

Law News

Newsletter for commercial clients

Spring 2015

Chambers 2015 – leaders in their field



We are pleased to report another good showing in *Chambers*, the annual independent legal directory. It researches the UK legal scene, conducting interviews with lawyers, clients and business contacts and compiles a list of recommended firms and lawyers.

For the first time our intellectual property department is acknowledged to be one of the best in the county, with an impressive tier one ranking. Our employment and family/matrimonial lawyers are also ranked tier one.

Most of our departments and 11 lawyers have been ranked. New entrants to the individual rankings for their work are litigation partner **Paul Gordon**, company commercial partner **Theresa Grech**, the *"open, friendly and diligent"* wills, probate & trusts associate **Ruth Baker**, *"pleasant, straight-talking"* agricultural partner **Frank Smith** and the *"very professional, knowledgeable and attentive"* commercial property partner **Nigel Whittaker**.

HR Legal Toolkit introduced at the Gloucestershire Business Show

We have joined forces with HR software specialists Cloudtamers and developed an innovative software solution to help HR managers, and those with line management responsibility, to manage human resources more efficiently and to mitigate employment law risks. We will be launching this new module at The Gloucestershire Business Show in May.

Cloudtamers Ltd has been working with ERP, HR and payroll solutions since 1991 and helps organisations keep track of their most valuable assets: customers, employees and finance. In 2013 they developed HR management software which covers the entire employment lifecycle, from recruitment, through retention and reward to release. This powerful cloud-based system can assist businesses globally – and it is all contained within one system.

The ground breaking new element, HR Legal Toolkit, integrates with Cloudtamers HR software and creates a seamless system to guide users through approved HR processes – from recruiting to performance issues or dismissal – thereby controlling spend and reducing

the likelihood of litigation. This service provides a 'one-stop shop' for businesses with staff in England and Wales – no matter what the size or industry.

Come and visit us on stand CA5 near the Entrepreneurs Bazaar at The Gloucestershire Business Show on 13 and 14 May 2015 at Cheltenham Racecourse.

Law News is now available electronically. If you would prefer to receive it in this format then please let us know, email us at: law@willans.co.uk

CLOUDTAMERS

Cloudtamers HR Legal Toolkit

Process templates | Document library | Legal helpline

Official legal provider

willans

Willans LLP | solicitors

Top tips for trustees

Conflicts of interest

On 1 May 2014, the Charity Commission updated their conflicts of interest guidance; it contains a revised definition and introduces a three-step approach to handling conflicts of interest.

The essential trustee

On 25 November 2014, a new version of the Charity Commission's "The essential trustee" guidance was published. It is due to issue a final version in Summer 2015 following recent consultation with trustees.

Annual return 2015

The updated online return is now ready. All registered charities with an income of more than £10,000 and all CIOs who are reporting on their financial years ending in 2015 must complete the online form.

Public benefit reporting

A reminder that trustees of registered charities must state in their annual report how they have carried out the charity's purposes for the public benefit.

Kate Hickey
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Trustees of charities – is CIO status for you?

Since The Charities Act 2011 introduced the new form of legal entity, known as a charitable incorporated organisation (CIO) 3,426 charities have registered as CIOs.



Kate Hickey – a corporate lawyer with a charities & not-for-profit sector focus.

Unless a charity is purely grant making, its activities almost certainly involve a level of risk, which may create personal liability for the trustees. It is possible to give considerable protection to the trustees by incorporating the charity as a company limited by guarantee or a CIO.

CIOs are increasingly popular although their power to borrow money is limited, since there is no register of charges at the Charity Commission for a lender to give notice of its security. However, a CIO is a separate legal entity in its own right and enjoys a simple regulatory regime, since it only has to register with, and report to, the Charity Commission.

By contrast, a company limited by guarantee has to comply with two sets of regulations – those under company law and those under charity law. A CIO is able to hold property itself and does not require trustees to hold property on its behalf, thereby avoiding the need to document assignments of property or contracts every time there is a change of trustees.

The Charity Commission said some while ago that it was going to introduce a straightforward procedure for trusts to convert to CIOs. We are still waiting for these regulations to be issued. Until then the way to proceed is to incorporate a new charity in the form of a CIO; transfer the assets from the old charity and then dissolve the unincorporated charity. This process involves drafting a new constitution for the CIO and then applying for registration to the Charity Commission. Once the CIO is registered, an agreement is prepared to transfer the assets of the original charity to the new CIO.

Care should be taken over the transfer of existing contracts (including employment), since a change of control may be triggered or novations and registration of property may be required. Once the asset transfer has been completed, the original charity is dissolved.

Kate Hickey
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Business immigration – how we can help

With immigration a key political issue ahead of the upcoming general election, businesses can often find themselves on the front line of the debate. Therefore, it is vital that they ensure their recruitment processes are in line with statutory requirements.

Employers are increasingly relying on overseas workers to provide the skills they need for their business, and immigration clearance for key employees can therefore be crucial for a business to succeed.

Following the introduction of the points-based system, employers are required to do more than ever to comply with immigration regulations, or face significant penalties for employing illegal workers.

It is important that a business puts in place the correct procedures and trains recruitment staff to operate them to ensure compliance and avoid any penalties.

Our employment team provides a full service to employers, from advising on business visitors and international assignments, to the tiered points-based system. We can also assist overseas companies looking to transfer employees to the UK.

We can help companies obtain sponsorship under the points-based system and provide practical advice on using the sponsor management system.

Business immigration can play a key role in a company's workforce. We go the extra mile to provide practical and business-focused advice to help businesses achieve their commercial goals in a cost effective way.

Matthew Clayton
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Matthew Clayton – Chambers UK say: "is responsive, commercial, understands where employers are coming from and gets right to the point."

Client news

National shelter and homelessness charity **Shelter** has instructed commercial property associate **Alasdair Garbutt** to manage the majority of its property in England. Alasdair has previously handled

a number of shops for them but they have now appointed him to look after a portfolio of 66 shops and 20 offices around the country.



Dispute resolution partner, **Paul Gordon** obtained a favourable judgment for UK company **Excelerate Technology**. They recently won a costs order on account of over 90% of their budgeted costs; a very good day in court.

New company name and trading disclosure regulations cut red tape for businesses

New regulations which came into force on 31 January 2015 have made it easier for companies and LLPs to choose or change their name.

The Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2014 introduced a reduced list of words and expressions, for which companies, LLPs and businesses need approval of the Secretary of State to use in their name. The 'sensitive' words that have been deleted from this list include "National", "Board" "European", "Group", "Holding", "International" and "United Kingdom".

Having to seek approval for a name can hold up registration. The aim of reducing the list is to allow a greater number of new companies to incorporate quickly without delaying the process.

The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2014 replace five sets of regulations and deal with restrictions relating to the registered names of companies, LLPs and business names, and the requirements for making trading disclosures.

The regulations implement the following:

- the list of characters, signs and symbols that can be used in a name is extended. Previous regulations required a company name to consist of letters from the roman alphabet and a small number of additional characters. The characters have been extended to include "@", "&" "£" "\$" and "€" amongst others.
- the words to be considered or disregarded when determining if a proposed name is the 'same as' another in the registrar's index are amended.
- the trading disclosures requirements are amended, so that if at least six companies share an office, place or location, their registered names may be held and made available for inspection at that venue, rather than the name having to be displayed at all times.

Further details of these Regulations can be found at www.legislation.gov.uk

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

The new fees for money claims

Large increases in court fees were introduced in March. If a money claim is below £10,000, then the court fees are unchanged, but for those above, the court fee will be 5% of the value of the claim. This will be capped at £10,000 for a £200,000 claim, and those lodged via Money Claim Online will have a 10% discount on fees.

This increase has caused great concern to both the Civil Justice Council and senior judges, who argue that it may limit access to justice and prevent equality before the law.

There is now a proposal to raise the court fees for possession claims by £75.

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

Big business quiz – save the date 19 May

Calling all keen quizzers! Our annual charity quiz will be held on Tuesday 19 May at National Star in Ullenwood, Cheltenham. A fantastic quiz night, it provides great networking opportunities, as well as prizes for the best team.

Contact
events@willans.co.uk
or call 01242 542916
to sign up a team of 4.
Cost is £50 per team.

Dispute resolution lawyer, **Nick Southwell** successfully acted for Mr Horrocks in a breach of contract claim against Bank House Investment Management Ltd for fees and commissions which were due to him

following the termination of an agreement. We recovered damages together with indemnity costs for Mr Horrocks.



Rural legal experts **Frank Smith** and **Rupert Burchett** defeated an application to register manorial rights over a client's farmland in Gloucestershire, successfully arguing to

the Land Registry that the evidence provided was deficient.

Should you settle a claim early to restrict costs?

Litigation is a very expensive way of resolving disputes and it is not uncommon for the cost of issuing, or defending, a claim to exceed the damages. One way of trying to limit your exposure to costs is to use Part 36 of the Civil Procedure Rules.

Under this rule one party makes a formal without prejudice offer to the other party to settle the dispute. It can be made at any time, whether or not proceedings have been issued. If the offer is accepted, the defendant is required to pay the claimant's costs up to the date of acceptance. However if an offer is not accepted you should consider the cost consequences bulleted below.

Note that costs are awarded on either a standard or an indemnity basis. In the case of the former, the party receiving their costs must prove the reasonableness and proportionality of the amount claimed. In the case of the latter, there is no requirement for the costs to be proportionate, which means that it is for the paying party to show that the costs claimed are unreasonable.

- The claimant succeeds but fails to beat his own offer – the claimant is awarded costs on the standard basis
- The claimant equals or beats his own offer – from the expiry of the relevant period the claimant is likely to be awarded interest on the whole or part

of the sum awarded to him; costs on the indemnity basis; interest on those costs and (as a penalty) an additional percentage of the amount awarded

- The claimant loses – the claimant pays the defendant's costs on the standard basis plus interest from expiry of the relevant period until judgement
- The claimant beats the defendant's offer – the claimant is awarded costs on the standard basis
- The claimant fails to beat the defendant's offer – the defendant pays the claimant's costs on the standard basis up to the expiry of the offer; thereafter the claimant pays the defendant's costs on the standard basis plus interest
- The claimant loses at trial – the defendant is awarded costs on the standard basis plus interest from the expiry of the relevant period until judgement

For the defendant in particular, where there is a concern over liability, and in order to protect their position on costs, it is important to put forward a reasonable offer to settle the claim in accordance with Part 36 as soon as possible.

Nick Southwell
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Nick Southwell – handles a variety of disputes and is focused on providing pragmatic and commercial advice to clients to achieve results whether in negotiations or at trial.

Amending a contract? Remember the law against penalties

Commercial contracts often contain what is known as a liquidated damages clause. One party may have to pay the other a pre-agreed sum for failing to meet a particular obligation in the contract. To be enforceable such a sum needs to be proportionate and a genuine pre-estimate of loss, and should not amount to a 'penalty'.

In a recent case, the High Court had to consider a contract which had been amended to substantially reduce the price payable for services under the contract, but where the liquidated damages provision had not been reduced. The court ruled that the

provision was void as a penalty and unenforceable as the sum was no longer proportionate.

This case is a useful reminder that, when varying the contract, you should think about the effect the amendment may have on the original liquidation damages provision. Is it rendered disproportionate and unenforceable? If so, the parties should also consider varying the liquidation damages clause.

Theresa Grech
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Client news

Our **wills, probate & trusts team** recently supported the Ministry of Justice's campaign to highlight the importance of planning your future by making a will and a lasting power of attorney.

#ChoicenotChance encouraged people to think about what would happen in the event of their death or loss of mental capacity. Through the use of social media the MoJ aims to raise awareness among the

25-50 age group. It is reported that this group is less inclined to consider making a will, despite often having young families, or running their own businesses on which their families depend.



Shareholders' agreements – Why do you need one?

Whether you are a small company with two, or a larger business with multiple shareholders, it is impossible to overstate the importance of having a properly drafted shareholders' agreement.

The agreement helps manage the relationship between directors and shareholders within a business, providing clarity and certainty and enabling directors to focus on the running of the business whilst also providing protections for shareholders.

It is very important that a shareholders agreement is a bespoke document, drafted to address the specific needs of a particular group of shareholders. For example, the agreement can be used to:

- control the decision making capabilities of the board of directors
- set the dividend policy of the company
- put in place procedures which the company must follow for share transfers or on a sale of the company
- protect minority shareholders' interests by placing restrictions on dominant shareholders
- determine what happens to his shares if a shareholder becomes bankrupt or if his employment with the company is terminated

- set out what happens if a shareholder dies, by implementing cross options, deemed transfer notices or permitting transfers to family members
- place restraint of trade provisions on shareholders, restricting their ability to compete against the company.

Failure to put a shareholders agreement in place means that there is greater uncertainty in the event of a dispute or if an unexpected event occurs.

In the absence of an agreement it will be much harder to resolve disputes between shareholders quickly and cheaply.

We must stress that an agreement does not guarantee that disputes between shareholders will be avoided. It does however, provide shareholders with a security blanket, giving them assurance that if ever a problem arises they have a point of reference which is likely to protect their interests.

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

New fact sheet available – Company books checklist

All companies are required under the Companies Act 2006 to keep their company books up-to-date. We have produced a guidance note of the typical information you should include in your books which can be accessed from downloads on our website.

Rural news



Specialist rural affairs partner, Frank Smith is described by *Chambers UK* as “a pleasant, straight-talking solicitor.”

Come and see us at the Cotswold Point-to-Point, 12 April

We are pleased to be supporting the Cotswold Point-to-Point on Sunday 12 April at Ossage Farm, Andoversford, Gloucestershire. Come and visit us at our tent for a glass of wine and other refreshments.

Careful lotting of farmland is required to save SDLT

The Autumn Statement in December saw wholesale revisions of the stamp duty land tax (SDLT) system. The changes will bring major savings on residential transactions below £937,500 but anything above that figure could result in a higher SDLT bill.

Agricultural buildings and permitted development rights

Local authorities have been slow to come to terms with the new Class MB permitted development right, which allows agricultural buildings under certain circumstances to be converted into residential dwellings. Successful conversions are almost always only taking place where applicants appeal the initial decision.

CAP reform – Basic Payment Scheme

1 January 2015 saw the introduction of the Basic Payment Scheme (BPS) which replaced the existing Single Farm Payment Scheme. Take care if you are thinking about restructuring your existing business to “fit” the new regulatory requirements.

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

Employing an ex-offender – retribution or rehabilitation



Asim Khan – advises individuals and businesses on a full range of employment law issues.

Society believes that an offender should be punished for their crime. However, it also recognises that once the punishment has been served, the offender should be rehabilitated back into society having served their “time”.

The recent media coverage and furore surrounding the case of footballer Ched Evans, who was convicted of rape and imprisoned in 2012, has placed the subject of employing offenders firmly in the spotlight.

The issues faced by an employer in such a situation will depend on the individual’s length of service, the nature and seriousness of the crime, and whether the conviction is spent or unspent. In all cases, the key to an employer successfully navigating this difficult area will be ensuring that they have a clear and comprehensive understanding of their rights and obligations (if any) to the relevant individual, and undertaking appropriate due diligence.

The Rehabilitation of Offenders Act 1974 prohibits an employer using knowledge of a spent conviction as grounds for excluding or dismissing a person from employment. However there is no specific penalty provided for breaking the law here. Under the Exceptions Order, certain roles are excepted and examples include lawyers, teachers, police officers and those who provide health services.

Whether or not an employer can safely dismiss someone will depend upon the circumstances. It is extremely unlikely that a dismissed employee could allege discrimination because they would have to rely upon one of the so-called protected characteristics.

However, if the employee has sufficient qualifying service to bring an unfair dismissal claim, and the dismissal is based merely on the discovery that the employee has a spent conviction, then it will not fall within the range of permitted reasons for a dismissal.

An interesting point for consideration is whether or not an employee who resigns because they are asked to work alongside, for example, a convicted rapist, could have a claim of their own for constructive dismissal. An employer would need to be alive to this potential issue.

It is important that employers avoid making knee-jerk reactions and consider what bearing, if any, the offence has on the particular role in question.

Asim Khan
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Thomas Pink wins trademark court battle against Victoria’s secret

In *Thomas Pink Limited v Victoria’s Secrets UK Limited*, the British shirt maker issued court proceedings for trademark infringement against lingerie retailer Victoria’s Secret over the right to use the word “PINK”.

Thomas Pink is the registered proprietor of the trademark “PINK”. Victoria’s Secret used a similar logo as a sub brand and opened UK retail units.

Victoria Secrets counterclaimed for revocation of the UK mark for non-use and invalidation for a lack of distinctive character. The court had to consider whether Thomas Pink could rely on use of the mark in a different form to that later registered.

The court said that proprietors do not always consistently use a mark in the precise form it is registered. There was no good reason why European trade mark law should be so restrictive as to require that the use relied on for a mark to acquire distinctive character had to be use of the mark as exactly registered.

The court found that Victoria’s Secret’s use of “PINK” in the EU both on its products and as the name of its stores was an infringement of Thomas Pink’s registered trademark.

It is unlikely that this will open the floodgates to allow other businesses in the retail sector to monopolise coloured names. The Thomas Pink trademark is registered in a specific logo form (not the word itself) and it was a result of the trademark having acquired distinctiveness with consumers, and being used as a brand for such a long time, that Thomas Pink was successful in this case.

It is also interesting that as a result of the judgment in favour of Thomas Pink, the court awarded them 90% of their budgeted costs.

Paul Gordon
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Partner Paul Gordon – an experienced litigator and mediator, used to handling complex commercial proceedings, who has acted for many large corporate organisations.

Are you dealing with your digital legacy?

£25 billion. That is the current reported figure of unclaimed digital assets in the UK alone.



Partner Simon Cook – a private client practitioner with over 22 years' experience, he deals with all aspects of wills, probate & trusts work.

What are digital assets?

There is no precise legal definition but commonly they include:

- online bank accounts
- photographs and videos stored online
- blogs and e-books
- social media statuses and tweets
- information contained in documents, such as emails.

Each internet service provider may have different policies for dealing with online assets on death. These policies will have been accepted when the online account was created. A few examples are:

- **Facebook** – since 2009 Facebook has allowed accounts to be memorialised so that family and friends can continue to post photographs and comments on a deceased account holder's timeline. However, logging into or editing a memorialised account is not permitted.
- **Google** – since April 2013 Google's inactive account manager allows account holders to decide how their stored data should be dealt with once they have died.
- **Apple/iTunes** – this is a licence only and there are no rights to reproduce content. Account holders are prohibited from passing on details of ID and passwords to others.
- **Apple/iCloud** – these accounts are personal to the account holder and cannot be transferred on death.
- **Twitter** – accounts terminate immediately on death.

What should I do?

Most wills contain a clause dealing with personal chattels. Computer hardware (eg the computer itself) is a tangible asset and falls within the definition of personal chattels, but digital assets are intangible ones and therefore are not covered by the definition.

We suggest you consider amending the usual personal chattels clause in the will to include digital assets, or make a separate provision or leave them to be dealt with as part of your general residuary estate.

To summarise, there are a number of important points to bear in mind regarding digital assets to ensure that they do not add to that £25 billion:

- Make a list of digital assets that have financial or sentimental value.
- Choose who should deal with the digital assets. Remember this could include access to emails so privacy may be an issue.
- Keep records of online accounts, usernames and passwords regularly updated and separate from the will. Consider using a third party provider, such as an online password protection programme, to help.
- Make a will and consider your digital assets carefully.

Simon Cook
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Starlight: carol concert success

Thank you to those who attended our first carol concert last December which raised close to £1,000 for local charity National Star. We received very positive feedback and will look to hold a similar concert later this year.

Marketing calls – fines imposed

A first tier tribunal has upheld a monetary penalty notice for £50,000 for failure to comply with the rules on unsolicited direct marketing calls, as set out in Regulation 21 of the Privacy and Electronic Communications Regulations 2003 (as amended).

A company selling UPVC windows and related products to the domestic market made nearly 4 million telephone calls between May 2011 and April 2013 of which some 80% to 90% were direct marketing calls. The Information Commissioner relied on 524 unsolicited marketing calls, many of which had been made to individuals who had registered their telephone number with the Telephone Preference Service.

This case serves as a useful reminder to businesses that they are legally obliged to check the Telephone Preference Service before calling individuals, without their consent, for direct marketing purposes. Organisations need to keep up-to-date and accurate records, evidence of staff training and compliance in relation to direct marketing.

Theresa Grech
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Stay informed: 2015 employment law seminars

Our employment lawyers are running another series of their popular breakfast briefings aimed at providing directors, HR managers/advisors and in-house lawyers with the top-line facts.

Venue

Cheltenham - National Star College, Ullenwood, Cheltenham, Gloucestershire GL53 9QU

Gloucester - Holiday Inn Express South Gloucester, Waterwells Business Park, Quedgeley, Gloucester GL2 2AB

Timings

7.30am - Registration, breakfast, networking and meet the speakers

8.00am - Seminar

9.00am - Close; further networking opportunity

Cost

£15 per seminar (incl VAT). Receive a special rate of £30 if three seminars are booked.

To book

Register for these briefings at events@willans.co.uk, supplying the name of attendee(s) and seminar dates you wish to book, as well as your company details and telephone number. Alternatively, please call us on 01242 542916.

Dates and topics:

14 May 2015

Disciplinary processes – FAQs (Cheltenham)

Tuesday 22 September 2015

'Ask the expert' - put your questions to the speakers (Cheltenham)

Thursday 19 November 2015

Employment law changes this year and next (Gloucester)

Thursday 26 November 2015

Employment law changes this year and next (Cheltenham)



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.

Company/commercial

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Employment law

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Litigation & dispute resolution

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Paul Gordon paul.gordon@willans.co.uk

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