



# COMMERCIAL BULLETIN

Your guide to the latest legal updates  
from the team at Radius Law.

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# Nº 78

## COMMERCIAL

### Business to Business contracts (usually) mean what they say.

Disputes often arise between businesses when they realise, in hindsight, the contract terms do not reflect what they had assumed they'd agreed.

In *Contra Holdings Ltd v Bamford*<sup>1</sup>, a contract stated that Contra would be paid a success fee on the sale of a corporate group. Ultimately, whilst there was some group restructuring, it was not sold.

Contra, unhappy that it had provided consultancy services and was not being paid the success fee, argued that the contract implied that the fee would also be due following any such restructuring.

The High Court and the Court of Appeal disagreed noting that the contract referred only to the proposed sale and reminded the parties of the well-established principle that the ***Court will only imply terms to the extent they are (i) so obvious as to go without saying, or (ii) necessary to give an agreement business efficacy.***

### Beware: Are you a De facto director?

There is no definitive test of what a de facto director is. In short, it's someone who acts like a director but is not actually a registered director. Courts have previously described a de facto director, as a person who '***assumed the status and functions of a company director***'. De facto directors can be sued and held liable in the same way as ordinary directors.

In *Aston Risk Management Ltd v Jones*,<sup>2</sup> Mr Jones argued that he was not a de facto director and was merely providing direction in his role as the representative of the parent company.

The High Court disagreed, deciding that Mr Jones acted individually in his activities relating to the company, rather than as part of the board of the parent company. He was the dominant personality of the two directors of the parent company and his actions could not only be attributable to those of the parent company.

### New Failure to Prevent Fraud Offence

The government has introduced a new ***failure to prevent fraud offence*** into the Economic Crime and Corporate Transparency Bill<sup>3</sup>. If this becomes law, it will be important for large companies to provide training and policies to evidence they have '***reasonable fraud prevention procedures***'. The government will be under a statutory duty to publish guidance on reasonable procedures before the offence comes into force, likely to be later this year or early 2024.



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## DATA SECURITY

### British Airways, Boots and BBC Fall Victim to Cyber-Attack

The BBC, British Airways and Boots have each announced that Zellis, their Payroll services provider, has suffered a cyber-attack. A vulnerability in a software tool was exploited by a Russian ransomware group.



### Balancing ‘Legitimate Interests’ and Fundamental Rights and Freedoms

To process personal data businesses must have a lawful basis. The Information Commissioner’s Office (ICO) website details the [lawful basis options](#). One lawful basis is [legitimate interests](#), but to rely on legitimate interests, businesses must demonstrate that their interests are proportionate to their data subjects’ ‘fundamental rights and freedoms’.

The First Tier Tribunal (FTT)<sup>4</sup> recently struck out the ICO Enforcement Notice that it had issued against Experian for relying on Legitimate Interests to justify using data from its credit referencing agency business for direct marketing purposes. The FTT commented that the ICO *‘had fundamentally misunderstood the actual outcomes of Experian’s processing’ and that the worst outcome of Experian’s processing* ‘is that an individual is likely to get a marketing leaflet which might align to their interests rather than be irrelevant.’

This FTT decision will be welcomed by businesses seeking to rely on the legitimate interests, but it should be noted that the ICO has stated that it intends to appeal.

## Is your privacy notice compliant?

In April the ICO fined TikTok £12.7m for breaches of UK data protection law. Interestingly the ICO’s enforcement notice contained a [58-page annex](#) detailing why TikTok’s privacy policy did not meet the requirements of the UK GDPR. Key takeaways are:

- If you have a Data Protection Officer, state how they can be contacted.
- In one place note the data you are processing, why you are processing it and the lawful basis that you are relying on. It’s recommended to use a simple table format as shown here.

The personal data that we are processing.	Why we are processing the personal data.	The lawful basis we are relying on.
<ul style="list-style-type: none"> <li>• Name</li> <li>• Address</li> <li>• Debit &amp; Credit card information.</li> </ul>	<ul style="list-style-type: none"> <li>• To process payments.</li> </ul>	<ul style="list-style-type: none"> <li>• To <b>perform our contract</b> with you.</li> </ul>
<ul style="list-style-type: none"> <li>• Name</li> <li>• Address</li> </ul>	<ul style="list-style-type: none"> <li>• To send you information about our services.</li> </ul>	<ul style="list-style-type: none"> <li>• Your <b>consent</b>.</li> </ul>

- Be specific about who you share personal data with.
- Explain which countries to which you transfer personal data.
- Provide examples to illustrate the periods that you will retain personal data.

## Updated Guidance Regarding DSARs

Data protection legislation affords individuals the right to request a copy of their personal data from organisations processing their personal information. The ICO has issued [updated guidance](#) for employers regarding workers’ Data Subject Access Requests.

## New Guidance Concerning Privacy Enhancing Technologies

The ICO has published [new guidance](#) concerning privacy enhancing technologies (‘PETs’). PETs enable organisations to demonstrate the implementation of organisational and technical measures and, by virtue of that, afford them an opportunity to process personal data in full compliance with their data protection obligations.





## ICO Provides Cookie Enforcement Remains Priority

While the Information Commissioner's Office ('ICO') has yet to launch a major cookie enforcement action, the data protection regulator has asserted that *organisations failing to include a 'reject all' option in their website's cookie banners are 'breaking the law'*.

## ENVIRONMENTAL

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### The Court Refuse ClientEarth Permission to Pursue Directors of Shell

We reported in our [May Bulletin](#) that ClientEarth issued proceedings against Shell's directors for failing to adequately consider the environment in their decision making. The Court dismissed ClientEarth's application but has granted ClientEarth's request for an oral hearing, during which the Judge will reconsider his decision.

## EMPLOYMENT

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### Preventing competition by ex-employees

After employment ends, employees may compete with their former employer, unless they have agreed to express post-termination restrictions. Post-termination restrictions will be unenforceable unless:

1. they protect a legitimate interest of the employer, and
2. their effect is no wider than what is reasonably necessary to protect that legitimate interest.

When deciding whether restrictions should be enforced, courts may sever or delete wording that makes the restriction too wide, provided this does not significantly change the nature of the restriction.

### A wide 12-month non-compete clause was enforceable

Recently, the Court of Appeal<sup>5</sup> upheld the High Court's decision to enforce a 12-month non-compete clause after severing wording that made it too wide.

It was reasonable to grant an interim injunction preventing the employee from joining a competitor because:

1. The former and new employers operated in a very niche area of the global pharmaceutical industry
2. The employee would be taking up a senior role with the former employer's main competitor and
3. it would be very difficult for the new employer to insulate the employee from competitive activity.

### Employer's delay renders 12-month non-compete unenforceable

In another case<sup>6</sup>, the High Court held that a non-compete clause lasting up to 12 months at the employer's discretion may be enforceable, even where the employee had already spent 12 months on garden leave.

The employer was, however, unsuccessful: it sought an injunction months after becoming aware of the employee's intention to join a competitor and it could not explain the delay. In the circumstances, *it was unjust to grant an interim injunction*.

## Government plans to limit the extent of non-compete clauses

In contrast to these recent decisions, the [Government has announced plans](#)<sup>7</sup> to introduce a *statutory limit of three months* on non-compete clauses in employment contracts.

Until the statutory limit is introduced, employers can rely on existing case law to enforce restrictions.

Guidance on menstrual health, menopause and reproductive health.

The British Standards Institute has published a *new standard on menstruation, menstrual health and menopause in the workplace (BS 30416)*<sup>8</sup> to help employers:

- support employees experiencing menstruation or the menopause and
- retain experienced and talented staff of all ages.

In addition, the CIPD has published helpful [guidance](#) on *fertility*<sup>9</sup>, which looks at best practice in supporting employees with fertility challenges.

## Holiday pay

The Employment Appeal Tribunal (EAT) has confirmed<sup>10</sup> that payments in lieu of holiday made when employment terminates must not be lower than what the worker would have received had they taken holiday during employment. The Working Time Regulations specify a formula for calculating pay in lieu of accrued holiday on termination. Employers cannot pay a lower sum, even if the employment contract (or other relevant agreement) allows them to do so.

## New Legislation

The following legislation has been enacted:

- [Neonatal Care \(Leave and Pay\) Act 2023](#) creates a new right to paid time off where a baby requires additional medical support;
- [Carer's Leave Act 2023](#) gives carers a new right to unpaid time off; and
- [Protection from Redundancy \(Pregnancy and Family Leave\) Act 2023](#) gives additional protection to a wider group of employees taking family leave.

The Acts will come into force after regulations have been issued. Regulations are expected in 2024.

## IR35 training and audit service

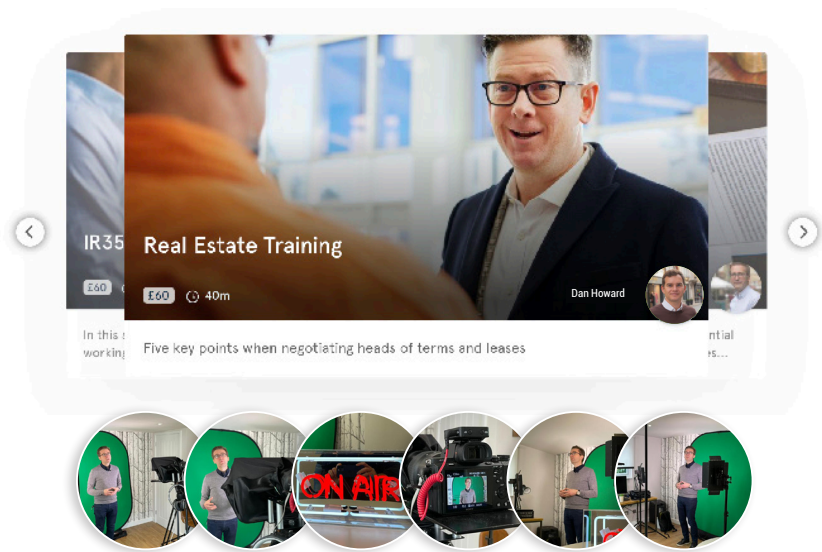
We have produced detailed online training to explain IR35 and its requirements – please [visit our training hub](#) to access.

We also provide an IR35 and Worker Status Audit service.

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## Cases, laws, decisions referred to in this Bulletin

1	Contra Holdings Ltd v Bamford [2023] EWCA Civ 374.
2	Aston Risk Management Ltd v Jones [2023] EWHC 603 (Ch).
3	Economic Crime and Corporate Transparency Bill.
4	Experian v Information Commissioner [2023] UKFTT 00132.
5	Boydell -v- NZP Ltd & Anor [2023] EWCA Civ 373
6	Jump Trading International Ltd v (1) Damien Couture (2) Verition Advisors (UK Partners) LLP [2023] EWHC 1305 (KB)
7	<a href="https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156211/non-compete-government-response.pdf">https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156211/non-compete-government-response.pdf</a>
8	<a href="https://storage.pardot.com/35972/1685453102nj6VRj14/BS_30416.pdf">https://storage.pardot.com/35972/1685453102nj6VRj14/BS_30416.pdf</a>
9	<a href="https://www.cipd.org/en/knowledge/guides/fertility-challenges/">https://www.cipd.org/en/knowledge/guides/fertility-challenges/</a>
10	Connor v Chief Constable of the South Yorkshire Police [2023] EAT 42

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