



*Up*front

VOL NINETEEN SPRING 2021

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Welcome

to Upfront Volume Nineteen

Spring is the season of new beginnings. Fresh buds bloom, temperatures slowly rise, and the world comes to life again.

This spring we move forward into a new world. A world full of opportunities to put the lessons we have learned from the last year to good use. For me, the recent challenges have highlighted the sheer importance of good, honest & clear two-way communication coupled with strong leadership.

Having gone from 12 offices to 360 home offices, virtually overnight, it's been extremely important to us that we maintain our Forbes culture and our competitive advantage. Most law firms will say that their people are their competitive advantage, however many don't actually believe it... at Forbes' our main competitive advantage is our people. However, this alone is not enough. Our advantage is our range and depth of services, regionally, and nationally. It is our investment in systems. It is our culture and acceptance that there isn't just one way - that we embrace real people and have a problem-solving mentality to find solutions for our clients. Our competitive advantage is our people, at all levels, and in all roles, who play a part in helping our clients achieve their goals. Supporting our people and our clients has been our priority.

Our honest and up-front communication and engagement strategy during the last 12 months has resulted in our Employee Engagement scores doubling, which is fantastic to see. In addition to this, our Client Service levels have remained extremely high, with many of you keeping in touch with us through Zoom and Microsoft Teams. As we spring forward, communication is going to continue to be at the forefront of our plans.

In this version of Upfront, you'll find a catalogue of useful articles and top tips. We've covered everything from the importance of creating a commercial contract to top tips for investing in property, to having discussions around lasting powers of attorney. You'll also find information on how to stay in line with GDPR and the latest news on employment rights.

Last, and by no means least, I would like to highlight the amazing resilience of the companies we work with, many of whom have embraced change and reinvented themselves. If you haven't already seen our Reinvention and Resilience Top 50 report, please head to page 9. It is an inspirational read!

I hope you enjoy our latest edition of Upfront.

Oliver



Spring clean

YOUR BUSINESS

Properly preparing your business for sale takes time, which means you need to start planning for a sale well in advance. However, you never know when an offer might come along that is too good to pass up – would your company be in a position to be sold at short notice?

If not, this is the best time of the year to give your business a spring clean. Most of the steps you will take in preparation for sale are, in fact, just good practice that we would advise company owners to carry out regularly. Here we set out a few of the main areas which can trip up sellers during the due diligence process, and which can be remedied in advance to make the sale process go far more smoothly.

Statutory Registers

It is a legal requirement for the majority of limited companies to keep an updated register of various matters concerning the company, such as the shareholders, directors, company secretary, persons of significant control (PSCs), share transfers and allotments and charges.

We often find that companies have not kept their statutory registers up to date, and many don't even know if they have any, which can cause significant delays upon sale of the company.

When buying a limited company, the statutory registers are the definitive record of the nuts and bolts of the company, and as such a buyer requires a seller to reconstitute the registers from scratch before completion, which can be a time-consuming process.

Other common related issues include companies not keeping a proper record of shareholder resolutions and/or board minutes, as well as stock transfer forms and/or share certificates not being retained. When documents, such as the share certificates, are missing, sellers are often asked to provide the buyers with indemnities at the point of sale – which is one extra obligation that could have been avoided.

Employment

For most businesses, their workforce is the biggest asset they have. Ensuring that all employment documents are correct and up to date can take another significant chunk out of the due diligence process.

It is best practice to review your employment contracts, staff handbooks, pension provision and other employment documents and processes at least once a year to ensure that they remain current with the fast-paced change of employment law.

Contracts

Are all your customer and supplier contracts up to date? If not, do you know the basis on which you trade with your key business counterparts? Are your terms and conditions of trade up to date, and enforceable? This is another key area where you can save time, and also limit risk exposure, by taking the time to review the position.

“ Properly preparing your business for sale takes time and you need to plan well in advance ”



Property

One area which can significantly slow down a sale process is the property assets of a company.

Does your business own or rent premises?
If so, is everything up to date, have all rents, charges, taxes and other expenses been paid?
Is your lease current, or has it expired? Do you know where the deeds are to your properties?

Are they owned by the correct corporate entity?
Dealing with the rectification of property issues in a sale can take a lot of time and money at a time when your focus should be elsewhere.
Carrying out a spring clean of your property portfolio, and keeping up to date with it, can save significant time and stress in the long run.

We can assist with all of these matters, and would be happy to meet with you to discuss how we can help give your business a spring clean, just in case that too-good-to-turn-down offer lands in your inbox sooner than you expected!

For more information contact David Filmer in our Corporate Department via email at david.filmer@forbessolicitors.co.uk or phone on 0333 207 1132. Alternatively send any question through to Forbes Solicitors via our online contact form.

Intellectual Property

Does your business own or use any IP?
Most businesses do, even if it is just a website!
As with many other areas of your business, an audit on at least an annual basis of your IP is essential to a smooth transition to new ownership.

Does the company own the domain name for your website, or is it owned by the employee who registered it in the first place when you were starting? Are your registrations and licences current and up to date?

Shareholders' Agreements

At the time of incorporation of a company, the focus is often establishing and building the business. While it is never too late to put a shareholders' agreement in place, it is wise for the shareholders to turn their minds to this from the outset.

A well-drafted shareholders' agreement will set out expectations for the management of the company and the relationship between its owners. It will also provide a mechanism to manage disagreements and changing circumstances that may arise as time passes.

“...a shareholders' agreement is an important document that should not be overlooked.”

There is no standard form of a shareholders' agreement. Rather, it is a document that is tailored to meet the needs and desires of the shareholders of a particular company.

As a business grows, the structure of the company may change including a change of ownership. A shareholders' agreement can be amended at any time to reflect these changes with the consent of all of the parties to the existing shareholders' agreement.

Regardless of the size of your business or the relationship amongst the shareholders at the outset, a shareholders' agreement is an important document that should not be overlooked.

Some of the Main Areas a Shareholders' Agreement May Deal With:

- Who you can and cannot transfer shares to. It may surprise you to learn that a shareholder may give their shares to anyone they wish in the absence of anything preventing this. In most SMEs and owner managed businesses, this would be disastrous.
- What happens when a shareholder wants to leave the business? Do they have to sell their shares or can they keep them? Do they get full value for them, or does it depend on the nature of their departure?
- Can one shareholder take a key decision without the consent of the other(s)? Are there certain things that everyone needs to agree on? If they don't, how is that deadlock broken?
- A shareholders' agreement creates certainty around the rights and obligations of the shareholders and can help avoid potential disputes that could otherwise become costly to resolve.

CROSS OPTION

Agreement

For many SMEs and owner managed businesses, business continuity and control of the share capital is critical to their success. But what happens if one of the owners becomes seriously ill or worse, and what happens to their shares in the company?

A cross option agreement, often in conjunction with appropriate life insurance policies, gives the shareholders extra protection in such circumstances. The usual position is that, where a shareholder is permanently unable to participate in the business, either due to critical illness or death, that their shares are passed to the other shareholders, whilst the insurance policies provide the financial wherewithal to fairly compensate the shareholder or their estate for those shares.

This ensures business continuity, and prevents the shares from falling into the hands of people who have no involvement with the business, whilst ensuring that proper financial compensation is made to achieve that, without the need to dip into the company's cash reserves, or taking on additional borrowing.

For more information please contact John Pickervance, Partner in our Commercial Department, via email john.pickervance@forbessolicitors.co.uk or call 03332 071134

Such an agreement should be looked at in conjunction with any shareholders' agreement, as well as the individual wills of the shareholders, to ensure that all aspects align and there is no room for dispute. Getting all of these aspects in order can take some of the stress out of an otherwise extremely difficult time, both personally and for the business. We can work with your broker and financial advisor to ensure that the company and your family are protected should the worst happen.

WHY *EQUITY FINANCING*

IS A FABULOSA WAY TO GROW YOUR BUSINESS

Earlier this year, home cleaning specialist, Fabulosa, secured a major funding boost and is now set for further expansion. Instarmac Holdings has committed £1.55m for the purchase of an aerosol filling line and construction of a warehouse extension to accommodate the forecast increased capacity.

This deal is a perfect example of how equity financing can help a business grow substantially within a short timeframe.

Fabulosa was only established in 2019 and reported £30m of sales in 2020 and, with this cash boost, its end of year projection for 2021 is £40m.

Businesses typically have two options for financing to consider when they want to raise capital for business needs: equity financing and debt financing. Debt financing involves borrowing money and equity financing involves selling a portion of equity in the company.

Equity financing involves selling a portion of a company's equity in return for capital. By selling shares, a company is effectively selling ownership in their company in return for cash.

Some of the benefits of equity financing are that the money does not need to be repaid, there is no interest to be paid, and there is no charge placed over the business. However, equity financing does have some drawbacks. When investors purchase stock, it is understood that they will own a small stake in the business in the future. A company must generate consistent profits so that it can maintain a healthy stock valuation and pay dividends to its shareholders. Since equity financing is a greater risk to the investor than debt financing is to the lender, the cost of equity is often higher than the cost of debt.

That being said, bringing new investors into the business does not have to be seen as such a negative thing.

Yes, you will be sharing the profits of the business and parting with a percentage of

your shareholding; however, in the long run, the purpose of the investment is to boost profits so that there will be more money to be split between shareholders. Moreover, if you pick your investors wisely, they will be able to contribute more than just money. For example, Instarmac Holdings had been a major supplier to Fabulosa before the deal and the two had built a close relationship - now that the Chief Executive of Instarmac Holdings will be on Fabulosa's board of directors, he will be able to bring his knowledge and experience in the sector with him to assist in ways that, 99.9% of the time, money can't.

For more information please contact Pauline Rigby, Partner in our Corporate Department, via email pauline.rigby@forbessolicitors.co.uk or call 01254 222357.

Top 50

REINVENTION & RESILIENCE

2020: a year to remember. Some might say a year to forget, but to forget would be to disregard the lessons that we have learned and the phenomenal effort that has been made in every corner of society.

On 23rd March 2020, the country went into a police-enforced lockdown with drastic measures in the fight against the coronavirus outbreak. Following lockdown, there was a 'strong rise' in business activity in the North West throughout August, according to NatWest's Regional PMI report, which tracks changes in the goods and services sectors. It said the area's economy continued to recover during the month following the record downturn caused by COVID-19. However, despite the North West economy remaining on the path to recovery, the rate of growth failed to kick up another gear, as areas of the region continued to suffer at the hands of the global pandemic.

Yet, with every headline of mass job losses, of companies filing for administration, and of negative financial predictions, comes a story of reinvention and resilience. In fact, many entrepreneurs have used the global pandemic as an opportunity, which is where our Reinvention and Resilience report comes in.

The Reinvention and Resilience report identifies key trends that have seen companies 'pivot' to improve resilience and what this means for businesses looking to thrive in an economy affected by coronavirus.

These include:

- Reutilisation; companies finding new ways to use existing equipment or materials to create new products
- Rising risk tolerance; businesses dialing down their aversion to risk, whether it's through M&As or opening new sites
- From linear to flat management structures; companies embracing more democratic work cultures to accommodate resource shortages, investing in their team and digital ways of working
- Always open; companies investing in digital transformation and mobile, and new shift patterns to keep themselves always open for business
- Innovation; businesses using COVID-19 as a reason to diversify and expand their product and service offering
- Demand; responding quickly and efficiently to a surge in demand and capitalising on an overnight opportunity
- Community / CSR; highlighting the charitable and public sector efforts.

Keep an eye out for our Reinvention and Resilience Top 50 Report for 2021

The Top 50 list is brimming with examples of companies that have shown these qualities in abundance - but it's clear this is just the tip of the iceberg. It should serve as an indicator of the many more positive stories that exist across the region and as a reason to be confident that the region will come back stronger and better than before.

[Click here](#) to read our Reinvention and Resilience Top 50 report.



Back to basics

THE IMPORTANCE OF A CONTRACT

Contracts are used in all aspects of our lives whether it be buying a property, accessing an 'over the top' streaming service or purchasing the assets of a company.

Contracts define the legal relationship between parties and even in the most basic form, a contract will provide the ultimate understanding of the respective obligations and the price that will be paid for the goods and/or services. By defining the expectations of the parties the odds that the relationship and that transaction will be successful is increased.

While many contracts are signed and never considered again, a documented contract becomes of the utmost importance when the relationship between the parties becomes fractured.

A well-drafted contract should, therefore, not only include the basic variables but also provision for what procedures are to be engaged should a party fail to deliver on a contractual obligation. A contract must include such provision as the jurisdiction which applies to the contract (this is of particular relevance in cross border trade), any pre-litigation procedures which needed to be adhered to and what rights are retained if the contract is terminated. Ensuring these terms are documented will assist parties with remedying a dispute or enforcing their rights.

The Commercial Department at Forbes Solicitors can assist you in avoiding any contractual pitfalls.

If you have any questions regarding the status of a contract or require assistance with drafting an agreement please contact John Pickervance in our Commercial Department via email at john.pickervance@forbessolicitors.co.uk or phone on 0333 207 1134.



CROSS BORDER

Trade

Important considerations and matters arising out of Brexit

One of the major considerations for any firm engaged in or considering cross border trade is cost; a factor that is of relevance following the conclusion of the Brexit transition period.

Businesses engaging in cross-board trade need to consider the obvious costs such as trade tariffs. However, there is a raft of potentially significant but less obvious ones, including customs handling fees and the increased cost of transportation. All of which will influence not only the price to be charged for goods or service but also on the businesses ability to effectively trade in a territory.

Businesses trading across the borders must accept, and work within, what can be complex sets of rules and regulations, including quality control, health and safety. UK businesses have grown used to harmonisation with the EU, however, the effect of Brexit is that businesses might need to ensure that goods and services comply with standards which may be more stringent than those expected in domestic markets. Businesses supplying goods, for example, may need to adapt their products to adhere to the legal expectations of foreign markets and even consider producing versions of the products to satisfy jurisdictional requirements.

When establishing terms for trade across borders businesses should also consider how they might ensure certainty and clarity about the delivery of goods. By adopting the International Chamber of Commerce's recently updated Incoterm a business will be assured that they are utilising commonly accepted definitions and rules related to the delivery of goods between trading partners worldwide. The Incoterm is designed to provide clarity as to the obligations, risks and costs of each contracting party. They are not in themselves a contract for sale, and therefore it is advised to effectively incorporate them into the delivery provisions within a contract to give them maximum effect.

Those trading across the border must also give due consideration to how they might use and/or protect any intellectual property (IP) owned by the business. Businesses should consider the due process for protecting IP or mechanisms for licencing its use in foreign jurisdictions.

The Commercial Department at Forbes Solicitors has a wealth of experience advising clients with all aspects of cross border trade.

If your business is considering expansion into a foreign jurisdiction please do not hesitate in contacting John Pickervance via email at john.pickervance@forbessolicitors.co.uk or phone on 0333 207 1134.

Top Tips

CONSTRUCTION AND DEVELOPMENT

The Devil is in the Detail

When disposing of the site it can appear that once you have the set up for one plot to be sold that is the formula for all. However, it is usually the issues relating to the small nooks and crannies of the development and boundaries that take up a disproportionate amount of time and can affect the times for completion and occupation of certain plots. It is important to do an early review of the land and the site, and even a site walk with your lawyer to check the boundaries.

Existing / Mixed Use Development

Where residential development is planned above commercial premises, or existing use development, then there can be a multitude of Landlord and Tenant Act issues that relate to the future use of the building, the interplay between the new and any existing leases, and how the disposal of any freehold is treated. An early and comprehensive review of the title and any leases is always key when dealing with these type of premises.

Warranties and Latent Defects

For any residential or commercial development, any buyer will want to know early on that they are adequately protected from any unforeseen issues with the design and build. Failure to have this in place can have a significant impact on the marketability of any project, and can even prevent disposals from going ahead at all. These can be by way of standalone warranty insurance policies, or collateral warranties of the design team and contractor/subcontractors. For collateral warranties, it is important to assess what warranties are available (and who is contractually obliged to give them) early on in the project. For a defect liability insurance policy, a robust and high creditworthy insurance policy will be key, particularly when buyers will be using finance.



Top Tips

FOR INVESTMENT PROPERTY

What Type of Property?

Commercial properties come in all shapes and sizes and cover a wide variety of uses, from high street shops, lock-up units and pubs to sprawling factories, shopping centres and city centre office blocks. An investor is likely to have a good reason for investing in a particular type of property, it may be that they have experience in renovating particular types of property (for example, retail shops), they have experience in a particular sector such as leisure and are therefore aware of trends, threats and opportunities or have spotted the potential of a particular location, such as new transport links opening up fresh opportunities.

Location, Location, Location

An investor should consider the geographical area that they wish to invest in carefully as values and prospects for a particular type of property can vary significantly from place to place, even between towns and cities that are very close by. Often an investor will wish to invest close to home, in areas that they are familiar with, but an investor may also be attracted more widely to an industry that they have experience in or because a particular area has a reputation as up and coming in a particular sector, such as technology or advanced manufacturing. In any case, an investor would be well advised to work closely with property professionals that have a good knowledge of the chosen location and industry sector.

Risk

Investment in commercial property can present significantly varying levels of risk to the investor.

The purchase of commercial property in an established location with a well-drafted, longer-term, full repairing and insuring (FRI) lease to a blue-chip tenant is likely to offer a more secure investment but is also likely to cost more to purchase in relative terms and potentially offer a lower rental yield, to reflect the relatively low risk.

A property in a secondary location (potentially partially vacant and/or subject to short leases to less financially secure tenants) might be available for a lower purchase price and offer potentially greater rental yields, but also presents greater risks such as the property potentially becoming vacant. An investor should carefully consider the level of risk that they are prepared to accept for the opportunity of greater reward, and if the investor is prepared to take greater risks, have a clear plan for how to manage those risks if such adverse events do occur.

For more information contact Adam Bromley in our Commercial Property Department on adam.bromley@forbessolicitors.co.uk or visit our website.

Top Tips

FOR RETAIL

Landlord and Tenant:

Dialogue

The landlord and tenant relationship is one of symbiosis; at its core, it depends upon the success of both parties in the relationship - landlords need tenants to pay to occupy their property and tenants need a property from which to trade. As such, it is in the best interests of all parties to ensure that there is a clear, honest, and open dialogue, to avoid any uncertainties and confusion. The past 12 months have shown us that this open dialogue is more important than ever in securing that continued relationship. Ultimately, each party relies in some form or another upon the other and although at times there may be friction between a landlord and tenant, it is ultimately in their respective best interests to find a workable solution.

Heads of Terms

At the genesis of every lease transaction, there should always be a clear and concise set of Heads of Terms. The Heads of Terms serve as the blueprints for the contractual relationship which will be created by the lease and as such it is vitally important that all parties are clear on their commercial position. Uncertainties over key points, such as determining turnover for calculation of turnover rents, the calculation of the service charge and any cap on it can delay and prolong a transaction. Accordingly, the benefits of having these points ironed out before the instruction of the legal representatives will go a long way to making the transaction flow smoothly from inception to completion. A property agent or surveyor would usually negotiate the Heads of Terms, preferably in conjunction with the party's solicitor.

Diarise

Active diary management is a key tool for managing a landlord and tenant relationship. Once a lease has been completed, a multitude of key dates will appear on the horizon for all parties - be it rent payment dates, repair and decoration dates and (if the lease contains provisions for them) rent review and break option dates. These dates are vitally important for all parties, as a tenant will not want to find themselves in breach of their obligations in the lease neither party will want to overlook key milestones.

Particular care should be taken when dealing with break rights. Careful attention needs to be paid to the notice periods attached to such rights as, if the notice to break is not served within the specified timeframe, by the specified means and on the correct person, the break right cannot be exercised or will be invalid, and the parties will remain bound for the remainder of the lease term - or until the next break date, if there is one.

Effective diary management can therefore help a landlord and tenant relationship to run smoothly, by ensuring that essential dates are honoured and thus reducing the stress and strain that might otherwise be caused.

For more information contact Adam Bromley in our Commercial Property Department on adam.bromley@forbessolicitors.co.uk or visit our website.

WHAT IS THE

'First Homes'

INITIATIVE?

As part of the Government's plan to help first time buyers enter the property market, the 'First Homes' initiative is being introduced to offer a substantial discount on the first purchase, with limited exceptions also made to certain non-first-time buyers.

First Homes must be sold by developers with a minimum 30% discount of the property's market value, providing that those purchasing the property are getting a mortgage to help fund the purchase, as the Government is understandably looking to make the scheme available only to those first-time buyers who would otherwise struggle to finance a property purchase independently. It is important to note that the 30% discount will apply when the property is sold in the future. It is at the discretion of the Local Authority to raise this discount higher - this will depend on the prosperity of the area. First Home properties will be open to local area prospective buyers for a period of at least three months (the exact period will be determined by the Local Authority), in which they will be made available to the wider public.

The current plan is for there to be two price caps on which the discount will apply - £420,000 for London based properties, and £250,000 for elsewhere across England.

To enforce the scheme, First Homes must consist of 25% of the affordable housing properties constructed on a development. The Government has proposed that a restrictive covenant be placed on each of the First Home titles to ensure that the discount offered at first instance is carried over to the next sale.

For more information contact Michelle Thompson in our Residential Conveyancing Department on michelle.thompson@forbessolicitors.co.uk or phone on 01254 580 000. Alternatively, click [here](#) for a free conveyancing estimate.

Lasting

POWERS OF ATTORNEY

Be prepared for if the unthinkable happens - protect your future and your loved ones from unnecessary emotional distress.

The pandemic has brought to light the importance of having measures in place to enable your family to access and manage your finances in the unfortunate case that you are unable to do so yourself.

It's not an easy conversation to have but it really does pay to plan ahead and set up Lasting Powers of Attorney sooner rather than later. Not just for the instances that you or someone you love is diagnosed with a progressive illness such as dementia in later life, but earlier on in your life too.

At the beginning of 2020, Kate Garraway had no idea what lay ahead for her and her family just three months into the year - which still has a huge impact on her family over 12 months later. Her heart-breaking story of her husband Derek's battle with Covid has been made even more complicated by the lack of legal protection she and Derek had in place.

She has been unable to access his bank and credit card accounts or re-finance the mortgage. She doesn't have the legal right to see his medical notes due to data protection. All of which could have been prevented had they made Lasting Powers of Attorney (LPA). Ironically, they had talked about it a few years ago but did not follow it up and get them in place.

Research shows that 65% of us think our next-of-kin will make medical and care decisions for us if we are no longer able to. That is not the case without a Health and Welfare LPA being in place. Like Kate and Derek, a lot of us talk about it and know we should get things in place, but only 22% of people in the UK actually have an LPA.

There are not only problems dealing with your personal finances and making medical and care decisions, what about the business you are involved with?

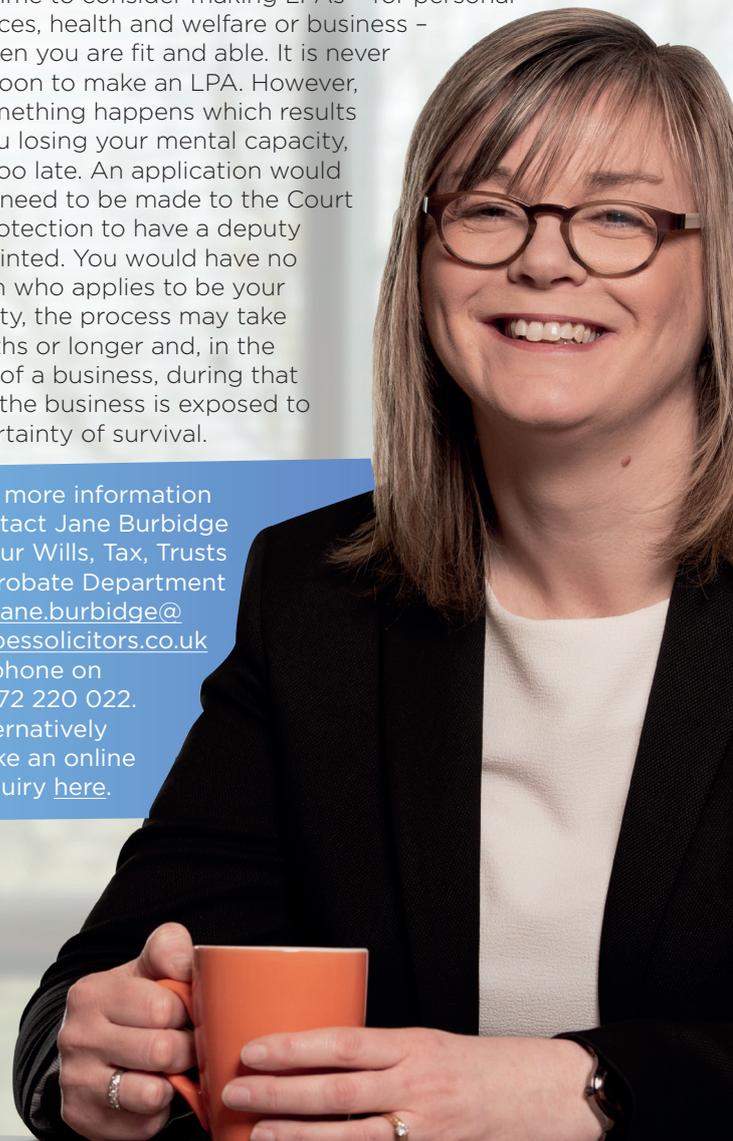
Most businesses have undergone crisis management - identifying and preparing for probable risks, such as floods, computer hacks or theft. However, fewer businesses consider preparations for significant business decision-makers being incapacitated.

Without a business LPA in place, certain risks arise. For example, if one of the bank account signatories lacks capacity, the bank could freeze the account. If there is an overdraft, the possibility of the bank freezing the account is greater. Contracts entered into by a person who had capacity but now lacks it, may become unenforceable owing to their incapacity.

Paying creditors, employees or tax becomes difficult as does running the business generally with a businessperson who now lacks capacity. Investors may require their investments to be returned.

The time to consider making LPAs - for personal finances, health and welfare or business - is when you are fit and able. It is never too soon to make an LPA. However, if something happens which results in you losing your mental capacity, it is too late. An application would then need to be made to the Court of Protection to have a deputy appointed. You would have no say in who applies to be your deputy, the process may take months or longer and, in the case of a business, during that time the business is exposed to uncertainty of survival.

For more information contact Jane Burbidge in our Wills, Tax, Trusts & Probate Department on jane.burbidge@forbessolicitors.co.uk or phone on 01772 220 022. Alternatively make an online enquiry [here](#).



APRIL

Considerations

As lockdown begins to ease and things return to normal, businesses will be looking forward to welcoming employees back. However, a lot has changed in the previous 12 months and undoubtedly several businesses will be looking at how they may change. At Forbes we can assist with this as you may require.

We have set out below three considerations that businesses may currently be looking at and how we can assist.

Upskilling or Varying an Employee's Role

It is increasingly likely that businesses will be asking employees to carry out different duties to what they have previously, and this may involve an element of training and upskilling. Additionally, businesses may ask employees to work from a different location.

All of these options are available to businesses; however, they do need handling sensitively and to act reasonably.

HR Consultancy

In addition to the above this may result in businesses undertaking a large-scale project. This could include a change to terms and conditions, redundancy and reorganisation or even TUPE. We have vast experience in all these areas and advising businesses on the legal issues and providing commercial advice to help businesses achieve their desired outcome.

Budgetary Certainty

Finally, given the past twelve months it is understandable that businesses require certainty, and this is understandable in respect of budgets. At Forbes we offer a number of services, tailored to your business that will provide this along with commercial advice to help businesses achieve their outcomes.

For more information contact Andrew Halpin in our Employment & HR Department via email at andrew.halpin@forbessolicitors.co.uk or phone on 01772 220239.

UBER DRIVERS ARE *'workers'* HOLDS SUPREME COURT

The Supreme Court handed down its long-anticipated judgment about the action brought against Uber by drivers claiming to be workers as opposed to self-employed contractors. The judgment provides the answer to whether 'gig economy' workers can be classed as 'workers' for the purposes of the Employment Rights Act 1996 ('the Act'). The case has been a longstanding focus of debate and captured the attention of many due to its potential impact on employers relying operationally on the 'gig economy' model to ensure profitability.

The relevant legal provision is section 230(3) of the Act which defines a worker as an individual who has entered into or works under (a) a contract of employment or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Companies reliant on the gig economy such as Uber have historically relied on the contract of engagement and the wording used in those contracts to define the individual as self-employed as opposed to a 'worker' within the meaning of the Act.

Uber engaged taxi drivers under contracts that refer to them as being 'self-employed subcontractors.' The documentation described Uber as an intermediary, providing booking and payment services through its technology platform, and that the drivers concluded a contract with each passenger as an independent contractor. When starting work, drivers are required to log on to an app to confirm they are available for work in their area. In being treated as contractors, Uber drivers have not been entitled to the same conditions of work as those who have 'workers' status, such as the right to statutory rest breaks, minimum wage, and annual leave. This caused frustration amongst Uber drivers, who sought to challenge their status in the Employment Tribunal.

In defending the case, Uber argued that it was simply a technology platform that put drivers in touch with passengers. However, the Tribunal looked at the practical implications of the operational agreement and determined that the definitions used in the contract did not reflect the actual reality of the arrangement in place, and accordingly determined that the drivers were in fact workers. The Court of Appeal upheld an Employment Tribunal's decision that the contractual documentation between Uber, the drivers, and passengers did not correspond with reality. The majority agreed with an expression made by the Tribunal that it was not correct to regard Uber as working "for" the drivers by providing the platform. The reality was the other way around; Uber ran a transportation business, and the drivers provided the skilled labour through which that business delivers its services and earns its profits. It was noted that Uber also exercises a high degree of control over the drivers. For example, complaints about individual drivers were dealt with centrally, and if drivers fell below a specified satisfaction rating Uber could deny them access to the app. They were also held to account if they were not picking up work when they were logged on and in the area. As such, Uber could not be said to be the driver's client or customer. The majority also held that the drivers were workers for the duration of the time that they were in the territory to which they were assigned, logged into the Uber app, ready and willing to accept rides, and were therefore 'workers' for the purposes of the Act.

“Companies reliant on the gig economy such as Uber have historically relied on the contract of engagement and the wording used in those contracts to define the individual as self-employed”

Uber then obtained leave to appeal the decision in the Supreme Court and the judgment was handed down. Unsurprisingly, the Supreme Court ultimately reached the same conclusion as the lower courts, confirming that Uber drivers are ‘workers’ under the definition afforded by the Act. It found that Uber drivers are ‘workers’ from the moment they engage work by switching on the Uber app and are available for work in their area, until such time where they switch off their application at the end of the day and/or to take a break.

The Supreme Court reinforced the approach taken by the Tribunal confirming the relevant factor for determining employment status is to examine the reality of the relationship between the parties as opposed to descriptive aspects of contractual documentation.

As the drivers have now been confirmed as ‘workers’ under the terms of the Act, this means that they now also attract the rights and protections afforded by the Act. As such, they are entitled to minimum wage, the statutory 5.6 weeks’ paid annual leave each year, protection against an unlawful deduction from their wages, the statutory minimum length of rest breaks, the right to not work more than 48 hours on average per week or to opt-out of this right if they choose and significantly, will have right to protection under Whistleblowing legislation. It is important to note that the judgment does not give them ‘employee’ rights, such as the right to a redundancy payment or to claim unfair dismissal.

In the immediate aftermath, the main concern for Uber may well be that drivers could now claim back pay for minimum wage (up to two years in the Employment Tribunal, or six years in the County Court), with the claims being based upon the entire working day, not just when they had a rider in their cabs. Given some estimates of the number of drivers reaching 60,000, the financial implications are considerable, and concerning both for Uber, but also for other companies and industries reliant on the gig economy who will no doubt be reviewing their terms of engagement following this judgment.

The judgment will have a considerable impact on areas of commerce reliant on the gig economy. As such, to pre-empt difficulties or potential claims, we advise companies to carry out an audit of individuals providing services to your organisation and seek legal advice in respect of any concerns to ensure that not only are you protected from individuals seeking worker status, but also the associated legal costs in dealing with such claims even if such claims ultimately are unsuccessful.

For more information contact Emma Swan in our Employment & HR Department via email at emma.swan@forbessolicitors.co.uk or phone on 0333 207 1154.



Pensions

AND DIVORCE

In this article Sarah Robson, one of our family law specialists, considers how pensions are treated in a divorce.

Pensions are one of the main assets of a marriage, usually second only to the family home. If you are facing a divorce it is vital to give proper consideration to the pensions in any financial settlement. It is important to note that a pound in a pension fund is not the same as a pound in cash or even property and is therefore treated differently in a divorce.

The starting point is to obtain the cash equivalent value of all of your pensions. This is done at the same time that you obtain valuations for all other

assets and provide financial disclosure of all assets and liabilities. It can take time for the pension provider to calculate the figure so applying for it promptly is advisable. You will need to provide the valuations of all pensions, not just those that were accrued during the marriage. In some instances, it might be possible to make adjustments to the financial settlement to reflect pensions accrued outside the period of the marriage (and cohabitation). Your spouse will obtain the same figures for their own pension entitlement.

There are several options available to the court regarding pensions, but the main ones are:

- Pension sharing – an agreed percentage of one spouse's pension fund is transferred into a pension fund in the other spouse's name. There is generally a fee payable to the pension provider for implementing a pension sharing order. The advantage of this option is that a clean break can be achieved between the parties.
- Offsetting – with this option the value of any pension is offset against other assets. For example, one party might retain the family home in return for the other party keeping their pension. It is vital that pension expert advice is obtained, usually from an actuary, as this is not a straightforward exercise.
- Pension attachment order – some of your pension benefits are "earmarked" so that your ex-spouse receives some of the pension when it becomes payable. This can be income or capital lump sum.

The options available for dividing pensions are also applicable if one party has retired and their pension is in payment. All of the options available for dividing pensions require a court order in a divorce. If you and your spouse reach an agreement regarding the division of your assets, then you can apply to court for an order by consent. If an agreement cannot be reached, then either of you can apply to court for a financial order. For both options the cash equivalent value of your pension provision is required by the court.

Determining what happens to pensions in a divorce is a complex issue. As well as having legal advice it may be necessary to instruct a pension expert to prepare a report advising on the best way to share the pensions. This is particularly the case for final salary pensions, Local Government pensions and Army pensions, to name a few. You might also need to take independent financial advice.

For more information contact Sarah Robson in our Family Department on sarah.robson@forbessolicitors.co.uk or phone on 01254 580 000. Alternatively make an online enquiry [here](#).





Top Tips

Effective credit control

Have a clear and well-publicised policy that all staff can adhere to and remain strict with your policies. As soon as payment is late send a seven-day demand for payment and follow up with a phone call, this will help flush out any disputes or problems with the invoice alongside helping you understand if the debtor is just delaying payment or has genuine cash flow problems.

Know your customer

Be familiar with the entity you are contracting with. Identifying the customer from the outset will avoid potential problems later down the line when attempting to recover payment. Credit checking the customer where possible will also give you an idea of their financial position and avoid approving credit for both problematic customers and non-payers.

Be pragmatic

Do not hesitate to escalate matters at the earliest opportunity. Should you find that your attempts to recover payment are proving unsuccessful, escalate the matter without delay and pass the debt over for legal action. This can encourage the debtor to make payment as a matter of urgency to avoid any court action being taken.

For more information contact Sadie Butler in our Debt Recovery Department on sadie.butler@forbessolicitors.co.uk or visit our website.

Advice for

COMMERCIAL LANDLORDS

Inspect Your Properties

Inspect the property regularly and at least annually. Look for signs of breaches of the lease such as an unlawful subletting (look for signage, talk to staff). Look for signs of dilapidations and if appropriate prepare and serve an interim schedule of dilapidations. It is much easier to enforce obligations upon the tenant to keep the property in a good state of repair during the course of the lease when you are not limited in recovery when it comes to terminal dilapidations. Also look for signs of problems with the tenant, for example empty shelves, worried staff, excessive sales.

Know Your Dates

Diarise to consider serving renewal notices 12 months before the expiry of the contractual term. The advantage of this is that the tenant is less likely to hold over and remain in the property longer than you would like or on uncertain terms. Take advice from a valuer and a solicitor about the advantages and disadvantages, and find out what the market rent is likely to be. If you do decide to serve your notice whether requesting the tenant enter into a new lease or not it will protect your position in terms of interim rent. It will also push the tenant into deciding whether or not they want to stay. This should avoid or reduce void periods.

Stay in Control of Finances

Chase the arrears. Even if you do not expect to be paid or even if you are aware that the tenant is unable to pay. Chasing rent arrears and documenting those chases is very useful when it comes to spotting potential problems, helping with cash flow and ultimately the chases and rent areas can be used as evidence to refuse the tenant a new renewal lease when their contractual term is up, without having to pay compensation.

COMMERCIAL LITIGATION

Top Tips

Make Sure Terms are Clear

When carrying out any transaction or entering into a business relationship with another party it is vital that the terms of the agreement are clear and the scope of any contract is clearly set out in writing and ideally signed by the contracting parties. In the event of a dispute or any default, clear terms which have been agreed will narrow the scope of any potential litigation moving forward. Any agreed terms will also benefit from direction as to what happens in the event of a dispute and deal with things such as jurisdiction and whether any dispute should be dealt with by way of mediation or arbitration.

Keep Communicating

If you become involved in a dispute or can see that a falling out is on the horizon, communicating with the other parties involved is key to preventing a dispute from escalating and early resolution. If efforts to keep lines of communication open fail, you might consider appointing an independent third-party mediator to try and bring the parties together. Parties can benefit from the early involvement of a mediator, who can facilitate discussions either on a 'roundtable' basis with all parties present, or if relationships have broken down beyond being in the same room the mediator can attend on each party separately to narrow issues and broker a deal.

Seek Advice Early

If early negotiation does not lead to resolution, it is key that you have your strategy in place for that eventuality. Whilst all steps should be taken to avoid court proceedings you need to be in a position to either be able to bring or defend a commercial claim. If Plan A of the settlement fails then put yourself in the best place to protect your position and be able to follow up on Plan B which may include issuing of proceedings at court. It is important to remember that how parties to litigation conduct themselves within litigation, even in early stages, may be considered when looking at cost liability and with the right advice you can protect yourself from this.

For more information contact Sadie Butler in our Debt Recovery Department on sadie.butler@forbessolicitors.co.uk or visit our website.

ENSURING YOUR

GDPR Compliance

IS IN ORDER

As companies look forward and plan for the return of their workforce, it is understandable that GDPR compliance may not be at the top of your list of priorities.

However, during the course of the Covid-19 pandemic we have seen our clients dealing with an increase in the number of data breaches, subject access requests, complaints and claims for compensation relating to breaches of the GDPR. This has been compounded by the increase of redundancies and delays to companies ordinary disciplinary processes.

In light of the increased awareness of data protection rights, how can you ensure that your company's GDPR compliance is in order? We have set out some of our top tips below.

Review Existing Policies and Procedures

Data protection policies and procedures underpin a company's approach to data protection and set out how a company will comply with data protection law. They are also essential for demonstrating compliance with the GDPR's 'Accountability' principle - this states that companies must take responsibility for what they do with personal data and must have appropriate measures and records in place to be able to demonstrate your compliance.

Given that it is now nearly 3 years since the GDPR was implemented in the UK, any policies and procedures introduced at that time will now be ready to be reviewed. In addition, the pandemic will undoubtedly have changed the way in which your workforce is operating and your policies and procedures should reflect current working practices.

Review Employee Facing Privacy Notices

Employee facing privacy notices (or privacy policies) are different to your overarching data protection policy. Your data protection policy will set out how employees should handle data they come across as part of their role. Conversely, an employee privacy notice will set out what information an employer collects from its employees, how it will use this information, who it will be shared with and how long that information will be held for.

It is likely that your use of employee personal information has changed over time (e.g. you are now more likely to be conducting workplace testing or collecting more health information than has been previously envisaged). You should review your privacy notices to see if they are up to date and amend them if necessary.

Develop Procedures for Workplace Testing and/or Collection of Vaccination Data

If you are planning on conducting any workplace testing or collecting vaccination data from employees, you will need to ensure you consider data protection law and build these considerations into your procedures. These considerations should include:

- What are our reasons for collecting this information?
There should be a legitimate business need, rather than 'just in case'.
- What is your lawful basis under the GDPR for collecting this information?
- How will the data be stored?
Who will have access to it?
- Who will the data be shared with?
- How will you inform employees about the collection of this information?
- How long will the data be kept for?

If you wish to discuss your GDPR compliance or any element of this article, please contact our Accredited Data Protection Practitioner Bethany Paliga via email at bethany.paliga@forbessolicitors.co.uk or phone on 01254 222347.



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