



Sean Logan



Robert Ridd

## Expansion

Solicitor **Sean Logan**, who qualified in November, is a welcome addition to our commercial property team. He worked as a paralegal in the department before starting his training contract with us, gaining useful experience in this area of law.

And solicitor **Robert Ridd** joined our company/commercial department in November. Robert, who trained with top international law firm Reed Smith, moved from a Nottingham firm where he has handled a wide range of commercial work including mergers and acquisitions.



Paul Symes-Thompson

## Legal 500

We are delighted to be recommended for our work in more fields of law than ever before in the latest edition of *Legal 500*.

We are rated in all areas of commercial law, namely property, corporate, employment, property litigation, dispute resolution and charity law. In private client services, we are recommended for divorce and family law and for wills, probate and trusts.

Partner Paul Symes-Thompson said: "*Legal 500* is the definitive legal directory because, unlike others, it is researched and recommendations are made and not paid for."

## Season's greetings

Once again the partners have voted against corporate Christmas cards. Instead, we will be making a substantial donation to a local charity.

In the absence of a card, please accept our warm wishes for Christmas and the New Year.



### Leaning over backwards to be 'PC'

*We live in an age where political correctness is all. Like it or not, we have to operate in this regime, but some are going too far, not least in the area of discrimination. Some big organisations seem to be so keen to demonstrate their PC credentials that they end up breaching the very laws they are leaning over backwards to uphold,* comments **William Morse**.

Take the example of the former serviceman who applied to join the police. He passed the entrance tests only to be told that the constabulary in question was unable to offer him a place because they had to meet 'quotas' in relation to ethnic origin. In fact what this means is that they were proposing to select recruits on the grounds of race, which would be unlawful and discriminatory.

Another example came from the BBC. "The BBC is actively seeking an older female newsreader, as it seeks to counter accusations of ageism." reads a news report on the corporation's own website. Had they acted on what was presumably a rather hasty announcement, and tried to recruit an older female, they could have been discriminating on the grounds of age and sex.

Even Amnesty International are not immune. They refused to promote an employee, who was of northern Sudanese ethnic origin, to the position of researcher for Sudan. Amnesty's subsequent defence to her claim was that her ethnicity would compromise their perceived impartiality. It may have been a noble enough reason, but the courts said that the motive was irrelevant when the treatment was on the grounds of race.

It is dangerously easy for employers to fail to identify the danger posed by this aspect of discrimination law. Take the very common situation where a small supplier company seeks to secure contracts from a large organisation

or public body. The tendering process will often be initiated by way of the supplier's business effectively being 'vetted' for its compliance with the politically desirable model. If, in anticipation, the would-be supplier seeks, through recruitment, to put themselves in the correct shape to strike a 'desirable' balance between, say different sexes or races, then they will be acting unlawfully and will be vulnerable to litigation, most commonly from an unsuccessful applicant.

The fact that so many large organisations are kindling this culture of compliance—and are doing so in the sincere belief that they are not doing anything wrong—highlights the extent of the misunderstanding about this area of law.

In short, if you recruit on the basis of race, sex or age, you are probably breaking the law ... and don't let anyone try to tell you differently!



Contact **William Morse**  
(william.morse@willans.co.uk)

### More on sick leave and holidays

*As reported in our Spring issue, employees on long-term sick leave gained the right to all accrued statutory holiday, thanks to an ECJ decision in January. Now they have ruled that workers are also entitled to reclaim holiday that has been 'lost' through illness.*

The case in question was *Pereda v Madrid Movilidad SA*. Mr Pereda worked for the vehicle impounding department of Madrid City council. He had booked annual leave but, before it was due to start, he was injured in an accident at work. His sickness absence then overlapped with his annual leave, meaning that he would be unable to enjoy his holiday. He asked if he could change his holiday dates, but the request was refused by his employer.

The court drew the distinction between statutory leave, which allows a worker to rest and relax, and sick leave, which allows a worker to recover from illness. They decided that a worker can request 'replacement' annual leave for any part of statutory annual leave during which they were sick.

The potential here for the unscrupulous is plain to see. A worker may appear fit and healthy on departing for their two weeks in the sun but later claim that a week of the holiday was 'lost' as a result of an upset stomach. In Mr Pereda's case, the

accident happened before his holiday began so it is likely that the employer had evidence that his sick leave was genuine.

So how do employers handle this? There was no guidance from the court on what evidence of illness will be expected. If a worker asks to treat any part of their holiday as sick leave, then it would be reasonable for them to comply with the company's normal sickness absence reporting procedures and provide the usual certification. Employers may wish to insist on a doctor's certificate in such cases to try to prevent abuse.

This judgment is a good illustration of the problems created when courts base decisions on a logical premise but make no allowance for how they will work in practice for businesses.

Contact **Trula Brunsdon**  
(trula.brunsdon@willans.co.uk)

### Working with children

*There have been enough howls of protest and ridicule about the new Independent Safeguarding Authority and its sweeping remit, without the need for more of the same from us. The latest move is the ISA's new 'Vetting and Barring Scheme'. Trula Brunson highlights some of the implications for employers.*

The scheme was launched at the beginning of October and replaces the current barring lists. It requires people to be registered with the ISA if they work regularly with children or vulnerable adults, either on a paid or voluntary basis.

The ISA has the power to bar individuals who are considered unsuitable to work with children or vulnerable adults. It is a criminal offence to allow such a person to engage in regulated activity. The requirement to be registered is being phased in over a five-year period. Although it does not yet apply to everyone, we are advising employers to carry out checks on all prospective employees or volunteers to be certain they are not barred.

An important duty has now been placed on organisations such as schools and care homes that are responsible for the management or control of regulated activity. They must refer to the ISA any information showing that a particular person poses a risk to children or vulnerable adults.

This would include instances where someone has been dismissed or has resigned because they have harmed, or may harm, a child or vulnerable adult. Employers be warned - failure to refer information is a criminal offence and can lead to a fine.

To avoid unwittingly committing a criminal offence and risking a fine or even imprisonment, employers should seek advice if they are unsure about their new obligations.



Contact **Trula Brunson**  
(trula.brunson@willans.co.uk)

### Carbon reduction scheme

*A mandatory emissions trading scheme known as Carbon Reduction Commitment (CRC) comes into force on 1 April 2010. It will apply to around 5,000 businesses and organisations, primarily those with an annual electricity bill of more than £500,000. Another 15,000-20,000 businesses will be required to disclose information.*

The aim of CRC is to encourage businesses to reduce their carbon footprint. Each year, the government will auction allowances for businesses to trade with each other. Each business must buy sufficient allowances to cover the equivalent amount of carbon dioxide produced. After three years, the number of allowances will be limited, thereby encouraging energy efficiency. During the year 1 April to 31 March 2011 businesses will have to report their carbon dioxide emissions, thereafter allowances must be purchased.

The final CRC order will set out rules establishing who has to comply based on direct, indirect and self-supply, but this may not be the business whose name is on the energy supply contract. The business that has to comply with the CRC is

the one that receives the energy supply, eg if the landlord receives the energy supply but provides some of that to the tenant, the landlord will need to comply with the CRC. Landlords and tenants may need to make provision in their leases for CRC allowances and credits.

Guidance and further details on the CRC can be found on the Environment Agency's website.



Contact **Sarah Webb**  
(sarah.webb@willans.co.uk)

## The cost of contamination

*A significant land contamination case was concluded recently, when the former owner and the developer of a site in Hertfordshire lost their appeal against an environmental remediation notice. The Secretary of State ruled that they must both start paying to clean up the site.*

Crest Nicholson, the developer, bought the site of a former chemical works in 1983 from Redland Minerals. Both parties were aware of the presence of bromide on the site and Crest had carried out remedial work to the soil before development began. But the chemicals had leached into the ground, threatening the drinking water supply. In 2005 the site was designated as contaminated land and the Environment Agency served clean-up notices. Both Redland and Crest Nicholson appealed.

The notices were upheld on the basis that Crest Nicholson had caused the contamination to be on the site through their action and inaction during the time they owned the site. Although they had done some remedial work, it had not been completely successful since both bromide and bromate had been able to leach into the ground water supply.

Redland had tried to get rid of their liability by providing Crest Nicholson with information about the contamination (applying the so-called "sold with information exclusion test").

However, the Secretary of State felt they had not provided a full enough picture of the extent of the pollution and consequently they must share the liability with Crest.

The cost of the clean-up is likely to run into millions and could rise much higher if the affected water supply companies try to recover their own losses from Crest Nicholson and Redland.

Susie Wynne comments: "The case underlines the risks inherent in acquiring land known to be contaminated. Potentially, the costs of cleaning up can be greater than the value of the land itself and may have to be picked up by future owners, like Crest."



Contact **Susie Wynne**  
(susie.wynne@willans.co.uk)

## The less said the better

*A recent ruling by the Court of Appeal creates a potential problem for landlords seeking to evict secure tenants, explains Sean Logan.*

*In Inclusive Technology v Williamson, the landlord had to compensate the tenant for failing to inform him that he had decided not to go ahead with the redevelopment work which had formed the basis of his refusal to grant a new lease.*

The background to this is the security of tenure provided to business tenants by the Landlord and Tenant Act. Even when a lease or tenancy runs out, a statutory tenancy continues until it is brought to an end in accordance with the Act. This is done either by a landlord serving a S25 notice or a tenant serving a S26 request.

A landlord can only oppose a tenant's request on the limited grounds set out in the Act. The most common of these is that he plans to demolish or reconstruct the premises and cannot do so without obtaining possession. The vacating tenant may then be entitled to compensation for disturbance.

However, the recent appeal decision must now be taken into account by a landlord considering redevelopment as the ground on which to end a statutory tenancy. It can be beneficial for a landlord to make clear his firm intention to redevelop as it may persuade a tenant to vacate without argument and not take court action. But the new ruling highlights how this approach may expose the landlord to a potential claim for compensation, should he later change his mind without informing the tenant.

Where a landlord gives notice to a tenant that clearly constitutes a representation of his present intention, he is placed under a duty to inform the tenant of any change of mind. A failure to do so

will amount to a misrepresentation or concealment that will result in compensation being awarded well in excess of the statutory compensation paid for disturbance.

It is settled law that service of a S25 notice does not in itself amount to a representation of an intention. However in this case, it was held that an earlier warning from the landlord and the specific terms set out in a covering letter, together with the notice clearly constituted a representation of a present intention. The tenant was awarded £48,000 – the difference in rent between what he had offered to pay when seeking to retain the premises and the rent he had to pay for new premises.

If a landlord is considering redevelopment as the ground to rely on to end a statutory tenancy, he should not take any additional steps to suggest this intention to the tenant, when serving the S25 notice.



Contact **Sean Logan**  
(sean.logan@willans.co.uk)

### First corporate manslaughter charge

*The prosecution of Birdlip-based Cotswold Geotechnical Holdings began in June this year, marking a new chapter in English law. It is the first case brought under the Corporate Manslaughter and Corporate Homicide Act 2007 - legislation introduced to make it easier to bring companies to justice if the death of an employee can be attributed to serious managerial failings, explains **Nick Richardson**.*

Peter Eaton and his company were jointly charged following the death of Alexander Wright, a junior geologist. Wright, who was taking soil samples, was killed when the sides of the trial pit he was in collapsed.

The 'crime' of corporate manslaughter was first recognised by the courts as long ago as 1965 but few prosecutions have been brought because of the limitations of the old common law. The principle of 'identification' meant that blame had to be pinned on at least one director, which is generally very difficult to prove.

Under the new law, the offence is committed where an organisation owes a duty to take reasonable care for a person's safety but the way in which its business has been 'managed or organised' amounts to a gross breach of that duty and causes death.

For a conviction, a 'substantial element' of the gross negligence must come from 'senior management'. Companies convicted of the crime are subject to an unlimited fine, likely to equate to between 2½-10 per cent of turnover in the three years before the offence. This is a dramatic increase since up to now, most large companies convicted of fatal safety crimes have been fined at a level less than one 700th of annual turnover. Another

available penalty is a 'publicity order' which forces the company to publicise its conviction and make good the state of affairs that led to the fatality.

Directors can also be prosecuted for safety offences alongside a corporate manslaughter prosecution. The Health and Safety (Offences) Act 2008 has widened the range of offences for which prison is a possible punishment.

Too often, only lip service has been paid to health and safety. Perhaps the new legislation with the threats of huge fines, publicity, the requirement to address the deficit and the possibility of imprisonment may do the trick and focus the collective minds of management.

The Geotechnical case is expected to be heard early next year but at the time of going to press, a plea has yet to be entered. It may be the first corporate manslaughter prosecution, but it certainly won't be the last.



Contact **Nick Richardson**  
(nick.richardson@willans.co.uk)

### Service via Twitter

In the last issue of *Law News* we reported that courts are accounting for new technologies and permitting service of proceedings via Facebook. In a further example of the courts' willingness to adapt to new means of communication, the High Court has recently made an order for service to be permitted using the social networking medium, Twitter.

The case involved service of an injunction sought by a Mr Blaney, who runs a blog called 'Blaney's Blarney', against an alleged impersonator using the Twitter username '@BlaneysBlarney'. As the defendant was anonymous and there was no easy means of identifying him or her, service via Twitter was allowed.

### Charging orders survive bankruptcy

At a time when personal insolvencies have reached the highest number on record, a recent decision may help creditors who otherwise might find their security going up in a puff of smoke, says partner **Paul Gordon**.

In the case, Nationwide had obtained a charging order over Jonathan Wright's home. Neither they nor the court knew that there was a bankruptcy petition against Mr Wright. His trustee in bankruptcy successfully asked the court to set aside the charging order but this was overturned on appeal.

The court ruled that any creditor who had acted in good faith and without notice of the bankruptcy petition should not be deprived of his security merely on the basis of a later bankruptcy. There would have to be some additional reason before the court would set aside the charging order.



Contact **Paul Gordon**  
(paul.gordon@willans.co.uk)

### A tale of two legal systems

*Nick Cox has been taking a wry look at a string of court decisions filtering across from the US that highlight the gulf between our respective approaches to compensation.*

*In one case Terence Dickinson was awarded \$500,000 for mental anguish after being trapped in a garage for eight days, surviving on a box of dog biscuits and a case of Pepsi. In another, Mrs Grazinski was awarded \$1.75 million after her Winnebago left the highway unexpectedly, crashed and overturned.*

These large damages awards reflect the 'blame and shame' culture that exists in the US, but the most startling thing about them is that both 'victims' were almost entirely the authors of their own misfortunes. The reports do not show whether the awards were reduced to reflect that, but one suspects not, given the facts.

Mr Dickinson was actually trying—via the garage—to exit a house that he had just burgled. Because the connecting door locked automatically and he couldn't open the garage door itself, he was trapped for eight days. Some might take the view that any 'mental anguish' suffered was entirely self-inflicted.

Contrast his case with the sole company director in *Stone and Rolls Limited (in liquidation) v Moore Stephens* who tried to sue his auditors for failing to detect his fraudulent activities. The Lords decided that, where a single director 'was' the company, the maxim that no party may bring an action in reliance on their own misdeeds must apply. Mr S could not therefore bring an action at all.

As for Mrs Merv Grazinski, her case is in cruel contrast to the tragic facts of *Marsden v Bourne Leisure*, where a two-year old boy drowned in a pond at a holiday park in Wales. The family

was awarded damages of £25,000 but this was reversed on appeal. The information on potential hazards provided to parents on arrival was clear: the park operator could not be expected to take additional precautions, the court said. It was not necessary to find that the parents were to blame in order for the park operator to escape liability.

How Winnebago Industries would have loved a similar dose of common sense in Mrs Grazinski's case. Alas, the court ruled that their instruction manuals were deficient. They did not expressly spell out that when the vehicle was set to cruise control at 70 mph, as Mrs Grazinski had done, the driver still needed to remain at the wheel, as Mrs Grazinski had *not* done .... preferring instead to go to the kitchen to make herself a sandwich!

Whatever frustrations exist about the English system, cases like these surely mean that we will never edge too close to what they get up to on the other side of the Atlantic.



Contact **Nick Cox**  
(nick.cox@willans.co.uk)

## Company / commercial

### Pre-packs under fire

*The increasing use of pre-pack administrations is attracting much attention and raising a number of concerns. Earlier this year, a report by the BERR Committee (Department for Business, Enterprise & Regulatory Reform, formerly the DTI) on the Insolvency Service stated that prompt, robust and effective action is needed to ensure that pre-pack administrations are transparent and free from abuse.*

The practice of 'pre-packaging' the administration process was developed in response to the need to maintain value and continuity while a business is rescued. In a pre-pack, the company is put into administration and the business is then sold very soon after an administrator is appointed. Often the insolvency practitioner, the directors and the ailing company's bank will already have obtained valuations, agreed a price and drafted contracts to enable the business to be sold in this way.

This approach offers potential benefits to both creditors and the future purchaser. For example, it can help maintain the continuity of supply that is essential to keeping customers on-side, ensure that key employees are retained and enable existing contracts to be supported and fulfilled so as to avoid disputes.

Though pre-packs may be seen as a good thing by the businesses concerned, they are not always well

regarded by those on the receiving end, typically creditors and bankers. It is a common perception that assets may have been sold at an undervalued price or that goodwill has not been fully valued because of the speed of the sale. Consequently questions are raised over the size of any pot available to creditors for repayment.

The BERR Committee reported mounting complaints and unease about the lack of transparency and potentially reduced returns to unsecured creditors following pre-pack sales. There were even more concerns in cases where existing management buy back a business and continue to trade, clear of the original debts.

Contact **Simon Brazier**  
(simon.brazier@willans.co.uk)

## Re-sale price maintenance

*In the present economic conditions, with downward pressure on prices, **Simon Brazier** looks at what controls suppliers have over the cost at which their products are sold on and offline by wholesalers or distributors.*

### Applying competition law

Anti-competitive agreements are prohibited under both The Competition Act and Article 81 of the EC Treaty. Agreements that fix the price at which products must be sold are presumed to infringe competition rules. This includes attempts to fix prices by indirect means, such as

- fixing either the margin or the maximum level of discount the distributor/retailer can grant
- only granting rebates if certain price levels are maintained
- linking the prescribed resale price to the resale prices of competitors
- threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level.

There is nothing anti-competitive in suppliers providing regularly updated lists of recommended retail prices to distributors/retailers during the life of their agreement.

But if the suppliers use pressure to enforce recommended prices (eg by refusing to supply further goods or threatening to terminate contracts if recommended prices are discounted), contracting parties may feel they have no choice but to comply with the demands. But by agreeing to adhere to recommended prices, they themselves may also be in breach of the competition rules.

### Potential risks

The Office of Fair Trading (OFT) or the European Commission may investigate an arrangement of this type. If they find that rules have been breached, the parties may be ordered to stop what they are doing. Tough financial penalties can also be imposed.

In recent years, the OFT has investigated a number of high profile cases involving distribution agreements that breach competition rules by containing price maintenance clauses.

For example, a fine of £18.6 million was imposed by the OFT on ten suppliers of replica football kits (including JJB Sports) for having agreed to set the price of kit manufactured under licence by Umbro. It also imposed a fine of almost £5 million on Hasbro, the toy and games manufacturer, for actively enforcing price maintenance clauses on its distributors.

### Third party claims

Under EC law, third parties can bring private damages actions in the courts if they can establish that they have been adversely affected by an anti-competitive agreement.

In the UK, interested parties or specified bodies on behalf of groups of affected consumers may bring a claim via the Competition Appeal Tribunal (the CAT).

For example, following the OFT's decision against suppliers of replica football kits, the Consumers' Association began legal proceedings against JJB Sports on behalf of customers who had paid more for replica shirts as a result of the price-fixing agreements. JJB subsequently settled the case out of court and agreed to pay damages to those affected.



Contact **Simon Brazier**  
([simon.brazier@willans.co.uk](mailto:simon.brazier@willans.co.uk))

## 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.

## Commercial law services

### Company/commercial

#### Paul Symes-Thompson

paul.symes-thompson@willans.co.uk

#### Simon Brazier

simon.brazier@willans.co.uk

### Employment law

#### William Morse

william.morse@willans.co.uk

### Property & construction

#### Jonathan Mills

jonathan.mills@willans.co.uk

### Dispute resolution

#### Nick Cox

nick.cox@willans.co.uk

#### Paul Gordon

paul.gordon@willans.co.uk

### Charity law

#### Margaret Austen

margaret.austen@willans.co.uk

## Private client services

### Conveyancing

#### Charles Middleton

charles.middleton@willans.co.uk

#### Bridget Redmond

bridget.redmond@willans.co.uk

### Wills, probate & trusts

#### Jenifer Gillman

jenifer.gillman@willans.co.uk

#### Philip Allen

philip.allen@willans.co.uk

### Matrimonial & family law

#### James Grigg

james.grigg@willans.co.uk

### Personal injury law

#### Nick Richardson

nick.richardson@willans.co.uk

### Willans LLP | solicitors

28 Imperial Square  
Cheltenham  
Gloucestershire GL50 1RH

01242 514000

info@willans.co.uk

www.willans.co.uk

## Personal matters

### Use it or lose it

Philip Allen reminded business owners recently of the importance of making use of Business Property Relief (BPR) when considering succession.

The government looks favourably on people with the right sort of business interests, at least as far as inheritance tax is concerned. They do not want family businesses, which provide employment and annual tax revenues, to have to be sold or broken up when their owners die.

BPR can relieve businesses from inheritance tax. The relief can be 100 per cent or less commonly, 50 per cent, depending on the facts.

Basically BPR is available to sole traders, people with an interest in a partnership and owners of

shares in a private company, providing the business in question involves trading, not investment.

*There is a longer version of this article in the news section of our website. Please feel free to contact Philip Allen if you would like to know more about BPR.*



Contact **Philip Allen**  
(philip.allen@willans.co.uk)

## Client news

We advised an international client on a **major acquisition**, which was completed at the end of September. Our six-partner team, led by Paul Symes-Thompson, advised on the corporate transaction as well as employment, property, pensions and intellectual property matters connected with the transfer. It was an intricate and complex transaction, added to which there were also UK and EU competition law issues. The acquisition brings the total value of transactions handled by the corporate team in the past 12 months to well over £100 million.

James Grigg and Jonathan Eager report increasing interest in **pre-nuptial agreements** following some recent decisions in the higher courts, not least among successful businessmen and women embarking on second marriages. Interestingly there has also been a notable rise in the number of **post-nuptial agreements** we are advising on. The courts are tending to treat these with respect, meaning that potentially, they have more of a binding effect than the pre-nup.

Residential property activity has been strong since early Spring and our conveyancing team has been as busy as ever. In part this may be because a larger proportion of our work involves higher value properties and this sector has been less hard hit than the first-time buyer market.

We completed the sale of **Talland Bay Hotel** in Cornwall in October. Owners **George and Mary Granville** bought the hotel, near Polperro, seven years ago and have carried out a major programme

of refurbishment and improvement to the property and the land. Our good wishes to them in their next endeavour.

Jonathan Mills is acting for **Freedom Sailboards Ltd**, trading as **Weird Fish**, in the acquisition of larger premises in Rutherford Way, Cheltenham, for use as their headquarters.

A management buyout was completed at the end of October at e-learning business **E2 Train**, based in Cirencester. The company provides learning and performance management systems that help large enterprises deliver e-learning to employees. Funds managed by Westbridge Partners totalling about £1.2 million are backing the deal. The remaining monies for the transaction came from the management team, with debt finance provided by Royal Bank of Scotland. Paul Symes-Thompson and Simon Brazier acted for several of the vendor shareholders in this transaction.

