Willans LLP | solicitors

Law News

Newsletter for commercial clients

Winter 2015

Finalist of 2015 Business Awards

We were flattered to be one of three who made the shortlist for the corporate social responsibility category of this year's prestigious Gloucestershire Business Awards.

We have been part of the Gloucestershire community for almost 70 years and have a firm stake in the success and welfare of the local community. We are very proud of the contribution that we have made, and continue to make, and are delighted to be recognised for our efforts by others outside the firm.

New charity 'Lincs'

We are pleased to announce that we are supporting the Leukaemia and Intensive Chemotherapy (LINC) fund as our charity of the year. We have plenty of fundraising events in the pipeline including our annual Christmas raffle, pool competition, Christmas carol concert and quiz night.

From Padstow to Imperial Square

We held a small reception in our offices at which UK chef, writer and broadcaster, Rick Stein was a guest. The firm sponsored his talk about his new BBC book 'From Venice to Istanbul' at the Cheltenham Literature Festival, a large-scale international event.

Strongest ranking to date in Legal 500

We are delighted to report great results in this year's independent guide, *Legal 500*. We are ranked in 11 legal specialisms and 12 lawyers, some of whom have been recommended in several categories, have been rated by the guide's South West researchers.

Eight of our department rankings moved up a tier and corporate & commercial partner, Theresa Grech and commercial property partners, Laurence Lucas and Susie Wynne secured new recommendations.

Green Deal in trouble

The Green Deal was a scheme developed under the Energy Act 2011 to improve the energy efficiency of buildings in Great Britain. However, take up has not been as dramatic as the government had originally hoped.

It announced in July that it would no longer fund the Green Deal Finance Company, which is the only active provider of finance for this scheme. Unless alternative sources of finance are obtained, it is difficult to see how it can continue to operate.

The basis of the scheme was to facilitate the installation of energy efficiency improvements on a "pay as you save" basis, with the capital cost of the improvements being borrowed from Green Deal finance providers. The company will now have to replace the government finance facility with an alternative source through the open market. It is not expecting to be able to do this before 2017.

Susie Wynne
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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

Please don't take offence...

Gone are the days when completing the purchase of a residential property involved a solicitor physically handing over a banker's draft to another solicitor in exchange for a bundle of title deeds.

So much of our business and personal life is now conducted remotely, without ever seeing or meeting the people we do business with. Fraud warnings come thick and fast, from banks and financial institutions and the media. Yet the fraudsters always seem to be a step ahead.

One family, who recently made the news, lived abroad and returned home to find someone else living in their house. The occupiers could produce evidence to show that they had paid the full market price to acquire the property. Unfortunately they had been the victim of fraud and had paid the fraudster, not the real owners. How completion took place was not recorded.

Some recent frauds have resulted from the hacking of emails passing between clients and their lawyers. Sometimes the lawyers and their clients believe that they were talking to each other, only to discover too late that they were revealing precious information to a fraudster.

Others have been as a result of malware getting past firewalls on the back of enclosures or attachments sent through as part of an 'apparently legitimate' document, which direct the receiver's computer to send out sensitive information.

It is perhaps no surprise that fraudsters are very keen to access solicitors' client accounts as they usually hold substantial amounts of client money and often transactions are time critical.

At Willans, we are aware that we ask clients a lot of questions about their personal circumstances and finances when handling their transactions. We need to know enough to properly advise you and to satisfy our legal duty to prevent money-laundering. But perhaps an equally important reason now is the need to recognise when something may be amiss, so we can best protect our clients and us from fraudsters.

We have adopted some simple rules for conducting business:

- We will ask you, where necessary, to let us have confirmation of alterations to your bank details face-to-face or in a paper form.
- If you do email us with your bank details we will aim to contact you by phone to confirm them, and we suggest you adopt the same approach in reverse.
- Where we have concerns we may ask you to contact us by an alternative method to email to confirm your instructions if they differ from what you originally told us. If you do decide that you want your funds paid into an account other than the one we would expect, please give us plenty of warning.

Please do not be offended or feel that we are being difficult if you are asked by us to go over something again, or provide us with verification, as we are only trying to protect you.

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"*.

Client news

Commercial property partner Susie Wynne acted for **Western Computer Group**, Apple's leading UK Premium Reseller, in its move to its new premise in the Regent Arcade in Cheltenham. The flagship store's move from Beechwood Shopping Centre marks the latest success in the company's 30 year history and adds yet another impressive brand to the Arcade.

Our corporate & commercial team, led by partners Paul Symes-Thompson and Theresa Grech, have completed a deal for multi-million pound car valeting enterprise **Autoclenz Group Limited**. They were responsible for the complex demerger and subsequent sale of the demerged business (the REACT arm of Autoclenz's operations) to Verdes Management plc.

Lease drafting – a cautionary tale

The importance of ensuring that lease provisions are correctly drafted was recently highlighted by the Supreme Court decision in *Arnold v Britton*.

Commercial property lead partner, Nigel Whittaker is a *"highly regarded property specialist"* who acts for a diverse range of business and charity clients as well as investors on the acquisition and disposal of high value commercial premises.

This case related to a number of holiday chalets at Oxwich Leisure Park in Wales which had been let on long leases. There were several versions of the service charge provisions within the various leases but, essentially, each one placed an obligation on the tenant to pay a service charge *"in the sum of Ninety Pounds and Value Added Tax (if any) for the first year of the term hereby granted increasing thereafter by Ten Pounds per Hundred for every subsequent year"*.

The landlord, Arnold, took the view that the service charge was therefore a fixed sum which would increase at a compound rate of 10% in each year, and this would mean that by 2072 each tenant would have to pay a service charge in excess of £500,000 each year irrespective of what services were actually provided!

The Supreme Court held that Arnold was correct and stated that when interpreting a written contract the court should focus on the facts and circumstances known by the parties at the time the document was executed and the natural and ordinary meaning of the wording. If the words are clear then it would be very difficult for a court to justify departing from them, even if to do so would bring about commercial common sense and assist a party who had made a bad bargain. It is for the court to identify what the parties have agreed and not what the court thinks they should have agreed.

This has, unfortunately, resulted in alarming and financially disastrous consequences for the tenants of these chalets but reinforces the importance of carefully checking the wording of a lease.

Nigel Whittaker
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Scheme document published for Flood Re regulations

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

New draft regulations to establish Flood Re were laid before Parliament on 1 July 2015, along with a new edition of the scheme document. If approved, Flood Re will start operating on 1 April 2016, although it is likely to test its systems behind the scenes with insurers, before that point.

It is worth noting that Flood Re is not a universal panacea for flood insurance in affected areas. There are still many types of property at risk of flooding which will not benefit and will be subject to market levels of premium and excess. They include all commercial property built since 1 January 2009, all buy-to-let property, and most blocks of flats.

There is also nothing in the draft regulations or the scheme document which restricts excesses for flood insurance, or which limits the conditions which insurers can impose on policy holders (such as installing flood resilience measures).

Susie Wynne
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Litigation solicitor Nick Southwell acted promptly for **Jockey Club Racecourses Limited** on three separate occasions to remove squatters from the 350 acre Cheltenham Racecourse which hosts the best jump racing in the world.

Agriculture & estates partner Frank Smith acted on the purchase of a large equestrian property in Gloucestershire which will be used as an eventing yard by the new owners.

Commercial property specialist, Alasdair Garbutt acted for **Lilian Faithfull Homes** which has relocated its administration office to Festival House in Cheltenham to allow for more care facilities at St Faith's Nursing Home. The charity, which cares for more than 200 residents across four homes, plans to double the charitable support it offers over the next five years.

Recovering debt?

Effective debt collection procedures are an essential part of any business; not only does debt impact on cash flow but also one's ability to trade. If you find yourself in a sticky situation it is important to know the best way of recovering money when the debtor is unwilling or unable to pay.

Here are some of the most common options available to a creditor to recover debt.

Court proceedings

This is the most common method, but litigation is never without its risk and remains an expensive exercise (although there are various methods open to a party to fund a claim). Recently, there has been a significant rise in court fees and a claimant must also be aware that obtaining a judgment against a defendant may only be half the battle, as it can be both time-consuming and expensive to enforce a judgment.

Winding up proceedings

A creditor can make an application to wind up a company on the grounds that it is unable to pay its debts. The advantages are that the threat can put considerable pressure on a company to pay a debt promptly and that the basic procedure is relatively quick and inexpensive. Set against that, winding up proceedings are not something to be undertaken lightly and should not be used where the debt is disputed or if the company has a genuine cross-claim or right to 'set-off'. Furthermore, there may be very little by way of a dividend to be paid to unsecured creditors once the company has entered into liquidation and, even when there are assets available for distribution, there is often a substantial delay before the dividend is paid.

Mediation

This can be a very effective tool in resolving disputes and is now actively encouraged by the courts, so much so that, if a party unreasonably refuses to engage in mediation first, then this can lead to them being penalised. Perhaps more importantly though, mediation may allow the dispute to be resolved without significant harm to the creditor's trading relationship with the debtor.

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

Top tips for charity trustees

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

Managing financial difficulties and insolvency

Trustees are expected to know and understand their charity's financial position so it can continue to operate effectively. See the Charity Commission's guidance which explains the key elements of effective financial management and details the role and potential liabilities of trustees.

Changes affecting the SORP from 2016

Honorary treasurers of charities preparing their accounts using The Charity Commission and the Office of the Scottish Charity Regulator's SORP should be aware that for accounting years beginning on, or after, 1 January 2016, a move back to just one SORP is being proposed in order to simplify charity accounting. See www.charitiessorp.org for more details.

Trustee declaration form

The Charity Commission has revised its trustee declaration form. If you are applying to register a new charity make sure you complete the latest version of the form to avoid applications being delayed or returned.

Updated guidelines on public benefit

The Charity Commission has updated its guidance on ways that trustees of fee-charging educational charities, including charitable independent schools, can ensure they are running their charities for the public benefit. It has also updated its sample trustees' annual report for charitable schools, to reflect the recommendations in the updated guidance. This report can be downloaded at www.gov.uk

Kate Hickey
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Client news

Commercial property partner Laurence Lucas advised **Moog Controls Ltd** on the acquisition of their new industrial production and engineering facility at Ashchurch Parkway, Tewkesbury. He is pictured with representatives of the company and the developer celebrating the signing of the development agreement in 2014. Moog has recently celebrated 50 years of trading in Europe.

Commercial property partner, Susie Wynne acted on behalf of **CITW (2015) Limited** who recently purchased The Cottage in the Wood Hotel and Restaurant in Malvern.

How well do you know your constitution?

A trustee of a charity is responsible for the activities the charity undertakes and can be held legally accountable for their decisions.

It is crucial that a trustee understand his duties and in order to do this he needs to understand the charity's legal structure and its governing document. This sets out the powers of the trustees and the rules and regulations that govern the charity, in addition to the general law.

Each charitable structure has its own governing document; one type of constitution does not fit all. For example, unincorporated associations, charitable incorporated organisations, companies limited by guarantee and industrial and provident societies can all be charities, but have different types of constitution. As a trustee you should therefore check that your constitution is suitable for your charity.

In general terms, the document should typically set out;

- its charitable purposes ("objects"). All of the charity's activities should be focussed on achieving those objectives
- what it can do to carry out its purposes ("powers") such as buying or leasing property, engaging staff and borrowing money
- who runs it ("trustees") and who can be a member (if applicable)
- how meetings will be held, decisions made and trustees appointed
- any rules about paying trustees (if this is required), making investments and holding land
- whether the trustees or members can change the governing document, including its charitable objects ("amendment provisions")
- how to close the charity ("dissolution provisions").

Trustees must have a copy of their constitution, understand it, refer to it and review it regularly as it tells them how to run the charity. They should be regularly asking themselves the question 'do the charity's current and future plans fall within the current objects?'. If not then a charity should take legal advice on whether it may be possible to amend its objects before proceeding with those plans. The consent of the Charity Commission would be required.

Having undergone significant change in the last few years the Charity Commission has been focusing more on its formal role as a regulator and, as a result, charity trustees need to educate themselves on their responsibilities. The starting point should be the charity's constitution and the Charity Commission website. It is vital to know your governing document, use it as a reference point when making decisions, and question whether it is still suitable and up-to-date.

Kate Hickey
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Rural news

The *'knowledgeable, practical and pragmatic'* specialist agriculture & estates partner, Frank Smith.

Open air festivals

Landowners who organise festivals on their land or have an agreement with a company to run one on their land, may inadvertently find themselves liable to pay business rates for such use.

Agricultural occupancy conditions – your options

An agricultural occupancy condition is often imposed on new rural properties and can limit the use and occupation of the property to those employed in agriculture.

'Fly grazing'

Landowners faced with horses illegally abandoned on their land can now take swift action to remove them as the Control of Horses Act came into force in England on 26 May.

Best farmer award goes to…

Once again we sponsored the farmer of the year category in the 2015 Taste of Gloucestershire Food & Farming Awards. This time it was won by Tim and Julie Juckes of Tewkesbury. The judges felt that they are a 'good example' of excellent and diversified farming.

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

Should you be following in Google's footsteps?

Google recently announced that it is to undertake a major re-organisation of its business with the creation of a new holding company, Alphabet Inc.

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

This new company will manage its non-core business elements such as the investment and research divisions and the drone business.

The impetus for the reorganisation seems to be efficiency, but there are many reasons why a group of companies may choose to reorganise itself:

- **Tax** – many intra-group reorganisations take place specifically to secure tax advantages.
- **Before an acquisition** – when a group is planning to buy a new company or business, a pre-acquisition reorganisation can allow a company to form a new subsidiary in its group structure, which may be necessary for the proposed acquisition.
- **Before a sale** - a pre-sale reorganisation is often undertaken when a group or company wishes to sell part, but not all, of its business (eg. if a company proposes to sell one of its business divisions but that business is not already a standalone company).
- **After an acquisition** – to ensure that the acquired assets fit into the group in the most appropriate place (eg. a target company or its business could be honed down into an existing operating subsidiary of a group, or intellectual property may be transferred to an intellectual property holding subsidiary and then licensed back to an operating company).
- **Efficiency grounds** – a reorganisation for operational or administrative reasons (eg. to reduce the size of a group structure, or to provide a standalone subsidiary).

If you think your group or company would benefit from a reorganisation or restructuring please contact us or please read our fact sheet on 'Planning a reorganisation' which can be downloaded from our website.

Theresa Grech
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Is your business ready for the Consumer Rights Act 2015?

The Consumer Rights Act 2015 came into force on 1 October 2015. There are some key changes such as enhanced consumer remedies which may mean businesses have to adjust their trading practices in order to reduce the risk of incurring additional liability. One such remedy is the short-term right to reject which is limited to 30 days. The 30 day period can be extended by the trader, but cannot be reduced.

The 2015 Act uses the concept of non-conforming goods, services and digital content as the trigger for the remedies available to consumers. The specific non-conformity dictates which 2015 Act remedy applies. These remedies include, amongst others, rejection, refund, repeat performance and price reduction.

It introduces a new category of product – 'digital content'. It sets out a hierarchy of remedies that will apply, such as a right to compensation where digital content provided under a consumer contract causes damages to a device or other digital content belonging to the consumer. There are also several terms which relate to the liability of a trader which cannot be excluded or restricted.

There are a number of practical steps that businesses can take in relation to the 2015 Act:

- review standard consumer terms to make sure they comply with the 2015 Act, in particular the new fairness requirements and the new enhanced consumer remedies for non-conforming goods, digital content and services.
- review the processes used to deal with non-conforming goods, digital content and services and, if necessary, amend them to factor in these new remedies. This process should include training to ensure that employees who deal with customers on a daily basis are aware of the new rules and handle consumer requests for repair, replacement, repeat performance and refunds appropriately.
- review all company information given to consumers to make sure it is up-to-date, accurate and reliable.

For advice on how the 2015 Act affects your business, please contact our corporate & commercial team.

Theresa Grech
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Data subject access requests

Under the Data Protection Act 1998 individuals have the right to make a subject access request (SAR) to obtain personal information held about them by a data controller. When the original Act was passed in 1984, it is doubtful that one could have foreseen the technological developments that have occurred since. Gone are the days when an employer merely held on file an employee's home address, payroll details and start date of employment.

Personal information now usually includes the employee's mobile number, email address, bank details and health information, to name but a few items. In addition, they are likely to be named in seemingly endless chains of emails. As a result, SARs have become increasingly onerous to comply with and often require electronic searches of email systems and back-ups, resulting in both IT and HR teams being needed.

Unfortunately this has led to an increasing number of requests being made by dismissed employees in order to place an onerous task on the employer, or as a 'fishing' exercise to try to force disclosure before making a tribunal claim.

However, a recent High Court decision may give employers a new-found optimism that it is possible to challenge a SAR in scenarios when it is obvious that it has been made for vexatious and improper reasons. In *Dawson-Damer and Ors v Taylor Wessing and Ors 2015*, a group of claimants who were in a dispute with a trustee company based overseas submitted individual SARs to the trustee's firm of solicitors who were based here in the UK.

They wanted copies of all personal data held by the solicitors relating to them, and when the solicitors declined to comply, they applied to the High Court for an order to require compliance. The court held the requests were made with the improper motive of seeking documents related to the litigation. It reinforced the point that the purpose of a SAR under the DPA is to enable an individual to establish what data is held about them by an organisation; it is not to be improperly used as a way to obtain documents in connection with litigation.

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

The national living wage is on the horizon

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

In the 2015 budget, the Chancellor of the Exchequer, George Osborne, outlined plans for the implementation of the national living wage from April 2016.

At the time of writing, the living wage is in place as a reference point for employers; it is a guide and compliance is not mandatory. Its calculation is based on the cost of living and is currently at £7.85 per hour, rising to £9.15 per hour for London. (This is in contrast to the national minimum wage which is mandatory and carries penalties if not complied with). At present, payment of the living wage is still seen as something new, and a 'novelty' – Lidl has recently hit the headlines for being the first UK supermarket to implement a minimum wage of £8.20 as recommended by the Living Wage Foundation.

However, from April 2016, the national living wage will be implemented alongside legislation that will enforce penalties for non-compliance. In many respects its introduction will create a new tier of the national minimum wage for those aged 25 and over. Although its inaugural rate of £7.20 per hour is lower than the 2015 figures, it will still be higher than the national minimum wage (which rises to £6.70 from 1 October 2015).

It is estimated that it will affect around six million people, and is therefore likely to place additional pressure on many businesses. Employers will face a significant financial penalty for failing to pay it - a minimum of £100 (rising to a maximum of £20,000) per worker, alongside the penalty of having to pay double the amount owed in arrears.

Despite the government attempting to help ease the pressure by offsetting the cost through other measures (such as changes to corporation tax rates), it is still estimated that as many as 60,000 jobs may be cut as a result of the wage increase (Office for Budget Responsibility). For more information on the implementation process contact our employment team.

Laura Davis
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Own a property abroad? Ignore this at your peril!

If you are already aware of the recent legislative change affecting succession law and think that because the UK has opted out of the change then the new rules do not apply to you, keep reading.

If on the other hand, you are blissfully unaware of the revolutionary step being taken in an attempt to unify succession laws applying to your property wherever it may be situated then... keep reading.

Brussels IV is the new EU regulation (Regulation) that has been a long time coming. It has been widely adopted across the European Union and applies to the estate of any person who dies after 17 August 2015, where that person has a connection to more than one European member state (for the purposes of the Regulation).

Generally speaking every country has its own set of rules which govern who inherits your estate on your death. Furthermore, each country also has its own set of rules to determine which country's laws will apply to your estate when you die. If you own assets in more than one country, the various sets of rules can often conflict with each other. The Regulation aims to reduce the potential for conflict. One of the ways it does this is to allow you to elect in your will which country's laws should apply to your estate on your death.

The implementation of the new Regulation could also mean that you may have inadvertently elected the law that will govern your estate on your death in your existing will, even if it does not explicitly mention this. This could mean that your will might not do what you thought it would.

Although the UK has not signed up to the Regulation, Brussels IV will still impact on UK nationals who own property abroad.

If, upon reading this, you know that Brussels IV applies to you, then whilst you should of course already have a will in place, now is the time to review it, to make sure that your wishes regarding your estate are carried out, and to reduce the potential for costly disputes.

If you have not made a will on the basis you will 'get round to it later', don't let later get you first!

Ruth Baker
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After sitting exams and spending a substantial amount of time working for elderly clients, solicitors **Ruth Baker** and **Jennifer Emerson** of our wills, probate & trust department have joined the elite few in Gloucestershire as fully accredited members of Solicitors for the Elderly. It is an independent, national organisation of lawyers who provide specialist legal advice for older and vulnerable people, their families and carers. Full members must have experience and specialise in a wide range of legal issues affecting elderly people and follow the organisation's code of practice.

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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