Willans LLP | solicitors

Law News

Newsletter for commercial clients

Winter 2016

Best results yet for Willans in the latest national legal guide

We are delighted to report great results in this year's *Legal 500*. The national guide recognises that Willans has had another successful year, including a top tier department accolade and one of our partners making the 'elite list' of outstanding lawyers nationwide.

The results show that 11 work areas are ranked, including a new top tier accolade for commercial litigation. 14 lawyers have been recommended, a number of them across several categories. Commercial property partner Nigel Whittaker is recognised as a 'leading individual', listed by the *Legal 500* as one of the UK's outstanding lawyers.

Bridget Redmond, our managing partner, said: *"Congratulations to all departments and lawyers named in this year's UK edition of the Legal 500. This is another excellent result and underlines the firm's capabilities and commitment to providing clients with a top-notch service.*

"Thank you to clients and friends of the firm who gave up their time to be interviewed by the Legal 500 research team."

For more information about the guide visit: www.legal500.com

Commercial team expansion

Associate, solicitor Caroline Leviss

We welcome London-trained solicitor Caroline Leviss to our 5-lawyer strong corporate & commercial team. She joins us from a Somerset law firm with a national reputation in the charity and education sector.

Caroline has extensive corporate and commercial law experience working with directors, shareholders, companies, partnerships and sole traders and has particular expertise advising both national and local charities together with academies and independent schools.

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

Gloucestershire company scoops our 'best digital business' award

Congratulations to Maybe* who won the award for Digital Business of the Year, the category we sponsored at the prestigious Gloucestershire Business Awards. Well done to all finalists and winners, a number of whom are clients.

We feel privileged to be the legal advisers for so many local success stories, helping them on their journeys from start-ups to becoming well-established businesses, and that is one of the main reasons for supporting the business awards this year.

Paul Symes-Thompson, head of our corporate & commercial team, is pictured presenting the award to winner Maybe at the ceremony attended by more than 750 people.*

Protection for tenants from forfeiture despite non-payment of rent

The case of *Pineport Ltd v Grangeglen Ltd* saw a commercial tenant, whose long lease had been forfeited by re-entry for non-payment of rent, entitled to relief from forfeiture despite the fact that it took the tenant fourteen months to apply to the court.

In this particular case the tenant had paid £90k for a 125 year lease and, after committing certain regulatory and criminal offences, fell into service charge arrears. The landlord forfeited the lease but had not re-let the property before the tenant applied to the court.

Despite the lengthy delay the High Court decided that it was wrong to consider the delay in isolation without regard to all of the circumstances. The court's discretion is a broad one and there were a number of issues in this case which it took into account as relevant which overrode the serious delay on the part of the tenant, not least the potential loss of the premium.

As is usually the case, the court held that the tenant was entitled to relief on the condition that it paid all arrears and costs.

Although tenants might take comfort in this decision it is clear from the circumstances of this case that the court would not take the same view on a short term occupational lease where no premium was paid. There would in that case be no compelling reason for the court to grant relief.

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

Take care when varying a lease

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

While it is always better to record any variations to a contract or a lease in writing (and even better by deed), a recent Court of Appeal case has highlighted that verbal agreements to vary contract or lease terms can be just as effective, even where the original contract or lease itself states that any changes must be made in writing.

In this particular case the tenant fell into arrears on the offices they rented. They agreed verbally with the landlord's credit controller that they would pay a reduced rent for the first part of the tenancy and an increased rent later on, when they hoped that their cash flow would have improved. Unfortunately, the landlord claimed that the credit controller did not have authority to make the agreement, terminated the tenancy due to the arrears and locked the tenant out of the property.

The court found that the landlord's credit controller did have sufficient authority to bind the landlord and that a valid agreement had been made and kept to by the tenant. Although the tenancy agreement contained a clause stating that any variations or additional agreements had to be in writing, this was not binding. Any clause which states that changes must be in writing will not be effective where there is clear evidence that a verbal agreement has been reached and complied with.

The clear lesson for landlords is to make sure that anybody negotiating with a tenant (including credit controllers dealing with arrears) is very clear as to the extent of their authority and what they can and cannot agree. Just because the employer believes that they have not given authority to an employee to agree changes, it does not mean that a court will take the same view.

The clear lesson for tenants is that it is always best to make sure that there is clear evidence of the circumstances surrounding any unwritten agreement, such as a follow-up letter or email setting out the terms. The tenant must also stick to the terms of any verbal agreement to ensure that it is legally binding.

Susie Wynne
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Client news

Cheltenham-based **Vpress Ltd** have developed their 'Coreprint' cloud-based online print management solution into one of the UK's leading web-to-print platforms used by over 3,000 well-known brands and corporates. Acting for the company, Theresa Grech helped with the drafting and negotiation of an international distribution agreement to enable them to expand into Australasia.

Susie Wynne acted for investment company **Crescent Bakery Limited** in the £1.18 million sale of their multi-let property in St George's Place, Cheltenham.

Without prejudice

In the dispute resolution team, clients often come to us brandishing a raft of correspondence they have sent and received headed with the words 'without prejudice'.

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. He is also an accredited mediator.

The phrase means that such correspondence will usually be prevented from being put before a court. In other words, it attracts the benefit of a blanket rule whose purpose is to allow parties to negotiate freely and to not concern themselves that statements made during those negotiations may be used against them later in court. Such communications and documents are described as 'privileged' and this privilege may only be waived with the consent of all parties.

However, it is important to understand the impact this can have later on and whether the words 'without prejudice' (WP) will actually have any effect.

For the statement to bite there must be a dispute, not just the possibility that one might exist later. For example, letters (stated to be WP) written by one party at a time when there appears to be a claim but which has not been contested by the other party cannot be without prejudice. Such letters may therefore be put before the court.

Further, any communication that is expressed to be WP must demonstrate a genuine attempt to negotiate settlement. The communication will not benefit from the WP rule if it is not, in substance, a genuine attempt to settle an existing dispute. Equally, a communication that is not expressed to be WP may still benefit from the rule if it is, in fact, a genuine attempt to settle.

Finally, it is also sensible to consider whether you, in fact, want your communications to benefit from WP privilege. For example, if you are serving a formal notice under a contract or lease (such as a termination or break notice) then you almost certainly do not want to mark it WP as it may later be ruled invalid.

For certainty as to the status of your communications in relation to a dispute, or potential dispute, we suggest you seek legal advice as early as possible.

Nick Southwell
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Trade secrets directive

In our summer edition, we reported that the European Council had formally adopted a draft directive for the protection of trade secrets across the EU (the Directive). It came into force on 5 July 2016 and EU member states have until 9 June 2018 to incorporate it into domestic law. Although the UK will still be a member of the EU by then, it is not certain to implement the Directive.

The UK has a well-developed law of confidence to protect trade secrets, which is closely aligned with the Directive, and therefore it may make little difference to businesses based only in the UK.

However, UK-based businesses with an EU presence, or cross-border operations, will want the Directive implemented to ensure that the level of protection for trade secrets across the EU matches that already provided in the UK.

Sophie Martyn
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A new fact sheet filled with tips from our corporate & commercial lawyers for drafting good business contracts is available to read at willans.co.uk/downloads

WE ARE MACMILLAN. CANCER SUPPORT

Commercial property associate solicitor Alasdair Garbutt recently acted for **Macmillan Cancer Support** on the newly built Macmillan Horizon Centre which is due to open soon.

This state-of-the-art purpose-built centre has been designed with input from people affected by cancer, to make it the best place to offer the support and services that people in Sussex need.

The Macmillan Horizon Centre is a partnership between Macmillan Cancer Support, the Sussex Cancer Fund and Brighton and Sussex University Hospitals NHS Trust.

Alasdair advised Macmillan Cancer Care throughout the project from initial concept several years ago to the completion of the build.

Share purchase agreements – when is a warranty a representation?

When buying or selling company shares, the share purchase agreement (SPA) will contain extensive warranties and representations about the company which the seller will make to the buyer. A breach of a warranty or representation can have serious consequences so they should be considered carefully.

A warranty is a promise which is made in a contract by one party to another, while a representation is a statement of fact made by one person to another which induces the other to enter into a contract.

This distinction is important because damages for a breach of warranty and damages for misrepresentation are calculated differently – generally speaking, a claim for misrepresentation will be more favourable to a buyer of shares than a claim for breach of warranty. Warranties by their nature are also statements of fact, eg "there are no litigation claims in the company". So can a breach of warranty also be a misrepresentation?

In the case *Idemitsu Kosan Co. Ltd v Sumitomo Corporation*, a buyer of shares discovered that one of the warranties was untrue and tried to claim that the warranty was a representation as they were time-barred from bringing a warranty claim under the SPA. The court held that a warranty contained in a share purchase agreement does not automatically amount to a representation by its mere insertion in the SPA. In order for a warranty to be a representation, it is important that the representation is communicated before the contract is signed.

What is clear from the decision is that it is likely to be difficult to bring a successful claim that a breach of a warranty in the SPA is also a misrepresentation, if the SPA does not expressly include a provision that the warranties are also to take effect as representations.

A seller of shares should therefore not agree to such a provision and, furthermore, should ensure that the SPA includes a comprehensive 'entire agreement' clause so as to exclude any claim for misrepresentation, whether arising from pre-contractual statements or from the warranties.

Theresa Grech
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Theresa Grech – *"displays first-class commercial awareness"* with wide experience of corporate and company matters, and is a specialist in data protection and IP.

It's not working out

The termination of employment can be a tricky business and will almost always carry the risk of employment tribunal claims. Of course, if there is a genuinely fair reason for termination, such as gross misconduct or redundancy, the risk of an employee bringing tribunal proceedings will be minimal, but it is never completely non-existent.

It is this underlying risk which encourages many employers to use settlement agreements to limit the risk of any future claims by their ex-employees. Settlement agreements (formerly compromise agreements) ensure that employees who sign them waive their rights to bring a claim against their employer. In return, employers pay compensation which the employee may not otherwise be entitled to.

Since the concept of 'protected conversations' was introduced in 2013, it has become much easier for employers to initiate severance discussions without the worry of prompting a constructive dismissal claim if the agreement is not signed.

If you make an offer to, or hold discussions with, an employee whilst they are still employed, with a view to ending that employment on agreed terms, that can amount to a 'protected conversation'. Its effect is very similar to a 'without prejudice' conversation in that an employee cannot refer to it in support of a subsequent unfair dismissal claim if the negotiations fail.

However there are limitations; the conversation will still be admissible in a claim for discrimination. It could also be admissible in any claim if, for example, undue pressure has been put on the employee to accept the proposal. As a result, employers should take legal advice before starting a protected conversation.

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

Client news

Paul Symes-Thompson advised Rupert Thompson and Tony Rodgers in connection with a significant re-organisation of **The Brand in a Box Company Limited** which was completed at the end of July. The company provides quality, planet-friendly packaging, labelling & point of sale to catering businesses nationwide. The transaction involved the incorporation of a new holding company and a share-for-share exchange.

We wish Rupert and Tony every success with the company in the future.

THE BRAND IN A BOX company

Confidential information - if you have a policy, use it!

Two recent employment tribunal cases serve as a timely reminder that it is not enough for an employer merely to have policies in place to protect confidential information; they must also be applied and enforced consistently, and any breaches of policy investigated thoroughly. This is particularly the case in regulated sectors where the consequences of dismissal will be all the more serious for the employee.

In *Stimpson v Citibank N.A.* and *McWilliams v Citibank N.A.*, Mr Stimpson and Ms McWilliams were foreign exchange traders working for Citibank. They disclosed confidential client information to traders from different banks in an online chat room and were dismissed for this without notice.

The employment tribunal held that the dismissal was wrongful and unfair, and that the bank could not rely on a strict reading of its policies and codes of practice on protecting confidential information, when it had not properly investigated how the policies were actually applied in the foreign exchange business, or the extent to which the information was already in the public domain. If it had done so, it would have known that there was a culture of information sharing between foreign exchange traders at different banks. Indeed this fact was highlighted by a regulatory investigation into the bank by the Financial Conduct Authority.

The bank made things worse for itself by failing to realise that the regulatory investigation was relevant to the disciplinary process, and failing to interview witnesses who might have corroborated the traders' defence. The tribunal also found that the breach of confidentiality was not deliberate as the traders believed their conduct was permitted, because peers and immediate managers were doing the same. Further, at the time of the dismissal, Mr Stimpson had not shared confidential information in chat rooms for three years following a specific management instruction on the use of chat rooms.

These cases do not dilute the importance of having policies and contractual terms to protect confidential information. Our employment law team frequently advises clients on putting such policies and terms in place, and on disciplinary processes and legal action when they are breached.

Matthew Clayton
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HR and employment partner Matthew Clayton – *Chambers* says *"clients appreciate his down-to-earth, practical and common-sense approach."*

Supporting The Nelson Trust

We are pleased to announce that this year we are fundraising for local charity The Nelson Trust through a number of fantastic events, including a pool tournament, Christmas raffle and quiz night, as well as other activities around the office.

From its treatment centre in Stroud and women's centres in Gloucester and Swindon, the charity provides residential addiction treatment, services for those affected by addiction and support for people in recovery.

John Trolan, CEO of The Nelson Trust, said: *"We are thrilled to be chosen by Willans as their charity of the year. Our women's centres are safe, caring communities for families affected by addiction, poverty, homelessness, mental illness, lack of qualifications and family breakdown. At the centres we help with substance misuse, housing, employability, finance, health, relationships and domestic abuse, as well as crèche facilities, weekly lunch clubs, counselling, and workshops for developing confidence and life skills."*

We are giving Christmas cards a miss this year and instead donating money to local charity, The Nelson Trust.

Ex-gratia payments made upon termination of employment can be paid tax free up to £30,000. Currently it is possible to bring some (but not all) notice payments within this exemption. The government plans to close this loophole in 2018. It also plans to charge employer's National Insurance contributions on payments over £30,000, which are currently only subject to income tax.

Agriculture & estates partner **Robin Beckley** acted for a long-standing farming client on the sale of a range of redundant farm buildings to a Gloucestershire landscape business to expand its operation with new workshops and a nursery. This is a good example of how obsolete farm buildings can be developed for non-agricultural purposes to the benefit of both parties.

Commercial property partner **Susie Wynne** and commercial partner **Paul Symes-Thompson** have recently acted on property finance transactions, including a £9m refinance of a large multi-let investment property.

Another tax on death (by a different name)

Wills, probate & trusts solicitor Victoria Borrow assists with all areas of private client law.

Earlier this year it was announced that the government is planning a huge rise in the fees charged for grants of probate. Final details of what is proposed, including the date from which the changes will apply, are yet to be announced but what is certain is that, if the proposals go ahead, many executors and administrators will soon find themselves faced with a much higher initial outlay to deal with the administration of an estate.

The current system requires a flat fee to be paid to the Probate Registry, regardless of the value of the estate (unless it is worth less than £5,000 in which case there is no fee). The fee for a grant extracted by a solicitor is £155. When an application is made by an individual personally the fee is £215.

This flat fee scheme has been in place since 1999. Before then (between 1981 and 1999) the probate fee was linked to the value of an estate and something similar to this is what the government now intends to reintroduce, using a banded approach.

The proposed probate application fees are as follows:

- £300 for estates worth more than £50,000 and up to £300,000
- £1,000 for estates worth more than £300,000 and up to £500,000
- £4,000 for estates worth more than £500,000 and up to £1 million
- £8,000 for estates worth more than £1 million and up to £1.6 million
- £12,000 for estates worth more than £1.6 million and up to £2 million
- £20,000 for estates worth more than £2 million.

The Ministry of Justice argues that reform is needed to ensure long-term sustainable funding for Her Majesty's Courts & Tribunals Service (HMCTS) to improve the overall efficiency of the service and to address the country's deficit. Figures quoted suggest that the current shortfall each year is £1.1 billion, between the cost of running the courts and tribunals administered by HMCTS and the income received.

Technically, by capping the fee at £20,000, it will never exceed 1% of the value of the estate. It is also suggested that by increasing the threshold value of estates exempt from paying fees from £5,000 to £50,000, some 30,000 estates per year will now pay no fee at all.

There are concerns that executors and administrators, or the solicitors representing them, may struggle to find the money to meet the cost of the increased probate fees. This is because these fees have to be paid before the assets of the estate can be released. The whole probate process will therefore become more difficult and time-consuming.

Many argue that the fees are not justified as the value of an estate has no bearing on the process involved in issuing a grant of probate and therefore it is merely another tax on death.

Victoria Borrow
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Festive cheer

As part of our fundraising activities this year for The Nelson Trust, and as an excuse for a festive get together, we are holding a carol concert in the chapel at Cheltenham College on Thursday 15 December. The remarkable local choir Severn's Eight (which includes one of our lawyers) will perform and there with be plenty of time for socialising over mulled wine and mince pies afterward.

If you would like to join us for the evening please contact us for more information. We encourage you to reply early via events@willans.co.uk or call 01242 51400 as there are limited places available.

Village greens

The High Court decision in *Lancashire County Council v The Secretary of State for Environment* is a salutary warning to landowners of the risks of not taking steps to prevent land used "as of right" for lawful sports and pastimes for more than 20 years being designated as a town or village green under the Commons Act 2006.

In this case substantial areas of open land were owned by a school. One area had been used for school games and there was a licence agreement to take hay on another part of the land. These areas were used by the general public for recreation and no steps were taken by the school to interfere with that use even when school games were in progress. Furthermore, the public skirted around the playing area but were not told by staff to leave.

An application to register all of the land as a village green was made when the school started to build an extension on part of the land.

In the first instance the inspector at the public enquiry ruled that the land could be registered as a village green. He found the education authority and the head teacher had failed to take steps to prevent or deter recreational use of the land. The High Court agreed with the inspector and also ruled that a licence to take hay was not inconsistent with recreational use of the land.

This problem could have been avoided if the school had maintained notices indicating that the land was private, intended for school use only and that any recreational use required the school's consent.

The school could (since 10 October 2013) also have deposited a declaration with the local authority making it clear that the land was not intended to be used for recreational purposes. If this process had been available to the school at the relevant time it would have defeated the claim for registration as a village green.

Robin Beckley
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Agriculture & estates partner Robin Beckley recently joined Willans to lead our rural offering. *Chambers* says *"his technical knowledge is tremendous and he's very measured."*

Pre-employment checks and the DPA

Helen Howes – has extensive experience in employee relations and negotiations. She also advises businesses on immigration matters and assists them with securing sponsorship licences.

It has always been common for employers to carry out some degree of pre-employment checks before making a firm offer of employment. Traditionally these checks have consisted of obtaining references, or asking the preferred candidate to attend a medical. More recently modern technology has enabled employers to make wider and more detailed checks which often include a criminal record or credit check, and a general social media search.

It is understandable that businesses want to check whether or not candidates pose a threat to the business or to try to identify exaggerated claims of experience, skills or qualifications. However, employers must be alert to their legal duties, in particular those relating to data protection and discrimination.

Personal data obtained during a recruitment process will be subject to the Data Protection Act 1998 (DPA), so it is important employers consider how they process and store this data. The Employment Practices Code (published by the Information Commissioner's Office) suggests all information is securely stored and destroyed when no longer required or within a six month period. Although the code is not itself legally enforceable, non-compliance may amount to a breach of the DPA and lead to civil proceedings. It is also important to carry out 'right to work' checks prior to offering employment; failure to comply with Home Office requirements can result in costly fines.

Research of a candidate's online profile should be done carefully, as information posted may not be credible or truthful, and relying on it may be in breach of article 8 of the European Convention on Human Rights (right to a private and family life). Any subsequent action could be considered discriminatory and this is important given that discrimination legislation protects job candidates as well as employees. It is possible that an unsuccessful and disgruntled candidate may make a subject access request in an attempt to establish whether discrimination was at play.

Their request will allow them access to all personal data held by you about them and will require you to provide copies of any files, notes or emails about them that have been created or shared within your organisation. You therefore need to ensure that all emails/notes on file clearly identify objective reasons for declining an application and focus on skills, experience and performance at interview.

Helen Howes
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Brexit – how will it affect your intellectual property?

In times of uncertainly, the UK Intellectual Property Office has published guidance following the vote to leave the EU earlier this year. It outlines that:

- while the UK remains a full member of the EU, then EU trade marks and registered community designs will continue to be valid in the UK
- there will be a consultation as to 'the best way forward' but there is guidance that even after the UK leaves the EU, UK businesses will still be able to register any new trade mark which will cover all remaining EU member states
- the UK is a member of the International Trade Marks system (the Madrid System) and this allows users to file one application in one language and pay one set of fees to protect trade marks in up to 113 territories, including the EU
- the referendum result has no impact on the right to apply to the European Patent Office (EPO) for patent protection. It will remain possible to obtain patents from the EPO which apply in the UK, and Brexit will not affect the current European patent system governed by the European Patent Convention
- whilst the UK remains in the EU, our copyright laws will continue to comply with the EU Copyright Directives. However, whether this remains the case following our exit from the EU will depend on the terms of the UK's future relationship with the EU
- the UK is a signatory to a number of international treaties and agreements and this means that UK copyright works (for example music, films, books and photographs) will continue to be protected around the world.

If you have any queries about your intellectual property rights, or the impact that Brexit may have on your business, please contact our intellectual property team.

Paul Gordon
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Legal 500-rated dispute resolution partner Paul Gordon is praised for his ability to *"take in detailed information and formulate a winning strategy"*. He handles a range of intellectual property cases that include well-known household brands.

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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