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Newsletter for commercial clients

Welcome to the Spring 2021 edition of Law News, in which we're pleased to bring your business the latest developments in the world of law. We take a look at the recent Budget and the legal implications of the Chancellor's plans, examine the real meaning of 'vacant possession' and discuss the rising popularity of management buyouts.

As always, we're here to help if you need legal advice or support. We wish you a safe and happy Spring and a prosperous year ahead for your business.

Bridget Redmond managing partner

Our team continues to grow

We are delighted to announce the appointment of two new partners, a range of senior promotions across the firm and two additional new lawyers.

Adam Hale has become a partner after three years as senior associate in the firm's agriculture & estates team. Simon Hodges has also re-joined the firm as a partner in the residential property team.

Wills, trusts & probate specialists Miranda Hawkes and Tom O'Riordan become associates, as does residential property lawyer Mary Young.

We have also welcomed two new lawyers in our private client teams. Family law solicitor Kristie Rhodes joins us from another Gloucestershire firm and is a member of Resolution, an association of family law professionals committed to resolving disputes constructively.

Chartered legal executive Janine Guthrie joins our wills, trusts & probate team as an associate. With over 12 years' experience in the private client field, she is a specialist in Court of Protection matters and a fully-accredited member of Solicitors for the Elderly.



We're proud to sponsor the Growth Business of the Year category in the inaugural SoGlos Gloucestershire Business Awards, celebrating the innovation and creativity that so many of the county's businesses have demonstrated over the past year.

Nominations open in March 2021, and can be made at www.soglos.com/awards**business**. It's free to nominate your business, but the nomination must be made by an official representative of the business who will be the point of contact through the process. Winners will receive a trophy to display at their premises, as well as a winner's certificate, official winner's badge to use on their website, and editorial coverage on the SoGlos website via its email newsletter and social media channels.

Businesses can choose from a range of categories, including 'Most innovative business of the year', 'International business of the year' and 'Pivoting business of the year.' Watch this space for more updates!



• Budget 2021 special

What's in

this issue?

- Brexit and your intellectual property - what's changed?
- The rise of the management buyout
- Vacant possession: What does it really mean?

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GROWTH BUSINESS

of the year

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Budget special: What's in store for 2021?

The Chancellor's Budget on 3 March outlined the next steps for the economy...

Corporate & commercial



"Many commentators predicted that Business Asset Disposal Relief (which used to be Entrepreneurs' Relief) may be in the firing line, but

no changes seem to have materialised. In fact, apart from freezing the amount of the annual exemption, capital gains tax has not been mentioned.

Bigger businesses (those that make a profit of more than £250,000 per year) will bear the brunt of an increase in corporation tax rates, which will be hiked from 19% to 25%. Businesses that make a profit of under £50,000 per year (which we're told makes up nearly three quarters of trading companies) are shielded from the hike and will continue to be taxed on their profits at 19%.

Investment, particularly in renewable energy, was a big theme in the speech. Plans include a new UK Infrastructure Bank which is intended to fund up to £40bn worth of green projects in both the public and private sectors, funded through the issue of £15bn of green bonds by the government to enable investors to participate with the objective of 'net zero carbon emissions by 2050'."

Chris Wills, partner

Employment law



"The Budget gave us few surprises from an employment law perspective. As anticipated, the Coronavirus Job Retention Scheme (CJRS - or 'furlough') will be

extended until the end of September 2021.

In the main, the CJRS remains the same, save that from July 2021, businesses will be asked for a 10% contribution towards hours Suzanne O'Riordan, partner (non-solicitor) not worked by employees, rising to a 20%



continuation in August and September.

The National Living Wage will be increased (see p.7 for more information). From a PAYE perspective, there will be no rise in the rate of National Insurance contributions, or Income Tax. The Income Tax threshold for paying the basic rate will rise from £12,500 to £12,570 in April 2021, and will be frozen to 2026. The higher rate Income Tax threshold will rise from £50,000 to £50,270 in April 2021, and will be frozen to 2026.

All in all it's fairly positive news for employers as the support to pay employees' salaries continues for another 6 months, although this will be gradually reduced and businesses will be expected to make an increased contribution from July onwards."

Jenny Hawrot, senior associate, solicitor

Residential property

"As anticipated, the Stamp Duty Land Tax (SDLT) holiday has been extended until 30 June. This is great news for those who have already started the legal process of moving (i.e.

those who have found a property to buy, or are selling a property, but have yet to complete). To smooth the transition after June, the nil rate band will be tapered; it will be set at £250k from then until the end of September, returning to its pre-COVID level of £125,000 on 1 October.

To give a boost to aspiring first-time buyers, the Chancellor has announced a mortgage guarantee scheme, aimed at removing the barrier of a high deposit for those wanting to get on the property ladder. The 95% mortgages will be available to those looking to buy property under £600,000 and many big-name lenders are already on board."

Commercial property

"Those who have had to close their commercial premises will welcome the extension of the business rates holiday up to the end



of June. After that, there will be a gradual, phased return to payment of rates as businesses hopefully begin to re-open their doors. Discounts of up to two thirds will be available during this tapered period, up to a value of £2 million. A "lower cap" will apply for businesses who haven't had to close during the pandemic."

Alasdair Garbutt, partner

Wills, trusts & probate

"Many Budget predictions put tax hikes on the cards, especially for Capital Gains Tax (CGT) but somewhat surprisingly, the Chancellor was quiet on this subject.



The allowances for CGT and Inheritance Tax remain the same, as does the pensions lifetime allowance. It's an opportune time for individuals to think about their longerterm financial planning."

Simon Cook, partner

Business immigration



"We await further details on the proposals, but the immigration system will be reformed to allow highlyskilled workers, in the

fields of science, research and technology. to come and work here without the need for sponsorship. It was also promised that the existing system would be simplified to encourage highly-skilled entrepreneurs and tech start-ups to establish themselves in the UK." 🗖

Helen Howes, solicitor

What we've been advising on...

Our corporate team has advised leading recruitment business **Sanderson Solutions** Group plc, in acquiring recruitment company Highams, along with three further trading divisions of Nakama

Group plc – Nakama UK, Nakama Hong Kong and Nakama Singapore, growing its team by approximately 15%. Corporate & commercial partner Chris Wills, who led the transaction, commented:

"We're pleased to support the group with its expansion, and proud that this progressive company is a longstanding client of the firm who we've been advising for close to two decades."



Brexit and your intellectual property: the changes

The Intellectual Property Office has provided useful guidance on the key changes post-Brexit.



The Brexit transition period, set out in the UK and EU's Withdrawal Agreement, came to an end on 31 December 2020. Now that we are well into 2021, we strongly recommend that you consider how the post-Brexit legal landscape may impact on your intellectual property ('IP'), if you haven't already.

To clarify the key changes, the Intellectual Property Office ('IPO') have provided some useful guidance.

Trade marks

A comparable UK trade mark for every EU trade mark ('EUTM') will be created by the IPO, with the equivalent legal status to those that were registered under UK law. The original EUTM filing date and original priority or UK seniority dates will be retained.

These will be independent UK trade marks that can be assigned, licensed, renewed or challenged separately from the EUTM. You will not need to pay a fee or file an application. Whilst you will not receive a UK registration certificate, you can access details about the trade mark from the IPO website.

Registered designs

For every registered community design ('RCD'), a re-registered design will be created by the IPO. They will be recorded on the UK designs register, with equivalent legal status to those that have been applied for and registered under UK law. As above, you will retain your original RCD filing date, and original priority date. They will be fully independent UK designs that can be assigned, licensed, renewed or challenged separately from the original RCD. Again, you will not need to pay a fee or file an application for this, nor will you receive a certificate, but you can access details about your registration from the IPO website.

Unregistered designs

Unregistered community designs which came about prior to the end of the transition period will remain protected in the UK for the rest of their 3 year term,

Commercial property partner **Thornton Allen** is acting for many of the purchasers of new holiday homes to be built within Waters Edge – a new development at Cotswold Water Park. For the developers, leading Swedish firm Trivselhus, we are the recommended solicitor for buyers, and are working closely with the selling agent, Savills. All plots at Waters Edge have a lake terrace qualifying country. Please note that first disclosure in the EU will not establish a SUD; it could "destroy novelty" of the design should you look to create a UK unregistered right later down the line. Therefore, businesses will need to be very careful as to where to disclose their products to ensure they are protected in their key market.
Patents
The European Patent Office ('EPO') is not an EU agency, so the existing European patent system will remain unaffected by Brexit.

through continuing unregistered designs. As of 1

('SUD') has been available in UK law; this gives

January 2021, a supplemental unregistered design

similar protection to that offered by the unregistered

community design, but for the UK only. The SUD will

be established by first disclosure in the UK or another

Copyright

The UK continues to be party to international copyright treaties, so the majority of UK copyrighted works, including books, music and film will retain protections in the UK and the EU. However, some protections for other copyright will change.

The importance of your IP to your business should not be underestimated, and will in most cases represent a valuable asset. If you are unsure on your current rights, please contact us.







Paul Gordon Partner, litigation & dispute resolution

Paul is recommended by *Chambers UK* and *The Legal 500 UK*. He handles a broad range of commercial and civil disputes for national and international clients, often working on complex commercial litigation and IP cases.

Uber drivers are workers, says Supreme Court



In a landmark decision on 19 February 2021, the UK Supreme Court ruled that Uber drivers are indeed workers and not selfemployed.

They will now have access to minimum wage and other employment benefits. The decision is likely to have wide implications for UK employment law, and the 'gig economy' as a whole.

Watch this space for more updates.



Alasdair Garbutt Partner, commercial property

Alasdair advises on sales & acquisitions, development transactions, landlord & tenant and property management matters, with particular expertise in the charity sector.

Land access for digital infrastructure is subject of new consultation

The government has opened a consultation to help them understand whether changes to the Electronic Communications Code are required. **Alasdair Garbutt** explains more.



A government consultation is underway to review the legal framework for building and maintaining digital infrastructure (such as mobile phone masts and broadband cabinets) on private and public land.

With the long-term aim of providing more homes with better connectivity and internet speeds, the consultation is to assess whether changes to the UK's Electronic Communications Code ('the Code') are required to further facilitate agreements between telecom providers and landowners (which stakeholders say, and from personal experience, do not always progress quickly or smoothly).

According to Matt Warman, Minister for Digital Infrastructure, the government are considering legal reform "so people can get the benefits of better connectivity as soon as possible", alongside a £5.5 billion investment in supporting technology.

The consultation is looking for feedback on issues or difficulties that may have cropped up for operators and landowners in the process of obtaining, using and renewing agreements under the Code, and sharing and upgrading infrastructure. General proposals include clarifying the automatic rights which can be exercised when phone masts need to be upgraded to 5G to remove a coverage blackspot, for example.

The consultation is also looking for views on whether operators and landowners have a clear understanding of what will happen when land agreements expire and how to renew them.

The latest version of the Code came into force in 2017, giving telecommunications operators statutory rights to install and operate electronic communications apparatus on, under or over land. The path to improved digital infrastructure hasn't always run smoothly. In *EE Limited v London Borough of Islington (2019)*, the tribunal imposed a 10-year lease on a landowner, noted it was in the public interest to avoid a breakdown in mobile phone network coverage and therefore allowed operators to secure rights to move their equipment to a new site. The tribunal decided that a financial sum would adequately compensate the property owner despite them being "deprived of the right to do as they wish with their own property".

But a further development, in the recent decision in *Cornerstone Telecommunications Infrastructure v Ashloch Ltd and another (2021)* is likely to be welcomed by landowners. The Court of Appeal upheld the decision of the Upper Tribunal that an occupying telecoms operator could not use Part 5 of the Code to secure a new Code agreement, and that the Upper Tribunal did not have the jurisdiction to impose an agreement under Part 4. The telecoms operator will now have to apply for a new tenancy under the Landlord & Tenant Act 1954.

In the light of complex cases such as the above, it is easy to see why the consultation has been launched. It is key for landowners to seek professional representation from surveyors and solicitors regarding the agreement, to ensure that it properly represents their interests. In many cases, the network operator will pay the landowners' professional fees or at least contribute to them. Please do get in touch if we can assist.



Our business

immigration team has been particularly busy post-Brexit, helping a range of businesses to recruit skilled workers from overseas using the new points-based system. Under this system, businesses must apply for a sponsor licence for the skilled worker category. Most recently, solicitor **Helen Howes** acted for a Gloucestershire-based business owner searching for industry specialists from overseas through the application process, assisting them with their ambitious expansion plans. Helen is also helping them generally on their compliance duties to UK Visas & Immigration, and once individuals are identified for employment, Helen will be helping them to assign certificates of sponsorship to the employees. If you need advice on business immigration law, please get in touch.



The rise of the management buyout

While traditional M&A transactions continue to be tempered by current market conditions, management buyouts are proving popular, reports corporate & commercial partner **Chris Wills**.



Despite the chief economist of the Bank of England's reassurances that the post-COVID economy is "poised like a coiled spring", current market conditions are undoubtedly making traditional mergers and acquisitions (M&A) more difficult.

Some potential purchasers are taking a more conservative approach to expansion given the prevailing economic conditions, with their primary focus being on protecting their core businesses while conserving cash. Similarly, many lenders are (quite understandably) having to focus their resources on pandemic-related support for their customers rather than looking at funding deals. Added in to the mix are the challenges that remote working presents to the due diligence process.

Despite these obstacles, we are finding that many business owners are re-evaluating their own situations and are still keen to exit. Increasingly, management buyouts (MBOs) in various forms are providing neat solutions.

A management buyout (MBO) is a type of acquisition where a company's existing managers acquire a large part of, or all of, the company.

Variations on a theme include a management buy-in (MBI), where a new management team is parachuted into the target company, and a vendor initiated management buyout (VIMBO), in which the vendor proactively promotes the sale of the company to management as part of an exit or retirement strategy.

Lately, we have seen a flurry of VIMBOs, with some common characteristics that tackle the traditional M&A difficulties. The sellers take the lead and drive the process, and there are willing buyers in situ; both of these factors can help to speed up the negotiation process.

In this scenario, sellers are generally prepared to be realistic about how much cash they take out now, with the balance payable from the company's future profits over a sensible timeframe. In addition, the management teams tend to have sufficient knowledge about the business to help simplify the due diligence process.

While the benefits of an MBO are numerous, anyone thinking of taking part in one should naturally still take sound legal and accounting advice.

Critical to any proposed MBO is funding. This can come from a range of funding providers including the company's managers, banks, private equity investors or the vendor shareholders in the form of vendor loans.

External investors will always want to know what they are funding, so rigorous due diligence is still needed, although the management's knowledge of and involvement in the business can make this simpler, as mentioned above. Similarly, sellers may be reluctant to offer anything but the most basic of warranties on the basis that the management should know plenty about the company.

If you are a potential buyer or seller, our corporate team can provide clear, practical advice on MBOs of all different forms, so get in touch.



We were one of two Gloucestershire-based law firms to advise on a multi-million pound management buyout of CKF Holdings Limited, the holding company of **CKF Systems Limited**, an established UK robotics and automation supplier which has been operating for over 30 years.

Partner Chris Wills and corporate solicitor Helen Howes advised the management team of CKF Systems Limited.

Jamie Quinton, Managing Director of CKF Systems Limited, said: "We'd like to thank Chris and the team at Willans for their pragmatic approach and commercially sound advice given to the management team. Their expertise together with hard work and determination ensured the transition ran as smooth as possible."



Chris Wills Partner, corporate & commercial

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



US \$1.7 billion deal hangs in the balance as court examines validity of clause

A recent High Court decision has shone the spotlight on material adverse change (MAC) clauses and their effectiveness. **Helen Howes** explains more.

What is a material adverse change clause?

You will most likely come across a material adverse change (MAC) (or material adverse effect (MAE)) clause in corporate and finance agreements. They essentially serve as a 'catch-all' to allow a party to withdraw without cost from an agreement if an unpredictable or unforeseen event or circumstance occurs, although the effect of the event or circumstance on the party must usually meet a specific threshold in order for them to do so.

When are they triggered?

This will depend on the drafting of the agreement but generally the 'threshold' is unlikely to be met by generic global changes, such as economic downturn. Instead, there will need to be a specific impact on one of the parties in question – like a business being ordered to close.

The importance of wording

The case of *Travelport Ltd v Wex Inc* serves as a pertinent reminder of the importance of how an MAC clause is drafted.

The full trial is yet to come in this case, but as a preliminary issue, the court had to examine whether a MAE clause had been triggered; the clause referred to the effect of the MAE on the party in comparison to other 'industries'. Importantly it didn't narrow this down to its own specific industry or its competitors. As a result, the court has held that the wider interpretation applies.

This could prove to be very costly indeed. The clause sits in a share purchase agreement documenting the purchase of two target companies who provide payment services in the travel industry; the purchaser is seeking to argue that the global decrease in the travel industry as a result of COVID-19 triggered the MAE clause, and entitled it to step out of the deal (worth US \$1.7 billion).

This decision highlights the importance of clarity, in considering the specific wording of the MAE/MAC clause. Interestingly, in the case above, the court was reluctant to interpret the wording differently, given that the agreement itself would have been heavily negotiated prior to being finalised.

Depending on the nature of the target, buyers should consider the inclusion of a specific measurable trigger. By contrast, a seller will be seeking any MAC clause to be as narrow as possible by excluding certain events or events of a specific nature.

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Helen Howes Solicitor, corporate & employment law

Helen advises clients on corporate and commercial contracts as well as advising on the full range of employment law issues. She has specialist expertise in business immigration matters.



Discrimination: Latest developments in employment law

A recent case has highlighted how important it is for employers to regularly refresh their staff equality and diversity training.

In *Allay v Gehlen*, the Employment Appeal Tribunal (EAT) had to decide what counted as "reasonable steps" towards preventing harassment in the workplace.

The employee claimed he had been harassed as a result of multiple racist comments. In response, the company said it had taken reasonable steps to stop this occurring, including providing equality and diversity training for staff. The EAT rejected this defence on the grounds that the training employees had received was 'stale'; it was over a year old at the time the alleged harassment took place. This view was taken despite a lack of concrete evidence that further training would have been effective.

Another change to be aware of is in disability discrimination. In a recent European Court of Justice (ECJ) case, a Polish hospital was accused of discriminating between different groups of disabled people. It offered a bonus worth around €60 to employees who could provide them with a certificate of disability, but made no such offer to those who had already provided them with one. The ECJ held that disabled employees should be protected against being discriminated against, not just by comparison with non-disabled employees, but also when compared with other groups of disabled employees.

In the case of *Steer v Stormshore Ltd*, the EAT concluded that the tribunal could not grant interim relief in a discrimination case, but conceded that this part of the law should be clarified by the Government. (At present, interim relief can be

claimed only in whistleblowing and union-related cases; if successful, the claimant is reinstated in their previous position until the full case is heard.)

The EAT found that current legislation in this area was not compatible with the European Convention on Human Rights (ECHR) although it was not within their powers to issue a formal declaration of incompatibility – this could only be done by the Court of Appeal. Ms Steer has been given permission to pursue the matter in the Court of Appeal and so we could see further developments in due course, with Parliament possibly being asked to extend the law to allow interim relief to be granted in discrimination cases.

These examples highlight the importance for employers of thorough, up-to-date staff training. We can help with this; we regularly undertake inhouse training for staff on issues such as equality and diversity. Further details of the courses available, and how to book, can be found at **willans.co.uk/events**.

If you'd like to learn more about the developments in discrimination law, we are running a webinar for Gloucestershire CIPD on Tuesday 18 May. See below for further details.

matthew.clayton@willans.co.uk



Matthew Clayton Partner, employment law

Matthew leads our employment law and business immigration team and is lead partner for the firm's data protection group.

With over 20 years' experience in the employment law field, Matthew is noted as a 'leading individual' by The Legal 500 UK.

Upcoming webinar: Equality & diversity

Tuesday 18 May | New and upcoming issues in equality and diversity | 09:30-11.00am | Join via Zoom

In this webinar from the Gloucestershire branch of **CIPD**, our *Legal 500*-rated employment law team will take you through recent developments in the law surrounding equality and diversity.

We will be talking about gender fluidity, neurodiversity, the ethnicity pay gap, caste discrimination and the discriminatory risks of using artificial intelligence decision-making.

View the 'Events' tab at **www.cipd.co.uk/learn/branches/** gloucestershire and click the Eventbrite link to book.

Be first to hear about new webinars via willans.co.uk/ subscribe, or email events@willans.co.uk.

New statutory rates announced

The new April 2021 rates for the $\ensuremath{\textbf{National Living Wage}}$ will be:

- Age 23 or over: £8.91 (up 2.2% from £8.72).
- Age 21 to 22: £8.36 (up 2% from £8.20).
- Age 18 to 20: £6.56 (up 1.7% from £6.45).
- Age 16 to 17: £4.62 (up 1.5% from £4.55).
- Apprentice rate: £4.30 (up 3.6% from £4.15).

Family-friendly payments (statutory maternity, paternity, adoption, parental bereavement and shared parental payments) will increase to £151.97 per week (from £151.20).

Statutory sick pay is set to increase to £96.35 per week (from £95.85).

Changes to the calculation of **Post-Employment Notice Pay** will also take effect from 6 April 2021 to rectify an unintended consequence of the present formulas, which allow for more or less favourable outcomes depending on when in the year employment terminated.

Pretty vacant: When stripping out goes too far

Nick Cox discusses a recent High Court case in which a tenant took 'vacant possession' to a whole new level...

In an interesting case decided in December 2020, the High Court considered whether a tenant who exercised a break clause went too far in making sure that he gave vacant possession.

In this instance, the tenant's lease allowed them to break if they gave vacant possession of the 'premises'. However, the tenant had stripped out various key features of the property, including ceiling tiles, lighting and heating equipment.

The premises included the original building on the property and landlord's fixtures (whenever fixed), alongside all additions and improvements.

The tenant had paused work while it tried unsuccessfully to settle its outstanding liabilities and agree a surrender with the landlord, but failed to replace these features before moving out.

The judge held that the requirement for vacant possession had not been satisfied, but the unusual feature of the case was that it threw up a different question to the one so often asked. Most reported cases consider the position where items were added and not removed; here, items were taken away and the property was left devoid of essential fixtures and fittings.

The court held that the definition of 'premises' prevented the tenant from handing back an empty shell of a building which was dysfunctional and could not be occupied. It considered vacant possession had not been given because the state of the property meant that the landlord's use of the property was substantially impeded; he could not move back in and make use of the property immediately.

Although the case referred to the requirement to give vacant possession when operating a break clause, such an approach might also be valid where the lease is coming to an end by other means. The consequences here of handing back less than required invalidated a break right; in other cases taking too much away could breach the 'yield up' and repairing covenants.

The moral of the story is that tenants should not be over-zealous with stripping out, and should consider what they are actually leaving behind. If you need legal advice on any landlord and tenant matter, we are here to help.



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Nick Cox Partner, litigation & dispute resolution

Nick, who is recommended by The Legal 500 UK, leads our property litigation team. He deals mainly with disputes over commercial properties, acting for a wide range of landlords and tenants.

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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