



New partners

We're delighted to announce the promotion of two of our commercial lawyers **Simon Brazier** and **Paul Gordon** to partnership.

Simon joined us in 2004 and **Paul** the following year – both moving from London firms. They have established themselves as capable and well-respected members of our growing commercial practice.



Paul Gordon and Simon Brazier

An easier way to divorce

Collaborative law is a relatively new way of dealing with divorce and family disputes, the aim being to resolve matters without going to court. Both parties appoint their own lawyer but instead of conducting negotiations by letter or phone, they meet to work things out face-to-face. Each has their lawyer by their side throughout the entire process to ensure they benefit from legal advice as they go.

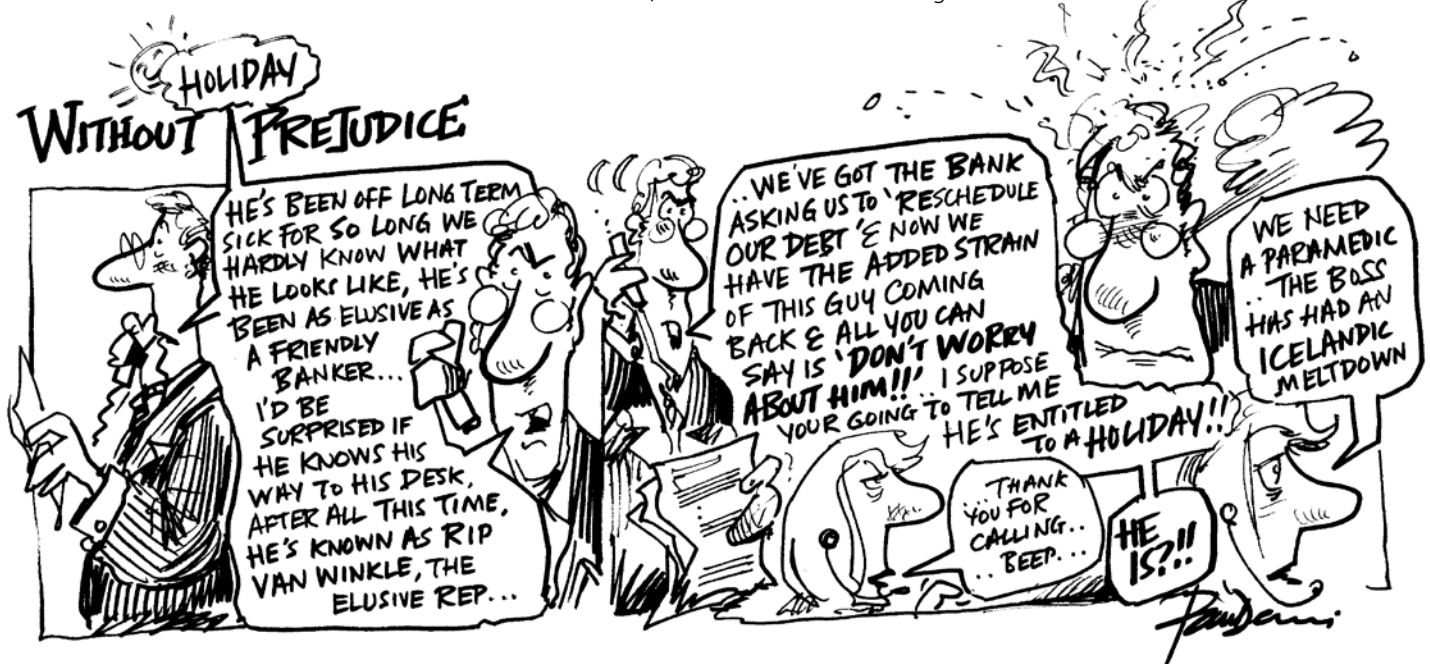
Partner **James Grigg** is now a trained collaborative family lawyer. James said: "It's estimated that somewhere around 80 per cent of cases are settled before they reach court. The key difference with collaborative law compared to the traditional approach is that couples contractually agree to settle differences at the table, literally, with their lawyers alongside guiding them."

Planning seminar

Leading landowners and property professionals braved the February snowstorms to attend a planning seminar at our offices. Consultant **Helen Adlard** and visiting speaker **Graham Warren**, a planning consultant and Fellow of the RICS, discussed examples of work they have done to increase land value or save the loss of considerable land value. They also highlighted situations where planning law expertise can be critically important in maximising assets, such as when allocating land for future development or applying for permission to tidy up unauthorised land uses and avoid enforcement action. Guests included property managers, landowners, architects, house builders and land agents.

And the winner is ...

It's not quite the BAFTAs, but bravo nevertheless to **Jonathan Mills, James Grigg** and **Jon Harris-Gibbins** for receiving particularly honourable mentions in the latest edition of *Chambers UK* for their work in commercial property, family law and immigration law respectively.



Sick leave and holiday rights

In January, the European Court of Justice handed down a ruling on holiday entitlement during long-term sick leave. The ruling will come as a real blow, particularly to smaller employers struggling to keep jobs alive during the recession, says **Will Morse**.

The ruling says that employees on long-term sick leave have a right to all the statutory holiday they have accrued. When a worker is off sick, his entitlement to paid holiday continues and he has a right to take the holiday when he returns to work.

The ruling means that a worker who is off sick for two years could be entitled to at least 40 days' leave, plus public holidays, on his return. This is because, under the ruling, employers must give staff a reasonable chance to take the holiday accumulated during sick leave.

If the employee never returns to work, as often happens in long-term sickness cases, the accrued holiday has to be paid as a lump sum. Regardless of whether the employment has ended because the worker gave notice or whether he was dismissed, he is entitled to pay in lieu of the holiday he has been unable to take.

The verdict clears up years of dispute over whether accrued holiday rights are lost after prolonged illness. At the same time, it creates financial burdens as well as a range of other potential difficulties for companies.

As things stand, there is not a great deal employers can do to limit potential exposure in this area. However, the judgment related to two joined cases: *Stringer* (which previously went under the name of *Commissioners of Inland Revenue v Ainsworth*) and a case brought by a German worker. *Stringer* is due to return to the House of Lords this year or in 2010 when some of the issues will be re-addressed.



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New code on discipline, dismissal and grievance

The statutory disciplinary & dismissal and grievance procedures, introduced in October 2004, are shortly to be replaced. **Trula Brunsdon** outlines the new code of practice.

These statutory procedures, brought in five years ago, were intended to reduce the number of claims made to employment tribunals. They introduced harsh penalties for employers or employees who failed to follow the rules, with adjustments to awards of between 10-50 per cent.

They have not been a success, resulting in litigation about the procedures themselves as well as employers facing the possibility of a technical finding of unfair dismissal against them regardless of the substance of a claim. From 6 April 2009 they are to be replaced with a code of practice on discipline and grievances.

However in practical terms when looking to discipline or dismiss an employee for misconduct and/or poor performance, the steps remain the same as now, namely:

- inform the employee of the problem
- hold a meeting with the employee to discuss the problem
- allow the employee to be accompanied at the meeting
- decide on appropriate action
- provide the employee with an opportunity to appeal

If an employer starts the procedure on or before 5 April 2009 by sending the employee a letter inviting him to a disciplinary hearing, the old statutory procedure will apply.

Although not legally binding, tribunals will continue to take into account compliance with the code. Penalties for non-compliance will be a little less harsh with adjustments to awards of between 0 and 25 per cent. Non-compliance will not automatically result in a finding of unfair dismissal.

Our advice is that employers should still follow a clear and fair procedure when disciplining or dismissing an employee. This will provide maximum protection should a claim result.



Contact **Trula Brunsdon**
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Lay-off and short-time working

*Announcements of redundancies, lay-offs or reduced working hours are becoming depressingly familiar. The news media is often inclined to use the terms 'redundancy' and 'lay-off' interchangeably though legally they are two separate situations, explains **Trula Brunson**.*

Redundancy is a dismissal by the employer. Lay-off is when, for a temporary period, the employer does not require the employee to work. Short-time working is where employees are laid off eg for a number of days each week or hours each day.

The fact is that most employees have no legal right to be provided with work by their employer. However, generally they have the right to be paid their salary. The exceptions are where the contract of employment or a collective agreement provides for lay-off without pay or where the right has arisen through custom and practice over a long period.

Lay-off and short-time working are temporary variations to the contract of employment. So, in the majority of cases, employers should consult with employees and obtain their agreement before implementing a period without pay. In better times, it may be harder to obtain that agreement but in the current climate, employees may agree to a four-day week rather than risk being without a job at all.

An employer who simply imposes lay-off or short-time working without obtaining agreement runs two risks. An employee may resign and claim constructive unfair dismissal or remain in employment but bring a claim for breach of contract. (A year's service is required for the first but none for the second.)

If staff agree to a period of lay-off or short-time working, they may be entitled to a statutory guaranteed payment of up to £21.50 per day. After four consecutive weeks if they are receiving less than half a week's pay, or six weeks in a 13-week period, they are entitled to give notice to end their employment and claim a statutory redundancy payment.

This is an area with which employers may, thankfully, be less familiar. If you are at all uncertain, expert advice should be sought.

Contact **Trula Brunson**
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Set fair for retirement

Age discrimination regulations, introduced in October 2006, set out a procedure that must be followed to fairly retire someone

Some clients who have contacted us for advice in relation to redundancy situations have commented that certain employees will not be included in the redundancy process as they will be retiring them. We thought it was worth reminding employers of the need to observe the correct procedure before retiring an employee. It includes giving at least 6 months' written notice and considering any request by the employee not to retire. If the correct procedure is not followed it can result in claims for unfair dismissal, age discrimination and compensation of up to 8 weeks' pay.

The default retirement age contained in the legislation is 65. It may be obvious but it is worth stating that the earliest a retirement can take effect is on the employee's 65th birthday – unless

retirement before that age can be objectively justified or a company has a normal retirement age over 65. This is only likely to be possible in exceptional cases. The default retirement age applies only to employees, not to partners. At the end of last year the EAT overturned a tribunal's decision that a law firm had objectively justified retiring partners to retire at the age of 65.

Providing the correct procedure is followed retirement can be a relatively safe way to terminate employment but as with most law, the devil is in the detail!

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Useful reminders

- From 1 February 2009 the limit on a week's pay, for the purposes of calculating statutory redundancy payments, increases to £350.
- From 1 February 2009 the daily maximum guarantee payment during short-time or temporary lay-off increases to £21.50.
- From 1 April 2009 employees are entitled to 5.6 weeks holiday (28 days for a full-time employee). This can include statutory public holidays.
- From 5 April 2009 statutory maternity, paternity and adoption pay and maternity allowance increases to £123.06 a week or 90 per cent of normal weekly earnings if lower.
- From 6 April 2009 statutory sick pay increases to £79.15 a week.

Potential development pitfalls

Drainage issues

A recent Court of Appeal decision is good news for developers and, on the face of it, bad news for sewerage undertakers.

The dispute arose when developer Barratt Homes wanted to connect to the public sewer at a specific point. The sewerage undertaker, Welsh Water, said the connection must be made at a different location. The High Court ruled that Welsh Water was entitled to refuse permission on the grounds that the location of the connection was prejudicial to the public sewer system. The decision was reversed on appeal. Welsh Water was not permitted to make an outright refusal to a connection on the grounds that the public sewer would be overloaded. Further, they could not require connection at an alternative location to prevent overloading.

The Water Industry Act 1991 provides that, when a developer wishes to connect to a public sewer to service his development, he must give notice to the relevant sewerage undertaker. There are only two grounds on which they can refuse permission: substandard condition of the private drain or sewer or if connection would be 'prejudicial to the sewerage system'.

Since privatisation, planning authorities have not been required to consult with sewerage and drainage undertakers during the planning

process. However, the court suggested that a responsible planning authority would normally refuse consent for development unless the sewerage undertaker's requirements could be met. The Barratt Homes case was unusual in that the planning authority discharged the drainage condition in the planning permission for the development without reference to Welsh Water.

If planning conditions that require improvements to drainage infrastructure are too stringent, developers may struggle to fund the work, which could lead to more disputes. Ultimately, it will be in the interests of sewerage undertakers and developers to liaise with the planners to ensure that drainage-related planning conditions are realistic.



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Rights of light

Development plans can easily be thwarted by the existence of rights to light. It is not unusual for developers to strike agreements with neighbouring landowners whereby in return for some form of consideration, the neighbour consents to the development, even though it may affect his rights to light.

A recent case (*Salvage Wharf Limited v Birmingham Development Company Limited and G&S Brough Limited*) is interesting as it illustrates that the neighbour had not, after all, extinguished his rights to light by such agreement.

The developer had entered an agreement with a neighbouring landowner in 1999. In it, the neighbour acknowledged that the proposed development may adversely affect his existing rights to light, air and other easements and that he would not take action to enforce those rights. The development was duly carried out but not in accordance with the plans referred to in the agreement.

In 2006 the developer applied to the council for the registration of a light obstruction notice (under the Rights of Light Act 1959). If those affected do not take action to protect their rights to light within one year then any such rights will be interrupted.

The land owner successfully applied to the High Court, arguing that he was entitled to receive light through the windows of his property and asking that the obstruction notice be cancelled. The decision was later upheld by the Court of Appeal who said that the actual development work was substantially different from what was envisaged by the 1999 agreement and the agreement did not constitute an abandonment of the existing rights to light.

Developers should be cautious about relying on documentation in which neighbouring landowners agree to give up their prescriptive rights. This is particularly so if the plans have altered significantly in the meantime in a way that further reduces light to the neighbour's property.

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Creative leasing

*In a climate where landlords and tenants are having to think rather more carefully about their requirements, **Susie Wynne** offers some comments.*

Every landlord wants a reputable tenant who will be able to pay the rent and comply with lease obligations, including repairing covenants. It can be a temptation to ask for security, such as rent deposits or guarantors, from tenants 'just in case'. However, few tenants will be keen to give personal guarantees or tie up large sums of money in rent deposits. One thing no landlord wants is an empty property generating no income while he waits for the perfect tenant.

One way of allowing a landlord to manage his property more effectively is to grant short-term leases that exclude statutory rights of renewal. This approach makes it easier for a landlord to get rid of 'bad' tenants and reward 'good' ones by granting longer-term leases when the first lease comes to an end.

Some landlords are actively looking for longer-term leases and tenants, particularly if they need to support a bank loan secured against a property. As the supply of property exceeds demand, tenants are looking for more attractive deals. Landlords will be keen to keep the level of rent on new lettings as high as they reasonably can. This will make it easier to agree similar rents on rent review, without other tenants enquiring too closely into any inducements paid on comparable deals.

In order to maintain these 'headline' rents, landlords may offer capital contributions towards tenants' fitting-out works or rent-free periods. However, tenants need to make sure that they take account of the tax implications of receiving the capital contribution or the rent-free period. A rent-free period will slightly reduce the amount

of stamp duty land tax payable on the lease, but both forms of incentive could be taxable.

Landlords and tenants may also agree to 'rent phasing' or 'stepped rents'. Here the tenant pays a lower amount of rent during the first couple of years of the lease in exchange for paying a slightly higher rent later on when, with luck, market conditions will have improved anyway.

With retail premises, it may be tempting at present to agree a turnover rent where the landlord receives a percentage of the turnover generated at the property. If tenants are considering such rents, they should ensure that the maximum amount payable is capped.

Landlords and tenants both need to consider the length of the term of the lease. Tenants are unlikely to want to commit too far ahead at the moment, as they do not know what the future holds. But a longer-term lease with options to break may be beneficial for both sides. The landlord can hope that, once in situ, the tenant will not go to the expense of exercising his break right and relocating. The tenant can exit the lease if necessary but has flexibility to remain in occupation if he wishes – which may be better than the prospect of having to leave the property on the expiry of a shorter-term lease.



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Fire alarm

*The Regulatory Reform (Fire Safety) Order 2005 (FSO) came into effect in October 2006. It applies to all non-domestic premises in England and Wales, including common parts of blocks of flats and houses in multiple occupation. **Nick Richardson** reports.*

Those brought up in the era of fire safety certificates may have found the transition to FSO rather difficult since it is now the duty of a 'responsible person' (usually the owner, employer or occupier) to conduct the fire risk assessment and implement suitable safety measures. The laudable aim is to minimise the risk to life and keep the assessment up to date.

if you are a landlord of tenanted property, almost certainly the 'responsible person' will be you as the duty now falls to those who are best placed to address the issues. It is not necessary to carry out the assessment personally - you can appoint a professional to do it and liaise as necessary with the local fire service (who have a statutory duty to enforce compliance).

Businesses cannot afford to ignore this ongoing responsibility: failure to comply can result in being hauled before the magistrates' court with the threat of imprisonment and/or fines.

You may find that over-zealous fire and rescue authorities take pre-emptive action. The official motive will be the greater good but underlying this may well be viability concerns of such authorities who are fighting their corner to prevent closure.



Contact **Nick Richardson**
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Personal guarantees .. a risky business

In times of economic uncertainty, company directors should be aware of the dangers of giving personal guarantees, warns Philip Chapman.

If a director acts as a guarantor for any type of commercial loan or lease agreement on behalf of his company, he can remain liable for repayment for a potentially unlimited period - even if his association with the business comes to an end. Also, personal guarantees are often secured by way of a charge on the family home – so if they ever have to be enforced, the implications can be extremely serious.

A guarantee is generally a contract whereby the director promises to fulfil his company's obligations to the bank if the business fails to perform. Where a director has contracted on the bank's own standard form of guarantee, any ambiguities in the drafting will be construed against the bank. This has spurred banks to make their terms as far-reaching as possible so as to maximise their chances of enforceability and guarantee documents are now often long and complex.

Under the guarantee a director's liability begins if the company defaults on the loan. Sometimes there is a stipulation that the bank must formally

demand payment from the director before they can sue him on the guarantee. Many guarantees have a 'continuing' nature, meaning that the director continues to be liable until he is released. Even if at some point the company owes nothing to the bank, the director remains on the hook in respect of any future liabilities that arise, for instance if the company borrows more money (a decision the director may not know about). The guarantee also continues regardless of how circumstances change. For example the director would still be liable if he became ill, was made bankrupt or even if he died (in which case, liability would pass to his estate).

It is sensible to seek professional advice before entering into a personal guarantee and, indeed, most banks will insist on it nowadays. Directors need to understand precisely what their rights are, as well as the rights the bank has reserved for itself, including procedures to discharge the guarantee. We are happy to advise and negotiate variations of the terms if appropriate.

Dispute resolution

Waiving goodbye to a right to forfeit?

In a tough economic climate, landlords have a difficult balance to strike between keeping properties occupied but making sure that rent is received from them. It pays to know what you can and cannot do. Nick Cox reports on some timely guidance provided by the Court of Appeal in the case of Osibanjo v Seahive Investments.

In general if a landlord accepts rent when he knows that the tenant has committed a breach of covenant, then he is deemed to have waived the right to bring the lease to an end by forfeiture. This is an objective test, so if the ordinary man would conclude that the landlord knew of the breach yet accepted the rent, it would be taken that he had passed over the right to bring the lease to an end.

This would not stop him trying to recover any arrears of rent by other means, or seeking to prevent the breach in another way.

In the appeal case, the landlord, Seahive, served a statutory demand for rent arrears in November 2005, a common tactic. Mr Osibanjo made only partial payment and in January 2006 Seahive filed a bankruptcy petition against him.

It was a full six months later that Seahive's surveyor inspected and discovered a host of breaches, including unauthorised alterations and change of use. Nothing happened until October 2006, when Ojibanjo sent a cheque for £10,000 to settle the £3,414 still due under the claim in bankruptcy and on account of rent. Seahive's solicitors banked the cheque but advised Ojibanjo that this did not amount to a waiver of the breaches discovered in June. Crucially they also

returned the balance to Ojibanjo. The bankruptcy petition was dismissed.

When, a month later, Ojibanjo paid further rent, Seahive returned the cheque and issued forfeiture proceedings. The county court ordered possession. Dismissing Ojibanjo's appeal, the court made it clear that Seahive had not waived the right to forfeit simply by banking a cheque. They had not accepted the payment as rent at the time they knew of the other breaches of covenant. The fact that the other breaches were continuing was also a factor.

The case highlights the difficulties sometimes faced by landlords when offered money by defaulting tenants. They still need to think very carefully about how they respond and what their objective might be. Had all this happened a few years on in 2009, we suspect Seahive might have taken a different view when being offered substantial rent!



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Security for costs

Generally, the question of who pays for the costs of a claim is not determined until the claim is finally settled, by trial or other means. This is because usually, the winner recovers costs from the loser, so the outcome is not known until the end of the process. But sometimes there have to be exceptions, in which case an order can be made for 'security of costs'. **Paul Gordon** explains how a recent decision may mean this procedure is more widely available.

If a defendant is concerned that the claimant, should he lose, would not be able to pay, he can apply for an order that the claimant provides security for his costs. If the order is made, the claimant must pay a percentage of the other side's estimated costs into court before his case can proceed.

Security cannot be applied for in every case: strict criteria have to be met and even then it is by no means automatic. The financial status of the claimant is often subject to dispute and may involve a detailed analysis of his accounts. Applications for security tend to be relatively expensive, and also fairly uncertain in all but the clearest-cut cases because of the level of judicial discretion applied. They are more usual in high-value cases where the defendant will have to invest considerable sums in defending the claim.

Security is an application that only a defendant can make. However, the courts have now affirmed (in *Nicholas G Jones v Environcom Ltd and others 2009*) that a claimant can apply in respect of a counterclaim made against him where he is technically a defendant to that claim.

In the present economy, parties are more likely to consider security applications, which will become more significant in any litigation.



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Will I get my money back?

If you have gone down the route of issuing a winding-up petition against a company or suddenly found that you are a creditor of a company in liquidation whether voluntary or compulsory, the liquidator will ask you to provide proof of the debt owed to you.

This is done by way of a proof of debt form which is sent to all creditors with the notice of liquidation. The liquidator will then approve or reject your claim, and will rank it in the liquidation.

The general statutory order for the liquidator to make payment is:

Fixed charge These rank top in the priority list even though they are not afforded any special protection under the Insolvency Act 1986. This is because the asset is secured.

Expenses of winding up This may include some of your expenses of issuing a winding-up petition, ie the official receiver's deposit and court fee.

Preferential debts These include employee claims and contributions to occupational pension schemes. As a result of the Enterprise Act 2002, PAYE, VAT and NIC are no longer included as preferential debts but are now ranked as unsecured creditors.

Floating charges Creditors who have secured their debt by way of a floating charge will be affected here. They will rank below preferential creditors, even if the floating charge has crystallized.

Ordinary unsecured creditors These are the ordinary debts of the company. If there are insufficient funds to pay them all then each creditor will rank equally and will be paid in proportion to the sums owed to them.

Surplus If there is any surplus, it will go to the members once the company has paid off all the above in full.

Creditors often leave it too late before taking action to wind up a company. Some may even have decided to issue proceedings first. Unfortunately, judgments alone provide no better protection in terms of priority over other unsecured creditors. It is therefore essential to consider whether insolvency proceedings would be more appropriate than issuing a claim in the courts (provided that the debt is not in dispute), particularly if there is a risk that the company will be wound up prior to judgment being obtained and/or enforcement of that judgment.



Contact **Charlotte Mitchell**
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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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Dispute resolution

Fast track limit increases

From 6th April, the upper limit for fast track claims goes up from £15,000 to £25,000. This should lead to a quicker process for more cases.

When a claim has been issued and a defence filed, the court often allocates the case to one of three tracks, depending on factors such as value and complexity.

Most people are familiar with the small claims track which tends to be for claims of up to £5,000. The fast track now extends to claims between £5,000 and £25,000 and the multi track deals with claims above that limit.

Personal Matters

Overtaxed

Gordon Brown's attempt to steal one of David Cameron's election bids "to increase the threshold for inheritance tax to £1 million" seems to have lulled many into a false sense of security now that a married couple have a double tax-free limit on the second death provided everything passed to the surviving spouse on the first death. Despite the recession, the present limit of £312,000 is not particularly generous, even doubled.

Many are still well in excess of these figures and there are ways of reducing or avoiding inheritance tax altogether. It really is important to review wills on a regular basis. Visit the wills, trust and probate page on our website or contact **Jenifer Gillman** (jenifer.gillman@willans.co.uk)

Client news

Planning law specialist Helen Adlard has been advising **Moreton C Cullimore (Gravels) Ltd** on planning and waste licensing matters concerning minerals development at Cotswold Water Park and has received a number of new instructions from existing client **Brett Aggregates Ltd**. Helen also continues to advise **Jesus College Oxford** on a proposed strategic urban extension in the East Midlands region.

Susie Wynne acted for **Spirax Sarco** in acquiring the freehold of the five-acre ADC Krone site at Kingsditch. One of Cheltenham's largest employers, Spirax supplies products and services relating to steam systems used throughout the world for a huge variety of processes. The company is also a world leader in peristaltic pumping systems.

Jonathan Mills is completing the lease of a new retail outlet in Cowes, Isle of Wight, for **Weird Fish**, who design and manufacture casual clothing.

Susie Wynne also acted for **Western Computer Group Ltd** in acquiring the lease of new premises in Oxford. Western is an Apple Premium Reseller with other retail outlets in Bristol, Cheltenham and Swindon.

Good wishes to **Dr Hugh Koch** on the publication of his book *Active steps to reducing stress*. Dr Koch is a clinical psychologist and director of a medico-legal firm. He has worked with our lawyers as an expert in the field of workplace stress. The book aims to provide straightforward and practical strategies for minimising the impact of stress.