



COMMERCIAL BULLETIN

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

NOVEMBER 2023

Nº 80

COMMERCIAL & CORPORATE

Incorrect Invoices: What Do You Owe?

If a supplier mistakenly invoices below the contracted price, can it claim the difference? This was the issue in recent litigation between Rolls-Royce and Goodrich Corporation¹. Goodrich realising it had under-charged issued a claim for the under charge.

The Court ruling in Goodrich's favour explained that, unless the contract terms specifically states otherwise, an invoice is '*a two-fold statement by the supplier..this is what I think you owe.. and pay me now and getting the former wrong does not mean that nothing is owing*'.

Economic Crime and Corporate Transparency Act (the Act) receives Royal Assent.

The Economic Crime and Corporate Transparency Act received Royal Assent on the 26th of October. As reported in our [July Bulletin](#) the Act includes a new failure to prevent fraud offence similar to other existing strict liability 'failure to prevent' corporate offences (including the failure to prevent bribery under the Bribery Act and the failure to prevent the facilitation of tax evasion under the Criminal Finances Act). We do not yet know when the Act will come into force and are still waiting for government guidance to be issued.



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ADVERTISING & MARKETING

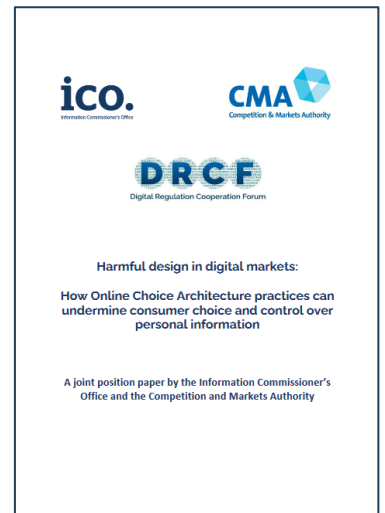
UK Regulators Warn Against the Use of Harmful Online Design

The Competition and Markets Authority and the Information Commissioner's Office have together set out their expectations concerning [harmful online design and how information should be presented to users of digital services](#). The joint paper explains that businesses may violate consumer and data protection laws if they:

- use '**harmful nudges**' or '**sludge**' – these are practices that prompt an ill-considered action – this could be by including an option to consent to non-essential cookies with a single click but does not include an equivalent option to refuse consent to non-essential cookies with the same ease;
- '**confirmshaming**' – this is use of suggestive language to direct users to the 'good' or morally acceptable decision in the mind of the website developer/owner e.g., use of phrasing which induces guilt or

embarrassment in relation to refusing an incentive;

- **‘Biased framing’** these are techniques to present choices in a positive or negative light. It could, for example encourage users to share their search history to generate a ‘tailored’ experience but neglect to mention any negative effects of this action;
- **‘bundled consent’** where consents for multiple purposes are compressed into a single option, leaving users with little control over where their permissions are given.



The ASA’s New AI Technology Recognises Greenwashing

The Advertising Standards Authority’s (‘ASA’) new [Active Ad Monitoring system](#) identifies online sustainability and green claims that may be non-compliant.

When the AI tool identifies a potentially non-compliant advert, it is referred to the ASA for ‘expert review’.

The ASA has recently upheld a ruling against 4AIR that had been identified by its AI tool. The ad in question had made claims that 4AIR made claims of:

‘Eco-Friendly Aviation- - Future of Sustainable Aviation’

‘Learn How To Turn Flying Into A Force For Good With 4AIR Rating. Industry-Leading Standard For Sustainability In Private Aviation. Sustainability. Aviation Industry’

Unsurprisingly, the ASA stated that such absolute environmental claims such as these require a **‘high level of evidence’** and that 4AIR had not met that standard.

You can read more about the ASA’s updated guidance on misleading environmental claims in our [September Bulletin](#).

ENVIRONMENTAL

The CMA Issues Final Guidance on Environmental Sustainability Agreements

Collaborating with competitors can be dangerous and may breach competition law. New Competition and Markets Authority (‘CMA’) [Guidance](#), however, aims to provide comfort that some competitor collaborations are permitted where they provide environmental and sustainability benefits.

The guidance confirms that parties:

- can contact the CMA to seek informal guidance about such collaborations;
- would be protected from fines and director disqualifications in relation to any environmental agreements that have been approved by the CMA;
- would be protected from CMA enforcement action where the agreements / collaborations are consistent with the guidance.

It's important to note however that, unlike similar guidance in the EU, agreements pursuing broader social objectives are out of scope of the guidance.

CONSUMER

The Online Safety Act Takes Effect

The controversial **Online Safety Act 2023** became law **26th of October 2023**.

It's intended to enhance protections afforded to children and give adults more choice in relation to what they see online.

Some powers in the act that could be used to compel messaging services to examine the contents of encrypted messages has sparked controversy with organisations such as WhatsApp who have threatened to leave the UK rather than compromise message security.

DATA SECURITY

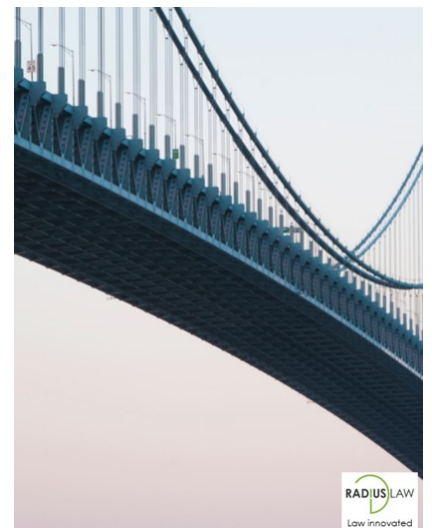
The Data Bridge Between the UK and the US is Now Live

On 10th July the EU approved a new means of transferring personal data to the US - the Data Privacy Framework (the DPF) and on the 12th October the DPF was extended to the UK.

US-based organisations may voluntarily join the DPF scheme. Once done, the commitments are enforceable under US law.

UK and EU businesses will no longer need to implement standard contractual clauses, nor undertake a 'transfer impact assessment' for transferring personal data to DPF member organisations.

It's worth noting that a US company must first sign up to the EU-US DPF scheme before it can also sign up to participate in the UK Extension.



The ICO Releases New Guidance for Monitoring at Work

The Information Commissioner's Office has [launched guidance](#) concerning the monitoring of workers, and how this interacts with data protection law. Key points provide:

- if data processing could put the interests of workers or others at higher risk, a data protection impact assessment ('DPIA') must be conducted beforehand;
- workers can be monitored only in ways that they would reasonably expect; it is considered unfair if the effects on workers are unjustified and adverse;
- employers must establish a lawful basis to process data if their monitoring is intended to capture special categories of personal data (such as health data) or 'makes it likely' that such data will be collected; and
- when processing workers' biometric data, employers must establish a lawful basis; conduct a DPIA; and inform workers about the operating system, what personal data will be collected and how it will be used, as well as the nature and purposes of the monitoring.

EMPLOYMENT

New Legislation

New Right to Request a More Predictable Working Pattern

The Workers (Predictable Terms and Conditions) Act 2023 will give workers (including agency workers) who work unpredictable work patterns in terms of number of hours, days of work or times of day, the right to request a more predictable working pattern.

Agency workers will also have the right to ask the hirer under whose supervision they are working, to enter into a direct contract of employment or worker's contract with them.

Employers must deal with the request in a reasonable manner and **respond within one month** and may only refuse for one of a list of specified reasons. There will be a right to complain to an employment tribunal if an employer breaches the rules.

The Act is expected to come into force in Autumn 2024. ACAS has issued a draft Code of Practice which is open for consultation until January 2024.

New Duty to Take Reasonable Steps to Prevent Sexual Harassment

The Equality Act 2010 allows an employer to avoid liability for harassment committed by its staff where it can demonstrate that it took all reasonable steps to prevent it from taking place.

The Worker Protection (Amendment of Equality Act 2010) Act 2023 introduces a **new duty on employers to take reasonable steps to prevent sexual harassment** of their employees. It also gives employment tribunals the power to increase compensation by up to 25% where an employer breaches the duty.

The Equality and Human Rights Commission will update its guidance on sexual harassment and set out steps employers should take to comply. Tribunals will have to consider the code when assessing whether an employer has complied.

The new duty will come into force on 26 October 2024.

29th November, 2023



Senior Counsel Event – O Shaped: The Mission to Make the Legal Profession Better for Everyone

Online

Our interactive virtual sessions are an opportunity for in-house counsel to share experiences, insights and best steps to protect your organisations.

[Book Now >>](#)

Liability for historic underpayments of holiday pay

Workers who have been underpaid holiday pay may claim unlawful deductions from wages. Where the underpayment has taken place over a period, workers can claim there has been a series of deductions. In Great Britain, workers can recover a maximum of 2 years' worth of underpayments. There is no cap in Northern Ireland.

The Supreme Court (SC) has confirmed³ that workers can claim for historic underpayments of holiday pay, even if there were gaps of more than three months between the series of deductions or a correct payment has been made in between deductions.

To determine if there was a series of deductions, all relevant circumstances must be considered, including:

- the similarities between the deductions
- their frequency, size and impact, and
- what links them together.

In this case, there was a common link between the deductions: **holiday pay had been wrongly calculated based on basic pay rather than normal pay.** This decision is likely to make it easier for workers to show that there has been a series of deductions.

Employer Allowed to Claw Back Bonus Payment

Under the doctrine of restraint of trade, a person is generally entitled to trade when, where and in what manner they wish, and any restraint of trade is unlawful.

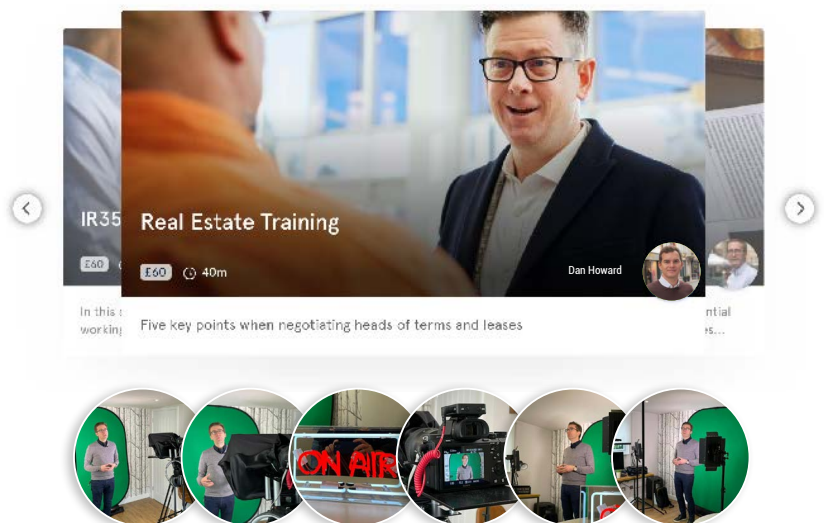
The High Court has recently decided⁴ that a clawback provision allowing an employer to recover payments of a discretionary bonus where an employee left employment or gave notice within 3 months of payment was not in restraint of trade.

The clawback provision meant to discourage employees from resigning, but this was not a restraint of trade and had no bearing on allowing the clawback. The employer could recover a bonus payment worth £187,500.

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UPCOMING EVENTS

30th November, 2023



Automotive Business & Legal Review

Online

On Wednesday, 3rd May 2023, Radius Law and The Motor Ombudsman are coming together to host their Annual Conference – Business & Law Update for the Automotive sector.

[Book Now](#) >>

07th December, 2023



In the Round: Diversity and Inclusion in the Workplace: Is Equality Enough?

LSH Auto UK Ltd Brighton Road Stockport Greater Manchester SK4 2BE

On Thursday, 7th December 2023, Radius Law, Douglas Scott and Begbies Traynor are coming together to host the next roundtable breakfast seminar in our In The Round series.

[Book Now](#) >>

13th December, 2023



Festive Forum: Learn, Connect, Celebrate

Grant Thornton 30 Finsbury Square London EC2A 1AG

On Wednesday, 13th December 2023, Radius Law and Montresor Legal are coming together to host our Festive Forum.

[Book Now](#) >>

Cases, laws, decisions referred to in this Bulletin

1	Rolls-Royce Holdings Plc v Goodrich Corporation [2023] EWHC 1637 (Comm)
2	Economic Crime and Corporate Transparency 2023
3	Chief Constable of the Police Service of Northern Ireland v Agnew [2019] NICA 32
4	Steel v Spencer Road LLP (trading as The Omerta Group) [2023] EWHC 2492 (Ch)



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