Willans LLP | solicitors

Law News

Newsletter for commercial clients

Spring 2016

Strong showing in national legal guide

We are celebrating another good year in *Chambers*. The guide researches the UK legal scene, conducting interviews with lawyers, clients and business contacts and compiles a list of recommended firms and lawyers.

Seven departments and ten lawyers, some twice, are recommended. Our commercial teams compete with many heavy-weight firms across the entire South West, and our family department retains its impressive tier one ranking.

The guide quotes clients as saying *"I find them absolutely brilliant – they always pick up the phone quickly and go out of their way to be obliging."*

Our commercial property team are considered *"very flexible and adaptable in how they deal with us. We feel really valued as a client."*

Corporate and commercial lead partner, Paul Symes-Thompson brings *"to bear notable experience in corporate transactions both domestically and abroad, as well as joint ventures and disposals."*

"Nicholas Cox of Willans is recognised as a superb litigator" and sources say employment law partner, Matthew Clayton *"takes his time to understand the client's business."*

Trustee oversight

The Public Administration and Constitutional Affairs Committee report into the recent Kids Company debacle provides us with a good example of how the issues raised in the Cadbury report on corporate governance remain just as pertinent today as they did over 20 years ago.

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

One of the key issues highlighted in the PACAC report was that there was 'negligent' trustee oversight of senior management, particularly with regard to the charity's financial health. Trustees have to be comfortable with number-crunching and ensure that there is a suitable reserves policy in place (see our article on top tips for charity trustees which provides updated finance guidance).

Beyond the finances, trustees remain 'jointly and severally' accountable for the organisation and, as such, have a duty to challenge decisions across all areas of its operations.

A good relationship between the chair and the chief executive is the cornerstone to effective trustee oversight. For this to be in place, there must be clarity over their respective roles but sufficient trust for the delineating point to ebb and flow as circumstances dictate.

The chair needs to understand when it is appropriate for the trustees to step in and challenge decisions (for example, by ensuring that they receive regular and comprehensive reports), but equally an overbearing chair can alienate an otherwise enthusiastic chief executive. Similarly, the chief executive must not view the trustees as a nuisance but rather as stakeholders to whom he is providing a service and, one would hope, as experts in the sector upon whom he can rely for support.

Personalities will, to an extent, influence the precise nature of the relationship but the chair needs to be aware of his role and responsibilities, even where the chief executive appears to be extremely competent. Alan Yentob, the chair of Kids Company, has come under particular scrutiny in this regard since it was felt that the chief executive's domineering and confident personality contributed to his rather passive approach.

Trustees may like to consider organising a short training session where there has been a recent change of senior staff or trustees, or where relations have become a little strained, to remind the key players of the importance of a strong governance structure and to remind the trustees of their duties and responsibilities.

Laura Davis
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Be careful what you give away

A recent case has highlighted how developers need to be cautious when creating multi-use developments. In particular, they need to think very carefully about what rights each part of the development will have once it is complete.

This case concerned an estate where part of the land had been developed as timeshare units, and each owner had the exclusive right to occupy a particular unit at specified periods each year. The rest of the estate was adjacent to the timeshare land and had sporting and recreational facilities. These were open to members of the public who paid to use them.

When the timeshare land was transferred to separate ownership from the estate, it was given the benefit of a set of rights. These included usual rights of way and utilities. However, they also included a right to use the sporting and recreational facilities from time-to-time.

The owners of the estate argued that the rights to use the facilities were personal rights between the parties to the original transfer, and, as the land had now been sold on, the rights did not bind the land and therefore the current owners of the timeshare land should not use the recreational facilities. The original transfer did not contain any charging provisions in return for the facilities, so if the right to use them took effect as easements (rights capable of being used by subsequent owners of the land) they would be available free of charge.

Unfortunately for the owners of the estate the court decided that the right to use the facilities took effect as easements. The grant of the rights had been made by a developer for a number of timeshare owners, and did not concern neighbours in a purely domestic context.

There was no compelling evidence in this case to suggest that the rights to use the facilities were personal, and therefore they would continue to benefit the timeshare land. Indeed, the wording of the rights in the transfer indicated that it was a right for the transferee, its successors in title and occupiers of the timeshare land.

Susie Wynne
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The *"brilliant"* Susie Wynne is noted for her extensive commercial property experience.

Opening the floodgates on water pumping claims

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

In the case of *Robert Lindley Ltd v East Riding of Yorkshire Council* (reported in January this year), a farmer won a compensation claim in the Lands Tribunal for crop losses caused by the council pumping flood water away from the village of Burton Fleming.

The village suffered serious flooding between December 2012 and March 2013 and the council reacted by pumping water away from residential properties and into a water course which breached its banks next to the farming company's fields. The farm suffered additional flooding and the company lost part of its carrot crop. It brought a successful claim for compensation under the Land Drainage Act 1991 but it would have also had rights under common law, trespass or nuisance.

This decision can be seen as a test case as there are allegedly a large number of other similar claims for damage due to the pumping of flood water. In this case, the sum may have been relatively modest but the issue and principle involved will have far-reaching effects in respect of other claims.

The question to consider is whether this case opens the floodgates to claims for compensation for damage to, for example, residential or commercial properties caused by pumping flood water.

Alasdair Garbutt
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Client news

Corporate & commercial partner Theresa Grech recently acted for **CGT Lettings Limited** and **Tewkesbury Residential Lettings plc** in relation to a group reorganisation. This saw David Baker, who had been at CGT for 12 years, leave to work with his son in a family business. CGT Lettings Limited was first established in 1987 and has rapidly expanded (now having five offices including its recently opened Stroud office) so as to become one of Gloucestershire's leading residential letting and property management companies.

PSC register – new rules from 6 April!

The Small Business, Enterprise and Employment Act 2015 (SBEE) materially reforms UK company law with key changes being implemented in different stages. One of the changes is the introduction of a central public registry of those individuals or entities who have significant control of UK companies (known as PSCs and RLEs).

- From 6 April 2016 companies and limited liability partnerships (LLPs) must keep a register of individuals or legal entities that have significant control over them (known as a PSC register).
- From 30 June 2016 onwards companies and LLPs will have to deliver this information to the central public register at Companies House when making a confirmation statement. (It is anticipated that this requirement will tie in with the requirement for companies to submit an annual confirmation statement rather than an annual return.)
- From 30 June 2016 those setting up a new company or LLP will have to send a statement of initial significant control to Companies House, alongside the other documents needed when applying to incorporate.

Who is a person with significant influence or control (PSC)?

Companies – if a person holds, owns or controls more than 25% of a UK company's shares or voting rights, or who otherwise exercises significant influence or control over the company or its management.

LLPs – if a person holds the right to more than 25% of the assets on a winding up, holds more than 25% of the voting rights, or holds the right to appoint or remove a majority of management.

This is a brief summary of who can be called a PSC. For detailed statutory guidance on understanding the meaning of significant influence or control please click on these links if you are a company or an LLP or visit www.icsa.org.uk

Risk of non-compliance

The majority of UK companies will need to comply with the provisions of these obligations or risk being convicted of a criminal offence, (broadly speaking, UK listed companies are exempt as they are already subject to disclosure requirements under their listing rules). The offence is punishable by a fine and/or up to two years imprisonment.

Next steps

Over the next few months an officer of the company should:

- identify PSCs in the company and confirm their details using the guidance above
- record the details of the PSC on the company register
- provide the information to Companies House as part of the confirmation statement
- update the information on the company register as and when it changes, and update the information at Companies House when it makes its next confirmation statement.

The PSC register can never be blank. Where for some reason, the PSC information cannot be provided, other statements will need to be made explaining why the PSC information is not available.

For further guidance on this please refer to annex 2 and section 8.9 of the draft guidance, the summary (non-statutory) guidance or the website www.icsa.org.uk

Theresa Grech
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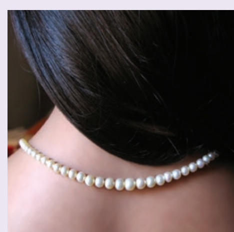
Praised by clients for delivering an *"excellent service"* and providing *"good solid advice"*, Theresa Grech is a partner with wide experience of corporate and commercial matters, and a specialist in data protection and IP.

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

We acted for well-known jewellers **Miles Mann Limited** on their recent acquisition of **Abbey Fine Jewellery** in Berkhamsted. Paul Symes-Thompson advised on the acquisition agreement, whilst Susie Wynne dealt with the property aspects and Jenny Hawrot advised on the employment law issues. Miles Mann Limited already own and operate a number of jewellery businesses in Cheltenham and the Cotswolds.



Paul Symes-Thompson and Alasdair Garbutt handled the acquisition by **Abbeyserve Limited** of **Abbey Vets** in Derby which completed earlier this year. This involved the allotment of new shares in Abbeyserve Limited to a group of investors. We helped with the bank funding requirements as well as the acquisition documents. Alasdair advised on the property aspects including the grant of two new leases.

Courting trouble?

In its 2015 review and accounts, HM Courts & Tribunal Service (HMCTS) made clear its aims. These included providing the infrastructure for a fair, efficient and accessible courts and tribunals system.

However, on reading those accounts it became clear that they, like most other arms of government, had a problem: money.

That might come as a surprise to a visitor to the newly upgraded Rolls Building in London, which is the centre for international dispute resolution. London, another recent report disclosed, is a major international hub, with over half of the litigants in High Court cases being foreign domiciled. The High Court is a major earner for HMCTS and for London firms.

Around the country the picture is rather different, particularly in the county court, where most cases are dealt with. Complaints to HMCTS about poor service are up from 13,451 to 15,866 in 2015, and in a recent comprehensive survey involving over 200 law firms nationally, 88% of those questioned felt that the county court system as a whole was not fit for purpose.

So what is the Ministry of Justice doing?

Well, perhaps it will come as no surprise; it has decided to close 86 courts and is consulting on increasing fees still further, in some cases by 25-50%.

With the small claims limit having already been increased, preventing recovery of any legal costs for a successful party, more people have been tempted to do it alone. If that has driven down the costs of justice on one hand, perhaps making it more accessible, it has not improved the efficiency or the fairness of the system because there will always be at least one lawyer in the room, the judge, and the case will always be decided on the law.

So what are the alternatives?

Last autumn a new set of regulations were brought in that required all businesses trading on standard terms with consumers to include an option to mediate.

Mediation is a structured negotiation aimed at resolving a dispute in a way that is acceptable to both parties. It involves an independent person (the mediator) trying to help the parties reach an agreement. It can take place at any time and often at a venue to suit the parties.

Does it work?

The simple answer is yes; statistics show that over 75% of cases referred to mediation settle. It has long been available to parties involved in disputes of all types, but in smaller claims it might just be the last best hope for a sensible and swift resolution.

At Willans, we have two in-house accredited professional mediators with many years' experience in settling a wide spectrum of disputes; involving commercial contracts; landlord and tenant relationships; property ownership; boundaries; rights of way.

Nick Cox
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Our senior partner, Nick Cox is a litigation partner who *"gives 'careful, clear advice to clients'"* and *"understands clients' needs"*.

New rate of stamp duty land tax for second homes

Partner Robert Draper is noted for his extensive residential property knowledge and experience.

From 1 April 2016, a supplementary rate of SDLT will apply to purchases of additional residential properties. This will cover second homes and buy-to-let properties and potentially other transactions.

The extra rate will be 3% and will apply as well as the current SDLT rates. The new rate will be based on the full purchase price for all purchases over £40,000. This rate will not apply if, following the purchase, the buyer will own only one residential property, irrespective of the intended use of the property.

The higher rates will not apply to caravans, mobile homes or houseboats or potentially to companies and individuals with portfolios in excess of 15 residential properties.

If at the completion of a transaction an individual owns two or more residential properties, whether he pays the higher rates or not will depend on whether he is replacing his main residential dwelling.

The Treasury recognises that there may be certain circumstances where purchasers have to pay the tax at completion but their circumstances then change. These people will be eligible for a refund of additional stamp duty land tax paid. This can be applied for up to 18 months after completion.

Robert Draper
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Penalty clauses

In our Spring 2014 edition we reported on the Court of Appeal case of *El Makdessi* and its effect on penalty clauses. The Supreme Court has now overruled their decision and has offered new guidance for *Cavendish Square Holding BV v Tulal El Makdessi* and *ParkingEye Ltd v Beavis*.

What is a penalty clause?

It is not unusual for parties to a commercial contract to agree that a specified sum be paid to one party if the other is in breach of a contractual provision in the agreement. However, damages for breach of contract should be compensatory and not punitive. If a court deems a clause to be a penalty clause, then it will not be enforceable and the normal rules to assess damages will apply. The other terms of the contract will remain unaffected.

Old test

The general rule was that if the amount stated in the clause reflected a 'genuine pre-estimate of the true loss' then the courts would not construe it as a penalty.

New test

These two cases now establish that the test of a penalty is whether the clause imposes a cost on the defaulting party which is out of all proportion to any legitimate interest of the innocent party. Therefore, the following guidelines would appear to apply:

- **Penalty –** if the payment is unconscionable and extravagant (compared to any legitimate interest of the aggrieved party) it will be a penalty.

- **No penalty –** if the payment is not unconscionable or extravagant it will not be a penalty – clauses in each of the following circumstances could therefore be valid:

  - a commercially justified term – the courts should hesitate to interfere in commercial contracts between parties of equal bargaining power. If the clause protects a legitimate interest of the aggrieved party, and is not unconscionable or extravagant, it is likely to be enforceable.

  - until these cases, a genuine pre-estimate of the loss likely to be caused by the specified breach would never be a penalty. The Supreme Court now says this is not the test. However, in practice, a clause based on pre-estimated losses would be unlikely to be extravagant or unconscionable.

  - until these cases, a clause whose primary purpose was to deter breach was always a penalty, but the Supreme Court has ruled that this is not always so. A payment may be intended to deter breach and yet be justified.

Practical ways to try and escape the rule against penalties:

- if possible make the agreed sum payable on an event that is clearly not a breach of contract eg the clause could be drafted so that there is a bonus for early or enhanced performance, rather than a penalty for late delivery.

- recite in the penalty clause the justification for the amount specified in the clause.

- keep a note of any calculations or negotiations involved in justifying the amount set out in the clause.

Theresa Grech
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Updated permitted development rights

From May 2016 the government is introducing permanent rights allowing offices to be turned into housing. These will replace the existing temporary rights which were due to expire at the end of May.

The new permanent rights form one of the measures which the government is using in its drive to provide more homes to solve the housing crisis. It gives welcome certainty for developers.

Big business quiz on 24 May – save the date

Join us for our annual charity quiz in aid of LINC which will be held on Tuesday 24 May at Manor by the Lake in Cheltenham. A fantastic quiz night that attracts over 200+ business people, it provides great networking opportunities and there are prizes for the winning team.

We look forward to welcoming you for a fun-packed evening – one not to be missed!

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

"The amount of support you received (both in numbers taking part, and also the staggering amount of money raised) was truly awe-inspiring … massive congratulations to all involved."

The complexities of implied easements unravelled

When a landowner sells part of his land the common law is prepared to imply easements in favour of the seller and the buyer in certain circumstances, with the court usually favouring the buyer.

However, whenever a transaction involves the sale of part of a property, the parties should always make clear provisions for agreed rights and reservations (which are intended to benefit the land being sold and that being retained), and to limit or exclude the effect of both common and statute law.

In *Wood v Waddington*, the Court of Appeal considered whether rights of way had either been expressly granted, or had passed under section 62 of the Law of Property Act 1925.

Section 62 provides that a conveyance of land is deemed to include all ways, watercourses, privileges, easements, rights and advantages which at that time are enjoyed with all or part of the land. Therefore, when part of a property is conveyed section 62 can operate to set up a right which up to then did not exist because the land had been in common ownership. This means prospective buyers could be unaware of limitations that may affect the land.

In this case the owner transferred part of his land to P1 (who subsequently transferred that part to SP1) and P2. The original transfers of part contained detailed provisions relating to the grant and reservation of easements including an express grant and reservation of rights of way over specified routes. Each transfer also included the following general clause:

"….the property is sold subject to, and with the benefit of, all liberties privileges and advantages of a continuous nature now used or enjoyed by or over the property and without any liability on the transferor to define the same."

The High Court ruled that SP1 was not entitled to claim two additional rights of way along tracks over P2's land that connected to a public highway, either by express grant or under section 62.

However the Court of Appeal ruled that under section 62 SP1 was entitled to the rights claimed. It agreed that the tracks benefitted the transferred land rather than just being enjoyed as a general right when the land had been in common ownership. There was evidence to show that there had been a sufficient pattern of use for them to qualify as easements under section 62.

The fact that the use of the tracks was not necessary for the reasonable enjoyment of the land meant that a claim could not be made under common law, but this was not the case under section 62. The tracks had to benefit part of the land transferred rather than just be enjoyed as a general right when the land was in common ownership.

This case contained a useful analysis of the existing law about rights which may pass under section 62. It also highlights the need for detailed enquiries and a physical inspection to be made when buying land, as the existence of private rights of way may not be obvious at first glance.

Laurence Lucas
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Legal 500-rated partner Laurence Lucas handles a varied range of freehold and leasehold work acting for clients in the industrial, retail and charities sectors as well as some residential property developments.

2016 employment law seminars

"Excellent advice and guidance; very worthwhile attending."

Tuesday 22 March 2016, 7.30am - 9am
New tax year, new employment laws: Employment law update over breakfast
Cheltenham (£15 pp includes breakfast)

Wednesday 23 March 2016, 7.30am - 9am
New tax year, new employment laws: Employment law update over breakfast
Gloucester (£15 pp includes breakfast)

Thursday 24 March 2016, 11.30am - 12.30pm
Why your business needs a social media policy
Cheltenham Chamber of Commerce, Cheltenham
Non-members are welcome

Tuesday 10 May 2016, 2pm - 5pm
Social media, the law and you
Direct Marketing Association, Cheltenham
Non-members are welcome

Stressed in the City

Mental health and wellbeing has become a hot topic in the media with various television and other campaigns encouraging people to talk about it to destigmatise the subject.

Stress in the workplace has also become a regular issue for many businesses. A 2015 survey published by the Chartered Institute of Personnel and Development (CIPD) revealed that two-fifths of organisations (and, shockingly, half of public sector organisations) found that stress-related absence had increased over the previous year.

The most common cause of the stress was excessive workload. In addition, two-fifths of organisations saw an increase in other reported mental health problems, such as anxiety and depression.

These findings are worrying for businesses. Not only do employers have a duty to protect the health and safety of their employees, but also stress can have a significant impact on their business, in that they won't get the best out of staff. Sickness absence can also have the same negative effect.

It is therefore important for employers to assess and manage stress at work. They may want to consider the following:

- **Regular stress audits and risk assessments:** Speak to employees regularly about their stress levels and the reason for them. Identify the causes in the workplace and find ways of avoiding them.
- **Anti-stress policy:** Implement a policy setting out the employer's attitude to stress and mental health problems in the workplace. Make clear the intention is to protect the mental health of employees and provide a process which will encourage them to seek support and assistance when needed.
- **Training:** Employers should train staff to recognise the symptoms of stress in themselves and in their colleagues. Spotting stress early and addressing the problem may help to prevent sickness absence, as well as any further incidents in the future.
- **Support services:** Consider providing confidential counselling services for employees to access which will help to address and alleviate their symptoms.

In 2014/2015 the Health and Safety Executive reported that 9.9 million working days were lost to work-related stress, anxiety and depression. Given that society is being actively encouraged to recognise and talk about mental health and wellbeing, it is likely that this number will only increase.

As with most things, prevention is better than cure, so if you do not have relevant anti-stress policies and procedures in place in your business, you would be well advised to introduce them.

Our employment law team would be delighted to assist you with this, so please do call us on 01242 514000 or send us an email.

Jenny Hawrot
jenny.hawrot@willans.co.uk

Wage hike

All businesses will be required to pay the National Living Wage (NLW) as of April 2016. It is expected to affect around six million workers in the UK.

The NLW is a premium added on to the National Minimum Wage (NMW). The inaugural NLW premium is 50p; this is in addition to the current NMW rate of £6.70, making a total of £7.20. NLW will apply to all eligible workers aged 25 and over, and the amount will be reviewed each year.

Any business which fails to pay the NLW could receive a fine of between £100 and £20,000 per worker, as well as double the amount owed in arrears.

Wednesday 29 June 2016, 8.15am - 4pm
Top tips for protecting your business legally
Growing Gloucestershire Conference, Gloucester

Thursday 22 September 2016, 9.00am - 1.30pm
Handling grievances & conflict management: 'Back to school' employment law workshop & lunch
Cheltenham (early bird price of £25 pp until 31 May)

Early November 2016, 9.00am - 10.30am
Recruiting and maintaining the best trustee board: A spotlight on charities to support Trustees' Week
Cheltenham (£15 pp)

More information

Please visit www.willans.co.uk/events

"Informative and the right length of time."

An unwanted gift?

Everyone has heard of the perils of inheritance and probate disputes. A disgruntled family member, perhaps someone you have not had any contact with for several years, makes a claim against your estate following your death and effectively takes money from those whom you wanted to benefit.

Following recent case law it is now even more important that a person making their will sets out very clearly their reasons for either omitting someone from their will or distributing their estate unequally between their children. In *Ilott v Mitson*, an only child who had been out of contact with her mother for 26 years, successfully made a claim on her death for one third of the value of the estate despite her mother's decision to leave it entirely to charity.

The most straightforward way to protect your estate from these types of claims is to make a will with a qualified solicitor who will not only listen to your plans for the distribution of your estate, but will walk you through the obligations you have to others, taking into account the type and value of your assets. This will include any business assets; perhaps you want to leave your business to one child over and above your other children; perhaps you would prefer the income generated from your business to be divided equally between all of your children without having a damaging impact on that business.

Depending on your circumstances there are several options available when considering whether or not to omit someone from your will. This could include a carefully considered statement in the will itself making it clear to all who read it as to the reasons why you made that decision. Or you could leave a small gift to the person you wish to exclude (calculated by the potential value of their claim on your estate), if you want to dissuade them from making a claim on your death.

Finally it is also possible to put a clause in your will stating that if a beneficiary receives a gift under your will and makes a claim against your estate for additional funds, they will be forced to forfeit their original gift.

Jennifer Emerson
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Compensation for existing overhead electricity cables

There has recently been a flurry of excitement in predominantly rural areas where overhead cables (both pylons and poles) cross private land. It is now open for property owners to claim compensation for the diminished value of their property, even though the cables and poles might have been there when they purchased. The claim can be based on the reduction in the value of property caused by the presence of the apparatus.

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.

Corporate & commercial

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Litigation & dispute resolution

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