

# Law News

Newsletter for commercial clients

Winter 2014

## A good year in *Legal 500*



We have retained our strong ranking across the South West region in the 2014 edition of the *Legal 500* directory.

Eleven departments have held their positions for their legal specialisms and ten lawyers (eight partners and two associates), have been recognised for their particular expertise. Four partners in particular have been recommended in two categories.

Bridget Redmond, managing partner of the firm, reflected on the news: "We are delighted to retain our strong position in the South West. The *Legal 500* is an independent guide, and firms and individuals are recommended purely on merit."

## Starlight: Carols at Christ Church

As part of our fundraising activities this year for National Star, and as an excuse for some festive drink, we are planning our own take on a Christmas carol concert with them on Wednesday 10 December. We will be serving mulled wine and mince pies afterwards.

It will be held at Christ Church in Malvern Road from 5.45pm with carols starting at 6pm. Please RSVP to [events@willans.co.uk](mailto:events@willans.co.uk) by 25 November.



## Two silver anniversaries

Conveyancing lawyer Steve Diamond, currently the firm's longest serving member of staff, reached a 25 year working milestone at the firm in September. Hot on his heels is our consultant Jonathan Mills, a former partner and head of commercial property who joined Willans in November 1989.

They have seen the firm grow from one building in Imperial Square with 5 partners running the business, to 4 buildings and 13 partners, employing around 65 staff.



Steve Diamond



Jonathan Mills

## New addition to commercial team

Kate Hickey is a recent arrival to the firm. A Birmingham university graduate with first class honours, Kate has worked in corporate teams at two City law firms.

She has wide experience in all corporate commercial work including M&A, joint ventures, shareholder agreements, LLP's and private equity as well as providing general commercial advice.

Whilst continuing her general corporate and commercial practice, one of Kate's specialist areas will be charities & not-for-profit. She will support Margaret Austen on a range of charity law matters including regulatory and constitutional issues.

She will also work with colleagues in the firm's property and employment teams to advise charities on contractual matters.



Kate Hickey

## Some good news for landlords...and some not so good

From 24 October 2014, residential landlords who have troublesome tenants can evict them under a new mandatory ground inserted into the Housing Act 1988.



Nick Cox

What's new, you may say? A tenant who breaches his lease was always liable to be served with a section 8 notice and be pursued through the courts.

Not quite like this. The new regime sees three important changes.

First, the ground is mandatory, so if the court finds that the tenant is in breach he must leave.

Secondly, it does not necessarily require the tenant to have done something bad in relation to the property; they may have sinned elsewhere.

Thirdly, it can include a member of the tenant's household or a visitor.

For an order for possession to be made, the tenant (or his co-occupier or visitor) must first have been convicted of a serious offence, have breached a court injunction relating to anti-social behaviour or be convicted of breach of a criminal behaviour order. The offence must have been committed in, or in

the locality of, the house and have affected either someone who has a right to live in that locality, or the landlord or the landlord's agent.

For the first time an eviction may be based on grounds that have nothing to do with the subject property.

However, for landlords in the West Midlands it is not all good news. From 1 December, they must check that any prospective tenant has the proper immigration status before granting a tenancy. The Home Office is providing a helpline and an online checker, and if the system proves effective it will be rolled out in other parts of the UK from the middle of next year.

Perhaps landlords should carry out a criminal records check as well?

**Nick Cox**  
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## Early indicators on early conciliation



Asim Khan

ACAS recently published statistics for the first three months of compulsory early conciliation. Out of approximately 11,000 cases which started and finished during that period, 16.5% were resolved successfully and a further 19% ended because the employee decided not to pursue the matter. While it is early days, ACAS says it's a 'promising start'.

Notably the figures reveal that very few employers have chosen to initiate the early conciliation process, instead preferring to adopt a 'wait and see approach'.

Whilst individual experiences of early conciliation are mixed, overall there appears to be some merit in opening discussions before a tribunal claim is lodged to avoid potentially lengthy and costly litigation.

**Asim Khan**  
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## Shining a spotlight on local food & farming

Well done to a number of clients who were nominated for several food, drink and farming awards. Congratulations to Simon and Sarah Righton who won the best farmer category at this year's Taste of Gloucestershire Food and Farming Awards. We are delighted to have both sponsored the award and helped with the campaign to highlight the importance of farming in the region.

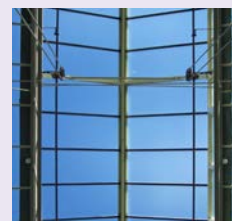


### Client news

**Paul Symes-Thompson** and **Theresa Grech** recently acted for Joedan Manufacturing (UK) Limited in relation to its purchase of the business and assets of Micron Aluminium Doors Limited (in

administration), a company based in Kent. The acquisition had to be completed very quickly in order to preserve the ongoing business of Micron and ensure the continued employment of its

employees. Joedan Manufacturing (UK) Limited is part of Joedan Holdings Limited based in Gloucestershire but operates both nationally and internationally.



## Shared parental leave: Are you prepared?

Shared parental leave (SPL) rights are set to come into force next year. Eligible parents will, for the first time, be able to share up to 50 weeks' leave.

The new regime applies to parents expecting a baby on, or after, 5 April 2015 and employers would be wise to prepare for the changes now.

New parents wishing to share their parental leave and pay will need to "opt in", as otherwise the current provisions for maternity leave/adoption leave will apply. A mother must still take a minimum of 2 weeks' compulsory maternity leave following the birth of her child and will not be able to begin a period of SPL until after this period. Her partner, however, may begin a period of SPL from the child's birth.

The right to take SPL in up to 3 separate blocks, rather than as a single continuous period of leave, is likely to prove the most difficult aspect for employers. For many employers it is difficult enough to cover an employee's maternity leave and to keep their job open, without the additional burden of having to do so on a "stop start" basis.

The current rate of SPL is £138.18 per week or 90% of the employee's average weekly earnings if lower. There is no statutory requirement to provide an enhanced rate of pay, but whether or not to do so, and if so on what terms, will be an important consideration for employers.

In practice SPL is likely to be most attractive to couples where there is a financial advantage in the mother returning to work before the end of her maternity leave.

Employers should consider putting a policy in place setting out eligibility and notice requirements in relation to SPL. As well as dealing with the mechanics of the SPL regime, employers should ensure that managers are well versed in employees' rights to take SPL.

**Matthew Clayton**  
matthew.clayton@willans.co.uk



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

## Robert Draper in leading role

Following the appointment as managing partner of Bridget Redmond, partner Robert Draper now heads up our Law Society-accredited residential property department.

Robert has over 20 years' experience and handles all aspects of residential property work but his particular specialisms lie in his in-depth knowledge of the Cotswolds and the work he does for developers.

He leads a 9-strong team of seven conveyancing lawyers and two paralegals whose client base spans the Cotswolds, Gloucestershire and beyond.



### New consumer regulations - does your website apply?

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 came into effect on 13 June 2014. Traders who enter into online contracts with consumers should review their websites to ensure that they are compliant.

Please read our 'UK Website Information Requirements' guide on our website which covers the regulations in detail or contact **Theresa Grech** to discuss.

Whilst acting on the sale of a farm worth nearly £3.5m, the **agriculture and estates** team prepared documentation to secure a royalty payment for our client should any minerals be extracted from the farm in the future.

**Nigel Whittaker** acted on a seven figure investment for CKF Systems Ltd, a Gloucester-based engineering and robotics business, who moved into their new headquarters on Olympus Business Park in Quedgeley.

The increased floor space of 24,000 sq ft will allow the business, which celebrated 25 years last year and employs around 50 people, to continue to expand.

The **agriculture and estates** department recently completed a highly complex land swap arrangement where one of our clients 'swapped' 168 acres of farmland with a neighbouring farmer.

This tricky matter was completed in a narrow 10 day window in order to comply with the seller's contractual arrangements.



## Business rates – payable or not?



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

A recent case has determined that when a property is capable of ‘beneficial occupation’, full business rates may apply.

In *R3 Products Limited v Salt*, R3 operated a business which consumed a lot of electricity. Before taking a lease of premises it carried out major works to install a high voltage electricity supply at the property as it could not use the premises until such works were completed.

R3 received a business rates demand covering the period of the works and appealed to the valuation office claiming that the rates shouldn’t apply while the works were being undertaken. Their appeal was dismissed on the grounds that the property was capable of beneficial occupation, just not by R3. Another company could have easily occupied the premises if they did not require a high voltage supply.

R3 appealed to the Upper Tribunal (Lands Chamber) but lost.

This decision highlights the fact that business rates may be payable even when a vacant property is not occupied due to the carrying out of substantial refurbishment works. If the intended occupier has a special requirement, which other potential occupants would not, then the property will still be deemed to be capable of beneficial occupation.

**Alasdair Garbutt**  
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## Does the expression ‘subject to contract’ work?

By time honoured tradition, the phrase ‘subject to contract’ has been used by lawyers and others to prevent what the parties intend to be preliminary discussions being turned into a binding agreement. The parties to a proposed contract often agree the main terms first and then leave the detailed terms to be drawn up in a formal, legally binding agreement.

The point at which a contract becomes binding at law is not, however, always clear as illustrated by two recent cases. These show that the courts are prepared to enforce a contract even where there are further terms to be agreed.

In *Newbury v Sun Microsystems* an offer was made to settle the proceedings “such settlement to be recorded in a suitably worded agreement”. The offer was stated to be open for acceptance until 5pm that day after which it would automatically be withdrawn. It was accepted by the time limit but on the basis that a draft agreement recording the settlement would be forwarded to the other party for approval.

The parties were then unable to agree the detailed terms but this did not prevent the court from finding that a binding agreement had already been concluded by way of the defendant’s acceptance of the offer.

In *Proton Energy Group SA v Orlen Lietuva* the claimant had made a ‘firm offer’ to sell 25,000 tons of crude oil blend on the basis of a number of key terms. The claimant subsequently wrote to add that “all other contractual terms... shall be discussed and mutually agreed... upon contract negotiations”. The defendant replied stating “confirmed” but subsequent negotiations as to the detailed contractual terms broke down. Again, the court held that a binding contract had been formed even though there were further terms to be agreed.

The moral of the story is that while the words ‘subject to contract’ are still useful, great care should be taken to avoid pre-contractual communications inadvertently forming a binding agreement.

**Paul Symes-Thompson**  
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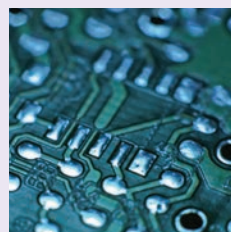


Paul Symes-Thompson – *Chambers UK* says: “described as a *tour de force* in the *Cheltenham market*.”

### Client news

**Theresa Grech** recently acted for Client Managers Toolkit Limited in negotiating their contract with Heathrow Airport relating to the provision of software products and services to Heathrow. Client Managers

Toolkit Limited provide software for managing NEC3 engineering and construction contracts to some of the biggest nuclear, airport, rail, utility, highway and waterway companies and authorities in the UK.



The **agriculture and estates department** has recently submitted an application to the Land Registry for voluntary first registration of a large and complicated estate to the east of Cheltenham.

# Changes to patent and design law – a new Act

The Intellectual Property Act 2014 received Royal Assent in May 2014.



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

Most of the measures came into force on 1 October 2014 and it is expected that all measures will be implemented by late 2015. The purpose of the 2014 Act is to modernise UK intellectual property so as to help businesses protect their intellectual property rights and reduce the need for expensive litigation. The Act changes aspects of the law mainly in relation to design and patents.

## What are the key changes?

### Designs

- *Design ownership*: the default owner of a right in a design (registered or unregistered) will now be the designer, unless the parties agree otherwise. The change will bring design ownership in the UK in line with that for Community designs and with copyright law, as rights in a commissioned design will be owned by the designer and not by the commissioner. The practical significance is that any agreement in which designs are commissioned will now have to expressly transfer ownership to the commissioner if so agreed. The situation under an employment contract remains the same, with designs produced by employees during the course of their employment continuing to vest in the employer, provided their contract makes this clear.
- *Scope of unregistered design right*: the definition will be amended and simplified to prevent protection being afforded to trivial aspects of a design and to clarify what 'commonplace' means when determining novelty.
- *New criminal offence*: a criminal offence for deliberate copying of registered designs will be introduced with a maximum penalty of ten years' imprisonment.
- *Central applications*: the UK will be able to accede to the Hague Agreement, allowing central applications for design restrictions in multiple jurisdictions.
- *Designs Opinions Service*: the Intellectual Property Office (IPO) will provide a Designs Opinions Service, offering non-binding opinions on the infringement and validity of registered designs and other issues.

### Patents

- *Unified Patent Court agreement*: there has been progress in creating a European patent right and the establishment of a Unified Patent Court. In order for changes to be implemented member states are required to ratify the UPC agreement and implement various legislative changes. The 2014 Act provides progress in that it seeks to grant the Secretary of State power to give effect to the provisions of the UPC agreement in the UK.
- *Patent marking*: The reforms in relation to patent marking are practical - rather than listing specific patent numbers, a patentee can use a weblink to direct third parties to a website that will display all the patent information.
- *Patents Opinions Service*: the changes will also be of practical use – they provide for the Patents Opinion Service (established in 2005) to broaden the range of matters on which opinions may be given and for those opinions to be binding. The IPO will be able to revoke a patent where there has been an opinion finding lack of novelty or inventive step (subject to the patentee having its right to contest the decision or amend the patent). For the potential infringer, this could provide a low-cost way of trying to invalidate the patent of a competitor without the need for court proceedings. However, patent owners may be more wary in using the opinion service as the IPO might give an unexpected opinion with the risk of revocation (as previously opinions were non-binding).

Both changes to the Act are of practical use particularly in relation to design; it should make it easier to identify and enforce design rights.

**Theresa Grech**  
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## Charity news

Our chosen charity this year is National Star. It is a national specialist further education college for people with disabilities and is based at Ullenwood in Cheltenham.

James Grigg, partner and head of the charity committee said: "I must say it is always a hard decision as there are so many deserving charities.

"As the campus is based a short distance from

our offices we are aware of the fantastic work that this charity does to improve the lives of its students, to help them grow in independence and ultimately to achieve their goals. We are proud to support them."



## Sunshine city



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

Every asset needs to work as hard as possible, and buildings are no exception. Building managers are under pressure to reduce running costs and maximise revenue from their bricks and mortar.

Rooftop photovoltaic panels (PV panels) can be a useful tool, especially if the building is large with plenty of roof space. Here are some tips to consider before taking the plunge:

### Buy or lease?

If you buy, you have to pay the initial capital outlay to install the equipment, but you are then able to benefit from both the FIT payments from the government and the cheap electricity generated by the equipment. If you lease, the energy company will keep the FIT payments, but you will avoid the cost of buying and installing the equipment.

### Long term plan for the building

Most PV panel leases are for 20 years, to take advantage of the FIT regime. If you are likely to redevelop the building during this period, then you need to consider carefully whether it is worth going ahead. The average payback period for FIT installations is estimated to be in the region of 10 to 12 years under the FIT scheme.

### What happens to the electricity generated?

Is it all to be exported to National Grid or is it to be made available at cheaper rates to the occupiers of

the building? (This can give additional revenue to landlords whilst benefiting tenants by reducing their energy costs.)

### What is the impact on the fire risk assessment and buildings insurance for the building?

The direct current (DC) generated by PV panels presents a different fire risk profile, as DC cables generally present a greater fire hazard and need shrouding more effectively if they run through common risers.

### Impact on rates relief?

Unless the rooftop is separately rated for business rates purposes, a claim for empty rates relief for the building may be compromised if the roof is occupied by PV panels (particularly if a lease has been granted to a FIT generator). Landlords will need to consider whether the loss of potential rates relief outweighs the rental income from any FIT lease of the roof space.

Susie Wynne  
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## 2015 dates - Employment law 'to go' breakfast briefings

Employment law used to be a matter of common sense but in recent years Parliament and the tribunals have developed a series of 'bear traps' which can produce unforeseen liabilities for the unwary employer.

These seminars will give you a synopsis of the constant changes in employment law to enable you to plan and keep your business ahead of these latest developments, and in line with the law.

Join us over breakfast from 7.30am. The seminars run from 8am until 9am.

### To find out more or to book:

Visit our events page on our website for further details, contact [events@willans.co.uk](mailto:events@willans.co.uk) or call and speak to Lesley on 01242 514000.

### Dates and topics:

**27 November 2014**  
*Employment law changes this year and next*

**17 March 2015**  
*Social media and HR - the legal issues*

**14 May 2015**  
*Disciplinary processes - FAQs*

**22 September 2015**  
*'Ask the expert' - an opportunity to put your questions to the speakers*

**19 & 26 November 2015**  
*Employment law changes this year and next*



## Passing off: living dangerously!

A passing off claim is a way of enforcing an intellectual property right. It is designed to prevent one trader from misrepresenting goods or services as being the goods and services of another, and to stop a trader from suggesting that his goods or services have some association or connection with another when this is not true. Broadly, businesses have rights in respect of their names, logos, packaging and advertising.

In order to succeed in a passing off claim, generally the claimant needs to establish:

- the existence of goodwill associated with the get-up and name of the product
- misrepresentation by the offending business
- damage to the claimant's goodwill

In *Moroccanoil Israel Ltd v Aldi Stores Ltd*, the claimant made and sold hair oil using the name 'Moroccanoil'. The well-known discount retailer, Aldi also sold hair oil called 'Miracle Oil'. While Moroccanoil did have a registered trademark it was subject to invalidity proceedings and therefore the company brought an action for passing off rather than for trademark infringement.

It claimed that Aldi had brought a product to market that had a get-up and name that was too similar to their existing product, and that customers would be confused and assume that there was a trade connection between the two products.

However, the court did not accept that this was passing off. While Moroccanoil could establish goodwill, the court was not satisfied that there had been any misrepresentation even though there was evidence that Aldi had various design labels, one of which referred to "...needs to match Moroccan Hair Oil Colours". The court referred to the *Specsavers International Healthcare v Asda Stores Ltd* case which decided that an intention does not necessarily lead to misrepresentation.

The court held that it was Aldi's intention to encourage the public to think of Moroccanoil when they saw the Aldi product, and that they had 'lived dangerously' by designing reminiscent packaging. However, the court found that Aldi did not intend to misrepresent the public that the two products were connected, for example by a common manufacturer or licence. Also, there was no evidence that members of the public were confused by a trade connection.

To increase your chances of protecting the goodwill of your brand, litigation partner Paul Gordon suggests that you register trademarks and design rights and make it clear in your promotional material that this protection exists. Primarily that should act as a deterrent, but it will also place the rights holder in a better position to pursue competitors who 'live dangerously'.

**Paul Gordon**  
[paul.gordon@willans.co.uk](mailto:paul.gordon@willans.co.uk)



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

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](mailto:law@willans.co.uk)

## Problems in offloading over rented property

Despite having climbed out of the recession, there is still a substantial quantity of leasehold property gathering dust on agents' books and tenants desperate to offload premises as quickly and efficiently as possible.

However, many leases contain a restriction preventing the tenant from underletting at less than the rent reserved by the lease. This poses a significant problem for tenants in a falling rental market and where, as a result, the current lease rent is greater than the actual open market rent.

In these circumstances, tenants do sometimes try to avoid the difficulty by underletting at the reserved lease rent, but providing a side letter to the undertenant stating that the undertenant does not have to pay more than what the parties agree is the then open market rent for the property. However, several Court of Appeal decisions confirm that a tenant cannot get around a restriction on underletting by entering into a personal side letter.

The proposed underlease has to be considered together with the side letter. Therefore a landlord could either block the grant of any proposed underlease or, if the underlease has in fact been put in place and a side letter entered into, apply for an injunction requiring the surrender of the underlease on the basis that it had been granted in breach of conditions in the tenant's headlease.

Commercial reality may result in tenants being prepared to run the risk of being caught out, but the safest approach would be for the tenant to obtain the consent of the landlord to the actual true nature of the underletting. This would avoid the risk of costly remedial action being taken at some point in the future.

**Nigel Whittaker**  
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### 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](mailto:law@willans.co.uk).



## Rural news



Specialist rural affairs partner, Frank Smith

### Fracking truths

As the fracking debate continues to rage across the country there are many myths which surround the practice. Frank's informative guide outlines some of the facts.

### Single Payment Scheme, Basic Payment Scheme and the transfer window

Farmers are reminded that Single Payment Scheme entitlements become Basic Payment Scheme entitlements on 1 January 2015. While the deadline for the transfer is usually 2 April, if you want the recipient to be able to claim them for that calendar year note that the rules are slightly different during this transitional period.

### Caution required when purchasing listed buildings

While buying a listed building may seem idyllic, owning a character property brings many obligations. A recent case acts as an important reminder that councils will carry out inspections and respond to complaints about unauthorised changes to listed buildings, using their statutory powers where necessary.

### Annual tax on enveloped dwellings – a pitfall for the farming community?

In the 2014 Budget the Chancellor widened the threshold on residential property owned by 'non-natural persons' (known as the annual tax on enveloped dwellings).

### Environment Secretary announces more detail about the greening element of the CAP changes

With the Basic Payment Scheme coming into effect in six months' time, the government announced on 10 June some much needed clarification about how they intend to implement the new 'greening' requirements of the revised Common Agricultural Policy (CAP) and provided further information about changes to the cross compliance regime.

To read Frank Smith's articles in full, visit [www.willans.co.uk/news](http://www.willans.co.uk/news)

More news on our website [www.willans.co.uk](http://www.willans.co.uk)

## Contact

For advice on any of the issues covered in *Law News* or any other area of law, these are the people to contact in the first instance.

### Company/commercial

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### Employment law

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