Willans LLP | solicitors

Law News

Newsletter for commercial clients

Spring 2014

New face in litigation team

Nick Southwell

Experienced litigator and accredited civil and commercial mediator, Nick Southwell has joined our dispute resolution & litigation team from a Gloucester law firm.

He has broad commercial and property litigation experience and will assist partners Nick Cox and Paul Gordon in handling high-value commercial matters ranging from complex High Court litigation to disputes involving commercial contracts, IT and IP related issues and commercial supply, distribution, franchise and commercial agency agreements.

Nick studied at Newcastle University and trained in a Hampshire-based law firm before spending three years at Lyons Davidson solicitors in Bristol and two years with Tayntons in Gloucester.

How do you rate Law News?

We are always interested to learn how we can improve our newsletters. If you have any suggestions or feedback for improving or changing the format of Law News could you please email your ideas to law@willans.co.uk.

Law News is now available electronically and if you would prefer to receive it in this format then please let us know.

Quiz raises cash for county's hospice

Our annual charity quiz in February raised about £3,000 to help Sue Ryder Leckhampton Court Hospice provide care and comfort to people with cancer and other potentially life-limiting conditions.

We were delighted with the support from at least 50 local businesses, many of whom entered a team or donated prizes towards the charity auction and raffle. We look forward to welcoming many of you back for next year's quiz.

Waving the green flag

We have appointed Gloucestershire-based sustainability veteran Commercial Group to provide our office supplies, but they will also, help improve our environmental programme.

Partnering with Commercial enables us to save more than 27% on the cost of our office supplies and to receive additional support in reigniting our environmental programme, starting with deliveries using hydrogen power. By using them, we are reducing our carbon footprint for stationery deliveries by 80%.

Point–to–point

Our agriculture & estates department will be out and about during the upcoming point-to-point season.

Come along and meet the team for a drink at the Cotswold Hunt Point-to-Point on Sunday 6 April at Andoversford.

For more information please contact Frank Smith via email; frank.smith@willans.co.uk

Dissolution of companies – Beware of the pitfalls

Peter Raybould outlines how to dissolve a company and some common mistakes to be aware of.

The process is considerably cheaper and more straightforward than instructing a liquidator to wind up the company, although certain formalities must be observed in accordance with the Companies Act 2006. Directors should seek professional advice to ensure the dissolution procedure is followed correctly.

Before applying to the Registrar of Companies to dissolve a company, directors must consider the following:

- the company must not have traded for a period of three months prior to making the application
- the company must not have changed its name for a period of three months prior to the application
- the company must not be involved in any legal proceedings
- the dissolution of a company is not absolute; it is possible to restore a company to the register and the directors may still be liable for the debts of the company
- all assets of the company, such as cash at the bank, plant and machinery, or land, should be transferred out of the company's ownership.

Upon filing the application, Companies House then places an advertisement in the London Gazette, giving third parties three months to object to the proposed dissolution. If there are no objections during this period, the company will be dissolved.

Directors must be sure that the affairs of the company are in order as it is a criminal offence for directors to make an incorrect application to Companies House.

In addition, ensuring all assets have been transferred out of the company's ownership before the application is submitted is very important. Failure to do so will mean that such assets will transfer to the Crown as "bona vacantia" on dissolution. It makes sense to complete a brief, asset sale agreement to provide evidence that all assets of the company were transferred prior to dissolution. If the transfer of assets is not dealt with properly the directors and shareholders may have to go through the time-consuming and expensive process of applying to the court to restore the company to the register to rectify their mistakes.

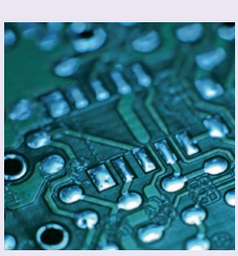
Unlike liquidation, dissolution is a reversible process which means that aggrieved creditors can apply to the court to restore a company to the register. Also, it is possible for directors to remain liable for the debts of a company following dissolution, especially if they have neglected to follow the steps outlined above.

Peter Raybould
peter.raybould@willans.co.uk

Peter Raybould – handles mergers and acquisitions, and advises clients on general aspects of commercial law.

Client news

The **company commercial department** has noted a significant pick-up in activity in the last few months. This has encompassed an increase in the number of corporate transactions under way and also new instructions in relation to a range of commercial contracts for manufacturing and technology clients.



Jonathan Mills acted for a private client in connection with the sale for a seven figure sum of a development site in Cheltenham.

"It's good to talk"

Litigation isn't pretty. In fact, it usually involves a considerable amount of mud-slinging on both sides. As William Roache reminded us recently, rarely do the 'winners' consider themselves lucky.

Laura Davis – an experienced employment lawyer who advises individuals and businesses on the full range of employment issues.

The process will have been time-consuming, potentially embarrassing and stressful because, by its very nature, the outcome remains uncertain.

Litigation is also expensive, not just for the parties involved but for the public purse. For some time now, the government has been devising ways of encouraging parties to resolve their employment disputes before they reach the courts. For example, they have extended the circumstances in which an employer can have an 'off the record' conversation with an employee about their departure. In conjunction with this, they have introduced measures to put off all but the most determined litigant, eg by increasing the length of service needed for unfair dismissal claims and introducing tribunal fees.

The latest scheme is early conciliation (EC). From 6 April 2014, an employee will be required to contact ACAS before lodging a claim in the tribunal. ACAS will then allocate an EC support officer who has up to a month to promote settlement between the parties. This 'stops the clock' in terms of the time limit for lodging the claim. If settlement is not reached, because either the officer decides there is no reasonable prospect of achieving this, owing to one party not engaging in the process, or the prescribed period expires, he will issue the employee with a certificate containing a unique reference number with which he can submit his claim.

The debate as to whether EC will have the desired effect continues. It works in theory and ACAS is optimistic but it remains to be seen whether it has the resources to take the proactive, robust approach necessary to get results. Another concern is that the government has chosen not to require claimants to provide information about their complaint to ACAS. This may hinder meaningful discussion, particularly if the claimant is unrepresented and cannot articulate the full extent of his claim. Lastly, with the recent introduction of tribunal fees, employers may choose to wait to see how serious the employee is before trying to settle.

To sign up for our monthly bulletins of updates on EC and other employment law developments as they arise contact laura.davis@willans.co.uk

Employment law 'to go' breakfast briefings – new dates

Our employment team has had a positive response to the first series of its employment law breakfast briefings and, therefore, we are running a second series. The topics have been selected from feedback received from delegates.

These briefings are aimed at providing directors, HR managers/advisors and in-house lawyers with the top-line facts; a quick overview of changes to keep up-to-speed with current HR requirements within the organisation. It provides an opportunity to meet like-minded professionals and to check that the organisation isn't falling foul of the law.

Dates and topics

Thursday 15 May 2014
Top 5 employment law issues for professional practices

Tuesday 8 July 2014
Auto-enrolment and what it means for your employment contracts

Tuesday 23 September 2014
Managing staff sickness and accommodating disabilities

Tuesday 18 November 2014
(held at a Gloucester venue tbc)
Employment law update

Timings/venue

7:30am – 9am (breakfast included).
National Star College, Cheltenham, GL53 9QU.

Cost

£15 (incls VAT) per seminar.
Receive a special rate of £30 if you book three seminars.

Booking

Contact events@willans.co.uk supplying the full name of the attendee(s), company details and telephone number or call 01242 514000.

Frank Smith recently acted on the sale of large acreages of farmland in Bedfordshire. The land was eventually sold in more than 11 lots with values ranging from £15,000 to £900,000. Most were sold with entitlements to single farm payment included. Careful negotiation was required to ensure our clients would also benefit from any future development of the land.

Alasdair Garbutt acted for **Macmillan Cancer Support** which has partnered with the Sussex Cancer Fund and Brighton and Sussex University Hospitals NHS Trust, to build a support centre for people affected by cancer.

A time for employers to lift their eyes to the horizon

At last, the UK appears to be emerging from recession with positive economic growth indicators, however the general business experience is still one of uncertainty about the future.

HR and employment partner Matthew Clayton – *Chambers UK* says: *"is deemed a solid and respected practitioner noted for his technical abilities."*

This said, those employers who have managed to weather the economic storm without laying off large numbers of workers will be pleased that they are best placed to take advantage of the potential upturn by having retained their knowledge and skills base. However, the recruitment market is warming up and now is the time to make sure you can retain your key staff when they might be tempted away by a competitor. A "carrot and stick" approach is often required.

It is important to think about incentives:

- Do some salary benchmarking to make sure you remain attractive when compared with your competitors.
- Share schemes can incentivise staff by using the growth potential in the company, without having to find additional cash – and there are still ways of doing this tax efficiently.

On the flip side, make sure your non-compete restrictions and confidential information clauses are tightly drafted, and review your policies and practical arrangements around data security, use of social media, and client satisfaction.

We have seen fewer large scale redundancy exercises since the dark days of 2007-2008. However, many employers have been continuing to review their organisational structure for efficiencies. In some cases this might involve changing terms and conditions of employment or outsourcing certain functions. In other cases it involves carefully scrutinising the contribution and effectiveness of individuals in particular (often senior) roles. The solution may be to move them sideways, or even out of the organisation altogether.

We have helped numerous organisations with all these kinds of activities. If you think any of these strategies may be useful, then please do get in touch with us for an initial no-obligation conversation.

Matthew Clayton
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Family Q&A

Our divorce & family lawyer Jonathan Eager answers some common questions that are asked in his line of work.

Q1: What financial information do I have to give my spouse as part of my divorce?

Answer: If, as is often the case, you need the court to make an order splitting the marital assets, then both parties will have to make full disclosure of their financial circumstances. Each party's statement must detail all assets and income, as well as capital and income needs, supported by relevant documentary evidence where necessary.

Q2: What happens if my financial circumstances change during my divorce?

Answer: Up until the point that the court makes a financial order, you must keep the other party informed of any changes in your financial circumstances. If you do not, then the subsequent order could be appealed later due to material non-disclosure.

Q3: I have been ordered to pay spousal maintenance – for how long will I need to pay this?

Answer: Usually the order will come to an end on the death or remarriage of your spouse or on further order of the court. Sometimes the terms of the order will state that it ends on a particular date or following the occurrence of a particular event.

Jonathan Eager – advises clients in connection with all family and divorce matters.

Client news

The commercial property team, led by **Nigel Whittaker**, is delighted to have been appointed to act for **Marie Curie Cancer Care** in relation to its property portfolio nationwide, following a competitive tender involving several prominent UK law firms. This win further bolsters our charity team's client base, which already includes many well-known, national charities and not-for-profit organisations.

Marie Curie operates around 180 shops across the UK, which help to raise vital funds to care for terminally ill people and their families. Last year the charity cared for over 38,000 people.

Please Sir can I have my fixtures back?!

Do the tenant's fixtures belong to the tenant at the end of the lease, and can they be removed?

Not necessarily. Tenant's fixtures, which includes equipment and machinery fixed onto the building, form part of the property while they are in-situ. Therefore, they belong to the landlord at the end of the lease term unless during, or at the end of the term, the tenant exercises its right to remove them. However, although a tenant can normally remove its fixtures, the lease can modify or exclude this right.

A recent Court of Appeal case has highlighted how important it is to check the provisions of the lease when installing fixtures so that both parties are clear about who the tenant's fixtures will belong to.

In 1971, a tenant entered into a 125 year lease of a site on which it agreed to build a fully-equipped steel making plant and rolling mill. The lease contained a covenant by the tenant not to make any alterations or improvements to the premises except in connection with steel making, steel rolling and ancillary operations. Later on, the tenant wished to remove and sell large parts of the steel making plant on the basis that these items were removable tenant's fixtures or chattels.

The landlord argued that the tenant could not because the removal was not in connection with the use of the premises for steel making. In the lease, the premises were defined as including the building and any landlord's and tenant's fixtures within the building from time-to-time. The Court of Appeal confirmed that the prohibition in the lease against alterations to the premises overrode the tenant's right to remove the fixtures, as they formed part of the premises. Therefore, the tenant was not allowed to remove any fixtures unless the intended removal was in connection with the use of the premises for steel making.

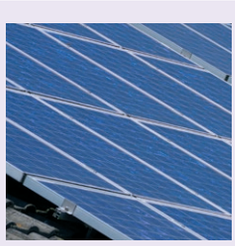
This case highlights the need for both parties to consider at the outset what should happen to tenant's fixtures. If the landlord wants to prevent a tenant from removing tenant's fixtures (perhaps because a large rent-free period was granted to the tenant in exchange for installing those fixtures) then this needs to be clearly stated in the lease to avoid any doubt.

Likewise, if the tenant wants to be certain that they can remove their fixtures at any point during the term, they need to make sure that the lease does not contain provisions which would prevent them from doing so.

Susie Wynne
susie.wynne@willans.co.uk

Partner Susie Wynne – experience includes portfolio management and investment work for high street names, telecommunications sites and large scale property finance.

Frank Smith and **Susie Wynne** have been instructed on the grant of a photovoltaic lease on the rooftop of farm buildings near Cheltenham. The lease will provide a steady income stream for our farming clients, for many years. This is one of the many types of renewable energy projects that our firm advises clients on.



Jonathan Mills and **Susie Wynne** acted for the landlords on an unusually complicated letting of an industrial unit. Issues included the renewal of the roof structure and the grant of a separate lease of the airspace for the installation of photovoltaic panels.

Preserving commercial relationships – an advantage of mediation

Mediation can be a very effective way of resolving a dispute.

Nick Southwell – an accredited civil and commercial mediator who handles a wide variety of work for both commercial and private clients.

Although there is no requirement for a party in dispute to agree to it, the courts are very keen to promote both it and other forms of alternative dispute resolution. They require both sides at all times to try to reach a settlement, both before and after proceedings have commenced and up to any trial or final hearing. If a party offers mediation the court may penalise the other side if they do not consider it.

The advantage of mediation in a commercial dispute, particularly before proceedings are issued, is that it gives both sides the opportunity to settle the disagreement between them, instead of taking the issue to court.

This distinction is in our view extremely important for two reasons:

- The terms agreed can address all of the issues and can therefore be much wider than any order imposed by the court. In contractual disputes the court will usually limit itself to an order for damages or injunctive relief.
- From a commercial point of view there is scope in the course of a negotiation to go into the issues which caused the dispute and for both parties to compromise, in order to reach a settlement. By doing so, they could preserve what may be an important commercial relationship which would almost inevitably break down should the dispute go to trial.

Mediation is a much quicker and less expensive process than court proceedings. If the matter reaches court, it may go on for years and is likely to be prohibitively expensive with an uncertain outcome. A successful mediation will result in a written agreement which will be legally binding on both parties and enforceable by the courts.

We understand the importance of preserving business relationships and have a team of experienced mediators who would be happy to talk you through the process.

Nick Southwell
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Rural news

Specialist rural affairs partner, Frank Smith is a nationally-recognised expert in agricultural, rural and equine matters.

Agricultural property relief – will your farmhouse qualify?

A farmhouse that is eligible for agricultural property relief (APR) will provide significant benefit to anyone wanting to reduce their liability to pay inheritance tax (IHT) upon their death. A recent case was won by the tax payer which will bring comfort to farmers where the farmhouse and land are owned separately.

Are business rates payable on renewables?

Farmers who have diversified into renewable energy generation over recent years may wonder whether they will find themselves liable to pay business rates.

Issues to consider when buying land with 'possessory' title

Where a seller's title is based upon adverse possession (commonly known as squatting) or where a title cannot be proven because the title deeds have been lost or destroyed, a seller is said to have a 'possessory' title only, rather than 'absolute' title.

To read Frank Smith's articles in full, visit www.willans.co.uk/news

Residential landlords and section 21 notices – which type should you serve?

A recent Court of Appeal case has resolved some uncertainty and now makes it easier for landlords to serve the correct section 21 notice.

Amy Gates – handles disputes arising out of commercial contracts, property and landlord and tenant matters.

A statutory periodic tenancy will arise at the end of a fixed term assured shorthold tenancy. Which type of section 21 notice should be served to end such a tenancy has been a topic of debate for some time as it was unclear if the landlord should serve a notice under section 21(1) or section 21(4). The difference is that a notice under section 21(1) does not have to expire on a particular date but a notice under section 21(4) must expire on the last day of a tenancy period, specifying that possession is required after that day. Consequently, it is possible for a landlord to serve an invalid notice under section 21(4) simply by miscalculating the expiry date of the notice.

Since the decision of the court in *Spencer v Taylor*, it is no longer necessary to comply with the additional requirement of section 21(4) of the Housing Act 1988, if the fixed term of the assured shorthold tenancy has expired and the tenant is on a statutory periodic tenancy.

A section 21(1) notice to evict the tenant should now be served where an assured shorthold tenancy is granted with a fixed term, whether that fixed term has come to an end or not. Where an assured shorthold tenancy is granted as a periodic tenancy from the outset, a notice under section 21(4) should be served.

Amy Gates
amy.gates@willans.co.uk

2014 property industry update – what will happen this year?

Commercial property lawyer Alasdair Garbutt summarises some of the developments relevant to the property industry that are expected in 2014.

The government has hopes of streamlining the UK's planning system and encouraging homebuilding and home ownership. Energy costs have dominated the news in recent months and property owners need to remain vigilant to changes that may have consequences on property ownership and management.

Changes to look out for include:

- Implementation of the commercial rent arrears recovery scheme
- Proposals to assist businesses in England with the cost of business rates
- The passage through Parliament of the High Speed Rail (London - West Midlands) Bill 2013–14
- A focus on tighter regulation of the privately rented sector
- More detail on the reform of the Common Agricultural Policy
- Reform of flood insurance through the Water Bill 2013–14
- Changes to the planning regime for nationally significant infrastructure projects
- A halving of the final period exemption for principal private residence relief
- Consultation on the introduction of capital gains tax on disposals of UK residential property by non-UK residents for Capital Gains Tax.

Look out for updates in later editions of Law News where we will include details of any significant legal implications.

Alasdair Garbutt
alasdair.garbutt@willans.co.uk

Alasdair Garbutt – a commercial property specialist who is experienced in sales & acquisitions, development transactions, landlord and tenant and property management matters.

Beware of contractual deterrents in share purchase agreements

A recent Court of Appeal decision *El Makdessi v Cavendish Square Holdings BV* has clarified that certain types of contractual clauses in the context of a share sale could be classed as penalty clauses. (We previously reported on the High Court decision in our spring 2013 issue).

In this case, the court held that certain penalty clauses in a share purchase agreement were unenforceable. They provided that, in the event of a breach of the seller's restrictive covenants, the buyer's obligation to pay deferred consideration would cease and he would be entitled to acquire the remainder of the seller's shares at a price based on net asset value (and excluding goodwill).

This case suggests that a careful approach is needed where a buyer of shares wants to link payment of deferred consideration to the seller's compliance with non-compete or similar covenants following completion of the transaction. Clauses in a share purchase agreement, which provide that deferred consideration will cease to be payable in the event (and as a consequence) of a breach of the seller's restrictive covenants, will be vulnerable to challenge on the grounds that they constitute an unenforceable penalty.

It was acknowledged that it might have been possible to avoid the application of the doctrine of penalties, if the agreement had been drafted so that the buyer's obligation to pay the deferred consideration was conditional on the seller's compliance with the restrictive covenants. Bearing this in mind, the buyer should consider structuring the deferred consideration as a conditional payment, rather than providing that its payment obligation will fall away in the event of, and as a response to, the seller's breach of covenant.

The case highlights that contractual deterrents in share purchase agreements should not be used without careful consideration of their potential legal implications.

For a checklist on buying a business or enterprise, please visit willans.co.uk/downloads to read our "Guide to buying a business".

Theresa Grech
theresa.grech@willans.co.uk

Theresa Grech – wide experience of corporate and company matters, and is a specialist in data protection and IP.

More news on our website **www.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.

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