

Law News

Newsletter for commercial clients

Winter 2011

New flagship commercial court



A £300m state-of-the-art law court complex opened in London in October as the government tries to make the UK the world's top destination for swiftly resolving international high-value legal disputes.

Containing 31 courts, plus three 'super courts' for multi-party litigation, the aim is that the new Rolls Building will attract high-profile business disputes from around the world, such as rows over pipelines and property ventures, contested insurance payouts, environmental pollution claims and disagreements over complex contracts.

This is already being borne out by a current case where Chelsea football club owner Roman Abramovich is being sued by his former friend Boris Berezovsky for damages in excess of \$5billion.

Justice Secretary, Kenneth Clarke, said that the court would allow London to become a global leader in law just as it is in the world of finance.

Legal 500



Willans has again been recognised as a strong player in the region in the latest edition of the *Legal 500*. We were rated for our work in eight areas in the industry 'bible', including company/commercial, commercial property, employment, property litigation, divorce & family law, personal tax, trusts & probate and charities.

www.willans.co.uk/news

Living wills

Advance decisions were recognised in law in April 2007 and are the only form of 'living will' that is legally binding. For FAQs, download our latest fact sheet www.willans.co.uk/downloads

Damages debate disentangled

Parliament has recently cleared up confusion over the amount of damages a claimant must be awarded to better a previous settlement offer. The new rule, which came into force in October, is good news for litigants.

The original rule (Civil Procedure Rule 36.14) adopted a practical approach. Where a settlement was offered and rejected and the claimant subsequently won damages higher than that offer, he was right to have refused it. He should not, therefore, be liable for legal costs run up after the point he rejected the offer.

This approach was thrown into disarray by the 2008 ruling in *Carver v BAA plc*. The court awarded costs against the claimant, Miss Carver, even though her damages award was higher than BAA's offer to settle. The court considered that the amount by which she had beaten the offer was too small.

The position has now been made crystal clear. When deciding who has to pay for legal costs after an offer to settle is rejected, the key question will be 'did the claimant obtain more damages than were initially offered to settle the claim?'. This means more damages in money terms by any amount, however small - no fudge, no grey area, no argument: just look at the figures.

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A slightly more level playing field



Partner William Morse – *Legal 500* recommended for skilled employment advice.

The government has announced plans to increase the length of qualifying service for bringing claims of unfair dismissal from one to two years, from April 2012. They also plan to introduce a fee for all employment tribunal applications. The cost is likely to be around £250 to lodge a claim with a further £1000 fee once the claim has been listed for a hearing and more if the claim is over £30,000.

Will these measures have a long term effect on the overall number of employment law claims? Probably. They would certainly make things a little fairer and would go some way towards countering the present culture of ‘tribunal blackmail’ that many employers have experienced.

Currently, there is no real requirement for a claimant to pay costs. Add to that the ease with which even the most spurious claims can be brought and you have a situation where many employers will be coerced into making termination payments, simply because it is cheaper to pay than to battle through the tribunal system.

Claims with genuine merit ought largely to be unaffected but those who bring claims purely with the intention of obtaining money from employers may well be deterred. We now wait to see whether the proposed changes materialise in the new year.

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Last year there were 236,000 employment tribunal claims - of which only some were unfair dismissal claims. The average award for successful complainants was £8,900.

According to the Treasury, almost 40 per cent of applicants withdrew their cases, but employers still had to pay legal fees in preparing a defence. More than 40 per cent settled out of court and there is no record of how much applicants settled for.

More rights for agency workers

The Agency Workers Regulations came into force on 1 October, giving temporary workers increased rights in pay and benefits. They cover temp work agencies, agency workers and hirers/end users.

Some of the rights apply from the start of an assignment; others kick in after 12 weeks with the same hirer in the same job. For example, from day one, agency workers can use facilities such as crèches, canteens or transport services and are entitled to information about internal vacancies at the company and be given the opportunity to apply for them.

The regulations do not turn agency workers into employees, nor give them rights dependent upon being an employee. They will not, for example, be entitled to all the same benefits, such as occupational sick pay, redundancy pay and health insurance. There is also no right to the same terms and conditions if the worker has a permanent contract of employment with the agency which states that he does not have any entitlement to equal pay under the regulations.

The regulations are detailed and it will be some time before tribunal cases arise to provide guidance on, for example, what is sufficient justification to refuse access to facilities. In the meantime hirers of agency workers should get advice if they are unsure what the regulations mean or how they should be applied.

Hirers should be aware that the regulations also oblige them to provide certain information to the agency. For an extended version of this article visit www.willans.co.uk/news

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ILEX

In October, the Institute of Legal Executives was granted the accolade of a Royal Charter. In future, ILEX Fellows will be able to call themselves ‘Chartered Legal Executives’

Chambers 2012

We are delighted that a number of our solicitors have been recognised as leaders in their field in the newly-published Chambers 2012 directory.

Partner **James Grigg** has retained the highest ranking in the county. Chambers says he has a fantastic regionwide reputation for his ancillary relief work, and quotes a source as saying he is

“head and shoulders the best ancillary relief solicitor in the region – a complete star!”.



Varying a contract of employment

The second of a series of articles by **Trula Brunsdon** on different aspects of the employment contract.

Once a contract has been formed it does not mean there is never a need to think about it again. As with any relationship, things can change over time. Changes may be formal (eg a request by an employee to work flexibly) or informal (eg an employee asking to take a slightly reduced lunch break on a Friday and leave early, which then becomes customary).

If the employer wants to introduce a change, he will usually need to secure the employee's agreement, unless the change is within the scope of the contract. Any clause that purports to allow the employer to vary must be drafted clearly and not be so wide as to be unreasonable. In the absence of an appropriate variation clause, agreement is not likely to be a problem if, for example, the employer proposes to reduce hours for the same pay. It is less likely to be forthcoming if he wants to reduce hours and pay!

The employer would need to go through an appropriate consultation process but what if there is still no agreement? If the employer goes ahead with the change and unilaterally varies the contract, the employee may go along with the change, simply by continuing to work without objecting. However it is

also open to the employee to object and bring a claim for breach of contract or to resign and bring a claim for constructive unfair dismissal. Finally, the employee could simply refuse to work in accordance with the change, potentially forcing the employer to discipline or dismiss him.

An employer who ends up facing an unfair dismissal or constructive unfair dismissal claim may seek to rely on the defence of 'some other substantial reason' (SOSR for short). SOSR is one of the potentially 'fair' reasons for dismissing an employee but is less well known than conduct, redundancy or capability.

Employers' lack of familiarity with SOSR means it is sensible to get advice at the start of the process to make sure the reason for the change is good enough to justify making it and the right process is followed. Planning the situation carefully from the start can make the difference between winning and losing in a tribunal.

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Solicitor Trula Brunsdon – clear, straightforward advice on all aspects of employment law.

The 'fit and proper persons' test for charities

New guidelines released by HMRC on the 'fit and proper test' for those who manage charities have potential implications for charities' eligibility for tax reliefs. The guidelines clarify the scope of the test, which was introduced by the Finance Act 2010.

In assessing who is 'fit and proper', HMRC will take various factors into account, such as previous disqualifications as a trustee or a company director; previous convictions involving deception or dishonesty; any history of tax fraud; bankruptcy or removal from a management position within a charity. Failure to satisfy the test is serious as a charity may lose charity tax reliefs. Eligibility for gift aid relief and capital gains tax relief already depends on the test and other charity tax reliefs may follow suit.

The choice of appropriate managers is now more vital than ever. Charities must consider checks for everyone with control over their expenditure, including employees. If in any doubt over who needs to be checked, it would be wisest to err on the side of caution or consult a specialist charity lawyer. For an extended version of this article visit www.willans.co.uk/news

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Partner Margaret Austen is a member of the Charity Law Association. Visit the 'commercial sectors' section of our website for more information.

Commenting on the firm, Chambers says Willans generates applause as a result of "pulling out all the stops" to assist clients and demonstrating "commitment to the task" at hand.



Jonathan Mills is deemed to be a "super chap" who handles all aspects of commercial real estate investment and development with aplomb.



Susie Wynne is noted for her strengths in property management, investment and financing.

Head in the clouds?

In recent years, cloud computing has grown from being a promising business idea to a rapidly expanding quarter of the IT industry.

Companies are increasingly realising that simply by using cloud services they can gain fast access to best-of-breed business applications and/or upgrade their IT infrastructure and resources, at very affordable rates. But as more and more valuable data and information on both individuals and companies is placed in the cloud, the question is how safe is it from a legal perspective?

What is cloud computing?

At its most basic, cloud computing is the delivery of IT as services over the internet. Cloud users don't need to buy or install software and companies don't have to run their own application and data servers. Cloud Service Providers (CSPs) host applications and provide the computing power from their data centres, benefiting from massive economies of scale and dramatically lowering the costs of IT service provision.

Despite its recent exponential growth, it is not a new phenomenon. Cloud computing is a development from models that were popular towards the end of the last millennium. Now with bandwidth ever increasing and with major IT suppliers such as Google, Microsoft and Amazon opening up cloud services on a one-to-many basis, it is likely to become a serious consideration for many companies as time moves on.

What are its key features and benefits?

There are a number of common characteristics of cloud services, including:

On-demand self-service: customer can access computing capabilities automatically as needed, without intervention from the supplier.

Broad network access: computing capabilities are available over the network and accessed through standard mechanisms any time, anywhere.

Resource pooling: CSP's computing resources are pooled to serve multiple customers using a multi-tenant model, resulting in low costs for the customer.



Rapid elasticity: computing capabilities can be quickly scaled up or down, depending on the customer's needs, allowing him to respond to business demands without risking being over- or under-resourced.

Measured service: the customer's resource usage can be monitored and controlled. In other words, the customer pays for what he uses.

Low fixed periodic service charges: can include support and maintenance.

What are the legal risks?

The key issues are data security and the lack of contractual protection available via the non-negotiable standard terms on which the services are normally provided.

Cloud computing is very accessible for smaller businesses but there are big risks: potentially you could find that your data has been chopped up and is being stored on different servers in any number of different countries worldwide, leaving you in complete breach of the data protection laws.

This area is complex. For an extended version of this article covering data protection and data security in greater depth, visit www.willans.co.uk/news

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Partner Simon Brazier – an experienced, ex-City lawyer with particular expertise in IT, e-commerce and internet-related issues.



Fact sheets

New fact sheets are regularly published on our website at www.willans.co.uk/downloads. Recent additions include:

- A basic guide to intellectual property rights
- Intellectual property disputes
- Professional negligence
- Commercial leases & landlord & tenant disputes
- Inheritance disputes and contested probate

Client news

In a lengthy and complex transaction, Laurence Lucas acted for **Kohler Mira** in connection with the purchase and development of a new 63,000 sq ft manufacturing facility in Hull with a value of around £6m.



Selling land for development

When selling land, it is vital that responses to pre-contract enquiries are updated if there is any change in circumstances. The consequences of failing to do so were highlighted in the case of *Cleaver and another v Schyde Investments Ltd*.



Solicitor Katie Froude works in our litigation team, handling a wide range of work from contractual and employment disputes to landlord and tenant matters.

Cleaver owned a garage site and entered into pre-contract negotiations with Schyde, who planned to develop it into a block of flats. Another interested party wanted to develop it into a medical centre.

As part of his replies to the commercial property standard enquiries, Cleaver agreed to notify Schyde of any change in circumstance. However, when Cleaver learned that the other party had applied for planning consent to develop a medical centre, he failed to update his replies to Schyde before contracts were exchanged.

When Schyde became aware of the application, he was concerned that, if the local community wanted a medical centre and obtained planning permission for it, it was unlikely that he would be granted permission for any other use. He tried to rescind the contract and recover the deposit, but

Cleaver objected and served a notice on Schyde to complete. The court found in Schyde's favour. Cleaver's failure to update his replies constituted a misrepresentation. Had Schyde been aware of the other planning application, he would not have entered into the contract.

As the case shows, a failure to notify buyers of such changes may lead to an abortive transaction, coupled with the possibility of court proceedings.

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Late payment interest

Under the Late Payment of Commercial Debts (Interest) Act, a creditor may claim interest from the debtor, at 8 per cent above the Bank of England base rate, from the date when the debt becomes due. If no payment due date is specified in the contract, there is a default period of 30 days.

Rates for calculating interest are called reference rates and are fixed for six-month periods. The Bank of England base rate on 31 December is used as the reference rate for debts becoming overdue between 1 January and 30 June of the following year. The rate in force on 30 June is used from 1 July to 31 December.

Creditors are also entitled to charge a one-off sum to compensate for the cost of recovering the debt. This is set at £40 for debts up to £1,000, £70 for debts up to £10,000 and £100 for debts above £10,000.

If the contract contains an express term providing for interest on late payments, the Act will not apply; the creditor can then only charge the contractual rate. But providing there is no such express term, interest and compensation may be claimed.

It is prudent for businesses to include a term providing for interest on late payments and also to preserve, by express provision, an alternative right to recover interest under the Act. This is a far more attractive option as the statutory rate may be much higher than the contractual rate.

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Amy Gates handles contentious debt for commercial clients. When enforcement is necessary, she advises on the best method in the circumstances of the case.

Susie Wynne acted for **Gloucestershire College** in the acquisition and development of a new, high quality residential accommodation block for its UK and international students.



Our litigation team's current caseload includes a judicial review, matters involving breaches of commercial contract, a range of commercial agency, landlord & tenant and IP disputes and some contentious probate.



Our company/commercial team's current caseload includes a number of supply and manufacturing agreements, intellectual property licensing, consultancy arrangements and website development contracts.

Is your side letter legally binding?

The use of side letters in commercial transactions is common. Ancillary to a contract, a side letter is used to clarify, supplement or vary the original agreement. The key question is whether or not it is in fact a legally binding contract.



Trainee Patrick Peake is currently working in our company/commercial department.

The recent case of *Barbudev v Eurocom Cable Management Bulgaria EOOD & others* highlights the need to ensure that the side letter is an enforceable contract and not simply 'an agreement to agree'.

The case concerned a company sale, where it was agreed that the seller, Mr Barbudev, would have shares in the buyer's newly-merged company. Because the terms of Mr Barbudev's investment could not be agreed before the sale was completed, the parties entered into a side letter.

Several years on, the company was sold but Mr Barbudev's investment agreement had still not been signed. The court thus had to decide whether the side letter constituted a legally enforceable contract.

In ruling that the side letter was merely 'an agreement to agree' the court concluded that its principal terms showed that it was not intended to

be legally binding. Although key terms were agreed in principle, there was no finality as the terms in the side letter were not comprehensive and no agreement had actually been reached.

If a side letter is required, it must be very clear about its purpose. It should set out the key terms that have been agreed and must be signed as if it is a contract - with consideration passing if it is to be legally binding. If it is not intended to be legally binding, this needs to be clearly stated within the letter. For an extended version of this article visit www.willans.co.uk/news

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The force is with us

The recent case of *Lucasfilms Limited and others v Ainsworth and another* received much media coverage. Mr Ainsworth, who had made some of the original props for the first Star Wars film, including the Imperial Stormtrooper helmets and armour, began selling life-sized replicas. Lucasfilm sued for copyright infringement in the USA and the UK. The UK proceedings raised various legal issues, including whether such three-dimensional articles are protected by copyright as sculptures.

A US judgment against Ainsworth included an award of \$10m for infringement. The English courts declined to enforce the US judgment but Lucasfilms pushed on to the Supreme Court, which upheld the lower English court's decision. The stormtrooper helmets could not be considered as 'sculptures' under English law that protects intellectual property rights (IPR).

Much of the media coverage went for the 'David and Goliath' angle but from a legal perspective there is a more interesting and significant point.

As the decision shows, the English courts have judicial authority in cases involving US copyright infringement claims because there is no longer legislation preventing this. Among other things, the modern trend is in favour of enforcement of foreign IPR. The court referred to European law, which only assigned exclusive jurisdiction to the country where the IPR originated in certain circumstances, which did not apply in this case.

This could have considerable implications for future IPR litigation since it would allow claims for foreign copyright infringement to be dealt with by the English courts and when the defendant has a sufficient connection to this jurisdiction, the force may well be with us! For an extended version of this article visit www.willans.co.uk/news

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Security for costs: a strategic consideration in litigation

There is little point in pursuing a debt and getting a judgment if you are ultimately unable to enforce that judgment. However much that sounds like stating the obvious, it happens.

If you are being sued it is, of course, the decision of the claimant to start the court proceedings. But as the defendant, you may be concerned that your opponent may not be able to pay your costs if you win the case. What can you do to protect yourself?

Paul Gordon offers a possible solution.

A defendant may apply to the court for 'security for costs'. This means that during the course of the court proceedings, and before trial, the court can order the claimant to provide security to cover legal costs. In practice, it usually means the claimant has to either pay money into court or provide a bond or guarantee by way of security. Until they comply with the order, they cannot continue with the case.

Although this option is only available to defendants, it can work the other way round: if you are a claimant and the defendant counterclaims, you may be able to bring such an application against the defendant as you are defending his counterclaim.

These orders are usually made against a company or other corporate body although sometimes courts will make them against an individual. Either way, they are not available for small claims (generally cases with a value of up to £5,000).

Before the court will agree to make an order, the defendant has to meet certain criteria. Simply

showing an entitlement to apply is not enough. Ultimately, judges have discretion as to whether or not to make an order, so success is never 100 per cent certain.

If you are applying for an order, your conduct is also likely to come under scrutiny. In one recent case, the defendant had breached another order made by the court during the course of the case before trial, and it was held that this conduct was one of the reasons the court refused to order his opponent to provide security.

All things being equal, it is well worth considering security for costs if you are facing a claim. As well as the obvious practical benefit, it can also give you a tactical edge.

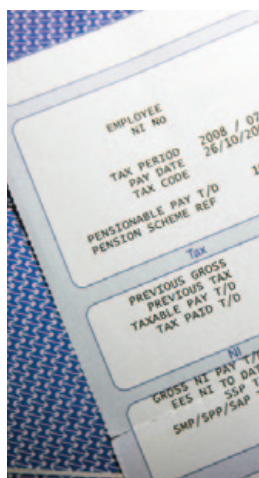
Signalling an intention to apply for security for costs will be another factor the claimant has to take into account in weighing up whether or not to proceed through the courts. In tight financial times, it may just tip the balance and persuade them not to sue but to consider alternative dispute resolution or other means of settlement instead.

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Partner Paul Gordon – an experienced litigator and mediator, used to handling complex commercial proceedings

Employment reminders



- The National Minimum Wage increased on 1 October. The adult rate (workers aged 21+) rose from £5.93 to £6.08, the rate for 18-20 year olds rose from £4.92 to £4.98 and the rate for 16-17 year olds rose from £3.64 to £3.68. A new apprentice rate, for apprentices under 19 years old (or those 19 and over but in the first year of their apprenticeship) was introduced at £2.60 per hour.
- The limit on a week's pay, for the purposes of calculating statutory redundancy payments, rose to £400 from 1 February 2011.
- From 1 February 2011 the daily maximum guarantee payment during short-time or temporary lay-off rose to £22.20.
- From 11 April 2011 statutory maternity, paternity and adoption pay and maternity allowance rose to £128.73 a week or 90 per cent of normal weekly earnings if lower.
- From 6 April 2011 statutory sick pay rose to £81.60 a week.

The rules rule - OK?

Two recent cases that went to the Lands Chamber (formerly the Lands Tribunal) remind landlords of the need to comply with the law governing service charges.



Bernard began his training contract with us in 2010 and is currently working in our company/commercial department.

In *Garside and another v RFYC Ltd and another*, the manager of a block of flats increased the service charge dramatically to pay for substantial repair works after years of neglect. Tenants complained that they could not afford the massive increase in the service charge.

The tribunal ruled that the decision to carry out all of the repair works at once was not reasonable. All factors could be taken into account when judging reasonableness, including the financial impact on tenants and whether work should be phased to spread costs.

It is also important for landlords to comply with service charge consultation requirements. In *Dean Investments Ltd v Benson and others* a landlord failed to meet the requirements, did not publish observations and responses, did not provide estimates, did not give sufficient time for comments and incorrectly stated that the building contract had already been awarded, leading the tenants to

believe that further comments were useless. They suffered significant prejudice as a result.

The tribunal refused to dispense with the need for consultation and confirmed that the landlord could only recover the statutory limit of £250 per tenant. On appeal, the court ruled that his considerable financial loss was irrelevant when deciding whether or not to dispense with the requirement to consult, whereas the prejudice suffered by the tenants was critical.

Landlords should not conclude that the courts are biased against them and tenants cannot simply refuse to pay service charges where these are 'reasonable'. Landlords are just being told to stick to the rules and consider the financial impact on tenants. It's all a matter of following the procedure.

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More news on our website www.willans.co.uk

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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