



60 years on

We are happy to be celebrating our diamond anniversary this year – an accomplishment that our founder, Alec Willans, would have been proud of.

The firm began life in 1947, above an opticians at 49 Clarence Street and moved to 28 Imperial Square in 1954. We have been known variously as Willans & Co (1961) Willans & Gyles (1975) Willans Stannard & Davey (1987) reverting to the original name Willans in the early 90s. Over the past 15 years or so we have expanded considerably and taken on three additional buildings in the square.

We now have twelve partners, six associates, three consultants and more than 70 people in total – enabling us to combine the integrity that has always been central to Willans, with legal hitting power. Confidentiality rules in our business, meaning we are seldom able to report our greatest success stories. Let's just say that, sixty years on, some of the largest law firms in the country have learned not to judge Willans by its size!

Successful outcome of 'frozen embryo' case

After five years of legal proceedings, the Grand Chamber of the European Court of Human Rights ruled in favour of our client, Howard Johnston, in April.



Our press conference in Cheltenham Town Hall attracted worldwide media attention



From left: partner James Grigg, our client Howard Johnston and barrister Kambiz Moradifer

Partner **James Grigg**, who represented Howard Johnston, said: "The decision upheld the principle that any two parties who embark on IVF, or any other similar treatment, must retain their right to withdraw consent up until the implantation of any embryos.

"Had Miss Evans' application succeeded, it would have led to a highly unsatisfactory position which would, no doubt, have had dramatic consequences for any couples who had already embarked on IVF treatment. The basis on which they originally agreed to begin treatment together would have been altered retrospectively."



Sarah Webb



Philip Chapman

People

In June, we welcomed employment lawyer **William Morse** as a partner and immigration specialist **Jon Harris-Gibbins**, as an associate. On the private client side of the firm, our longest-serving partner **Mark Hodgkinson** retired from partnership but will continue to work with us as a consultant. **Jenifer Gillman**, who also became a partner in June, has stepped into Mark's shoes to head up the wills, probate and trusts department.

Four new lawyers have joined us over the past few months: **Sarah Webb** in commercial property; **Philip Chapman** in company/commercial, **Trula Brunsdon** in employment and **Charles Abbott** in wills probate and trusts. Further details and photographs of all staff are available in the Who's Who section of our website.



Trula Brunsdon



Charles Abbott

It's all a matter of compromise

Compromise agreements can be an expedient and versatile answer to a great many employment impasses. They offer employers a fast way of avoiding protracted dismissal procedures and the associated risks of litigation. William Morse, who has acted in thousands of compromise agreements, gives away some tactical trade secrets.

A compromise agreement is best described as a tailor-made agreement to terminate employment. Usually drafted as a short contract, at the same time it has to satisfy the various conditions required by law in that type of agreement.

If it is to work, both parties need to be aware that it is like any other commercial deal. On one side, the employee receives payment or other incentives to compensate him for losing his job: on the other side, the employer gets a quick solution to a problem and protection against the potential of being sued.

Not worth the paper

Surprisingly often we see agreements that are defective - the employer has copied something from a website that either does not meet the statutes or is not tailored to the situation. A piece of paper purporting to be a full and final settlement is not enough.

A good example of this concerned a company who asked a senior employee to leave. They gave the woman a cheque for £20,000 and a piece of paper they claimed was a compromise agreement, asking her to sign it. She signed it, took the money and used it to pay a lawyer to bring a claim against the employer. We settled the case some months later for three times the amount the company had paid.

The golden rule is that compromise agreements need to be properly drafted. If the employee is going to give away his rights to a claim, the agreement can only be binding if it is in the statutory regulatory form.

Bolt-on conditions

Compromise agreements can be used to repair or anticipate potential problems. For instance, if the departing employee never had a proper service contract, you may be able to negotiate terms, for example preventing him from disclosing confidential information or agreeing restrictive covenants to stop him from poaching customers or joining certain competitors.

There are reasonable limits on the sort of conditions that can be bolted on. In one rather extreme example, an employer wanted to include a clause requiring a senior employee to 'live a decent and honest life and refrain from the use of alcohol and drugs for the rest of her life'! In case you are wondering, the clause was not included.

Booby traps

There are a couple of inherent risks with compromise agreements. One is that the employee must receive independent legal advice otherwise the agreement is not binding. This poses a risk that the lawyer might advise that the potential case is worth more than what is on offer in the agreement. This is where you are dependent on your own lawyer's tactical skill in advising where to pitch the deal. If the offer is too low, it could merely inflame the dispute, whereas if it is too high you could be throwing money away. The real judgment call is made by the employee's lawyer: the knack is to target him or her, factoring in all the variables and risk factors.

Another potential risk arises if negotiations break down part way through. Compromise agreements fall completely outside the statutory employment procedures - which is not a problem providing the deal is done. However, if talks collapse and the employee brings a claim, you might be seen to have abandoned proper procedure.

All negotiations are conducted on a 'without prejudice' basis, meaning the proposals cannot later be used as evidence. However in one recent case a young woman was dismissed on rather shaky grounds; a proposed compromise was never agreed and she then brought a claim alleging sex discrimination among other things. The court actually allowed her to use the proposals as evidence of the alleged discrimination. It is worth bearing the background risk in mind during negotiations.

Tactics

Whether or not a compromise agreement succeeds depends on getting the right blend of legal and technical experience, tactical skills and a grasp of the practical realities of what can and can't be done. In our experience, the vast majority of clients are extremely pleased to be able to achieve rapid and orderly outcomes to difficult 'people' problems.



For advice contact
William Morse
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Classic employment traps – references

References are a common employment trap for employers. The problems that arise tend to be high on the 'irritation' scale .. and sometimes disproportionately expensive.

Very often, the problem will stem from one simple act: the employer has responded in the form of a questionnaire sent by the new employer. These questionnaires are often constructed in such a way as to require you to answer questions you would rather not answer (sometimes it is better to avoid answering questions such as 'was this person easy to work with?' or 'would you employ this person again?').

Many job offers are made 'subject to references'. An unfavourable reference could result in some adverse consequence in the new job or in the individual not getting the job at all. In such circumstances the 'new' employer will often disclose the unfavourable reference to the 'failed' employee in order to get himself off the hook.

If the by-now disgruntled employee could, in the worst circumstances, show that the reference is maliciously false, he could sue: what is more likely is that he will come back and wrangle with the

former employer over the reference, and such wrangling is irritating and expensive.

There is no common law right to a reference. There are some situations, particularly where there has been some form of statutorily recognised discrimination, where an employer would be wise to give a reference for a departing employee. And while an employee has no legal right, in some cases refusal to provide a reference has amounted to harassment.

Morse's Rule 1 is never answer questionnaires. Rule 2 is if you wish to give a reference, it has to be honest and accurate. If you give information that proves to be false or inaccurate, and a new employer relies on it, you could potentially, be sued.

For advice contact **William Morse** (william.morse@willans.co.uk)

Coming shortly

Trula Brunsdon reports on two changes being introduced in October that will apply to all employers.



Holiday entitlement

This is to be increased from the current 20 days (which can include bank holidays) to 28 days. To give employers some breathing space, the increase will be introduced in two stages. Annual entitlement rises to 24 days from 1 October this year and then to 28 days from April 2009. Employers will need to change employment contracts to reflect the changes.

National minimum wage

The national minimum wage also increases on 1 October. It is a legal right that covers almost all workers above compulsory school leaving age. There are different rates for different groups of workers: the rate for an adult goes up from £5.35 to £5.52.

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Commercial property

Rating and empty properties

Following the 2007 Budget, the Rating (Empty Properties) Bill has now been published. The aim is to encourage owners to bring empty, non-domestic property back into occupation by reducing business rating relief. If the Bill is passed, the changes will take effect from 1st April 2008. Sarah Webb sums up the main points.

Currently, most empty commercial properties receive 100% relief for the first three months that they are unoccupied and 50% relief from then on. Industrial properties and warehouses receive full exemption for an indefinite period when they are empty.

Under the Bill, once the initial three-month rate-free period ends, the property will be subject to full business rates. Properties that are currently exempt will receive a six-month rate-free period after which full business rates will apply.

Unoccupied properties belonging to charities and community amateur social clubs will be zero-rated, compared with the 90% reduction in business rates they currently receive. Partially

occupied properties will be entitled to a business rates reduction on the unoccupied part, providing the property would be exempt or zero-rated were it totally unoccupied.

The Bill will also allow valuation officers to disregard deliberate changes to a property. This is to ensure that owners of empty property cannot actively make it derelict in order to avoid paying business rates.



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Landlords' duty clarified

When landlords have an express or implied right to enter premises to carry out repairs or maintenance, they have a statutory duty (The Defective Premises Act 1972) to take care that a lack of repairs/maintenance does not cause personal injury or damage to property. If such a defect is the tenant's fault, the landlord will not be liable to the tenant though he will be liable to others eg visitors to the premises.

For some time there has been concern that this duty could extend to latent defects and a recent case has clarified the position. It involved a tenant who suffered serious injuries when her arm went through a ribbed glass panel in the front door of her flat.

It was made of annealed glass, a material that was considered acceptable when the property was built but that has been recognised as a hazard since 1963. The landlord had never replaced the glass on the basis that it was neither damaged nor in disrepair.

The tenant argued that the landlord was liable because he knew of the hazard and should have fitted safety glass. Luckily for all landlords, the appeal court rejected this argument. They confirmed that the landlord's statutory duty is to repair and maintain the property; it is not a duty to make safe.

The vast majority of leases do contain rights of entry for the landlord to carry out repairs (eg if the tenant fails to comply with his repairing obligations). Landlords should not be complacent about the state and condition of their properties even if the tenant is fully responsible for repair. Their statutory duties are owed to all third parties, not just to their tenants. There is no substitute for regular inspections to make sure properties are kept in good repair.



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CVAs and landlords' rights

*The commercial property market has been keenly awaiting judgment in Prudential Assurance Company Ltd and Luctor Limited and others v PR Powerhouse Ltd. The concern was that a CVA (company voluntary arrangement) might be used to remove landlords' rights to guaranteed rental income. The High Court has now ruled that an attempt by a tenant company to strip away landlord guarantees provided by its parent through the use of a CVA was unfairly prejudicial to the landlords. **Susie Wynne** briefly examines the case and what it means for landlords.*

What is a CVA?

A CVA is a compromise or other arrangement with creditors to satisfy a company's debts. A proposal is put to the creditors at a meeting and, if approved, it is binding. A CVA can be challenged if it unfairly prejudices the interest of a creditor. If a challenge succeeds, the court may revoke or suspend the CVA.

Powerhouse owned a number of high street electrical stores and superstores, some held under leases where the landlords had the benefit of parent company guarantees.

The company got into financial difficulties, informed creditors that they intended to close 35 stores and proposed a CVA. Broadly speaking, the CVA recommended a capped fund from which creditors of the closed stores would receive just 28p in every pound owed to them. All other creditors were to be unaffected by the CVA.

Not surprisingly, the landlords challenged the validity of the CVA and were successful. When comparing the position of the landlords with their fellow creditors, the court said it was obvious that the landlords were unfairly prejudiced and left in a far worse position.

Had Powerhouse gone into insolvent liquidation, the landlords would have had the benefit of the parent guarantees. All the creditors, other than the scheme fund creditors (which included the landlords) were entitled to be paid in full. Effectively, the claims of the landlords were to be discharged from the fund at a fraction of their worth in order that other creditors could be paid in full. The court felt that this result was illogical as well as unfair.

While this clarifies that a CVA may not directly release guarantees, it can have the indirect effect of doing so by obliging a creditor to treat the guarantee as though it had been released.

The concern was that, had the decision gone the other way, there could have been a significant impact on the valuation of leasehold property where parent guarantees were used to support tenants' covenant strength.

Creditors, and in particular landlords, need to scrutinise the terms of a proposed CVA carefully before accepting it to ensure that the CVA offer is a fair compromise for all creditors, not just one category of creditor.



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Service charge recovery delay

Services charges are a common source of contention between landlords and tenants of multi-occupied buildings. They are usually the subjects of much negotiation when leases are entered into, and tenants often request concessions from landlords, such as a financial cap on their service charge liability.

Landlords need to keep in mind that they have granted such concessions and make sure that they do not inadvertently disadvantage the tenant. This was underlined in a recent case where the landlord knew the roof needed repairing and had arranged to do the work in 2003. This was during the period that the tenant benefited from a service charge cap. The repairs were delayed in order to incorporate some extra work and in the meantime, the tenant's service charge cap expired.

The appeal court ruled that the delay in carrying out the roof repairs was not necessary or acceptable, particularly since it prevented the tenant from benefiting from his service charge cap. The net effect of the court's decision was that the landlord was unable to recover the additional costs of carrying out the roof repairs over and above the tenant's service charge cap.

The case shows that landlords need to actively manage their multi-let buildings and be aware of any financial caps that would affect service charge recovery. Where they know that repairs are required they cannot delay them just to avoid a service charge cap.

Tenants should note that, although general service charge caps are valuable concessions, they are usually limited in time. They need to notify the landlord in good time before their cap expires, of any major repairs which need doing as part of the service charge. It is also worth negotiating a specific cap that is not time limited in respect of any major items that the tenant knows will need to be carried out during the lease.



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Dispute resolution

Guide to intellectual property rights

Associate Paul Gordon has prepared a basic guide to intellectual property principles, designed to help you decide whether you need to take any action to protect your intellectual property interests. It includes a summary of patents, design rights, copyright, trademarks and passing off. The guide is available in the resources section of our website.

From time to time, cases hit the headlines involving large companies trying to protect their intellectual property rights.

A recent one that made good reading involved a dispute between members of the Beatles and their families, who control the Apple Corps label, and Apple Computer, which uses an 'apple' trade mark in connection with the iPod and iTunes download service.

In another well-publicised case, the owners of a small country pub in the Pennines received a letter claiming they had breached one of KFC's trademarks. KFC were taking issue with the term 'Family Feast', which appears on the pub's Christmas menu.

Every business, regardless of its size, should recognise the value of, and seek to protect, their intellectual property rights. In an increasingly competitive marketplace, 'good ideas' must be protected at an early stage, otherwise the businessman who later seeks to exploit the idea may find someone else has beaten him to it, and potential profits are lost.

Depending on the nature of your goods and services, there are many legal principles that may apply, and steps you can take to establish and protect your intellectual property. Take the example of a motor manufacturer that produces a new sports car: any new mechanical features will be protected with patents; certain physical aspects of design will be protected by unregistered design rights; other design features may be registered; the manual and other literature would be subject to copyright protection; the trading name of the manufacturer and the name of the car may also be registered as trade marks.



For advice contact **Paul Gordon**
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Obscure legal terminology: Distress

Another in the occasional series, written by partner **Nick Cox**

If asked about the concept of distress and what it might mean in English law, many people might associate it with the area of personal injury law - the idea of an injured person being distressed is an easy one to understand. But they would be wrong.

The Shorter Oxford English Dictionary defines distress as 'severe pain, sorrow, anguish', but a few lines on there is a hint of a darker meaning: the line simply reads: 'Law = distraint'. The concept of punishment springs to mind, and in some ways that is not far from the truth. The Shorter Oxford defines distraint as 'the seizure of chattels to make a person pay rent etc'.

The word comes originally from the Latin *destringere* meaning to draw tight, like a noose, which in medieval times was described as *destringere*.

For centuries, bailiffs have roamed the land looking to exercise distress on unwary but recalcitrant tenants on behalf of disappointed landlords. All they needed was a warrant, issued by the landlord himself, and they had the right to seize any chattels (ie goods) owned, or apparently owned, by the tenant, which happened to be on the property.

'Seizure' often meant removal and (eventually) sale. Later, the concept of 'walking possession' was developed. This meant that the goods were not physically removed but the bailiff took notional possession by virtue of a signed agreement and the tenant lost the power to sell or dispose of them.

Sadly, for some, the phrase is due to pass into legal folklore, to be replaced by the concept of 'commercial rent arrears recovery' (CRAR). What will CRAR entitle a landlord to do? You've guessed it; it will allow him to seize goods owned by the tenant on the property. So the concept, at least, will survive.

The main difference will be that the tenant will have to be given notice, whereas with distress, the bailiff could just turn up on the doorstep. It remains to be seen if CRAR (or 'son of distress' as some are calling it) is as effective as its forbear, or whether the smart move for landlords is to buy shares in van rental companies as they watch the tenant's chattels drive off into the sunset before the bailiff comes to call.



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Company commercial

Do your terms & conditions do the job?

Many businesses use standard terms to govern the supply or purchase of goods and services. Properly drafted, they will create certainty, protect the user and be a first line of defence in any trading dispute. Getting them right should be an essential part of any business's strategy. Philip Chapman points out where firms go wrong.

One of the commonest mistakes is that many businesses simply use someone else's terms and conditions as a basis for their own. This is dangerous since terms need to be tailored for the business in question: if they offer a wide range of goods or services they may even need more than one set of terms.

A robust set of terms and conditions will deal with matters such as delivery, quality of the goods/services, payment (and retention of ownership until goods are paid for) and limitation of liability. This is a particularly crucial factor since there are many traps that can cause enforceability problems should a visit to court ever be necessary. For instance, there is a reasonableness test in business-to-business contracts which does not allow a 'blanket exclusion' on all liability under the Unfair Contract Terms Act 1977.

There are wide variations in the way that contracts come into existence. Businesses may provide written estimates, pre-printed order forms or the facility for customers to purchase over the phone or via a website.

Even businesses with established terms often fail to keep them updated and this can give rise to issues around enforceability. Another issue in disputes arising out of the use of standard form terms and conditions is whether the terms themselves (or a particular term) form part of the contract. In some cases, businesses may stand a greater chance of their terms being incorporated into the contract by making a small change, such as referring to them on the face of the sales document.

Advising on terms and conditions on a day-to-day basis as we do, gives us the ability to recognise the key issues and apply the necessary commercial drafting skills.



Contact **Philip Chapman**
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Companies Act update

Several parts of the Companies Act 2006 have now come into force and the remaining elements are scheduled to become law in stages between now and October 2008.

Various sections will be implemented in October this year, including those that will codify the common law rules on directors' duties. Some of the notable ones are: a duty to promote the success of the company - for the benefit of its members and having regard to its employees, suppliers, customers and the environment: a duty to exercise independent judgment - ie not subordinating their powers to the will/direction of others: a duty to exercise reasonable skill, care and diligence - directors must show the skills they actually have or which might reasonably be expected of a director with such skills: a duty to act within the company's powers - directors must know the company's constitution, and: a duty to avoid conflicts of interest.

If a director is found to be in breach, civil penalties or, where the company has suffered loss, damages, compensation or restoration of the company's property will apply.

A longer article on the Companies Act appeared in the Spring 2007 issue of Law News which can be downloaded from the resources section of our website.



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Personal matters

Do it now!

Are you one of the 'I've been meaning to put my affairs in order but haven't got round to it yet' majority? If so, it could be to your advantage to crack on and do it before things get complicated. Partner **Jenifer Gillman** explains why now is a good time.

An important part of putting our affairs in order is to make an enduring power of attorney (EPA). This deed allows you (the donor) to give somebody else (the attorney) the authority to act on your behalf and deal with your financial and property affairs, should you lose capacity. Although older people generally recognise the wisdom of having an EPA, in fact they can be created by anybody and are a sensible precaution against temporary or permanent incapacity, which can happen at any age.

If you want to ensure that straightforward and suitable provisions are made, we would advise you to create an EPA as soon as possible. EPAs made before the change comes into effect will continue to be valid.

For more information about EPAs, download our publication *Making a will won't kill you* from the resources section of our website.

Now, in a move that is unpopular with many solicitors, EPAs are to be scrapped. Under the Mental Capacity Act 2005, they will be replaced from October with new lasting powers of attorney (LPA). From what we know so far, it is clear that additional requirements and complexity will add to the costs of drawing up an LPA.



Contact **Jenifer Gillman**
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Contact

For advice on any of the issues covered in *Law News* or any other area of law, these are the people to contact in the first instance.

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Personal matters

New IHT trap was overhyped

Many people were alarmed by recent articles in the press suggesting that families would be hit by a new inheritance tax (IHT) charge. Partner **Jenifer Gillman** puts the record straight.

The trigger for the press interest was a court case brought successfully by HM Revenue and Customs earlier this year. Unfortunately, many papers reported the case with a fair amount of scaremongering spin, causing unnecessary worry.

The focus of concern was the growing trend for married couples to try to reduce their potential IHT liability by making use of their individual tax allowances (currently worth £300,000). As part of their tax planning strategy, they draft wills that put the allowance into a trust arrangement.

In fact, the Revenue's case did not challenge the principle of the trust, but rather the manner in which it was funded on this occasion.

For many families, their property is their main asset. When the time comes to set up the trust they are left with little option but to use a share in the property to fund the tax saving scheme.

A variation of this arrangement is for the trustees to accept a promise by the surviving spouse to pay the amount of the allowance in the future from his or her own assets, thereby effectively funding the trust by a debt. This is what had happened in this particular case - the Revenue was actually challenging the use of the debt arrangement.

This case is controversial anyway, in that the Revenue investigated a situation where the asset was acquired in joint names but one party had contributed all the purchase money. Historically, they have disliked schemes in which someone creates a debt over assets they have previously given away and legislation exists to catch this type of arrangement.

If you have any worries or concerns about your own arrangements, we will be happy to advise you. We can help you avoid problems by careful will drafting and by looking at other ways of funding the trust.

For information, contact

Jenifer Gillman

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Client news

After prolonged negotiations, the sale of **Phoenix Bearings Ltd** was finally completed by Paul Symes-Thompson with Susie Wynne handling related property aspects and William Morse advising on employment issues.

Simon Brazier acted in the acquisition of shares in our client **Leisurebrands Limited** by a Belgian-based joint venture partner. Leisurebrands make wall décor and accessories for kids' bedrooms.

Simon Brazier also acted in a joint venture between our client **Twyford Cookers**, one of the UK's most respected refurbishers, and **Aga**, makers of the iconic range cooker. By joining forces, the new partnership is able to offer an Aga-backed scheme for renovated Agas.

In a complicated transaction involving an offshore trust scheme, Charles Middleton completed a £7.75 million purchase in March. The property, in South Gloucestershire is to be used as an organic farm.

LLPs seem to be growing in popularity: we have advised on half a dozen or so in recent months for a diverse range of businesses. Transfers to LLP status involve incorporation of the LLP, drafting members' agreements, related employment matters and in many cases, the transfer of business assets and/or property to the LLP.

Margaret Austen acted pro bono in connection with the setting up **The Gardens Gallery CIC** - one of the first community interest companies. The Gallery, which forms part of the regeneration of Montpellier Gardens, will provide a display area for various local arts groups. Good wishes to all the members and particularly director and all-round driving force **Hazel Kitchin**.