Law News

Newsletter for commercial clients

Willans LLP | solicitors

70 YEARS 1947 - 2017

Summer 2017

New partner Alasdair bolsters commercial team

We are pleased to announce that we have appointed Alasdair Garbutt as partner in our commercial property team, bringing the total number of partners at the firm to 14.

An ex-City lawyer, he joined us in 2012 as an associate solicitor after eight years spent in the property team of international law firm Charles Russell Speechlys.

Alasdair said: *"I am delighted and I look forward to continuing to provide a first class service to our local and national clients."*

Managing partner Bridget Redmond commented: *"We are really pleased to appoint Alasdair as a partner. Since joining us, he has quickly established himself as part of the commercial property team, undertaking a mix of work for national charities and other property-owning clients. He is a great asset to the department and to the firm."*

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

Willans in numbers

80,000
£ raised for local charities over five years

99
% of clients who responded to our survey would recommend us

88
our lawyers' combined years worth of City experience

75
first class people work at Willans

70
years since Alec Willans established the firm in 1947

28
years (and counting!) of service from associate Steve Diamond

14
highly experienced partners steer the firm

9
consecutive years we have held The Law Society's quality mark

8
smaller firm mergers along the way

4
office buildings across Cheltenham's Imperial Square

Protecting your business in the age of cyber-crime

Associate, solicitor Nick Southwell handles a variety of disputes, providing pragmatic and commercially sound advice to clients. He is also an accredited mediator.

Cyber-crime has made many headlines recently and it is more important than ever to guard your business against this ever-evolving threat.

The potential consequences of a cyber attack may include the loss of trade secrets or intellectual property that could undermine competitive advantage; the loss of customers and sales; the loss or compromise of personal customer information or credit card data, carrying with it potential legal and regulatory issues and potential fines and penalties; claims brought by customers for compensation for any losses alleged to have been suffered; and immediate brand and reputational damage.

Coupled with this is the fact that where directors have failed to protect their business from cyber risks to the same degree as other business risks, they could end up facing legal action for breach of fiduciary duty.

Organisations should therefore:

- establish a cyber risk management policy and ensure that this is part of the company's governance framework
- undertake an initial risk assessment considering the amount and type of personally identifiable information, customer data and confidential corporate data maintained by the organisation and the manner in which the information is used, transmitted and stored
- ensure internet safety and network security
- provide training and increase user awareness
- establish an incident response and disaster recovery team and put in place a 'tried and tested' incident response plan. This should include lawyers who can be called upon to advise on potential risks and regulatory issues
- take out adequate insurance to protect the business against the particular risks and exposures it faces.

These policies should be regularly reviewed and a proactive approach is essential.

Nick Southwell
nick.southwell@willans.co.uk

Common sense prevails in appeal case

Solicitor Sophie Martyn has general corporate & commercial experience with a particular interest in advising LLPs and start-ups. With a background in science, she is naturally analytical in her approach.

The courts have long been against clauses which limit or exclude a party's liability and have thus tended to interpret them strictly using a variety of methods, including the *contra preferentem* rule. This states that where the meaning of a clause is considered ambiguous or uncertain, it will be interpreted against the party who drafted it. However, a recent Court of Appeal decision suggests that the courts are now prepared to take a different approach.

In *Persimmon Homes Ltd and others v Ove Arup & Partners Ltd and another* (2017), Arup had provided the developers with a collateral warranty, the last sentence of which attempted to exclude liability for any asbestos-related claim. After finding more asbestos than expected, the developers claimed that Arup had been negligent in failing to identify and report this earlier.

The Technology and Construction Court (TCC) held that it was "entirely clear" that the clause excluded all liability relating to asbestos, whether arising from negligence or not. The developers appealed, saying that the clause did not exclude liability for negligence and that the *contra preferentem* rule should be applied. The Court of Appeal upheld the TCC's decision and concluded that both the language used by the parties and any application of business common sense led to the same result.

The decision suggests that the courts may be increasingly willing to interpret and enforce exclusion clauses, or indeed any clause agreed by parties of equal bargaining power, and that the *contra preferentem* rule now has a very limited role in the strict interpretation of commercial contracts negotiated between such parties.

Sophie Martyn
sophie.martyn@willans.co.uk

Client news

Corporate & commercial associate, solicitor Caroline Leviss advised **Glide Media**, a successful regional business which distributes and displays leaflets promoting visitor attractions and arts organisations, in drafting contracts for the purchase of two further leaflet distribution companies.

Megan Bullingham in our dispute resolution team and **Nigel Whittaker**, head of our commercial property team, acted for a national charity in proceedings relating to a lease renewal on a retail premises, securing a new lease on very favourable terms together with an order for costs.

A step too far? Discriminatory dress codes in the workplace

In December 2015, Nicola Thorp was sent home from her job as an agency receptionist, without pay, for failure to comply with the agency's dress code. She was wearing flat shoes and the dress code required women to wear shoes with heels of between two and four inches. Ms Thorp started a petition, signed by more than 150,000 people, calling for it to be made illegal to require women to wear high heels at work.

As a result, two House of Commons committees produced a joint report on dress codes in the workplace. The government's recent response to that report says that it takes the issue of discriminatory dress codes very seriously, but rejects any prospect of legislative change, favouring an approach based on detailed guidance, an awareness campaign and "persuasive enforcement" by the Equalities and Human Rights Commission. Detailed new guidance on dress codes, produced by the Government Equalities Office, ACAS and the Health and Safety Executive, is expected this summer.

Some media commentators have observed that a requirement to wear high heels is discriminatory because a man would not be required to wear them. However, in the 1996 case of *Smith v Safeway Plc* the Court of Appeal held that having different dress code requirements for men and women would not be discriminatory if they applied a conventional standard of appearance and, taken as a whole, rather than item by item, neither gender was treated less favourably. This means that the dress code should not be more onerous for one gender, but in reality this decision does little more than to confirm conventional preconceptions about dress and appearance. It does not tackle the question raised by Nicola Thorp, as to why women are expected to wear high heels. A dress code can clearly create comfort and health issues, and should not disadvantage one gender over another in this regard, even if it is conforming to a social 'norm'.

Employers have few decided legal cases on this subject to guide them, and fuller guidance on dress codes would be welcomed. However, it is regrettable that there will be no review of the law as recommended by the committees. Considerable uncertainty remains about various aspects of the law which, together with the paucity of legal cases challenging discriminatory dress codes, can be exploited by unenlightened employers.

Readers of this publication, however, will no doubt await the published guidance with interest, and will review their dress codes in light of it, or even in anticipation of it.

Matthew Clayton
matthew.clayton@willans.co.uk

Matthew Clayton leads our employment law department. *Chambers* says "*clients appreciate his down-to-earth, practical and common-sense approach*".

A flying start for new business immigration service

Our employment law team have been advising a number of international firms setting up operations in the UK as part of our new business immigration service.

They have also been delivering training, educating key personnel to ensure their business is complying with right-to-work checks and duties when recruiting internationally.

Helen Howes, paralegal in our employment law department, says: *"It has been really exciting to work with companies going through a period of rapid growth.*

"Employing and sponsoring staff from outside the European Economic Area is becoming increasingly more complex and expensive. Our team's knowledge and experience help to ensure that key staff are in position to meet project deadlines and growth targets."

To find out more about our business immigration service and how we can help you with matters from eligibility for sponsorship through to global intra-company transfers, contact us on 01242 514000.

Helen Howes

Client news

We recently acted for **Medical First Limited** in the purchase of the entire issued share capital of Glide Ride-Sports Systems Limited (trading as Premier Sock Tape), which is a leading provider of sock tape for premier league football teams and other top leagues across the globe. Associate, solicitor in our corporate & commercial team, Caroline Leviss, led the transaction with the help of solicitor Jenny Hawrot in our employment law team.

Giving free professional advice? You may still owe a duty of care

Theresa Grech is a *Legal 500*-rated partner with wide experience of corporate and commercial matters, specialising in data protection and IP. She is praised by clients for her *"good solid advice"* and *"excellent service"*.

In *Lejonvarn v Burgess (2017),* the Court of Appeal has confirmed that a person who provides professional services to friends might do so on a "professional basis" and thereby assume a duty of care to them.

Mrs Lejonvarn (an architect and project manager) took on management of a project to re-landscape her friends' garden (Mr and Mrs Burgess). The parties never signed a contract for her services but construction began, which Mrs Lejonvarn supervised. The project did not go according to plan and the relationship between the parties broke down. Her former friends then claimed against Mrs Lejonvarn for the cost of the remedial works.

In the first instance the court decided that whilst Mrs Lejonvarn had no contractual liability to Mr and Mrs Burgess (because there had been no offer, acceptance or consideration) she did owe them a duty of care in tort that covered the design and management of the landscaping project.

Mrs Lejonvarn appealed against the decision. The Court of Appeal agreed with the first instance judge and held that Mrs Lejonvarn had assumed responsibility for overseeing the project and therefore had provided services to her friends.

Interestingly, the fact that the parties had not concluded a formal contract, and that Mrs Lejonvarn was to receive no payment for this initial stage of the project, did not change the court's view – the services for which Mrs Lejonvarn had assumed responsibility were clear and identifiable.

Mrs Lejonvarn was only under a duty to perform the services with "reasonable skill and care" and was not under an obligation actually to provide the services. So, if Mrs Lejonvarn performed the services without reasonable skill and care Mr and Mrs Burgess had a claim against her, but if she had not performed the services at all they would not have had a claim.

Although this case revolves around its specific facts, the principles set out in it are important for professionals e.g. accountants, lawyers, architects, surveyors, doctors, dentists, and vets, who might owe a duty of care when giving free advice to friends or family. They could also affect businesses which offer free advice in order to win new custom or improve client relations.

The judgement emphasises that professionals need to take care. Individuals and businesses alike should not assume that they will not incur any liability merely because they provide advice or services for free and outside of a business context. The question will be whether such professionals are using their expertise and whether the person to whom such advice is given will be relying on this.

Theresa Grech
theresa.grech@willans.co.uk

Networking event a success for young lawyers

Willans may date back to the 1940s, but we are constantly looking to the future and take great pride in the exceptional calibre of the young (and older!) lawyers we recruit.

To celebrate this talent, some of our lawyers hosted the firm's first event for young professionals in Gloucestershire on 6 June.

The evening started with networking, drinks and tapas and was followed by a talk by neuroscientist, Beau Lotto, at the Cheltenham Science Festival.

Thoroughly enjoyed by all, it was great to see our junior lawyers mixing with different industries.

Client news

Corporate & commercial partner **Paul Symes-Thompson** advised a director and shareholder of a Cheltenham-based group of companies in connection with the recent sale of his shares to a multi-national provider of integrated services.

Agriculture & estates partner **Robin Beckley** recently completed the sale of a large area of greenfield residential development land for an established agriculture client to a national housebuilder. It will form part of a site with more than 250 houses. This was the culmination of many years of negotiations with the housebuilders and the planners.

Raising a teacup to a great year of charity fundraising

We are delighted to have raised over £10,000 for our chosen charity of the year (2016-17), The Nelson Trust.

On 20 June our charity committee invited Ann Buxton, chair of trustees and Melissa Atherton, corporate & events coordinator at The Nelson Trust, to tea at our offices to present them with the final fundraising figure.

We exceeded our target through a range of fundraising activities in aid of the charity, which is headquartered in Stroud and supports individuals recovering from drug and alcohol addiction. Initiatives included a Christmas carol concert, a quiz night for local businesses and a pool competition.

Our staff took part in a range of 'dress-down' Fridays and donated clothing, washing powder and toiletries for the Trust for distribution to its residents. As well as the sum raised, our lawyers also donated their time and expertise by providing some pro-bono legal advice to the charity throughout the year.

James Grigg, partner and head of our charity committee, said: *"We couldn't be happier to present our final fundraising figure to a local cause as worthwhile as The Nelson Trust. We are a community-focused firm and nominating a 'charity of the year' has long been an annual tradition for us. It gives us a great opportunity to make a difference to a local cause*

in an enjoyable and challenging way. Thank you to all who volunteered their time and money to help us exceed our fundraising target."

Melissa Atherton of the Trust commented: *"We would like to thank all the Willans staff for their generous support of The Nelson Trust over this year. They have hosted exciting fundraising events, we have received donations of toiletries and clothing, as well as helping us raise awareness of the work we do in delivering a range of services to people affected by substance misuse and related issues. Thank you Willans from all here at The Nelson Trust."*

Lawyers go back to school to support future generation

As part of our continuing commitment to nurture and support the next generation of successful lawyers, we have joined forces with the University of Gloucestershire to provide mentoring and advice to new and current law students.

On 5 April, lawyers Jenny Hawrot, Caroline Leviss and Megan Bullingham met with law clinic students at the University of Gloucestershire to kick off our partnership. It was a productive day, with students grilling our lawyers on a range of topics, from a typical day at the office to handling caseloads and advising clients.

Activities planned include legal master classes and 'Your Future Plan' legal career talks. The university will also be presenting a new 'Willans award' to the best intellectual property student.

Dr Tracy Jones at the University of Gloucestershire commented: *"This partnership with Willans will offer our law degree students invaluable practical experience through engagement with industry.*

"The university is one of few in the country which strives to offer students opportunities to learn through practical and not just academic experience. We are grateful to Willans for their support."

Client news

Paul Symes-Thompson, corporate & commercial partner and **Jonathan Mills**, commercial property consultant, advised on the recent incorporation of a substantial property business which had previously been carried on as a partnership. They dealt with the transfer of the property portfolio and other assets to the new company, reduction of the share premium account arising from the transfer, and subsequent creation of new share classes, some of which were then transferred to a new family trust.

Reality rules - business rates on development property

Chambers-rated partner Susie Wynne is noted for her extensive commercial property experience and is described as "*diligent*" and "*efficient*".

Property owners and occupiers who are developing vacant commercial premises will be delighted with a recent decision of the Supreme Court.

Up to now there has been some confusion over how commercial premises undergoing development should be valued for rating purposes. There were two possible bases of valuation; the repair assumption or the reality principle.

Normally when the rateable value of a property is assessed, the repair assumption is used. This means that the rateable value of the property is based on the amount of annual rent reasonably obtainable for the property assuming that it is in a state of reasonable repair, excluding any repairs that a reasonable landlord would consider to be uneconomic. Where repairs would not be economic, valuation is based on the annual rent reasonably obtainable for the property in its unrepaired state.

The reality principle means that a property is to be valued based on how it exists on the relevant valuation date, and not by what it once was, or what it may become in future. The principle was created to deal with circumstances where the character or condition of a property is, or is about to be, significantly changed.

The Supreme Court decision involved a case where the first floor of an office building had been vacant since 2006. In 2010 the owners entered into a construction agreement to convert the floor into three separate offices to make it more attractive to potential tenants. The nature of the construction works were extensive, including the removal of the air conditioning system, electrical wiring, sanitary fittings and drainage connections, and removal of ceiling tiles. The rateable value of the property prior to the works was £102,000. The owners argued that the property should be listed as a building undergoing reconstruction, and the rateable value should be assessed at a nominal £1 amount - a substantial saving.

The court held that on the material valuation date, the property was in the process of redevelopment and no part of the property was capable of being occupied or used. In this instance, therefore, the repair assumption did not replace the presumption of reality, and the rating list valuation should be altered to reflect reality.

It will be a matter of objective fact in each case whether a property is simply in disrepair (and therefore the repair assumption should be used by the valuation officer) or whether a property is undergoing redevelopment and should be valued using the reality principle. The valuation officer will have regard to the physical state of the property on the relevant day and also any programme of works being undertaken.

Susie Wynne
susie.wynne@willans.co.uk

Stay up-to-date: 2017 employment law seminars

Thursday 21 September 2017, 9am-1:30pm
Building flexibility into your workforce
Stonehouse Court Hotel, Stonehouse
(£30 pp includes lunch)
In this half-day workshop, our employment law team will guide you through the maze of flexible and alternative working arrangements which increasingly are becoming the norm.

Tuesday 7 November 2017, 7:30am-9am
Incentivising staff in a growing business
National Star College, Cheltenham
(£15 pp includes breakfast)
Join our employment and corporate lawyers to explore alternative ways of incentivising and retaining your key talent, as your business grows.

Find out more specific event details or book online via Eventbrite - visit **www.willans.co.uk/events.** Alternatively, please contact us on **01242 542931**.

"**Excellent advice and guidance,** very worthwhile attending."

Bringing commercial property up-to-date - factors to consider

Many people see an opportunity in buying a house at a reduced price as it needs refurbishment or complete renovation. Equally, in the commercial sphere, there is scope for tenants to take secondary or tertiary office space that needs updating if they are willing to put in the work.

Not only can the rent per square foot be cheaper, but the landlord can also make significant contributions to the work needed to bring the office space up-to-scratch. Particular legal points to note are as follows:

- **Who pays for what?** If the space needs refurbishment, the tenant should ask for a rent-free period equivalent to the length of time it takes to carry out the works. It may also be possible to ask the landlord either for a financial contribution or an additional rent-free period to deal with the structure of the work space, which ordinarily ought to be the landlord's responsibility. That way, the tenant is not paying rent for the period he is carrying out works when he cannot use the premises for its commercial purpose. He can upgrade the premises at the landlord's cost.

- **Repair:** If the office space is taken in poor repair, it is critical to ensure that the lease agreement does not require the tenant to put it or keep it in a perfect state of repair and condition. The condition of the premises ought to be recorded in what is called a 'schedule of condition' which is simply a photographic or written survey report that records the existing disrepair. The importance of this is that when the tenant leaves the property he doesn't want the landlord to demand that he returns the property in a better condition than it was in before he took it on.

- **Documentation:** These critical points need to be included either in the lease document or a licence for works, which gives the tenant permission to carry out the refurbishment works and sets out the rights and responsibilities of both parties. Further it is critical that the improved state of the premises is not taken into account on any rent review in the lease if the works have been paid for by the tenant. Otherwise the rent would be inflated upon review to take into account the fact that the premises are in a substantially better state and condition than they were in at the beginning of the lease before the tenant's works.

Alasdair Garbutt
alasdair.garbutt@willans.co.uk

Alasdair Garbutt is a commercial property partner who handles sales & acquisitions, development transactions, landlord and tenant and property management matters.

A good way to incentivise employees in growing businesses

Caroline Leviss is an associate, solicitor in our corporate & commercial team. She is noted for her *"calm and robust position under pressure"*.

An Enterprise Management Incentive (EMI) scheme is a share option scheme that enjoys favourable tax treatment. These are specifically targeted at small, higher-risk, growing companies.

The scheme gives participating employees the option at a future date to buy shares at a fixed price (being the value of the shares at the grant of the option). So, if the company does well and the value of the shares goes up, the employee can purchase shares at a discounted price.

As this is aimed at small, higher-risk companies it is a way to incentivise employees to invest their time and skills to help smaller businesses to achieve their potential.

There are other similar schemes available, however this is the one most commonly used and is widely regarded as being the most tax-efficient. It is worth bearing in mind that not every company can use it as certain conditions must be fulfilled.

The tax benefits of an EMI share option scheme are as follows:

Grant of options:

- No income tax or national insurance contributions

Exercise of options:

- No income tax or national insurance contributions provided the exercise price is not less than market value at the date the option was granted and the option is exercised within 10 years of grant

Sale of shares:

- Capital gains tax (CGT) is payable on the difference between the sale price and exercise price with employees being able to use their CGT annual allowance. Entrepreneurs' relief may apply if there is a period of at least 12 months between the grant of the option and the sale of the shares.

To learn more about EMI share option schemes then please contact me or attend our employment law seminar on 7 November (more details opposite).

Caroline Leviss
caroline.leviss@willans.co.uk

Are you preparing for the GDPR? Guidance to note

There has been much in the press lately relating to the General Data Protection Regulation (GDPR) which is due to be implemented on 25 May 2018. There will be hefty fines for failing to comply with the GDPR.

The Information Commissioner's Office (ICO) has always published guidance to assist in the interpretation and application of the Data Protection Act, and it is committed to helping organisations prepare for the GDPR. One of the ways it is doing this is by publishing practical guidance or signposting guidance produced by other bodies.

The ICO has set up a data protection reform page on its website (www.ico.org.uk/for-organisations/data-protection-reform). We will try to keep you updated as to new developments but businesses would be wise to check the ICO website from time-to-time for guidance and updates as the implementation day approaches.

The ICO has published the following documents to provide guidance so far. Links to these documents can be accessed via the digital version of this article at www.willans.co.uk/news or the dedicated page on the ICO website.

- **GDPR: 12 steps to take now**
- **General overview of the GDPR**
- **Revised privacy notices codes of practice**
- **GDPR messages for the boardroom (video)**

The ICO considers that it is now moving from "Phase 1 (Familiarisation and key building blocks)" to "Phase 2 (Guidance structure and mapping, process review and initial development of tools)" so we can expect more information to be published over the next few months.

In particular, the ICO is due to publish guidance on contracts and liability and consent later this year. This guidance will be key in assisting companies to review their current contracts in light of this and the various consents that will be required under the new regime.

Complying with the GDPR will be a significant task. Companies should therefore start reviewing their commercial contracts now to ensure that they will be compliant when the GDPR comes into force. A first step may be to identify what personal data you hold, where it is held, why and for how long. This will then help you to take the next step once the ICO guidance mentioned above has been issued.

If you need any advice on the GDPR please contact us.

Theresa Grech
theresa.grech@willans.co.uk

Theresa Grech is a *Legal 500*-rated partner in our corporate & commercial team, who *"displays first-class commercial awareness"*.

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

Paul Symes-Thompson	paul.symes-thompson@willans.co.uk
Theresa Grech	theresa.grech@willans.co.uk

Employment law

Matthew Clayton	matthew.clayton@willans.co.uk

Litigation & dispute resolution

Nick Cox	nick.cox@willans.co.uk
Paul Gordon	paul.gordon@willans.co.uk

Rural business, agriculture & estates

Robin Beckley	robin.beckley@willans.co.uk

Charities & not-for-profit

Nigel Whittaker	nigel.whittaker@willans.co.uk
Margaret Austen	margaret.austen@willans.co.uk

Property & construction

Nigel Whittaker	nigel.whittaker@willans.co.uk
Susie Wynne	susie.wynne@willans.co.uk
Alasdair Garbutt	alasdair.garbutt@willans.co.uk

Residential property

Suzanne O'Riordan	suzanne.oriordan@willans.co.uk
Robert Draper	robert.draper@willans.co.uk

Divorce & family law

James Grigg	james.grigg@willans.co.uk

Wills, probate & trusts

Simon Cook	simon.cook@willans.co.uk
Ruth Baker	ruth.baker@willans.co.uk

Contact details

Willans LLP | solicitors
28 Imperial Square
Cheltenham
Gloucestershire
GL50 1RH

01242 514000
law@willans.co.uk
www.willans.co.uk

Follow us at **@WillansLLP**