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Willans LLP I solicitors

# Law News

Newsletter for commercial clients

Winter 2018

## What's in this issue?


- Are 'smart contracts' really all that smart?
- Traps for unwary commercial tenants
- The 'incapacity crisis'
- Recruitment ads and discrimination


## Welcome

In this issue, we tackle some interesting topics like the future of smart contracts, the merits of mediation, and the legal issues to be aware of if you're using your own name as a business brand.

We also address some practical concerns, like what employers should do when flu season inevitably hits, and how commercial tenants can avoid common pitfalls.

If you'd like advice on the topics highlighted in this issue, feel free to contact our lawyers directly - we'll be delighted to help.

**Bridget Redmond** managing partner

## Our commercial teams continue to grow

Adam Hale, senior associate

Kym Fletcher, consultant

Our commercial teams continue to develop with the appointment of two experienced lawyers.

Senior associate Adam Hale who has joined our agriculture & estates team is a full member of the Society of Trust & Estate Practitioners, and is a specialist in agricultural law, estate planning and estate administration. He is experienced in advising rural businesses, farmers and private landowners on a wide range of rural land management issues.

Our corporate & commercial team also benefits from the arrival of Kym Fletcher, a leading sports, media and technology lawyer with over 25 years of commercial experience. She has a solid background in intellectual property and has drafted and negotiated in excess of £1.5 billion of major sports rights and sponsorship agreements.

Contact Adam at **adam.hale@willans.co.uk** and Kym at **kym.fletcher@willans.co.uk** ■

## Sterling results in latest legal guide

The Legal 500 UNITED KINGDOM TOP TIER

Our dispute resolution and employment law teams have secured coveted top-tier rankings in the latest edition of *The Legal 500*. 13 of our lawyers are recommended in the guide, with many rated in multiple disciplines. **Paul Gordon** and **Nigel Whittaker** are highlighted as 'leading individuals' in their respective fields of commercial litigation and commercial property.

11 of our departments in total are ranked in the highly-respected guide, which recommends law firms across the globe, drawing on client feedback. Eight of these are highlighted for their expertise across the entire South West.

Managing partner Bridget Redmond commented: *"The combination of technical expertise, approachability and commitment to exceptional client service is the hallmark of Willans, and I am delighted to see that has shone through in the guide as a result of client feedback."*

To view the results in more detail, visit the News page on our website. ■

## Join us for festive cheer

As part of our fundraising activities for our charity of the year, Carers Gloucestershire, we are holding a charity carol concert on 5 December at Cheltenham College. Local choir Severn's Eight will perform and there will be mulled wine and mince pies.

This event is free to attend with an option for a charity donation on the night. Please reserve your space at **willanscarols.eventbrite.com** or call **01242 514000** with any queries.

We hope to see you there!

# Joint ventures: fail to plan, plan to fail

As part of a joint venture, your business can gain access to a range of resources and expertise that may not otherwise be available. But consider a few key issues first, says **Chris Wills**.

The term 'joint venture' does not have a specific meaning in English law. It is commonly used to describe a commercial arrangement between two or more entities that falls within one of the following basic structures:

- a limited company;
- a limited liability partnership;
- a partnership; or
- a contractual co-operation agreement.

Which option is most suitable will depend upon various factors (including commercial, legal and tax considerations), and careful thought and planning is needed from the outset to avoid unforeseen (and potentially costly) consequences.

There is no one-size-fits-all approach to joint ventures, but there are a few key issues to think about before embarking on one:

### Mutual reliance

The key to a successful joint venture is having two or more parties that want to exploit a business opportunity, with each party bringing something to the table that the other(s) cannot. If one party can succeed in exploiting the opportunity without the other, the joint venture is unlikely to be successful.

### Contributions

What is each party contributing to the joint venture? This can include assets (such as cash, equipment or intellectual property rights), expertise (such as management services or marketing resources) and products and/or services. Each party must understand what is being contributed, and on what basis.

### Business plan

A well thought through business plan, that is based upon reasonable assumptions and has been agreed between the parties, will form a strong foundation for any joint venture. Documenting an agreed approach to the joint venture in this manner will reduce the level of contingency planning that will otherwise need to be included in a joint venture agreement, because everyone knows the agreed way forward.

### Heads of terms

Invest some time (and money) into agreeing heads of terms at the outset. This will highlight areas of potential difference between the parties and encourage them to decide how they should be overcome before fully committing to the joint venture. This approach reduces the risk of disputes in the future, and should streamline the process involved in drafting and agreeing the joint venture agreement itself.

### Advice

Engaging appropriate professional advisors is crucial to the long-term success of any joint venture. Seeking that advice at the earliest opportunity (particularly before heads of terms are agreed) will help the parties to set their relationship on the correct footing from the outset.

We can help you with this, so get in touch. ■

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**Chris Wills**
Partner, corporate & commercial

Chris has over a decade of experience in advising businesses on a range of transactions and issues, including mergers and acquisitions, debt and equity funding, joint ventures and shareholders' agreements.

## Supporting the best of county businesses

Once again we proudly sponsored the 'Family Business of the Year' award at the Gloucestershire Business Awards in October.

The winners were Datasource Computer Employment Ltd, a specialist supplier of IT and technical professionals to support high profile projects.

To read more and watch a video about them, the other finalists and the awards ceremony, view our article at **www.willans.co.uk/news**

## What we've been advising on...

Employment law associate, solicitor Jenny Hawrot advised bespoke travel company **Holiday Architects** on the creation of new contracts of employment and a new employee handbook to accommodate the company's unique flexible working culture.

Employment law partner Matthew Clayton, with corporate & commercial team members, advised the company on their requirements under GDPR.

# Smart contracts: how ‘smart’ are they really?

Solicitor **Sophie Martyn** gives an overview of the legal buzzword of the moment.

The term ‘smart contract’ was created in 1996 by computer scientist and lawyer Nick Szabo during his research into digital currency. In a nutshell, they are contracts in which terms are encoded in computer code rather than legal language.

The code defines what happens when particular conditions are met and then automatically performs certain actions when those conditions are fulfilled. A universal example of a smart contract is a vending machine, which contains simple hard-coded rules to enable it to perform certain actions.

> “computer code... is incapable of subjective human intervention.”

In the modern world smart contracts are being created using blockchain. Blockchain is best known as the technology behind digital currency Bitcoin, although its uses extend to a wide range of industries, such as pharmaceuticals and financial services. Essentially, it is a digital network made up of blocks containing records of transactions, chained together through a common set of coded rules. When there is a triggering event, the contract executes itself according to the coded rules.

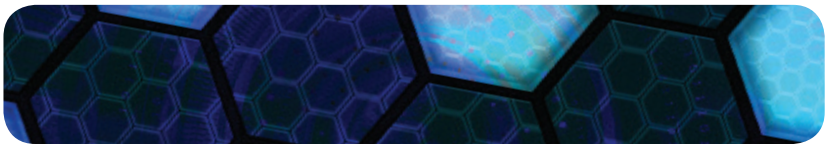
Combining smart contracts with blockchain can streamline and automate processes and, unlike traditional contracts, eliminate or reduce the need for intermediaries and physical documents. However, there is debate as to whether smart contracts are legally binding and enforceable. This issue goes right to the heart of contract law which states that for a contract to be legally binding there must be, amongst other things, an offer, acceptance and certainty of terms. Some argue that there is no offer and acceptance because the execution of the contract is a unilateral act, and no certainty of terms because smart contracts are too short to include all of the terms between parties.

There is also the fact that in drafting traditional contracts, lawyers can use subtle legal phrases to qualify certain contractual terms. The computer code in smart contracts is made up of hard-and-fast rules and incapable of subjective human intervention.

As for the future, technologically, smart contracts are dependent on the blockchain with which they interact, and this technology is still in its infancy. Legally, smart contract technology will need to be supported by the English legal framework and this will require a substantial review. ■

**Sophie Martyn**
Solicitor, corporate & commercial

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



# Green Paper update: new legislation on the horizon

In March we reported on the government’s response to the Green Paper proposals for corporate governance reform.

In June, following a number of high profile corporate failures, the government published draft legislation, ***The Companies (Miscellaneous Reporting) Regulations 2018.*** This is expected to come into force in January and companies will need to be ready to report on the new requirements from January 2020. To align with the new legislation, the Financial Reporting Council has also published its new 2018 UK Corporate Governance Code, designed to set higher standards of corporate governance in the UK.

All private and public companies of significant size will have to:

- explain how their directors comply with the requirements of section 172 of the Companies Act 2006 (the duty of a director to promote the success of the company),
- disclose their corporate governance arrangements, and
- explain how they have had regard to employee interests and the company’s business relationships with suppliers, customers and others.

In addition, quoted companies will be required to report on the ratio of CEO pay to the average pay of their UK workforce.

For advice on your company’s obligations, please get in touch. ■

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Corporate and commercial partner, Chris Wills, recently advised **Hallmark Powergen Limited** and **MA020 Limited** on their sale of two operational 500kW EWT wind turbines to Wind Renewables Income Fund, managed by Alpha Real Capital LLP, a London-based fund which invests in renewable energy projects.

We have been advising on shareholders’ agreements for clients in sectors ranging from manufacturing and health to PR.

No business is immune to disputes, but a properly-drafted, bespoke agreement offers shareholders the assurance that, should a problem arise, they have a point of reference which is likely to protect their interests. Contact us for advice.

# Using your own name as a business brand

Business owners should remember that the right to trade using one's own name is not unfettered, dispute resolution partner **Paul Gordon** explains.

**Paul Gordon**
Partner, head of litigation & dispute resolution

Paul, a ***Legal 500***-rated specialist dispute resolution lawyer and accredited mediator, has considerable experience in contentious intellectual property cases, both in the High Court and the IPEC.

Karen Millen is a well-known fashion designer, who had founded the business Karen Millen Fashions Limited. She subsequently sold out, and in doing so, agreed to restrictions for use of her name. Despite her application for declarations from the court that she could in certain circumstances use her name and apply for trademarks, in 2016 the court upheld that she was restricted in the use of her name for commercial purposes.

In a recent EU trade mark case, the court decided a case between the clothing brand KENZO and Mr Kenzo Tsujimoto (KT) in respect of the right to register a business owner's name as a trademark. KENZO had opposed KT's trademark applications on the basis his mark was too similar to the KENZO registered trademarks.

In its decision the court held that, whilst EU law does not permit the owner of a registered trademark to prevent another person from using their own name, at the same time the law does not provide an unconditional right to use their name.

The court highlighted this would not be allowed if it took unfair advantage of, or was detrimental to, the distinctive character or repute of an earlier trademark. In this case, KENZO won.

These cases are a reminder of the importance to those selling businesses of preserving own name rights, and for those buying the business to protect against competition from the seller. They also offer an insight into how the court balances the competing interests, and can be seen as favourable to brand owners who wish to stop competitors claiming own name rights to avoid existing trade mark protection.

For advice on intellectual property disputes and related issues, contact us. ■

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# Recruitment roulette? Don't take the risk

Employment law partner **Matthew Clayton** warns employers to think before they advertise.

It may come as a surprise to some, but a person who has not even applied for a job can theoretically bring a discrimination claim in respect of the employer's recruitment advertisement. Such a claim would be based on the content of the advert or a statement made by the employer in response to an enquiry.

Employers need to carefully consider their job ads to ensure that the language used does not put off any protected groups from applying for the role, nor should the requirements prevent any protected groups from being able to do it. For example, advertising for a 'young and energetic' individual could amount to age and/or disability discrimination. Advertising for a 'waitress' or 'salesman' may amount to sex discrimination.

That said, where there is a necessary occupational requirement, employers can justify what would otherwise be discriminatory criteria. For example, a firefighter (not fireman!) needs to be physically fit, so when advertising for one this requirement can be justified. However, despite the occupational requirement justification, employers should be aware of their obligation to make reasonable adjustments to accommodate disabilities.

Draw up a detailed written job description, focusing on the skills, qualifications and experience required for the vacancy. Describe those that are considered necessary for a candidate to have in order to perform all the duties in the job description. Consult your equal opportunities policy for guidance, and do not include irrelevant criteria. If you think that a criterion which, on the face of it, looks discriminatory, is in fact an occupational requirement, you should seek advice. Get in touch with us for clear guidance on this topic. ■

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**Matthew Clayton**
Partner, head of employment law

Matthew acts for both national and multi-national clients. ***Chambers*** says "clients appreciate his down-to-earth, practical and common-sense approach".

Residential property partner **Robert Draper** acted in the sale of Beechwood Farm in the Cotswold village of Compton Abdale.

The picturesque property and village were featured in a recently-aired episode of BBC One's 'Escape to the Country'.

Corporate & commercial partner **Paul Symes-Thompson** advised a professional services firm on its transition from partnership to LLP status.

We have substantial expertise in LLP agreements, so if you would like tailored advice, please get in touch with our corporate & commercial team.

# Land Transaction Tax reminder for Welsh land

Commercial property solicitor **Emma Thompson** demystifies the replacement for SDLT in Wales.

**Emma Thompson**
Solicitor, commercial property

Emma is a solicitor in our ***Legal 500***-rated commercial property team. With a particular interest in leasehold work, she advises clients on a wide range of issues, including sales and purchases, landlord and tenant leasehold matters, and ancillary matters.

As a reminder, as of 1 April all transactions and acquisitions of Welsh land became subject to Land Transaction Tax (LTT).

LTT replaced Stamp Duty Land Tax (SDLT) in Wales and is collected when a commercial property costing more than £150,000 is sold or leased. The legislation is broadly consistent with SDLT, with applicable rates as follows:

| **Freehold transactions** | |
|---|---|
| £150,000 - £250,000 | 1% |
| £250,001 - £1,000,000 | 5% |
| £1,000,000 + | 6% |
| **Leasehold transactions** | |
| £150,000 - £2,000,000 | 1% |
| £2,000,000 + | 2% |

When a property includes land on both sides of the England/Wales border, the transaction will be treated as two separate ones for tax purposes; one subject to LTT and one subject to SDLT.

The tax will depend on the amount of consideration given for the land. The taxpayer must split the figure between the two tax jurisdictions on a just and reasonable basis, based on the value of the land that falls into each area. The apportionment may be done by a qualified valuer or by the taxpayer themselves and must be based on the relevant facts of the transaction.

Apportionment based on the area of land may not be just and reasonable. This may be appropriate for a field with no buildings where there is likely to be little difference in value between the land in each jurisdiction; but for other types of property one area of land may be more valuable due to its access, location, use or development potential. For example, land with buildings on it is likely to have more value than land without.

Contact us for clear advice on this topic. ■

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## Willans raises over £10k for Winston's Wish

We are delighted to have raised in excess of £10,000 for our chosen charity of 2017/18, Winston's Wish.

Over the past financial year, our staff have taken part in a variety of fundraising activities in aid of the Gloucestershire-founded charity, which supports children, young people and their families after the death of their parent or sibling.

Fundraising activities included a quiz at Manor by the Lake attended by more than 150 people from the county's leading businesses, a pool competition, a 'bake-off' competition and a range of 'dress-down' Fridays. The firm also funded the charity's helpline for a day at Christmas.

Thank you to all of our staff, friends, clients and connections who have volunteered their time and money to help us reach this fantastic sum.

Visit the News page of our website to read more, and watch a video of the highlights of our fundraising year. ■


*Pictured (left to right): Malaney Varaljay-Boyce, head of regional fundraising and events at Winston's Wish, with Willans' charity committee members James Grigg, Rob Nunn and Sophie Martyn.*

Paul Symes-Thompson and Alasdair Garbutt recently advised **I Stojanov & Sons Ltd** on the purchase of a commercial property investment company based in Staverton.

The deal, worth in excess of £3 million, involved both the purchase of shares and the re-negotiation of commercial property leases. Paul acted on the corporate aspects of the deal and Alasdair advised on the commercial property aspects.

### Be in *Law News*

If you have worked with us recently and you'd like us to consider publishing your news in the next issue, contact sophie.pope@willans.co.uk.

# Commercial property focus: traps for the unwary tenant

When it comes to tenants taking on commercial leases, nothing is more important than careful negotiation. Partner **Alasdair Garbutt** and solicitor **Emma Thompson** in our commercial property team explain the key traps to avoid.

### Reinstatement and repair

In a recent case, the High Court stated that the reinstatement obligations on the tenant (in basic terms, the requirements for the tenant to put the premises into the condition described in the lease) were not drafted precisely enough.

As a result, the court decided that the tenant's break option (a provision in the lease which lets either or both parties finish it early) was not conditional on compliance with the reinstatement obligations. This is a reminder to both landlord and tenant to leave no doubt about what needs to be done for a break notice to be effective.

In another court case, a tenant was trying to identify the works that it was obliged to undertake to comply with the repairing covenant in the lease. Again, this is a critical area for certainty in the lease that must be documented properly. Before they sign a lease, tenants should consider the possible future cost of having to comply with their repairing obligation on lease termination.

We also find many tenants are often unaware of their rights when their lease expires. This is an entire subject on its own but, in short, commercial tenants should clarify before they take on a new lease what their rights will be on its expiry. Sometimes, they will have no rights and have to vacate on the last day of the lease. Alternatively, if they have renewal rights, they can remain in occupation until either they or the landlord starts the renewal procedures, or the landlord gives them a valid notice to vacate. ■

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### Break options and vacant possession

A provision in a lease which enables either the tenant, landlord or both to end the lease early is called a break option. If any conditions attached to a break option are not complied with, then the break will not take effect and the lease will continue. Consequently, commercial tenants with a break option conditional upon vacant possession who don't remove all their belongings from the property run the risk of invalidating the break.

Various cases have concluded that if there is a substantial impediment to the landlord's use and enjoyment of the property then vacant possession has not been given. This could be something physical, such as the tenant's belongings being left behind or because people are still in the premises.

In a fairly recent case, ***Riverside Park Ltd v NHS Property Services Ltd***, the tenant had leased an open plan premises and carried out various alterations, including the installation of removable partitioning. Subsequently, when the tenant attempted to exercise the break clause by vacating the premises, the landlord argued that failure to remove the partitions meant that vacant possession had not been given, and therefore the lease had not been broken.

The tenant argued that the partitions had become part of the premises and were therefore tenant's fixtures and there was no obligation to remove them in order to give vacant possession.

The High Court ruled that, although the partitions were fixed to the floor and ceiling, they were belongings and not tenant's fixtures. This was because they could easily be removed without causing any damage to the premises. Consequently, the tenant had not satisfied the condition and the exercise of the break option was therefore invalid.

Generally, when negotiating a break clause we would advise a tenant to ensure that vacant possession is not a condition of the break. In some cases it is possible to water down the obligation so the tenant must only give up the premises free from occupation. This would mean that any remaining belongings would not prevent the break, but might instead be subject to a dilapidations claim.

To reduce the risk of dispute later on, it may also be worth speaking to the landlord and negotiating a list of what needs to be removed for any break to be effective. ■

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## Fact sheet: what to look out for in a commercial lease

Download a free fact sheet with practical tips for tenants taking on a commercial lease at **willans.co.uk/fact_sheets.** For tailored, practical advice, contact a lawyer in our ***Legal 500***-rated commercial property team.

# Winter illnesses: a headache for employers

Employers should discourage 'presentee-ism' or risk a drop in employee productivity, explains employment law associate, solicitor **Jenny Hawrot.**

As winter closes in, there is a set of new problems facing employers. No longer are businesses plagued by employees asking 'is it too hot to work?', but rather, they fall victim to the common cold or flu.

With close working quarters and air conditioning, many workplaces are the ideal breeding ground for illness. But often, an underlying culture of 'presentee-ism' means that employees feel like they have to attend work under any circumstances, and failure to do so will be frowned upon. Consequently, employees will go into work even if they are too unwell, and risk infecting their colleagues.

Employers have a duty to provide a safe working environment, without risk of illness or injury to their workforce. They should not encourage or allow contagious employees to come into work, nor to undertake their jobs if they are not well enough, especially if they are operating heavy machinery and taking medication which may cause drowsiness.

What about those employees who are 'coming down with something' but still able to work? Where possible, employers should consider allowing them to work from home. The person is not too ill to work, but working from home does mean that whatever is about to strike them down won't enter the workplace.

Employers should also create a culture where staff know that it is ok to be off work due to genuine illness. Often, employees will recover more quickly and be more productive if they take time off sick, rather than forcing themselves into work whilst ill. Plus, if the employee is at home, so are their germs!

Having an effective sickness absence policy in place, setting out employees' rights and duties, will ensure that staff are aware of these obligations. It also gives employers the right to take action if an employee's sickness absence is unsatisfactory, or not due to genuine illness. For advice on creating effective sickness policies, contact us.

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**Jenny Hawrot**
Associate, solicitor, employment law

Jenny advises clients from SMEs to national organisations on the full range of employment-related matters, including TUPE, contractual matters and defending employee relations.

# Mediation: it's more powerful than you may think

Far from being the 'soft option', mediation is effective, time-efficient and can be a lifeline for businesses in conflict. **Nick Cox,** partner and experienced mediator, explains more.

Most small businesses value their time because, as the saying goes, time is money.

So when a problem arises with a supplier or a customer, with a neighbour or with an associate, the time that will need to be spent to resolve any issue is like money down the drain. This can put at risk a relationship that has taken time to nurture.

Efforts to smooth things over, especially where the two parties are in roughly similar situations, can result in a good old-fashioned compromise, designed by the parties themselves.

But what if these efforts fail? Do you walk away or threaten the big stick of court action? One could mean a big dent in profits or loss of a contract; the other could involve expense, risk and end up damaging or losing out on an existing business relationship that might have been really useful.

Well there is another way. Perhaps taking a lead from employer-employee relations, where conciliation and mediation has long been a compulsory part of the process of employment disputes, various bodies realised that there were positive benefits of using a third party to help resolve matters. And so the concept of a professional mediator was born.

Isn't mediation just a soft option, you may ask? Not to the three parties who took part in a mediation in which we were involved some years ago. Beginning at 8.30am the binding three-way deal was signed off at 2am the following morning. And it resolved so much more than the nominal issues in dispute. As have many mediations in which we have been involved over the last fifteen years.

And in almost half, parties have shaken hands at the end, and sometimes even hugged! Relationships can be maintained, and acceptable and inventive solutions found, in a way that suits everyone.

Perhaps most importantly in the commercial sense, the parties can set their own timetable and waste little time in setting up the meeting. And wasted time, as we know, is never recovered.

Contact us to see how we can help you achieve a favourable outcome to your tricky business issue.

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**Nick Cox**
Partner, head of property litigation

Nick is a specialist in commercial contract disputes, with particular expertise in landlord and tenant work. A highly-regarded mediator, he is accredited with the ADR Group. ***The Legal 500*** says "he understands clients' needs".

# Report warns of impending 'incapacity crisis'

A report published by Solicitors for the Elderly and the Centre for Future Studies has warned that the nation is facing an 'incapacity crisis'. Partner **Simon Cook** explains more.

It can be uncomfortable to think about what might happen if you were to lose the ability to make your own decisions about personal welfare or your finances. This idea resonates in the report, which found that over 75% of Britons haven't discussed or thought about their personal wishes when it comes to healthcare should they lose capacity.

Unfortunately, the combination of longer life expectancies, the prevalence of dementia and other conditions which cause mental incapacity and people's general reluctance to plan for the future, seems to be creating a perfect storm. Without proper planning, important decisions about your medical treatment, social care, business and finances might be left in the hands of strangers.

So, what can you do to plan ahead? A lasting power of attorney (LPA) can be a valuable form of insurance against temporary or permanent future incapacity. LPAs enable you to appoint one or more attorneys to step in and make decisions on your behalf if you are no longer able to do so yourself. The attorney could be a trusted friend, family member or (for a financial decisions LPA) a professional. There are two types of LPA:

- **Personal welfare** covers decisions such as where you live and what medical treatment you should receive.
- **Financial decisions** covers decisions such as buying and selling property, organising insurance, opening and closing bank accounts, investing assets and dealing with tax affairs.

Unexpected incapacity of a business owner can cause financial and operational difficulties for a business. It could, for example, result in no one having authority to control the business account. Whilst it may be appropriate to appoint a close friend or family member to deal with personal finances, that person may not have the best understanding of your business. Business owners therefore ought to consider making a separate financial decisions LPA.

If you lose capacity and have not made an LPA, an application to the Court of Protection may be necessary for an order appointing someone to act on your behalf. This process can be costly and time-consuming and the person appointed may not be the person you would have chosen.

So, if you are thinking of making a lasting power of attorney, don't put it off any longer. Contact us for clear, practical advice. ■

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**Simon Cook**
Partner, head of wills, probate & trusts

***Legal 500***-rated partner Simon specialises in wills, estate and tax planning, and trusts.

He is a full member of the Society of Trust and Estate Practitioners (including STEP SIG for mental capacity).

## 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

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### Divorce & family law

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