Willans LLP | solicitors

Law News

Newsletter for commercial clients

Summer 2014

Changes at the top

Margaret Austen and Bridget Redmond

We have appointed Bridget Redmond to share the role of managing partner with Margaret Austen, who has been in post since 2006.

Bridget joined the firm in 2004 and became a partner in 2006. In recent years she has headed up the firm's well respected residential property department. The daughter of a Somerset solicitor, Bridget is an LSE graduate and lives in Cheltenham with her husband and two children.

Margaret, who was appointed Deputy Lieutenant in September 2013, has reduced her hours to part-time from 1 June. She will continue to work for the firm's charity clients which include a number of well-known, national organisations.

Bridget commented on her new role:

"I feel excited and honoured to be sharing the role of managing partner with Margaret. She has managed the firm exceptionally well through difficult economic times and we have emerged from the recession in good shape to go forward. Willans is a great firm, and our success is built upon the brilliant lawyers and support staff that we employ and their hard work and dedication to our clients and to the firm. We have been part of the local community in Cheltenham for nearly 70 years, and we look forward to many more years serving private clients and businesses alike."

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.

Senior private client appointments

We are delighted to welcome Robert Draper and Simon Cook to the firm.

Robert rejoined us in March as a senior member of the residential property team, having previously worked here for some six years before spending close to ten with Cotswold firm Kendall & Davies. Local solicitors, Hilary Banister and Jamie Cook, have also joined the department increasing the team to 7 full-time lawyers.

Robert Draper

Simon Cook

Simon has joined as a partner in our wills, probate & trusts department. He has a wealth of experience in dealing with private client work, including trusts, wills, powers of attorney, the Court of Protection and estate planning and administration.

He was previously a partner with QualitySolicitors Thomson & Bancks, where he spent 23 years, more recently heading up their Cheltenham office.

Alongside Ruth Baker and Jennifer Emerson, this will bring the number of STEP qualified solicitors in the department to three, with the support of two paralegals.

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

We play a vital role in biggest UK exhibition of modern sculpture

We have long been a supporter of the arts in the county, and this year we are helping to bring some of the biggest names in contemporary sculpture to one of the largest exhibitions in the UK, which will be held at Gloucester Cathedral.

Crucible 2 will display 100 sculptures by many of Britain's most renowned sculptors and internationally famous artists. Gloucester Cathedral will provide the magnificent setting for the pieces, which will be placed throughout the building and the grounds.

Entry to the exhibition will be free of charge and it will run from 1 September to 31 October.

To find out more about Crucible 2, discover who all the artists are and to get behind the scenes visit, www.crucible2.co.uk

Margaret Austen and The Very Reverend Stephen Lake, Dean of Gloucester Cathedral

Restoring a company to the register

Companies can be 'struck off' the Companies Registry, and therefore cease to exist, for a variety of reasons. But in certain circumstances they can be restored to the register and this is a useful and necessary commercial tool, which directors, shareholders and creditors alike need to be aware of.

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

For example it may be necessary to restore a company to rectify a mistake such as failing to transfer ownership of property or contracts from the company prior to its dissolution; or a creditor may want to have a company restored so that it can make a claim against that company for an outstanding debt or breach of contract.

There are two separate procedures:

Applying directly to the Registrar of Companies

This only applies to circumstances where the company has been struck off by the Registrar in the first place, when the Registrar has reason to believe the company has ceased trading (eg the company has failed to deliver its accounts on time despite repeated reminders).

If this option is available, you need to be aware that the Registrar is likely to demand that as a condition of restoring the company, the directors must bring the filing requirements of the company up-to-date as though the company had never been dissolved.

This is likely to be a complicated and expensive process where accountants will normally need to be instructed.

Applying to the court

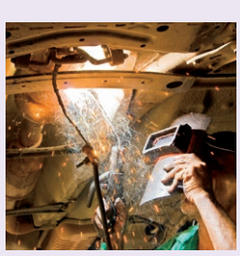
When a company has been voluntarily dissolved, the only other way to restore a company to the register is by application to the court. It should be made by the shareholders of the company, as it is likely that any property owned by the company prior to dissolution will be transferred into their names.

When making the claim to the court, the applicant must clearly state the reasons for wanting to restore the company to the register. If it is proposed that the company will start trading again it is crucial that the applicant says this. Failure to do so will mean that the court will order the company to be dissolved again once the purpose for its restoration has been fulfilled.

We recommend that you take legal advice to ensure that the restoration process is carried out correctly.

Client news

Theresa Grech, of our company commercial department, recently advised on the purchase of **Autostation Limited**, a car servicing and repair business in Tewkesbury.



Frank Smith has been instructed on the sale of a historic Gloucestershire property. The Grade II* listed property is a prominent half-timbered mansion and dates from 1583. The property is surrounded by extensive formal gardens, farmland and woodland. The sale includes a 40 acre woodland which hosts a sporting shoot in the winter.

Flexible working – a new dawn?

From June 2014, the flexible working legislation has been opened up as part of the government's bid to reduce red tape, but where does this leave businesses faced with flexible working requests?

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

Any employee can ask for flexible working arrangements at any time, but in most cases there was no obligation on employers to consider or agree to those requests.

Since 2003, certain employees have had the right to have such requests considered in accordance with a statutory process, and the categories of those eligible have been extended over the years. However, such employees have never gained the unfettered right to demand flexible working arrangements. Rather, employers are only able to turn down requests on certain specified business grounds.

From June 2014, the flexible working legislation has been opened up, as part of the government's bid to reduce red tape, and also because it believes flexible working is good for business. The right to request it has been extended to all employees after 26 weeks' service, rather than only those with children under the age of 17 (or 18 if disabled) and certain carers. Furthermore, the previous statutory procedure for considering requests has been replaced with a general duty to look at all requests in a reasonable manner.

However, two important limitations remain. First, employees may only make one request in any 12 month period. Secondly, employers can still refuse a request but only on one of the specified business grounds.

The duty to consider requests "in a reasonable manner" is amplified by an ACAS Code of Practice – which at the time of going to press was in draft form before Parliament. This will have statutory force and will be taken into account by employment tribunals in assessing whether an employer has acted fairly. Alongside this, ACAS has also published non-statutory 'good practice' guidance.

One might think that those who need flexible working arrangements because of caring responsibilities outside work would have some sort of priority under the new system. However, that is not the case. As a result, we foresee a 'first come, first served' culture emerging, with employers able to turn down requests on genuine business grounds due to the number of other staff already on flexible working arrangements. Indeed employers who prioritise requests from carers may even prompt discrimination claims from others whose requests are refused. The British Chambers of Commerce (BCC) requested clarification on the issue of how to handle multiple conflicting requests. The somewhat jejune response from government was to "put the names in a hat." "That's no way to run a business," commented the BCC – something with which we would agree!

Matthew Clayton
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Entries are now open for Taste of Gloucestershire Food & Farming Awards

This year, we are again supporting the Taste of Gloucestershire Food & Farming Awards, celebrating the very best of farmers, producers, retailers and pubs and restaurants in the county.

We encourage you to nominate yourself, friends or anyone else who deserves recognition.

It is really simple to enter. All you need to do is to fill out the online entry form by selecting the categories you wish to enter and adding in a brief description about the person or business. The nominations close on 15 August 2014.

For more information or to enter the awards visit www.digital-thisis.co.uk/gloucestershire/taste/

The Citizen | ECHO | Stroud Life
TASTE OF GLOUCESTERSHIRE FOOD & FARMING AWARDS 2013
IN ASSOCIATION WITH CREED

Paul Gordon in our litigation department represented **Total Ltd** in a High Court case which resulted in a recent ruling that YouView TV Ltd has infringed a trade mark owned by our client, an independent telecommunications company based in the South West. This is the third successive win for our client who will now seek an injunction against YouView.

total
mobile · voice · data · unified

Jonathan Mills acted for a private pension fund in the sale to Spirax Sarco of a large industrial site for a seven figure sum.

Restrictive covenants in employment contracts - the tide is turning

A High Court case has recently demonstrated that the courts are more willing to uphold restrictive covenants.

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

Employers will welcome the recent judgment of the High Court in *Prophet plc v Huggett* in which it took a highly flexible approach to the interpretation of a non-compete clause. When read in its original form, the clause made no sense; the former employee was prohibited from working in a competing business "in connection with any products…which he was involved with whilst employed". Prophet was a software developer so there could never be an occasion in which a former employee would use its products; rather, if they joined a competitor, they would be working on competing, similar products.

Historically, the courts have only used the "blue pencil" test to delete words in order to make a clause narrower and, therefore, more reasonable. What was surprising in this case was that the judge was prepared to amend the clause by adding the words "or similar thereto". This widened the restriction to cover software products similar to Prophet's thereby making it enforceable. Consequently, Mr Huggett was prevented from working for a competitor for 12 months.

This is the latest in a line of cases in which the courts have been more willing to uphold restrictive covenants. This trend has been driven in part by cases involving more senior, sophisticated employees who have had more equality of bargaining power over their terms of employment. However, there does appear to be a more general move towards taking a common-sense approach to such cases. This belies the often perceived wisdom that restrictions are unenforceable. This case shows that the courts will even strive to uphold non-compete clauses, which they have described as "the most powerful weapon in the employer's armoury".

That is not to say that employers can now take a lax approach to drafting their restrictive covenants. The courts will still expect to see that a legitimate business interest is being protected, and that the restriction goes no further than is necessary to protect that interest. These components are unlikely to change for the foreseeable future. It is therefore important for employers to review their restrictions and consider if their nature and duration is appropriate to their business and for each employee to which they apply .

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

No apportionment of rents permitted unless the lease allows it

In his autumn seminar on break clauses Nick Cox reported on the case of *Marks & Spencer v BNP Paribas*, which had suggested that if the lease included a break "premium" then a tenant might not have to pay rent for a full rent period if a break date fell between payment dates.

This decision has now been overturned by the Court of Appeal who have ruled that a tenant is only able to apportion rent, or to recover any overpayment of rent that results from the service of a break notice, if the lease specifically says so.

We advise that when agreeing terms at the outset, the precise date for any break to operate should, wherever possible, coincide with a payment day. However, if that is not the case then tenants should not risk failing to operate a break properly by apportioning rent payments, unless the lease allows them to do so. The obligation to pay rent in full on the payment days will be a condition precedent for almost all break notices to be effective.

Nick Cox
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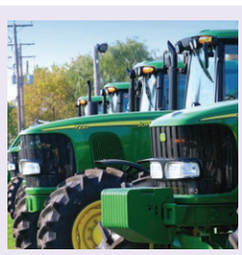
Nick Cox

Client news

Paul Symes-Thompson and **Peter Raybould** in our company commercial department advised Christopher Kelland on the sale of **Kellands Agricultural Limited** and its subsidiary company **Multidrive Tractors Limited** to Alamo Group Europe Limited. The Cheltenham business, which manufactures and markets self-propelled tractor mounted sprayers and a range of multi-purpose load carrying tractor vehicles, had turnover of £6.8 million for 2013. The deal was negotiated to ensure that Mr Kelland remained as a consultant to the business and the existing employees were kept on.



Residential tenancies - is a section 21 notice effective if served before the deposit is protected?

The outcome of a recent County Court case means it may now be possible to rely on a section 21 notice to end a tenancy agreement provided the tenant's deposit is lodged in the correct procedure.

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

Under current legislation (since 6 April 2007), a landlord must join a tenancy deposit scheme ('TDS') if a tenant under a residential assured shorthold tenancy ('AST') pays a deposit. The landlord is required to protect the deposit and provide the tenant with information about the TDS within 30 days of receiving it. If the landlord fails to comply, he cannot serve a notice under section 21 of the Housing Act 1988 unless the deposit is returned to the tenant in full (or in part by mutual agreement).

However, a recent case may have changed this position. On 18 December 2012, the tenant took an AST for an initial fixed term of six months commencing 20 December 2012. The tenant was to pay a deposit and the landlord was to register this with a TDS, within 14 days of receipt.

On 18 December 2012, the landlord served a section 21 notice on the tenant notifying him that she required possession at the end of the fixed term. On 2 January 2013, the tenant received a certificate stating that the deposit reached the landlord on 22 December 2012, and was protected from 2 January 2013. In June 2013, the landlord started possession proceedings and the tenant argued that the landlord could not rely on the section 21 notice because it had been served at a time when the deposit was not held in accordance with a TDS. The district judge dismissed the tenant's argument and refused permission to appeal.

The tenant sought judicial review of the County Court's decision to refuse the right to appeal. The High Court denied the request and commented that as the landlord had complied with the requirements of the Housing Act within 30 days, the section 21 notice was effective even though it was served before the deposit was protected by the TDS.

Therefore, if this decision is applied in future, it will be possible to rely on a section 21 notice served at a time when the deposit is not held in accordance with a TDS, provided that the landlord places the deposit in a TDS within 30 days of receipt.

Amy Gates
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Employment law 'to go' breakfast briefings

Our employment team run briefings 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 as well as to ensure the organisation isn't falling foul of the law.

To book

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

Dates, topics, timings and venues:

Tuesday 23 September 2014
Managing staff sickness and accommodating disabilities
7:30am – 9am (breakfast included).
National Star College, Cheltenham, GL53 9QU.

Tuesday 18 November 2014
Employment law update
7:30am - 9am (breakfast included).
Holiday Inn Express Gloucester South, Gloucester GL2 2AB.

Cost

£15 (incls VAT) per seminar.

Landlords - beware of the risk of releasing guarantors

It is well-established law that a landlord risks releasing a tenant's guarantor from its obligations under a lease if the terms of that lease are varied without consultation with, or the consent of, the guarantor. This has been illustrated once more by the Court of Appeal in the recent case of *Topland v Smiths News Trading*.

The tenant went into administration and the landlord called on the parent company, which had guaranteed the lease, to comply with obligations under the guarantee. The guarantor pointed to an earlier licence for alterations which allowed the tenant to construct a new garden centre on part of the site. The guarantor claimed that the effect of the document was to increase its obligations under the lease and that, as it had not been a party to the licence, it was released from any further liabilities under the guarantee. The landlord argued that the amount of rent payable had not been increased and that the guarantor's liabilities were no more onerous than before.

However, the court ruled that the guarantor was entitled to expect that if the lease was to be varied (whether by means of a licence for alterations or otherwise) then its consent should first be sought, as clearly the document had the potential of adding to the obligations of both the tenant and the guarantor. As a result, the issue of the licence for alterations did release the guarantor from all liability under its guarantee.

Therefore the message for landlords is that they should always consult the guarantor of a lease before agreeing any variation of the terms of a lease with the tenant, or risk the guarantor avoiding all liability. Any landlord would be well advised to seek advice from their solicitor.

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.

Check for IP provisions in your employment contracts

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

Although a business may create intellectual property (IP) during the course of its operations, in reality this IP is created by individuals. This may be by commissioning a third party to produce the intellectual property rights for it, or through the efforts of its own employees. It is vital that a business is aware of the rights which such individuals have in relation to this IP and adequately deal with this issue in any proposed employment or consultancy agreement.

Employees

Many types of IP rights created by an employee during the course of his employment will vest in the employer automatically without a need for a formal assignment to be signed by both parties. However, there are some exceptions to this general rule and employers should ensure that when drafting employment contracts an IP provision is included. For example, when registering domain names of a business, it is very common for an employee mistakenly to register the domain name in his own name rather than that of his employer. The owner of the domain name is then listed at the registry as being the employee and not the business.

Furthermore, where a business is very IP intensive and employees are engaged in research and development, it would be sensible to incorporate a more elaborate IP clause in their employment contracts. In particular, a business should take advice where patents are created by its employees, because certain statutory rights to compensation arise in favour of employees, if the patent created by them is of "outstanding benefit" to the business.

Consultancy

If the contract with a consultancy firm, or any other service provider, is silent in relation to ownership of the IP, the legal title will vest in the developer. It does not matter if a business has paid for the developer to create the work. It is therefore crucial that any contract with a consultant, who is creating IP on behalf of the business, deals with the question of the ownership of any resulting intellectual property rights.

Formalities

It is important to remember that any provisions dealing with an assignment of IP will only be valid if the agreement has actually been signed by the relevant individual. The business must always obtain the signatures of those involved.

Theresa Grech
theresa.grech@willans.co.uk

Selling to customers? Be aware of the new regulations

It is important that any business which is selling to consumers reviews their terms of sale and websites to ensure that they are compliant with new laws which came into effect on 13 June 2014.

The new laws relate to the selling of goods and services to 'consumers' under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('2013 Regulations'). These regulations are mandatory and should a business amend its consumer contracts in any way so as to restrict a consumer's rights under these new rules, then these contracts will not be binding on the consumer.

The 2013 Regulations will apply to sales to "consumers" for goods and services including distance sales, online, and in-store and off-premises sales (where, for example a contract may be concluded in a consumer's home). Some key points are as follows:

- One of the most important requirements of the 2013 Regulations is that the consumer must have the opportunity to read and understand the main elements of the contract fully before buying. Whilst not everything needs to be provided in contract terms, this would seem to be the logical place for certain elements of the information to be placed.
- Cancellation periods for consumers who are buying at a distance or off-premises should, as a minimum, reflect the new statutory cancellation period, which has been extended from 7 to 14 calendar days.
- Online suppliers must make it absolutely clear to a consumer when a transaction will trigger a payment eg, use words or symbols such as a click button or similar labelled "obligation with an order to pay". The BIS Guidance (mentioned below) suggests that a "pay now" button is a suitable alternative.
- Unless the business and consumer agree otherwise, delivery of goods should be without undue delay and within 30 days.
- Premium rate telephone numbers are no longer permitted for a customer service helpline or to discuss an order or problem with a supplied product or service.
- Businesses cannot impose hidden charges on a consumer and must get express consent from a consumer for any additional payment eg, a business cannot use a pre-ticked box on a website where this leads to a further payment by the consumer.

The 2013 Regulations form part of a series of major changes to consumer law in England and Wales. One of the first changes took place on 1 April 2014 when the Competition and Markets Authority assumed many of the consumer protection functions of the Office of Fair Trading. There is also currently a consumer rights bill before Parliament which will also introduce significant changes, including reforming the law on unfair terms in consumer contracts for goods and services.

We will keep you posted as to any further developments through Law News and on our website willans.co.uk/news.

Implementing Guidance, a booklet which aims to help businesses understand the scope of the new rules, is also available from the Department for Business, Innovation and Skills (BIS).

Should you need any advice on the 2013 Regulations, please contact:

Theresa Grech
theresa.grech@willans.co.uk

Sue Ryder

Final figure for Sue Ryder

Our fundraising efforts have come to an end for another year. We are delighted to have raised £6831.20 for our local hospice through a mixture of activities. These included cake bake-offs, a half marathon, a Christmas raffle, a quiz night and clay pigeon shoot.

Thank you to those people and businesses who supported us by donating prizes for our raffle and participating in our events. If you would like to get involved in some way this year please contact James Grigg.

Website blocking injunctions

Paul Gordon

If you believe that someone is infringing your intellectual property rights by using your content on their website, as well as taking action against that infringing party, you may also want to seek an injunction against the internet service provider (ISP) itself. This can require them to prevent customers from accessing the website.

A recent case at the European Court of Justice (*UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and another*), has increased the chances of the rights holder obtaining an injunction against an ISP. They can now be considered an 'intermediary' whose services have been used to infringe copyright and therefore someone against whom an injunction could be granted.

This is good news for those that want to protect their intellectual property rights, and provides another way to address the issue, should you find infringing material on the internet.

Paul Gordon
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Rural news

Specialist rural affairs partner, Frank Smith

New face, solicitor Rupert Burchett

New face in rural department

Solicitor Rupert Burchett has joined our agriculture & estates department.

He trained at London firm Clifford Chance LLP before moving to a leading Oxford firm, where he specialised in agricultural and property work. He has wide experience in agricultural property and advises clients on agricultural tenancies, sporting rights, farm partnership agreements and first registrations (including large estates).

An enthusiastic supporter of country pursuits, Rupert is a member of the Agricultural Law Association.

Transfer of existing agri-environment schemes

Natural England has confirmed that on the transfer of land subject to an existing agri-environment agreement, it will produce an agreement to assign the remaining obligations to the new owner, regardless of whether the transfer is a sale or change of tenancy arrangement.

Be sure to include appropriate provisions in your sale contracts to ensure buyers are obliged to carry out the requirements of existing agri-environment schemes.

Agricultural buildings to residential dwellings

Since the last edition of Law News, we have now seen the publication of changes to the Town and Country Planning General Permitted Development Order, which allows some agricultural buildings, of up to 450 square metres, to be converted into residential houses.

Give accurate descriptions – or you could be held liable

A champion show jumper, who sold an elderly horse to one of her riding pupils, faces an estimated £150,000 legal bill after senior judges upheld the buyer's appeal.

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

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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Paul Gordon paul.gordon@willans.co.uk

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