losses against their own profits to gain a tax advantage.

Unlike shareholders in a limited company, each partner is liable for all of the debts of the partnership. In a worst case scenario, where one of the partners becomes insolvent another may be left to foot the bill by liquidating their personal assets.

**The collaboration agreement**
Another alternative is to enter into a 'contractual' joint venture. Here, the parties can work together on a business enterprise without committing themselves to become shareholders in a limited company or partners. The relationship is governed by an agreement drawn up at the start of the venture, and each party maintains its own assets, liabilities and legal personality.

Because there is no formal conjunction between parties, such an enterprise is easily dismantled because there are no assets to distribute or liabilities to apportion. This makes it an ideal choice for a short-term project, or a situation where each party specialises in a particular area, such as where an inventor requires a manufacturer to produce the product they have designed.

There are other ways that you can choose to structure your joint venture. Your legal advisor should be able to explain these in more detail.

**Important considerations**
What happens when it all goes wrong may be the last thing on your mind when you are setting out on your new

and promising joint venture. However spending a little time and money getting sound documentation in place at the outset could save you a fortune if the worst should happen. At the very least, your agreement should cover the following:

- Are you and your partner clear as to precisely what the business activities of the venture will be? Where they will take place geographically? Who will be responsible for obtaining consents or licences required for the business activities?

- Financial disputes often bring joint ventures to a premature end. How much capital will each party contribute? Who will provide security for external finance, and what form will this security take? Are you prepared for an initial investment to be non-cash? Will you be obliged to continue to contribute financially? What are the tax implications of your arrangements?

- What will happen to joint assets on termination? If they include property, will you transfer the property outright? How will you value assets? What about intangible assets such as goodwill, or Intellectual Property (IP)?

- What happens if one party wants out of the venture early? If you have chosen to use a partnership, this may mean that it needs to dissolve. If you have a limited company, who will be entitled to purchase the shares of the exiting party? How will the board of directors be appointed?

- Will the parties be obliged to refer certain levels of business to the new venture? What information will they be required to supply? How will a deadlock situation be resolved?

**Next steps**
So make sure that you seek sound advice from the outset. Your commercial lawyer should be able to help you choose the most appropriate structure and draft a set of documents clearly setting out the rights and responsibilities of each party.

This will leave you free to concentrate on making your business a success, so that you can take the best advantage of this comparatively safe and flexible way of doing business. Good luck!

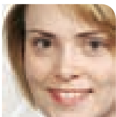
### In Short

- **Take professional advice on the best JV structure to create.**
- **A limited company is flexible, but may require personal guarantees.**
- **Partnerships are straightforward, but can expose partners to debt liabilities.**
- **Be sure to address what will happen if things go wrong.**

# Holding your **bank** and **insurer** to account

**What, if any, powers do you have over your bank if you are unhappy with its service? Or, if you do not agree with an insurance decision, how do you dispute it? Kate Ellingsworth has some of the answers.**

**"The banks are not permitted to make penalty charges."**



**We all know that banks are in business to make money – even if some of them have not done too well at it in recent times.**

Many people feel, however, that banks can abuse their bargaining power over the consumer, even resorting to trickery and bullying tactics to levy charges. Common complaints against banks cover areas such as mis-selling of financial products, mortgage exit fees, credit card charges for payment defaults (currently capped at £12 per misdemeanour) and unauthorised overdraft charges.

If you think that the charges made against you are unfair, what can you do about it?

**Contact your bank**

The first step in any complaint is to contact the bank (or building society) direct. Under the Data Protection Act 1998, you are entitled to ask your bank for a list of all the charges they have made against you, with dates, amounts and reasons. The banks may charge you up to £10 for providing this list. The Data Protection Act does not cover bank statements, though, and some banks are therefore claiming that they cannot provide a list of charges, but will provide copy statements instead – for a much higher fee. You should therefore make it

clear in your letter that you are using the Data Protection Act to request only a list of charges.

Once you have identified any charges that seem excessive, contact your bank about the charges and keep a record of any correspondence. The bank must deal with your complaint within eight weeks. While you might achieve a satisfactory resolution at this stage, some banks might call your bluff. In such a case, you might find that you need to take matters further by complaining to the Financial Ombudsmen Service (FOS).

**Involving the Ombudsmen**

The FOS deals with complaints about banks, building societies, insurance products, pensions, mortgages and investments. It deals with complaints on a case-by-case basis. Its decision is usually final, although if you are unhappy with the outcome, you can appeal to the Ombudsman's Independent Assessor.

You must write to the FOS with the bare facts of your case within six months of the final response letter you receive from the bank or other institution in question. The FOS will usually deal with a complaint within about four to eight months, although this can vary depending on the complexity of the case.

The FOS has the power to order the bank to pay compensation, to rectify a given situation, or to make an apology. Although it can order a bank to pay out a maximum of £100,000, awards are more usually only a few thousand pounds because the aim is simply to restore the customer to where they would have been. Awards therefore usually only cover the original capital sum plus interest.

There is more advice about how to make a complaint on the FOS website: www.financial-ombudsman.org.uk.

Banks and building societies are regulated by the Financial Services Authority (FSA). While able to give general information about banking and investment products, the FSA does not consider individual complaints made by members of the public.

**High Court update**

Many readers are probably aware of the test-case in the High Court, started by the Office of Fair Trading (OFT) against seven major banks and one building society, that seeks to establish whether certain charges for unauthorised overdraft facilities are legal.

This followed the arguments of many consumer groups who contend that there is a difference between fair charges that cover the administrative cost to the bank of arranging an overdraft, and charges that act as penalties. The banks are not permitted to make penalty charges.

Unfortunately for anybody seeking a quick resolution, the banks and the FOS have put all complaints about unauthorised overdraft charges on hold until the test-case has been resolved in full. This means that you will still be able to make a complaint to your bank, but it might take some time to resolve as the banks are waiting to hear if they will have to refund unauthorised overdraft charges.

The first issue that will be decided in the test-case is whether the banks' terms and conditions are governed by the Unfair Terms in Consumer Contract Regulations 1999. If the Court finds that they are, the OFT will have to decide whether the charges are in fact fair. The second issue the OFT is asking the Court

to decide is whether or not the charges made by the banks amount to penalty charges.

So far, the High Court has found that the banks' terms and conditions can be assessed for fairness under the Regulations. The banks intend to appeal that decision. The Court has also made a ruling that, in general, the charges did not amount to penalty charges. However there were some terms that the judge found he could not make a ruling on until he had further information, which, at the time of writing, is due to be presented in Court from December 2008 onwards.

This is what is currently holding up appeals and complaints, so it is in the interest of many consumers that a final ruling is delivered soon.

**Disputing an insurance award**
Turning to the question of insurance, there are two main disputes that can arise against an insurer – first, when it refuses to pay out when a claim is made, and second when it refuses to provide cover, or makes the decision to withdraw it.

If you have made a claim that your insurer is unwilling to pay, check the wording of your insurance policy straightaway. Income protection and critical illness policies in particular are well known for their highly restrictive wording that excludes a wide range of circumstances from cover.

If you are still unhappy with their service after checking the wording of your policy, you should write a letter of complaint to your insurer stating the reasons why you are dissatisfied.

If your insurer does not reply or you are dissatisfied with the response, you can take the matter further – just as with your bank.

Again, you can make a complaint to the FOS. This is free, and you will not need legal representation to make a complaint. The FOS has revealed, in fact, that Payment Protection Insurance was its largest category of complaint in 2008. Its insurance division confirms that it has upheld complaints by policy-holders where the wording or layout of a policy is confusing or misleading.

In order to make your complaint you must write to the FOS with the bare facts of your case within six months of the final response letter you receive from your insurer. The timescales are the same as with a bank complaint, and again the

FOS has the power to order the insurer to pay compensation, to rectify a given situation, or to make an apology.

If the FOS does not find in your favour, it is still possible to take your insurer to court. Simple claims of £5,000 or less may be pursued through the Small Claims Court, where you will not need legal representation. If the facts of your claim are more complicated, however, or the claim is worth more than £5,000, you will need a solicitor to guide you through the sometimes complicated and stressful litigation process.

The FOS will not deal with cases that involve the insurer's decision to refuse cover, as this is essentially a business decision. It may be possible to pursue such a claim through the court, possibly under discrimination legislation (if the insurer's decision is based on discriminatory grounds).

It is important to bear in mind, though, that the insurer may be able to justify their decision on statistical grounds. Such cases can be complicated, and it is important to obtain legal advice before deciding to pursue a claim of this type.

In Short

- **Complain direct to your bank in the first instance.**
- **Be prepared to involve the Financial Ombudsmen.**
- **Do not involve the FSA – this is not their remit.**
- **Be patient while test case is settled.**

# Are debtors adversely **affecting your business?**

**Cash flow has never been more important. Michael Lister has 10 top tips for controlling debt in the Credit Crunch.**

**"If your customer cannot pay, do not throw good money after bad."**

**As the Credit Crunch continues to dominate every news story, and redundancy rates reach a record high, cash flow has become paramount for the survival of every business. A healthy cash flow often depends on making sure that your clients and customers pay on time.**

We fully appreciate that debt collection can be an onerous, dispiriting task. If your business is experiencing difficulty with debtors, sometimes litigation can be your only recourse. It is important to discuss your situation with an experienced firm of solicitors before taking action.

**Action you can take**
My top 10 tips for the control of debt in a Credit Crunch are:

1. Review your terms and conditions. Is there any good reason why your invoices are to be paid in 30 days? Why not reduce to 14 or even seven days?

2. Never bark without bite. If you threaten to take action after seven days, do so promptly on the eighth day.

3. Demonstrate to your customer that excellent customer care is reflected in your excellent business housekeeping. Asking for an invoice to be paid in time is good business. Customers respect well-run businesses, and will often pay them before they pay businesses that are less well organised.

4. Instruct a solicitor why you believe your customer is not paying you.

5. If your customer is not paying because of their own cash flow difficulties, do not allow these to infect your business. Cash flow is a life blood of any business – yours as much as theirs. Time limits exist for a reason.

6. If your customer will not pay, instruct a solicitor to issue a seven-day letter threatening to wind up the company. In our experience the debtor will pay within seven days or soon after the issue of petition to avoid negative advertising.

7. If your customer disputes the debt, instruct your solicitor to write a 14-day letter. This should set out in detail the contractual basis of your claim, with a view to issuing legal proceedings unless you receive a

satisfactory response. If proceedings are issued and the defence is without merit, consider with your solicitor how you can avoid the cost of a full trial. This might involve an application for Summary Judgment, or a trial on just one issue that will facilitate settlement once decided.

8. If your customer cannot pay, do not throw good money after bad. Make status checks on the company or its directors, and review your position depending on whether or not they appear to have money. You can either carry out your own checks or instruct your solicitor to make enquiries on your behalf.

9. Take your solicitor's advice. Do not involve yourself in litigation that is doomed to fail.

10. Do not lose a valued customer if you do not have to. Be prepared to mediate, either formally or informally. It is perfectly possible both to have the debt paid and to maintain a positive ongoing relationship with your customer.

### In Short

- **Do not allow slow payment to threaten your business.**
- **Seek the help of a solicitor before launching legal proceedings.**
- **If you threaten legal action, be prepared to follow it through.**
- **Do not start litigation that you cannot win.**

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## East

### Cambridge

**Kester Cunningham John**
Chequers House
77-81 Newmarket Road
Cambridge
CB5 8EU
Tel: 01223 363111
Fax: 01223 323370
Contact: Simon Smith
info@kcj.co.uk
www.kcj.co.uk

**offices also at:**

**Bury St Edmunds**
Tel: 01284 761233

**Norwich**
Tel: 01603 703070

**Thetford**
Tel: 01842 752401

### Chelmsford

**Gepp & Sons**
58 New London Road
Chelmsford
Essex
CM2 0PA
Tel: 01245 493939
Fax: 01245 493940
Contact: J. Douglas-Hughes
mail@gepp.co.uk
www.geppandsons.co.uk

**offices also at:**

**Colchester**
Tel: 01206 369889

### Ipswich

**Gotelee & Goldsmith**
31–41 Elm Street
Ipswich
Suffolk
IP1 2AY
Tel: 01473 211121
Fax: 01473 230387
Contact: Brian Scott
info@gotelee.co.uk
www.gotelee.com

**also at:**

**Hadleigh**
Tel: 01473 822102

### King's Lynn

**Ward Gethin**
8–12 Tuesday Market Place
King's Lynn
Norfolk
PE30 1JT
Tel: 01553 660033
Fax: 01553 766857
Contact: Richard Pennington
enquiries@wardgethin.co.uk
www.wardgethin.co.uk

**also at:**

**Swaffham**
Tel: 01760 721992

### Lowestoft

**Nicholsons**
23 Alexandra Road
Lowestoft
Suffolk
NR32 1PP
Tel: 01502 532300
Fax: 01502 568814
Contact: Tonia Baker
tbaker@nicholsons.uk.com
www.nicholsons-uk.com

### Norwich

**Overburys**
3 Upper King Street
Norwich
Norfolk
NR3 1RL
Tel: 01603 610481
Fax: 01603 632460
Contact: Alisdair Liddle
admin@overburys.co.uk
www.overburys.co.uk

**offices also at:**

**Diss**
Tel: 01379 641221

### Peterborough

**Buckles Solicitors LLP**
Grant House
101 Bourges Boulevard
Peterborough
PE1 1NG
Tel: 01733 888888
Fax: 01733 888999
Contact: Sara Orbell
enquiries@buckles-law.co.uk
www.buckles-law.co.uk

**offices also at:**

**Stamford**
Tel: 01780 484570

### Romford

**Mullis & Peake**
8–10 Eastern Road
Romford,
Essex
RM1 3PJ
Tel: 01708 784000
Fax: 01708 784099
Contact: Diane Gardner
dianegardner@mplaw.co.uk
www.mplaw.co.uk

**offices also at:**

**Chadwell Heath**
Tel: 020 8599 2417

## East Midlands

### Derby

**Bakewells**
64 Friar Gate
Derby
Derbyshire DE1 1DJ
Tel: 01332 348791
Fax: 01332 739063
Contact: Martin Jinks
help@bakewells.co.uk
www.bakewells.co.uk

### Leicester

**Harvey Ingram LLP**
20 New Walk
Leicester
Leicestershire
LE1 6TX
Tel: 0116 254 5454
Fax: 0116 255 4559
Contact: Sean Moran
mail@harveyingram.com
www.harveyingram.com

**offices also at:**

**Birmingham**
30 St Paul's Square
Tel: 0121 262 6500
Edmund House,
12-22 Newhall Street
Tel: 0121 214 1200

**Milton Keynes**
201 Silbury Boulevard
Tel: 01908 295 350

### Lincoln

**Andrew & Co LLP**
St Swithin's Court
1 Flavian Road
Lincoln
Lincolnshire
LN2 4GR
Tel: 01522 512123
Fax: 01522 546713
Contact: Phillip Hoskins
philliphoskins@andrewsolicitors.co.uk
www.andrew-solicitors.co.uk

**office also at:**

**Newark**
Tel:01636 673743

### Mansfield

**Fidler & Pepper**
No.1 Low Street
Sutton-in-Ashfield
Nottinghamshire
NG17 1DH
Tel: 01623 451111
Contact: Mark Slade
info@fidler.co.uk
www.fidler.co.uk

**offices also at:**

**Kirkby-in-Ashfield**
Tel: 01623 451111

**Mansfield**
Tel: 01623 451111

### Nottingham

**Actons**
20 Regent Street
Nottingham
Nottinghamshire
NG1 5BQ
Tel: 0115 9 100 200
Fax: 0115 9 100 290
Contact: John Britten
john.britten@actons.co.uk
www.actons.co.uk

## Ireland

### Belfast

**Cleaver Fulton Rankin**
50 Bedford Street
Belfast
Northern Ireland
BT2 7FW
Tel: 028 9024 3141
Fax: 028 9024 9096
Contact: Brendan Fox
b.fox@cfrlaw.co.uk
www.cfrlaw.co.uk

### Dublin

**MacCarthy & Associates**
10 Upper Mount Street
Dublin 2 Eire
Republic of Ireland
Tel: 00 353 1 6613322
Fax: 00 353 1 6785039
Contact: Justin MacCarthy
info@mas.ie
www.mas.ie

### Waterford and Wexford

**MJ O'Connor**
Confederation House
Waterford Business Park
Cork Road
Waterford
Tel: 00 353 51 355663
Fax: 00 353 51 355667
Contact: Sean Nolan
snolan@mjoc.ie
www.mjoc.ie

**offices also at:**

**Drinagh, Wexford**
Tel: 00 353 53 9122555

## London

### London – West End

**Barker Gillette LLP**
11-12 Wigmore Place
London
W1U 2LU
Tel: 020 7636 0555
Fax: 020 7323 3950
Contact: John Gillette
john@barkergillette.com
www.barkergillette.com

### London – Marble Arch

**Ross & Craig**
12A Upper Berkeley Street
London
W1H 7QE
Tel: 020 7262 3077
Fax: 020 7724 6427
Contact: David Leadercramer
reception@rosscraig.com
www.rosscraig.com

## North East

### Darlington

**Latimer Hinks**
5-8 Priestgate
Darlington
County Durham
DL1 1NL
Tel: 01325 341500
Fax: 01325 381072
Contact: Anne Elliott
lh@latimerhinks.co.uk
www.latimerhinks.co.uk

### Newcastle upon Tyne

**Hay & Kilner**
30 Cloth Market
Newcastle upon Tyne
Tyne & Wear
NE1 1EE
Tel: 0191 232 8345
Fax: 0191 261 7704
Contact: Paul Taylor
lawyers@hay-kilner.co.uk
www.hay-kilner.co.uk

**offices also at:**

**Wallsend**
Tel: 0191 262 8231

## North West

### Altrincham

**Myers Lister Price Solicitors**
7 Market Street
Altrincham
Cheshire WA14 1QE
Tel: 0161 926 9969
Fax: 0161 926 1500
Contact: Michael Lister
info@mlpsolicitors.co.uk
www.mlpsolicitors.co.uk

### Chester

**Cullimore Dutton**
20 White Friars
Chester, Cheshire
CH1 1XS
Tel: 01244 321066
Fax: 01244 312582
Contact: John Arnold
info@cullimoredutton.co.uk
www.cullimoredutton.co.uk

### Isle of Man

**Simcocks**
Ridgeway House
Ridgeway Street
Douglas
Isle of Man IM99 1PY
Tel: 01624 690300
Fax: 01624 690333
Contact: Phil Games
mail@simcocks.com
www.simcocks.com

**offices also at:**

**London**
Tel: 020 3043 4243

## Manchester

**George Davies Solicitors LLP**
Fountain Court
68 Fountain Street
Manchester
M2 2FB
Tel: 0161 236 8992
Fax: 0161 228 0030
Contact: Mark Hovell
markhovell@georgedavies.co.uk
mail@georgedavies.co.uk
www.georgedavies.co.uk

## Warrington

**Forshaws Davies Ridgway LLP**
21 Bold Street
Warrington
Cheshire
WA1 1DF
Tel: 01925 230000
Fax: 01925 230616
Contact: Charles Agar
info@fdrlaw.co.uk
www.fdrlaw.co.uk

# Scotland

## Edinburgh

**MBM Commercial LLP**
5th Floor
7 Castle Street
Edinburgh
EH2 3AH
Tel: 0131 226 8200
Fax: 0131 226 8240
Contact: David Calder
david.calder@mbmcommercial.co.uk
www.mbmcommercial.co.uk

## Glasgow

**Miller Samuel LLP**
RWF House
5 Renfield Street
Glasgow
Scotland
G2 5EZ
Tel: 0141 221 1919
Fax: 0141 221 3796
Contact: Diane C Cairney
email@millersamuel.co.uk
www.millersamuel.co.uk

## Perth

**Miller Hendry**
10 Blackfriars Street
Perth
Tayside
PH1 5NS
Tel: 01738 637311
Fax: 01738 638685
Contact: Alan Matthew
info@millerhendry.co.uk
www.millerhendry.co.uk

**offices also at:**

**Dundee**
Tel: 01382 200000

**Crieff**
Tel: 01764 655151

# South

## Aylesbury

**Parrott & Coales LLP**
14 Bourbon Street
Aylesbury
Buckinghamshire HP20 2RS
Tel: 01296 318500
Fax: 01296 318531
Contact: James Couzens
commercial@parrottandcoalesllp.co.uk
www.parrottandcoalesllp.co.uk

## Basingstoke

**Lamb Brooks**
Victoria House
39 Winchester Street
Basingstoke
Hampshire RG21 7EQ
Tel: 01256 844888
Fax: 01256 330933
Contact: Robert Finlayson
enquiries@lambbrooks.com
www.lambbrooks.com

## Eastbourne

**Stephen Rimmer LLP**
28-30 Hyde Gardens
Eastbourne
East Sussex BN21 4PX
Tel: 01323 644222
Fax: 01323 733034
Contact: Stephen Rimmer
enquiries@stephenrimmer.com
www.stephenrimmer.com

## Enfield

**Vanderpump & Sykes Solicitors**
Lough Point
2 Gladbeck Way
Enfield
Middlesex EN2 7JA
Tel: 020 8367 3999
Fax: 020 8367 6252
Contact: Philip Lancaster
vs@vanderpumps.co.uk
www.vanderpumpandsykes.co.uk

## Epsom

**Lewis & Dick**
443 Kingston Road
Ewell, Epsom
Surrey KT19 0DG
Tel: 020 8393 0055
Fax: 020 8393 3317
Contact: Jonathan Owens
ewell@lewis-dick.com
www.lewis-dick.com

**offices also at:**

**Crawley**
Tel: 01293 526031

## Fareham

**Warner Goodman LLP**
Portland Chambers
66 West Street
Fareham
Hampshire PO16 0JR
Tel: 01329 288121
Fax: 01329 822714
Contact: Ian Curtis
enquiries@warnergoodman.co.uk
www.warnergoodman.co.uk

**offices also at:**

**Portsmouth**
Tel: 023 9275 3575

**Southampton**
Tel: 023 8063 9311

## Guildford

**Hart Brown**
Resolution House, Riverview,
Walnut Tree Close,
Guildford, GU1 4UX
Fax: 01483 887750
Contact: Bettina Brueggemann
bxb@hartbrown.co.uk
www.hartbrown.co.uk

**Cobham**
Tel: 01932 576789

**Cranleigh**
Tel: 01483 204700

**Godalming**
Tel: 01483 887766

**Wimbledon Village**
Tel: 0208 947 8171

**Woking**
Tel: 01483 887766

## Henley-on-Thames

**Mercers**
50 New Street /
47A & 50A Bell Street
Henley-on-Thames
Oxfordshire RG9 2BX
Tel: 01491 572138
Fax: 01491 572223
Contact: Mike Beadsworth
mbeadsworth@mercerslaw.co.uk
www.mercerslaw.co.uk

## High Wycombe

**Reynolds Parry Jones**
10 Easton Street
High Wycombe
Buckinghamshire HP11 1NP
Tel: 01494 525941
Fax: 01494 530701
Contact: Richard Hughes
partners@rpj.uk.com
www.rpj.uk.com

## Hove

**Bunkers**
7 The Drive
Hove, East Sussex BN3 3JS
Tel: 01273 329797
Fax: 01273 324082
Contact: Richard Crawt
mail@bunkers.co.uk
www.bunkers.co.uk

## Newbury

**Gardner Leader LLP**
White Hart House
Market Place, Newbury
Berkshire RG14 5BA
Tel: 01635 508080
Fax: 01635 521341
Contact: Derek Child
info@gardner-leader.co.uk
www.gardner-leader.co.uk

**offices also at:**

**Thatcham**
Tel: 01635 863271

## Orpington

**Clarkson Wright & Jakes LLP**
Valiant House,
12 Knoll Rise, Orpington,
Kent BR6 0PG
Tel: 01689 887887
Fax: 01689 887888
Contact: Amanda Mehlin
amanda.mehlin@cwj.co.uk
www.cwj.co.uk

## Oxford

**Darbys Solicitors LLP**
52 New Inn Hall Street
Oxford
Oxfordshire OX1 2DN
Tel: 01865 811700
Fax: 01865 811777
Contact: Paul Lowe
info@darbys.co.uk
www.darbys.co.uk

## Reading

**Rowberry Morris**
17 Castle Street
Reading
Berkshire RG1 7SB
Tel: 0118 958 5611
Fax: 0118 959 9662
Contact: Richard Leathem
admin@rowberrymorris.co.uk
www.rowberrymorris.co.uk

**offices also at:**

**Staines**
Tel: 01784 457655

**Tadley**
Tel: 0118 981 2992

## Slough

**Harris Cartier LLP**
Windsor Crown House
7 Windsor Road
Slough
Berkshire SL1 2DX
Tel: 01753 810710
Fax: 01753 810720
Contact: Paul Norris
enquiries@hclaw.co.uk
www.hclaw.co.uk

**offices also at:**

**London**
020 7405 7100

## Tunbridge Wells

**Berry & Berry**
11 Church Road
Tunbridge Wells
Kent TN1 1JA
Tel: 01892 526344
Fax: 01892 511223
Contact: Nigel Stratton
mail@the-solicitors.co.uk
www.the-solicitors.co.uk

**offices also at:**

**Maidstone**
Tel: 01622 690777

**Tonbridge**
Tel: 01732 355911

**Consulting Rooms at Kings Hill**
Tel: 01732 897925

## Uckfield

**Rix & Kay Solicitors LLP**
The Courtyard, River Way
Uckfield
East Sussex TN22 1SL
Tel: 01825 761555
Fax: 01825 764172
Contact: Francis Wallace
uckfield@rixandkay.co.uk
www.rixandkay.co.uk

**offices also at:**

**Heathfield**
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**Seaford**
Tel: 01323 897766

## Uxbridge

**IBB Solicitors**
Capital Court
30 Windsor Street
Uxbridge Middlesex UB8 1AB
Tel: 08456 381381
Fax: 08456 381351
enquiries@ibblaw.co.uk
www.ibblaw.co.uk

**offices also at:**

**Chesham**
Tel: 08456 381381

**Ingatestone**
Tel: 08456 381381

## Watford

**Matthew Arnold & Baldwin LLP**
21 Station Road
Watford
Hertfordshire WD17 1HT
Tel: 01923 202020
Fax: 01923 215050
Contact: Steven Mills
info@mablaw.co.uk
www.mablaw.co.uk

# South West

## Barnstaple

**Toller Beattie LLP**
Queen's House Queen Street
Barnstaple
Devon EX32 8TB
Tel: 01271 341000
Fax: 01271 344445
Contact: Robert Beattie
solicitors@tollerbeattie.co.uk
www.tollerbeattie.co.uk

## Bath

**Mogers**
24 Queen Square
Bath Avon BA1 2HY
Tel: 01225 750000
Fax: 01225 445208
Contact: Derwent Campbell
info@mogers.co.uk
www.mogers.co.uk

## Bournemouth

**Aldridge Brownlee Solicitors LLP**
Kingsway House
13 Christchurch Road
Lansdowne Bournemouth
Dorset BH1 3JY
Tel: 01202 294411
Fax: 01202 295944
Contact: Richard Hall
enquiries@aldridgebrownlee.co.uk
www.aldridgebrownlee.co.uk

**offices also at:**

**Highcliffe, Christchurch**
Tel: 01425 282150

**Moordown, Bournemouth**
Tel: 01202 527008

**Winton, Bournemouth**
Tel: 01202 526343

## Bristol

**Metcalfes**
46–48 Queen Square
Bristol Avon BS1 4LY
Tel: 0117 929 0451
Fax: 0117 929 9551
Contact: Bethan Southcombe
employment@metcalfes.co.uk
www.metcalfes.co.uk

# LawNet members

**Sherbourne**

**Dyne Drewett**
11 Cheap Street Sherborne
Dorset DT9 3PU
Tel: 01935 813691
Fax: 01935 813091
Contact: Nicholas Arnot
info@dynedrewettsherborne.com
www.dynedrewett.com

**offices also at:**

**Shepton Mallet**
Tel: 01749 342323

**Wincanton**
Tel: 01963 32374

## Wales

**Cardiff**

**Merrils Ede**
27 Park Place Cardiff
South Glamorgan CF10 3BA
Tel: 029 2037 1131
Fax: 029 2022 5540
Contact: Jan Tillyard
central@merrilsede.co.uk
www.merrilsede.co.uk

**offices also at:**

**Penarth**
Tel: 029 2037 1131

**Rhyl**

**Gamlins**
31/37 Russell Road Rhyl
Denbighshire LL18 3DB
Tel: 01745 343500
Fax: 01745 343616
Contact: Rob Salisbury
Gamlins@gamlins.co.uk
www.gamlins.co.uk

**offices also at:**

**Holywell**
Tel: 01352 714240

**Ruthin**
Tel: 01824 702102

**Denbigh**
Tel: 01745 812422

## West Midlands

**Coventry**

**Band Hatton LLP**
1 Copthall House
Station Square
Coventry CV1 2FY
Tel: 024 7663 2121
Fax: 024 7622 9038
Contact: Sally Cowie
law@bandhatton.co.uk
www.bandhatton.co.uk

**Kidderminster**

**mfg Solicitors LLP**
Carlton House,
Worcester Street,
Kidderminster
Worcestershire DY10 1BA
Tel: 0845 55 55 321
Fax: 01562 820066
Contact: Richard Connolly
mail@mfgsolicitors.com
www.mfgsolicitors.com

**offices also at:**
**Bromsgrove**
**Cleobury Mortimer**
**Halesowen**
**Oswestry**
**Telford**
**Worcester**

**Shrewsbury**

**Wace Morgan**
2 Belmont, Shrewsbury
Shropshire SY1 1TD
Tel: 01743 280100
Fax: 01743 280111
Contact: Keir Hirst
help@wmlaw.co.uk
www.wacemorgan.co.uk

**Stoke-on-Trent**

**Grindeys LLP**
Glebe Court
Stoke-on-Trent
Staffordshire ST4 1ET
Tel: 01782 846441
Fax: 01782 416220
Contact: Stephen Grocott
info@grindeys.co.uk
www.grindeys.co.uk

**offices also at:**

**Stone**
Tel: 01785 810780

**Wolverhampton**

**FBC Manby Bowdler LLP**
George House
St John's Square
Wolverhampton
West Midlands WV2 4BZ
Tel: 01902 578000
Fax: 01902 311886
info@fbcmb.co.uk
www.fbcmb.co.uk

**offices also at:**

**Bridgnorth**
Tel: 01746 761436

**Shrewsbury**
Tel: 01743 241551

**Telford**
Tel: 01952 292129

**Willenhall**
Tel: 01902 366566

## Yorkshire/ Humberside

**Barnsley**

**Elmhirst Parker LLP**
17/19 Regent Street
Barnsley
South Yorkshire S70 2HP
Tel: 01226 282238
Fax: 01226 244153
Contact: Martin Legg
01757 703602
www.elmhirstparker.com

**offices also at:**

**Selby**
Tel: 01757 703602

**Sherburn-in-Elmet**
Tel: 01977 682219

**Rotherham**

**Oxley & Coward**
34/46 Moorgate Street
Rotherham
South Yorkshire S60 2HB
Tel: 01709 510999
Fax: 01709 512999
Contact: Peter Hedley
mailbox@oxcow.co.uk
www.oxcow.co.uk

**Doncaster**

**Taylor Bracewell**
17–23 Thorne Road
Doncaster
South Yorkshire DN1 2RP
Tel: 01302 341414
Fax: 01302 340156
Contact: Mark Beresford
enquiries@taylorbracewell.co.uk

**Huddersfield**

**Eaton Smith LLP**
14 High Street
Huddersfield
West Yorkshire HD1 2HA
Tel: 01484 821300
Fax: 01484 821333
Contact: Malcolm Tracey
mail@eatonsmith.co.uk
www.eatonsmith.co.uk

**Hull**

**Stamp Jackson & Procter**
5 Parliament Street
Hull HU1 2AZ
Tel: 01482 324591
Fax: 01482 224048
Contact: Simon Burgess
info@sjplaw.co.uk
www.sjplaw.co.uk

**Scunthorpe**

**Symes Bains Broomer**
2 Park Square
Laneham Street
Scunthorpe
North Lincolnshire DN15 6JH
Tel: 01724 281616
Fax: 01724 280678
Contact: Ron Stone
info@sbblaw.com
www.sbblaw.com

**offices also at:**

**Epworth**
Tel: 01427 872479

**Goole**
Tel: 01405 763853

**Grimsby**
Tel: 01472 360991

**Howden**
Tel: 01430 430230

**Sheffield**

**Ashton Morton Slack LLP**
35-47 North Church Street
Sheffield
South Yorkshire S1 2DH
Tel: 0114 275 2888
Fax: 0114 273 0108
Contact: Robert Bryars
info@ashtonmortonslack.co.uk
www.ashtonmortonslack.co.uk

# Contributors to this issue:

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Matthew Arnold & Baldwin LLP
01923 2015088

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Matthew Arnold & Baldwin LLP
01923 202020

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0131 226 8206

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Matthew Arnold & Baldwin LLP
01923 208816


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Metcalfes
0117 945 3084

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0191 232 8345

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Miller Samuel LLP
0141 227 6030

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0191 232 8345

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01603 703070

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01689 887887

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Myers Lister Price Solicitors
0161 926 1544

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Metcalfes
Solicitors

46-48 Queen Square, Bristol, BS1 4LY
Tel: 0117 929 0451 Fax: 0117 929 9551
www.metcalfes.co.uk


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