



Festivals

Imperial Gardens seems to fizz all year round with festivals of one sort or another. With marquees, live music, famous faces and the occasional life-sized dinosaur, there is certainly plenty to see from our windows - but we also play a part behind the scenes.

Cheltenham Festivals is made up of four events through the year: music, literature, jazz and science. The organisation is set up as a charity and we are one of the two corporate patrons. Margaret Austen holds the post of Honorary Secretary to the Festivals. We are also longstanding sponsors of both the Literature and Music Festival and enjoy our association with them.

Planning for the future

We are delighted to report that planning law expert **Helen Adlard** is joining us as a consultant. Helen previously worked for Charles Russell and is well known in the area. She will be a great asset to our commercial property department.

Willans news

You may have noticed that our phone number has changed to **01242 514000**. This was Lester Maddrell's number, which we acquired, along with part of his practice, in 2002. It's more memorable than our old number and it seemed a good time to introduce it while we were rebranding as an LLP. Calls to the old number will continue to pop up on our switchboard.



Thanks

Thanks to everyone who sponsored Nick Cox, who completed his 71-mile trek from Bath to Cheltenham in 25 hours and 19 minutes, raising £1,234 for the National Association for Colitis and Crohns.

Without Prejudice - THE SQUEEZE.



Rewriting the contract

Clients often want to know whether they can alter clauses in employees' contracts, eg changing their place of work or working hours. Many contracts have a clause reserving the employer's right to vary the contract. But is it safe for employers to assume that they can rely on this to make whatever changes they wish?

Such clauses must be clear and not so wide as to be unreasonable. They will also look at the parties' intentions. In one recent case the appeal court said that it would be hard to uphold a clause giving the employer power to change any term if it was used to reduce employees' working hours, thereby cutting their pay.

So if an employer uses the clause and unilaterally varies the contract what can a disaffected employee do about it? He can agree to the variation; he can resign and claim constructive unfair dismissal; he can refuse to work under the new terms (putting the onus on the employer to decide whether to discipline or dismiss him) or he

can work under the new terms under protest and bring a claim for breach of contract. Employers are unlikely to want to face any of the last three options. It is therefore worth getting advice before imposing any changes that are not agreed by the employee. Unless a variation clause is clearly and tightly drafted it is unlikely to actually 'do what it says on the tin'.



Contact **Trula Brunsdon**
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Long-term absentees and sick pay

We are often consulted about long-term absentees and whether they are protected by the Disability Discrimination Act (DDA). One particular concern is whether employers should continue to pay full sick pay during periods of absence when the contractual limit has been exceeded.

The DDA obliges employers to make 'reasonable adjustments' to ease working conditions for disabled employees. What is 'reasonable' will always depend on the circumstances but we now seem to have a clear authority as a result of the decision in *O'Hanlon v Revenue and Customs Commissioners*.

Mrs O'Hanlon suffered from clinical depression and was therefore 'disabled' for the purposes of the DDA. She had long absences and had exhausted her sick pay entitlement. She claimed

that she should receive full pay for the whole period because that amounted to a 'reasonable adjustment'. By not making the adjustment, the employer was subjecting her to a discriminatory disadvantage. Her claim was rejected by the tribunal, the appeals tribunal and the Court of Appeal. The ruling shows that there is a sensible limit on what an employer is expected to do in terms of making adjustments.

Contact **William Morse**
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You couldn't make it up!

*We should never place too much trust in the predictability of employment tribunals. It has to be said, some decisions verge on the absurd, and the case of Parsons v Bristol Street Motors was a good example, says **William Morse**.*

Terence Parsons (60) worked as a salesman at the Peugeot dealership in Oxford. Believing the business was underperforming, Bristol Street Motors appointed a new manager, Mr Lawrence. Mr Parsons knew Lawrence from a previous job and did not welcome his arrival – he had a reputation as a tough manager with an uncompromising style. Within four months of Lawrence's arrival, Parsons resigned and claimed constructive dismissal.

The tribunal learnt that, among other things, Lawrence habitually grabbed colleagues 'in the testicles' and beat staff 'black and blue', slapping backs and punching arms. While the tribunal concluded that Lawrence was, indeed, indiscriminately 'tactile' with staff, he did the same to everyone, so Parsons was not being singled out.

They heard that Lawrence called Parsons by various nicknames such as 'old buzzard' and 'old git' and made references to a bus pass. This was not a reference to Parsons' age, said the tribunal. Lawrence was talking about two salesmen who

had been disqualified from driving and so were likely to use the bus.

There was evidence about foul language and dangerous behaviour in the workplace including the use of an air gun. It was also claimed that Lawrence had addressed the sales team in terms which, were he a football manager, might have been described as 'the hairdryer treatment'.

The tribunal nevertheless found that there had not been a constructive dismissal. It was left to the EAT to overturn this decision when they decided that such conduct was 'plainly and unarguably likely to destroy the employment relationship'.

Read the full report at <http://tinyurl.com/5e3cjin>.



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Benefits of becoming an LLP

Limited liability partnerships have now been around for some seven years. Many partnerships have converted, as we have just done, and new start-ups are increasingly opting for the flexibility of LLP status.

An LLP is something of a hybrid, combining aspects of a traditional partnership and a company. As a result, it can be seen as something of a win-win, offering advantages over both of these more traditional business vehicles.

LLP status offers all the benefits of limited liability. The position is very similar to that of holding shares in a company – the LLP member potentially risks his investment becoming worthless but does not risk losing his personal assets. Although there are some possible inroads into this concept (eg certain aspects of insolvency legislation in relation to LLPs) the position is far more palatable than that of unlimited personal liability within a traditional partnership.

One of the practical benefits is that, as a separate legal 'person', there is no need for business assets to be transferred when members retire or join the LLP. An LLP also has unlimited legal capacity so, unlike companies, there are no technical concerns

about whether a particular legal transaction is within its powers.

LLP status also offers organisational flexibility, allowing management or profit structures to be created as you wish, with no need to distinguish between members and shareholders as required with a limited company.

For more information, download 'Overview of legal issues' and 'Conversion checklist' from the company commercial page of our website (services menu).



Contact **Simon Brazier**
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Competition law

*Failing to comply with competition law can have serious consequences. An errant business may face fines of up to 10 per cent of turnover as well as finding that its agreements are unenforceable. For serious breaches, directors risk disqualification or even criminal sanctions. Clearly it is an area of law businesses need to be aware of if they are to meet their obligations, assert their rights and protect their position, says **Philip Chapman**.*

The aim of both UK and EC legislation is to promote *healthy* competition. It prohibits anti-competitive behaviour such as agreements between businesses to fix high prices and it makes it illegal for companies to abuse a dominant position. More specifically, you must not agree to fix prices or terms of business with competitors or discriminate between customers, for example by charging different prices or imposing different terms for the same product or service.

The OFT flags up some of the warning signs that a business may be breaking competition law, such as: a supplier who prevents you from selling their products at a discount; a long-standing supplier who decides, for no apparent reason, to stop supplying you, or; you receive quotes from various suppliers that are surprisingly and unusually similar.

How do you ensure compliance? A good starting point is to assess the likely impact of competition law on your business and the risk of committing a breach. The higher the risk, the more measures you will need to ensure compliance.

Even if you think the risk of a breach is low, you should still take steps to ensure compliance. One approach is to ensure your employees

are at least aware of competition law and the implications of infringement. If they have an understanding of the law, they will also be able to recognise when you might be the victim of anti-competitive agreements or conduct.

Many businesses implement compliance programmes. These must be applied in conjunction with appropriate policies and procedures. Not only does this minimise the risk of being non-compliant, it also provides evidence that you have a policy. This may be taken into account should you ever be investigated and could, in turn, lead to a reduction in any fine.

Subject to Parliamentary approval, the law protecting consumers against unfair trading is currently being standardised across the EU. This will increase protection for consumers and make it easier for businesses to operate in different member states. It is therefore even more important that businesses stay one step ahead to avoid either potentially severe penalties or adverse publicity.



Contact **Philip Chapman**
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Recent reforms in practice

The reform of empty rates relief and the energy performance certificates (EPCs) have both come into force recently. We take a look at what they mean in practice for landlords and tenants entering into new leases.

Empty rates relief

Landlords may wish to charge higher rents for shorter leases to reflect the risk of the premises becoming empty sooner. Tenants will want flexibility to assign or underlet, so as to mitigate any costs incurred should the premises become surplus to requirements.

Restrictions on assignment and underletting may mean that a tenant has to pay full business rates once the exemption period has ended. The heads of terms should therefore reflect who is to pay the costs for any period during which the premises are empty.

EPCs

Both landlords and tenants will require an EPC in order to sell their respective interests in the premises. The heads of terms should therefore deal with the following issues.

The costs of preparing the EPC These may be borne by the landlord, both parties equally or the tenant, by way of service charge. Any costs borne by the tenant ought to be proportionate, reflect the validity of the EPC (currently 10 years) and any circumstances which require a new EPC to be issued.

How often the tenant can be charged for an EPC A tenant may want to ensure that the landlord cannot charge for an EPC, say more than once in every three years, as is often the case for the re-charging of insurance valuations (bearing in mind that in a building with different tenants, there may be an EPC for the building and an EPC for each lettable unit).

Rights of access When a landlord is voluntarily preparing an EPC, sufficient rights of access must be included in the lease, as this is not yet covered by legislation.

Copy of the EPC When the landlord should provide the tenant with a copy of the EPC and whether he can charge the tenant for this.

Prohibiting the tenant from obtaining his own EPC This may invalidate the EPC prepared by the landlord.



Contact **Sarah Webb**
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Newts v wet feet

The Wildlife and Countryside Act 1981 can have an impact on building work close to any waterways. Under the Act, it is an offence to intentionally kill or injure various species of plants, animals or birds that are in danger of extinction or to interfere with places used for shelter and protection by them. This protection was recently extended to include unintentional damage to any such species or its habitat if the damage was reasonably foreseeable.

A Wiltshire couple has recently been ordered not to clear an overgrown ditch that had caused their farmhouse to flood because the ditch might be a habitat for the great crested newt. An assessment is now being carried out which is likely to take months - in the meantime the farmhouse will be at continued risk of flooding.

Nuisance was 'the pits'

If you want to change the use of land or develop on it, you need planning permission – but that's not the whole story. Having permission for a particular use is not an authority to use the land in a way that causes a nuisance to neighbours.

In a recent case, planning consents had been granted in 1963 and 1990 for use of the land as a motor racing circuit. Neighbours complained that the circuit was being used in an unreasonable way, resulting in long periods of intense noise, which constituted a nuisance.

Despite the fact that racing at the circuit predated the claimants' homes, which had been built in 1989, the court found for the claimants. Though the circuit had operated for some 40 years, the site had been developed over time and the increase in noise levels had been gradual. The planning permissions were administrative

decisions, and they could not extinguish private rights without payment of compensation.

Fortunately for the land owner, the claimants were willing to accept compensation so the court did not grant an injunction preventing the land from being used as a racing circuit (which would have closed his business). Instead, they awarded damages based on the loss of amenity over the preceding six years and the loss in capital value to the claimants' properties.

Contact **Susie Wynne**
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Having your cake and eating it

Overage is the legal device by which a seller can benefit from an uplift in the value of land after he has sold it. It is becoming increasingly popular as it enables sellers to share in the increased value of a site after development, without having the hassle of applying for planning consent or carrying out the development.

While it sounds like a simple concept, in fact it is a complex mechanism. Skill and care are needed to ensure that both parties understand exactly what they have agreed and how the overage will work in practice.

For example what are the trigger events? how long will the overage provisions last? how is the overage payment to be calculated? how will the overage payment be secured against the property to ensure payment? and what practical problems might arise in carrying out the overage agreement?

A recent case showed how things can go awry. The seller owned a development site which had the benefit of planning consent for 42 residential units in two blocks. He sold the land to a house builder. As part of the deal, the builder agreed to make a further payment to the seller if an improved consent was granted within five years. The agreement did not specify who would apply for consent, or even if it should be sought. It merely provided that if, in the five years following the sale, an improved consent was granted, the buyer would make a payment to the seller.

The builder started developing the site. In the meantime the seller applied for, and obtained, two new improved planning consents on the site and then tried to claim the overage payment

from the builder. As the builder had neither been involved with, nor wanted, the improved planning applications, unsurprisingly he refused to pay.

The Court of Appeal dismissed the seller's claim for payment. In the absence of express provisions in the overage agreement, it would make no sense to give a seller of land the right to trigger further payments without reference to the buyer. Had the seller acted as agent for the builder in obtaining the planning consent, that could have been regarded as an improved planning permission obtained by the builder. However, that was not the case in this instance; the seller had simply been trying to take advantage of weak drafting in the overage agreement and obtain a further payment which the builder had not expected.

The outcome of any dispute like this will turn on the precise wording of the overage agreement. Even though the court will look at the context of the agreement as a whole, the wording of the document can have a major impact on their decision. A lawyer's bill for expert drafting would normally be dwarfed by the sizeable sums at stake on deals of this sort.

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Can I have my money back?

In a difficult market it is inevitable that more land sales will fall through, some even after contracts have been exchanged and deposits paid. It is a standard requirement in land transactions that a buyer pays a deposit on exchange of contracts. He gets the deposit back if the seller fails to complete, but forfeits it if he is the one to drop out.

That is, at least, the expectation in standard practice but in fact the court has discretion to order the deposit to be returned if it thinks fit. This little-known discretion (contained in the Law of Property Act 1925) is an attractive idea for defaulting buyers, particularly if the deposit is substantial. But as recent case law shows, there must be very persuasive reasons as to why the deposit should not be forfeited.

The starting point for the court is that repayment should only be ordered if it is the fairest course in all the circumstances. The consequences of paying a deposit should be certain, and buyers should expect to forfeit if they fail to complete. They should not be able to reclaim the deposit merely because the sale does not go through.

The court will look at how close the buyer came to performing the contract, what other choices he is able to offer the seller and how they would compare with the actual performance of the original contract terms. If the seller can re-sell at

a higher price, the return of the deposit might be justified, but in itself this is not a sufficient ground. Equally, the conduct of the respective parties may be considered. This does not necessarily prevent the seller, however, from playing hard ball and refusing to negotiate with the buyer outside the terms of the original contract.

Buyers should make sure they definitely want (and can) go ahead with the transaction before exchanging contracts and paying the deposit.



Contact **Susie Wynne**
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Commercial property in a cold climate

*The past decade or so has been as changeable a time as any for commercial property professionals. We have revised our views on aspects of commercial leases, such as notices and break clauses, there are new codes of practice on dilapidations, commercial leases and service charges and now the abolition of forfeiture and peaceable re-entry is just round the corner. But with the cooling of the economic climate, and investment in property slowing, landlords have to be more careful about the whole process of negotiating and operating commercial leases. **Nick Cox** flags up some of the pitfalls.*

At the start of the lease, as well as personal guarantees where the tenant is a company or LLP, landlords should consider additional security. The best option may be a rent deposit (3 or maybe 6 months), covered by a well-drafted deed that allows sums to be drawn down to cover defaults on rent and service charge. Ownership of the money secured needs to be established, as it may be clawed back by a liquidator or trustee in bankruptcy. There also needs to be a provision that requires the tenant to replenish any funds drawn down on.

During the lease, a landlord will want to ensure that rent is paid on time. Where he doesn't wish to forfeit, he will need to take other, creative steps to keep pressure on any wayward tenant to establish whether the failure is a mere blip or sign of a more fundamental problem. For now, at least, a landlord can still distrain for rent by sending in the bailiff, but at a time when there is an oversupply of vacant property options may be limited. If a guarantor is named, debt proceedings against him and the company might

prove useful, or perhaps an interest invoice might be issued to prompt a disorganised tenant into payment.

At the end of the term, in a 'cold climate', tenants will probably be on stronger ground than for some years. Landlords may have to make concessions on renewals in terms of rent and perhaps repairs, but the starting point on renewal is the wording of the existing lease.

The market is a volatile thing, but the legal principles governing proper management of leasehold property remain similar. Landlords need to take careful interest in existing tenants so as to maximise their return, and retain good tenants on terms that suit both parties.



Contact **Nick Cox**
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"Ours is bigger than theirs"

*In an increasingly competitive world, businesses are turning to more aggressive advertising strategies. One example of these is 'comparative advertising' or CA. The term describes any advertising in which a business compares its own goods or services with those of another - usually on price, features or perceived quality. Generally English law does not prohibit CA, but if it is not carried out appropriately, it can give rise to civil and criminal liability warns **Paul Gordon**.*

Remedies and risks

If false statements are made about a competitor's goods, he may have various civil remedies such as defamation, trade libel and malicious falsehood. If he is successful in such a claim he may be awarded damages and costs.

Another option is for the competitor to refer the matter to the Director General of Fair Trading who may take action under the Control of Misleading Advertising Regulations 1988. These give the Director General powers that include court injunctions to restrain misleading advertising that is likely to injure a competitor's business.

An advertiser also needs to be careful not to falsely describe products or make false statements in relation to services since this may give rise to criminal liability under the Trade Descriptions Acts.

Trade marks

Owners of registered trade marks have some protection in law against infringement by the use of identical or similar marks. However, developments in the case of *O2 (UK) Limited v Hutchinson 3G Limited* appear to have eroded this protection in relation to trade marks used with CA.

The case involved Hutchinson's use of bubble imagery similar to that of the O2 trade mark. The

Court of Appeal has referred various questions on CA to the higher European Court of Justice. While these have yet to be determined, the Advocate General has already provided guidance that trade mark law has no role to play in CA, rather it should be a matter for the Regulations mentioned above.

In practical terms, that may mean the competitor has no separate cause of action for trade mark infringement in CA cases. That aspect of his case would therefore have to be left to the Director General to pursue.

In short, says Paul Gordon, it is not unlawful to engage in CA but it must be done carefully. If such advertising includes the use of a competitor's trade mark, the competitor may no longer be able to rely on an infringement under trade mark legislation, and for that aspect of his case may have to encourage the Director General to take action.

There is a fuller version of this article in the news section of our website (resources menu) including factors to consider when using CA.



Contact **Paul Gordon**
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Putting matters straight

Various changes in the trusts and tax world seem to have led to a mistaken belief that the nil rate band has doubled since last October. This is not so, says Jenifer Gillman.

The cause of the confusion is a relaxation in the rules relating to the nil-rate band (currently £312,000). If this allowance is not used on the death of the first spouse/civil partner, it may now be doubled on second death. As simple as it sounds, it may not be this straightforward in practice. Detailed advice may be needed to ensure that benefits are not lost.

For couples with tax planning wills involving the use of trusts, there is no urgent need to revise those arrangements. The change in the rules simply provides another option on the first death. The use of trusts in wills is still favoured because

of the flexibility they can provide in uncertain and complex family situations. Trusts can also protect assets from third party claims and means-tested help, such as nursing home fees. They can also provide children and grandchildren with tax-efficient funds that are outside their own estates.



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Divorce, court orders and bankruptcy

A heady mix indeed, and the recent case of Haines v Hill involved all three issues. The decision was an important one and divorce lawyers were hugely relieved at the outcome.

In summary, Mr & Mrs Haines had been married for 12 years when they divorced. In the settlement, the court awarded Mrs Haines the house. But when Mr Haines declared himself bankrupt, his Trustee in Bankruptcy tried to overturn the transaction.

Where a transaction (typically transfer of a property) is made for 'no consideration' (ie either no money changes hands or the transfer is at undervalue) and the transferor later becomes bankrupt, his Trustee can go back up to five years and overturn such a transaction. He would claim that this was a 'transfer at undervalue', which is contrary to the Insolvency Act 1986.

In this particular case the court had to consider whether a property, transferred to a wife as a consequence of divorce and an order made by the court, was open to attack by the Trustee.

The Trustee argued that there was 'no consideration'. The original judge disagreed. The High Court overturned the ruling then Mrs Haines appealed and won. In other words, the court order itself amounted to 'sufficient consideration'. It could only be set aside if the parties were colluding or there was some other factor such as fraud.

This notable decision has reinstated the law as it previously was. In effect the court has said there must be a fair balancing exercise. Creditors must be protected against any property adjustment orders that may have been made with the intention of putting assets out of their reach. Equally, orders made justly and to protect one of the parties to the marriage, must also be safeguarded.

They backed away from a straightforward choice in favour of creditors and said that each case must now be looked at on its own merits. With uncertain economic times ahead, the decision may become increasingly significant.



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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

French connection

Do you own property in France? If so, you may be more at risk from French taxes than you think, warns **Jenifer Gillman**.

The French authorities have become more assiduous in applying their tax regime to foreign residents - and their definition of 'domicile' is much narrower than ours.

We are now working in association with a French lawyer who specializes in property and succession matters. This may be of interest if you would like

to know what provision may be made for transfer on death or would welcome general advice in relation to property, inheritance and the relevant tax regime.

We are also planning some short talks on these topics later in the year. If you would like to receive an invitation, please contact Jenifer Gillman with your details.

Contact **Jenifer Gillman**

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Client news

We recently assisted **Total Telecommunications Limited** in some major restructuring of the group. Following the reorganisation and rebranding exercise, the company is now trading under the new name of **Total Limited**. We wish them continued success under their new colours.

We recently acted for a private individual in the purchase of various car franchises. As well as share acquisitions and a number of property lease arrangements, the transaction involved some quite complex arrangements relating to personal guarantees.

Transactions with LLPs are still relatively rare but we are building up significant expertise in this area. Paul Symes-Thompson recently handled the sale of a limited liability partnership. Our client **Leybrad Investments Limited** sold their entire interest in **KTS Recruitment LLP** to a new company backed by senior management.

We are developing a London market for our immigration work, with most of the business coming through personal recommendation from Antipodean professionals working at City institutions and companies such as Goldman Sachs, Clifford Chance, Shell and Sotheby's. In many cases, clients are using us to obtain highly skilled migrant visas. The obvious benefit to them is that we are able to provide a high calibre, personal service at out-of-town prices.

Our commercial property team has been busy with a wide mix of work in recent months. We acted for the landlords in leasing the former **Sia** shop in Montpellier to **Mandarin Slate Ltd** who are moving from their present premises a few yards away. Acting for **Chargrove Business Services Limited**, we leased space in former farm buildings at Tidenham for the newly-launched **Hanley Court Business Centre**. The centre offers around 3500 sq ft of high quality office space, configured into 14 units designed for start-ups and small businesses. This project was undertaken in partnership with a local organic dairy farmer with financial support from Gloucestershire Rural Renaissance Programme and funding from the SWRDA.

We also acted for **Kohler Mira Ltd** in connection with the renewal of a lease of industrial premises in Barnwood and for **Signature Build Ltd** in their recent purchase of the Duke of York Inn in London Road for residential development.