

Commercial services

Your business is going strong. You're competitive. You and your partners are working well together. Your debtors are paying up. The shareholders are happy. Right, it's time to get the lawyers involved.

While this logic might seem a little perverse, any business, whether a start up or an established successful company, needs good legal advice and protection to avoid unnecessary financial exposure or business disruption. This need is exaggerated in today's increasingly litigious and red tape strewn society. At FostersLaw we will manage, and where possible cut through, the bureaucracy, ensuring you and your business receive full legal guidance and protection.

Commercial law covers the wide range of legal issues affecting businesses from company law to employment law, and from tax law to health and safety.

Services include:

-  Business structure
-  Mergers and acquisitions
-  Selling a business
-  Dispute resolution
-  Civil and commercial litigation
-  Debt recovery (as per flyers)
-  Employment Law
-  Health and safety (including accident and Injury claims)

All companies face a wide range of legal issues in the day-to-day running of their businesses, from managing relationships with customers and suppliers, through recruiting and motivating an effective workforce, to understanding and complying with the ever-increasing burden of regulation. That is why FostersLaw has a specialist Commercial Services Department to provide practical and commercial legal advice to private sector businesses on all non-transactional matters. Our clients range from small start-ups to large multinationals.

The Commercial Services group comprises experts from across our offices and across our various specialist legal disciplines. However, all members of the Commercial Services Department have a number of things in common: a genuine enthusiasm for working with private sector businesses (however big or small) and a thirst to understand our clients' businesses so that we can help them to grow their businesses and resolve their legal problems in a cost effective way.

By working across the various specialist legal disciplines, our aim is to bring a "joined up" approach to our work with commercial clients, ensuring that our legal advice is not given in isolation but with a full understanding of our clients' businesses as a whole and the other legal issues that they face. To do this we work hard to understand each client's business and the sector within which it operates. Before starting any piece of work, we also ensure that we understand our client's objectives and expectations. This information is shared, as appropriate, with all members of the team acting for that client. By doing this we can ensure that we provide practical and commercial advice that is tailored to each client's needs.

Business structure

The right entity

If your research has shown that you have a solid business concept and an attractive marketplace, the next step is to decide the appropriate identity. There are four main legal forms your business can take:

- ✿ Sole trader
- ✿ Partnership
- ✿ Limited Liability Partnership
- ✿ Limited Company

Sole Trader

This is the simplest way to start a business. It means that you alone are responsible for the business. You do not need to register with anyone, but the following is required:

- ✿ Stationery with your name and business address
- ✿ Check if the business name that you use is legally acceptable (see 'Choosing a business name')
- ✿ Let HM Revenue & Customs and the DWP know that you are self-employed

Advantages	Disadvantages
Quick and easy to start. Simple record keeping. Keep all profits (after tax).	Liable for all the money your business owes. Have to do it all - could be lonely. Taking time off is a problem.

Partnership

This is an association of two or more people running one business with a view of making a profit. You can have up to a maximum of twenty partners. Each partner is jointly liable for debts, but any one partner can be held responsible for 100% of the debts even if you do not have any knowledge of the debts.

It is advisable to have a partnership agreement, that is, a deed of partnership that is drawn up by solicitors. You do not have to register your partnership, but you will be required to:

- ✿ Check if your business name is legally acceptable
- ✿ Have your name and address on your stationery
- ✿ Let HM Revenue & Customs and DWP know you are self-employed

Advantages	Disadvantages
Have more ideas and complementary skills. Allows a greater business potential. Potentially additional finance. Shared responsibility for risks and costs.	Split decisions. Jointly responsible for debts.

Limited Liability Partnership

Limited Liability Partnerships (LLPs) are a relatively new way of organising a business (since the Limited Liability Partnerships (LLP) Act 2000, which came into force in 2001). While the business is legally a corporate body, the members can limit their personal liability and avoid putting their own personal assets at risk.

Broadly this is not something that a member of a normal partnership can do and until now members have had to form companies in order to limit potential claims on their own personal assets.

Limited Company

A limited company is a business that exists separately from any of the people who own it. It means that the business is owned by a number of people who buy shares in it and get a share of the profits in proportion to how much they have put into it. The shareholders have limited liability which means if the company fails, they would not be held responsible (liable) for company debts.

A limited company is treated as a separate legal entity which means that:

- ✿ It pays its own tax on profits (corporation tax)
- ✿ It can sue and be sued
- ✿ It is completely independent of the people who work in it or own shares in it

Advantages of a Limited liability entity

Company formation to most people means forming a company limited by shares and is often known as a "private limited company". Shares are issued and directors are appointed by the shareholders (often the same people in a small business).

The advantage of this type of entity, over a non limited partnership or a sole trader form, is that the company owners have limited liability, so if the company fails, there is no claim on their personal assets (beyond their original investment). As a sole trader or other non-limited business, personal assets can be at risk in the event of a failure of the business, but this is generally not the case for a limited company. As long as the business is operated legally and within the terms of the Companies Acts, directors' personal assets are not at risk in the event of a winding up or receivership.

Operating as a limited company often gives suppliers and customers a sense of confidence in a business. Larger organisations in particular will prefer not to deal with non-limited businesses. Banks can appear to favour limited company customers, although they will often seek personal guarantees from the directors.

However with the benefits that this structure provides, it is worthwhile noting that appropriate control structures are recommended.

Business entity documentation

The Shareholders' Agreement

Although a limited company's 'Articles of Association' deal with the internal workings of the company, a Shareholders' Agreement is often viewed as one of the most practical documents a privately company has at its disposal, providing clarity and peace of mind to all shareholders about what can and cannot be done, and what happens if things go wrong.

Initial optimism, objectives and even individuals can change; by setting out the relationship of the parties, their share in the company and how the business will be run, the Shareholders' Agreement will allow you to manage any future issues. For instance, have you thought about:

- ✿ What happens if shareholders fall out?
- ✿ What happens if a major shareholder divorces or dies?
- ✿ Who can write the cheques?
- ✿ How are shares sold?
- ✿ How are the shares valued on any sale?

These minor issues can often develop into full scale conflicts that threaten the viability of the business. The Shareholders' Agreement precludes this by outlining your and your business partners' rights and responsibilities, and the procedures to guide them. It will cover:

- ✿ structure of the company
- ✿ financing
- ✿ strategy to resolve shareholder disputes – conflict
- ✿ preventing the personal circumstances of one shareholder affecting the company or other shareholders
- ✿ board member and their powers
- ✿ profit distribution
- ✿ protection of minority shareholders
- ✿ shareholder powers
- ✿ procedures and limits within which the company operates
- ✿ termination

Partnership Agreement

You and your partners can establish the shares of profits (or losses) each partner will take, the responsibilities of each partner, what will happen to the business if a partner leaves and other important guidelines.

A partnership is created when two or more people come together in business to share profit and losses, forming what is usually a long term business relationship. When entering into a partnership, without the guidance of Articles of Association or a Shareholders' Agreement, it is prudent to have a Partnership Agreement in place. A Partnership Agreement provides structure to this relationship with your partners in a way that suits the business. And, although a written Partnership Agreement is not legally required to form a partnership, it is vital to avoid uncertainty and the damaging effects of the automatic application of unsuitable statutory law.

You and your partners-to-be should perhaps consider:

- ✿ name of the partnership
- ✿ type of partnership – standard or LLP?
- ✿ contributions to the partnership
- ✿ allocation of profits, losses and drawings
- ✿ partners' authority
- ✿ partnership decision-making
- ✿ management duties
- ✿ admitting new partners
- ✿ withdrawal or death of a partner
- ✿ resolving disputes

Mergers and Acquisitions

Whether you are interested in starting or growing your business, one possible route is through purchasing an existing operation, the key benefit being that the organisation will have a proven and identifiable operational and financial track record. However, the time and effort required to find, research and complete a business purchase is considerable and there can be many pit-falls along the way. Any investor would be foolish to embark on the process without the professional advice and guidance of an experienced business solicitor and accountant.

Where to begin

Before you can even begin to look for a suitable business purchase, there are many important decisions to be made. You need to give careful consideration to what kind of business will be best suited to your interests, skills, financial status/expectations and level of commitment – and, just as important, how the purchase will be funded. You'll also need to research your chosen business sector and decide what legal structure will work best for you: franchise or existing business; limited company or partnership?

Making the right decisions at this early stage could save you a lot of money and mean the difference between success and failure.

Where to look

If time is precious, you may want to engage the services of a business transfer agent who (just as an estate agent finds properties to match a buyer's criteria) will do the searching on your behalf. Otherwise, you'll find details of businesses for sale in newspapers, trade journals and magazines and, of course, on the internet. On the other hand, if you have already identified a potentially suitable business but that business is not immediately for sale, you should use a professional adviser to make an anonymous initial approach on your behalf.

Negotiation and valuation

Once you've approached your potential business acquisition, you'll need to negotiate an initial set of principal terms upon which the deal will be based and you should expect to sign a confidentiality agreement before any information is exchanged.

Thorough preparation for this process is vital: you need to attend negotiations with a list of the information you require and an understanding of the implications. An experienced company/commercial solicitor will help take the headache out of this process and ensure that nothing is missed. Key to the negotiations is the need to acquire sufficient information about the business against which to make a fair valuation including:

- ✿ past activities and track record
- ✿ current performance (sales, turnover and profits)
- ✿ financial situation, taking into account cashflow, stock, debts, expenses, employees, and assets (including intangible assets such as good will, reputation, intellectual property rights and relationships with suppliers)
- ✿ the competition
- ✿ current trends in the industry
- ✿ the reasons behind the sale

Inevitably the seller will have a different view as to the true value of the business and the value will always be subjective. However, remember that, in time, a good business will always justify the purchase price whereas a bad one may not ever allow you to recover financially.

Due diligence - the Devil's in the detail

Due diligence is an agreed period (usually 3-4 weeks for a small business) when you will be able to access the business's books and records to verify that all of the information that you have been told so far is true and accurate. Often, the seller will agree to take the business off the market during this period (the exclusivity period) in return for an initial down payment.

A proper and effective due diligence procedure goes way beyond simply verifying the financial information. Your review must also include a thorough investigation of the company's:

- ✿ sales
- ✿ marketing

- ✿ employees
- ✿ property (particularly lease commitments)
- ✿ contracts and orders
- ✿ customers
- ✿ competition
- ✿ intellectual property rights (patents, trademarks, licences)
- ✿ systems and technology
- ✿ suppliers
- ✿ research and development
- ✿ legal and corporate issues (including any outstanding litigation).

In short, you want to complete the due diligence period knowing exactly what you are getting into. Potential deal breakers and other key issues should be raised immediately to maximise the time available to resolve such matters. In particular, you need to take legal advice about what happens to any existing employees as there is a raft of regulations that apply when a business is transferred as a going concern. The legislation is complex but, in brief, any changes to staff that you may wish to make after the purchase could result in you being summoned to an Employment Tribunal for unfair dismissal. It's vital, therefore, that existing employees are informed and consulted during the due diligence process.

Completing the deal

During the due diligence period your solicitor will draft a 'sale and purchase agreement' incorporating all the agreed terms of the sale. Subject to renegotiation as a result of the findings from due diligence, you and the seller will then exchange contracts with completion at a later date or agree to exchange and complete simultaneously. Completion will be subject to:

- ✿ transfer of finance
- ✿ transfer of contracts/licences
- ✿ transfer of any property/leases

Selling a business

If you've shed blood, sweat and tears building up your own business, the decision to sell it may be one of the hardest you'll ever make. However, there can be compelling reasons for wanting to make the break: you may decide it's time to retire to the sun or you may need some finance for the next exciting project - or maybe shifting market patterns suggest that you should get out while the going is good.

One thing's for sure: whatever your reasons for selling up, the level of care and effort you put into the sales process will have a significant influence upon the price you receive for your business - and upon how long it will take to complete your sale.

Forward planning

Selling a business is not a quick-fix solution; the process can begin as much as a year or two in advance. You'll need to have a clear understanding of your objectives, an informed view of the marketplace and, above all, time to prepare your business so that it is in the strongest possible position to maximise proceeds at the time you sell.

Professional help

Early involvement of an experienced solicitor and accountant is vital. They will advise on how best to groom your business and allow you more time to carry on with its day-to-day operation. They may also assist in valuing the business, identifying the best strategic purchaser and advising you of tax implications.

Fail to prepare and prepare to fail

If you're serious about getting the best price for your business, you'll need to do more than simply tweak the figures on the balance sheet. You need to take an objective look at your business from every angle and identify where and how you can make it more efficient and profitable so that it proves irresistible to potential buyers. You'll also need to consult – and if necessary, negotiate with – other shareholders and review the terms of any Shareholders' Agreement.

Areas of the business which you should consider include:

- ✿ improving profits through identification and elimination of excessive or unnecessary personal benefits and/or expenses
- ✿ increasing your sales figures through aggressive campaigning or offering special deals for customers
- ✿ ensuring that employment contracts are formalised and up-to-date
- ✿ ensuring commitment from customers and suppliers by formalising deals with appropriate contracts
- ✿ ensuring that an effective communications plan is put in place to keep staff, customers and suppliers informed of the possible change
- ✿ reducing costs by avoiding big purchases in the run up to the sale
- ✿ ensuring that your information systems are up-to-date and transparent
- ✿ removing uncertainties in respect of any disputes, claims and actions against or on behalf of the business
- ✿ putting a tax efficient structure in place to ensure personal tax liabilities are reduced on disposal
- ✿ working at establishing a market presence that differentiates you from the competition – some businesses undertake some pre-sales PR to raise their profile
- ✿ ensuring the business looks its best for when potential purchasers visit – this may be as simple as a new coat of paint for the premises

The sales process

Once the groundwork has been done in terms of getting the business into shape, you'll need to put together an information pack for prospective purchasers. This should include the Information Memorandum – this is the prime selling document and will include basic information about:

- ✿ details of your organisation
- ✿ position in the marketplace
- ✿ operational activities
- ✿ products/services offered
- ✿ details of management and staff
- ✿ prospects for future growth
- ✿ financial information, including :
 - 3 years' profit and loss (income) statements
 - tax returns for the business
 - details about any property/leases
 - a list of loans against the business, with balances and payment schedules
 - business plans

Marketing the business

With your business now (hopefully) operating from a position of strength, and armed with all the necessary information, you can now think about marketing your business. But give some thought to what time of year might be best to start: sales cycles or seasonal fluctuations may have a further impact on a potential buyer's perception of your business.

Professional advisers will be able to use existing contacts and networks to identify potentially suitable purchasers and will also know how to research other possibilities. They will also usually make the first approach to a potential purchaser. Other possible marketing channels include

newspapers, trade magazines and the internet.

The bidding process

Following the initial approach, prospective purchasers are usually given up to six weeks to propose an indicative bid. Due diligence may be carried out on your behalf during this period to provide more in-depth information than the Information Memorandum and to clear up any areas of uncertainty. Following this more detailed report, prospective purchasers will be asked to submit formal bids. Obviously, the more interest you can generate, and the more competition for the purchase, the better the price you should be offered. Your professional advisers will help to evaluate the bids and negotiate with potential purchasers.

Once you award exclusivity to one purchaser, it is normal for that purchaser to then undertake their own due diligence in order to verify that all the information you have provided them with is correct. Only then will the purchaser be in a position to decide whether to continue with the acquisition, or perhaps lower their offer.

Completion

Once a deal is struck, the solicitors will need to put in place a 'sale and purchase agreement' and final negotiations will take place before contracts are exchanged.

Dispute resolution

Unfortunately, at some point in our lives, many of us will end up in a hard-to-resolve dispute with someone - whether it be with an employer, a neighbour, a tenant or someone we are doing business with. Our Dispute Resolution team will help you to resolve that dispute either by negotiation or, if necessary, court action. We can help with the following:

Contractual Disputes

FostersLaw can advise you on how to deal with disputes arising from Commercial contracts including construction disputes.

Professional Negligence

FostersLaw can advise you if you feel that a professional you have employed has been negligent or if you are a professional yourself against whom an allegation of negligence has been made.

Shareholder or Partnership Disputes

FostersLaw can act for you to resolve disputes about company or partnership affairs.

Fraud

FostersLaw can help to seek financial recovery in fraud cases or to defend you if you are the subject of freezing or disclosure orders.

Property Litigation

FostersLaw can act for you in matters concerning business lease renewals, possession proceedings, dilapidation claims, agricultural tenancy matters and boundary disputes.

Employment Problems

If you have a problem with your employees, FostersLaw can advise and represent you. We can also work with you to prevent problems from arising and make sure your practices stay within the law.

Commercial litigation and business disputes

Even the best managed business can find itself involved in a dispute, whether it be something

simple like an unpaid invoice, or something more complex like a product liability issue, breach of contract or a shareholder dispute. Many business disputes will be disruptive, time consuming and potentially costly, so to minimise cost and disruption, our expert team always endeavour to pursue dispute resolution as an alternative to litigation. All of the Commercial Solicitors and Lawyers at FostersLaw are fully versed in the latest techniques in dispute resolution – from mediation to expert determination.

However, when all efforts to resolve a dispute by negotiation or mediation have been unsuccessful, in most instances the parties have no option other than to resort to litigation to right a wrong, or to seek redress for damage suffered. At FostersLaw we possess extensive experience in handling all aspects of the litigation process, from the initial demand letter to the final disposition.

Our litigation specialists have significant expertise in High Court and County Court litigation, arbitration, negotiation and mediation. Armed with specialist knowledge, tactical skills and commercial awareness, we look for creative and cost effective solutions designed to minimise the potential damage to your business.

Different options will be explored, and you will be offered advice and assistance in an efficient and cost-effective manner; only after carefully assessing the potential risks, benefits and costs of a particular strategy will our team proceed to take any action on your behalf.

Debt recovery

We know how difficult it can be to recover the money owed to you by clients and customers and our debt recovery team specialise in helping companies not only to recover outstanding debts but also to plan to avoid carrying long-term debt in the first place.

The FostersLaw team are experienced in commercial debt management and work with clients to look at ways of improving the recovery of money owed to you in the course of your business. Our quick and efficient service is supported by experienced litigators who deal with defended cases, advocacy, enforcement options, insolvency and other methods of dispute resolution.

In the event that debts do occur, we can help you to recover the money owed through County Court proceedings working with our experienced team of litigators.

If you are unhappy with the level of debt that your company is carrying, please contact us to see if we can help.

Employment Law

As your business grows, managing employees can become a complex legal nightmare with numerous rapidly-changing legal procedures of which you need to be aware. Employment Law and the rights and obligations conferred through an employment relationship are regarded as a minefield for employers and bewildering for employees.

Generally, professional advice and the information resources available to employers and employees do little to dispel this feeling. Calling on the assistance of a qualified Employment lawyer can help you to stay on the right side of employment law and reduce the risks of costly employment disputes.

At FostersLaw our lawyers can help you with:

- ✿ drafting policies and procedures for disciplinary and grievance processes;
- ✿ representing clients in negotiations and proceedings;
- ✿ directors' duties, service agreements and post-termination obligations;
- ✿ advising on the employment law issues of buying and selling businesses.

Legal advice on Health & Safety law and regulation

Health and Safety law is extensive. Very extensive.

Health and safety law creates rights and obligations on employers and workers and protection extends beyond an employer's own employees to other workers and visitors to the employer's premises.

The basis of UK health and safety law is the Health and Safety at Work Act 1974, This sets out the general principles of health and safety compliance and is supplemented by various Regulations, some of which apply to all industries and some of which apply to specific industries, types of premises or specific health and safety issues. The Health and Safety Executive (HSE) is the body responsible for health and safety policy and enforcement of health and safety law. In recent years the European Union has been influential in adopting health and safety measures which are implemented by member states, including, of course, the UK.

Understanding Health and Safety requirements

The employer's duties are to ensure, "so far as is reasonably practicable" the health, safety and welfare of workers, including stress at work. This has to be done by carrying out a risk assessment, consulting safety representatives and safety committees, providing information, instruction and training to workers and others who are in a contractual relationship. Compliance with some Regulations is absolute and not constrained by the "practicability" provision.

Failure by an employer to comply with health and safety law is an offence and may lead to prosecution by the HSE.

Workers who exercise their health and safety statutory rights are protected from detrimental action by their employer.

The following, non exhaustive list gives some examples of areas of work and matters which come within the scope of health and safety law:

- ✿ ventilation
- ✿ temperature
- ✿ lighting
- ✿ cleanliness and waste materials
- ✿ floor space
- ✿ seating
- ✿ sanitation
- ✿ washing facilities
- ✿ smoking
- ✿ visual Display Units (VDUs)

Workers have responsibilities and duties too and may be liable to prosecution as well if they interfere with anything provided in the interests of health and safety.

The health and safety law regime is deliberately severe and imposes a requirement on companies and individuals to prove that they have done all that is reasonably practicable to prevent accidents. If you are investigated for a breach of the health and safety legislation, it can be a confusing and stressful experience. Fortunately at FostersLaw we can advise you as to how you can take steps to ensure the safety of your employees and the protection for your business, and provide the legal

stewardship in the event of a claim or investigation.

How FostersLaw can help

At FostersLaw we have extensive experience of advising on achieving compliance, reducing the risk and/or managing an HSE enquiry or investigation. If an HSE investigation has begun, our lawyers and solicitors can advise, assist and defence individuals and companies to explain the HSE's powers, advise on interviews under caution, and analyse the evidence. HSE investigations are typically commenced following fatal accidents.

Our health and safety lawyers provide advice and representation in relation to:

- ✿ Prohibition and improvement notices
- ✿ The general requirements of the Health and Safety at Work Act 1974 and the huge number of other regulations
- ✿ Investigations after accidents have occurred which resulted in serious injuries or fatalities including business critical advice for corporate and public bodies under investigation. This advice covers all aspects of investigations, including attendance at interviews under caution and requirements to produce documents
- ✿ Representations on behalf of corporate or public bodies to the relevant authorities to attempt to avoid prosecution
- ✿ Representation of corporate and public bodies if a prosecution is commenced
Representation of individuals prosecuted for breaches of regulations, offences under the Health and Safety at Work Act 1974 and manslaughter
- ✿ Advice regarding Coroner's Inquests and the provision of representation at Coroner's Inquests

Conclusion

With most legal matters you are advised to gain the professional advice as early as possible; this recommendation becomes a necessity when dealing with commercial issues, many of which could prove critical to the operations of your business. Through addressing any issues from the outset, your legal adviser will be in a position to manage your case in order to achieve a satisfactory and timely conclusion.

For more information speak to Ed Foster at FostersLaw on 01227 283634.

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Our Solicitors are dedicated to providing legal services to our Private and Corporate Clients; meeting your personal, family and business needs.

Residential Property

- ✿ Buying or selling residential property
- ✿ Remortgages
- ✿ Transfers of equity
- ✿ Retirement homes
- ✿ Home Information Packs (HIPs)

Commercial Property

- ✿ Buying or selling a business
- ✿ Buying or selling commercial property
- ✿ Acting for developers
- ✿ Plot purchases

Private Client

- ✿ Wills
- ✿ Probate & administration of estates
- ✿ Deeds of variation
- ✿ Trusts & estate planning
- ✿ Powers of attorney
- ✿ Court of Protection matters

Family

- ✿ Divorce and separation
- ✿ Matrimonial finance & ancillary relief
- ✿ Children matters – private law (not care proceedings)
- ✿ Cohabitation and pre-nuptial agreements
- ✿ Separation agreements
- ✿ Injunctions

Mental Health

- ✿ Mental Health advice
- ✿ Tribunal representation

Dispute resolution

- ✿ Mediation services – civil and private family
- ✿ Landlord and tenant – residential
- ✿ Landlord and tenant – commercial
- ✿ Debt recovery and civil litigation

Employment

- ✿ Unfair dismissal
- ✿ Discrimination claims (sex, race and/or disability)
- ✿ Compromise agreements
- ✿ Advice on redundancy
- ✿ Company restructuring
- ✿ Breach of contract
- ✿ Drafting employment contracts and directors' service agreements
- ✿ Tribunal representation

Personal injury

- ✿ Accidents at work
- ✿ Assaults
- ✿ Road Traffic accidents
- ✿ Slipping and tripping accidents

Clinical negligence

- ✿ G.P. negligence
- ✿ Birth trauma cases
- ✿ Failures to diagnose
- ✿ Psychiatric claims
- ✿ All other types of medical negligence

Criminal law

- ✿ Please ask for further information

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