

# Law News

Newsletter for commercial clients

Summer 2021



## What's in this issue?



- LEGO wins important IP case
- ASDA equal pay case opens floodgates
- Protecting your business through LPAs and trusts
- Latest in commercial property legal news



Welcome to the Summer 2021 edition of *Law News*.

In this issue, our lawyers share the latest in case law (with household names like LEGO and ASDA hitting the headlines), along with some sage insights on how to protect your business interests through powers of attorney and trusts. Our commercial property and disputes teams give some top tips on ending a lease and share news on property case law and new planning rules.

As always, we're here whenever you need legal advice or business support. Have a safe and happy summer.

**Bridget Redmond** managing partner

## Fond farewell and happy retirement to dedicated Willans partner

After 26 years of service at Willans, corporate & commercial partner **Paul Symes-Thompson** retired at the end of May.

Highly regarded as a leader in his field of law, Paul joined the firm as partner in June 1995 from City firm Allen & Overy to spearhead our corporate & commercial practice. Under his expert guidance and vision, the department went on to become a thriving *Legal 500* and *Chambers*-rated key player in the area, acting as trusted advisors to generations of local, national and international businesses.

Paul (or 'PST' as he is known at Willans) has been a key member of the firm for many years and will be sorely missed by all of us. He plans to spend more time with family and enjoying his leisure pursuits.

We are sure our clients will join us in sending all good wishes to Paul for a long and happy retirement, full of adventure! ■



## County awards gather pace as nominations come to a close



We're throwing our support behind two county awards to help boost Gloucestershire businesses.

The inaugural *SoGlos Gloucestershire Business Awards*, will give recognition and publicity to businesses that have demonstrated resilience, determination and creativity during this gruelling pandemic period. We're sponsoring the Growth Business of the Year award. If you'd like to nominate your business (it's free), please do so at [soglos.com/awards-business](https://soglos.com/awards-business). But be quick - nominations close on 18 June!

We're also thrilled to have returned as headline sponsor for this year's *SoGlos Gloucestershire Lifestyle Awards*. The definitive awards for lifestyle businesses in the county, the shortlist will be revealed on 5 July and winners will be decided by a public vote. Please visit [soglos.com/awards-lifestyle](https://soglos.com/awards-lifestyle) for your opportunity to vote for your favourite shop, venue, eatery, pub, charity and more! ■

**Headline sponsor**



# Well played: LEGO wins important IP case

The General Court of the European Union (GCEU) has ruled in favour of the toy brick manufacturer in a recent intellectual property dispute. Partner **Paul Gordon** explains more.



A patent gives the owner the right to stop others from copying, manufacturing, selling or importing their invention without the permission of the owner. It enables the owner to benefit from the hard work it has put into the development and to achieve an advantage in the marketplace for the duration of the patent.

LEGO, the household name and Danish toy brick manufacturer, is now accustomed to having its IP rights challenged; many competitors have sought to usurp them as the main player in the toy brick market. In earlier court decisions in 2008 and 2010 the courts found that the classic LEGO brick did not enjoy patent protection, because the design was dictated by its technical function.

A newer design for the LEGO brick was registered in 2010. In a decision of the European Union

Intellectual Property Office (EUIPO) it was found that the LEGO brick design was also dictated by its technical function, therefore limiting the time for its protection as a design patent.

However it would seem for the time being that LEGO's fortunes in the courts have changed, as in the most recent decision of the GCEU, the decision of the EUIPO was overruled and it was found that the design was not limited to a technical function.

Regard was had to the fact that the three studs only run down the center of the plate, with the surface to either side being smooth, so its design is not limited to a technical function. Essentially, the decision is such that the EUIPO must consider an exceptions clause, whereby combination parts with innovative features that are major marketing features can be protected, even if they are of a technical nature.

This finding therefore allows LEGO to maintain a strong foothold in the toy building brick market and may mean that competitors soon have to stop selling some of their products as originally designed.

Nonetheless, we will have to wait and see if Delta Sport, the German company that challenged LEGO, decides to take the case to the European Court of Justice, the highest European Court. ■



**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.



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## Webinar | Emerging from COVID - an update for commercial landlords & tenants

Tuesday 22 June | 4:30 - 5:30pm | Free online event

Our property litigation and commercial property lawyers answer your questions on what landlords can do when there are rent arrears, as well as outlining options for struggling tenants. We will cover common questions involving negotiating concessions, variations and surrenders, underletting, assignment, landlords' remedies and liquidation.

Book your place online [here](#) and view other upcoming webinars at [willans.co.uk/events](https://www.willans.co.uk/events) ■



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

Commercial property partner Alasdair Garbutt acted for the owners of **Ritual Coffee Roasters** - a Gloucestershire-based business that hand-roasts sustainably and ethically sourced coffee from across the globe - in the

opening of its new HQ in Cheltenham's Lansdown Industrial Estate. The roastery sells its speciality coffees to customers in-person and online, and offers wholesale and coffee subscriptions.

Alasdair recently visited the new premises to take a look at the coffee roaster with the company's Head of Roastery, Callum Lister. ■



# Floodgates opened by Supreme Court’s landmark decision in ASDA case

A Supreme Court case involving supermarket ASDA has thrown equal pay claims into the spotlight. But whilst the shop workers have won the battle, it does not mean that they will win the war, explains senior associate **Jenny Hawrot**.



There has been much media coverage about the Supreme Court decision in the equal pay case brought by 35,000 shop workers against ASDA supermarkets. However, whilst the shop workers have won the battle, it does not mean that they will win the war.

Workers in ASDA’s distribution centres are paid more than workers in their supermarkets. As a result of this disparity, female shop workers at ASDA are bringing an equal pay claim against the supermarket, arguing that they should be paid the same amount as their predominantly male colleagues working in the distribution centre. In order to successfully bring an equal pay claim, the female employees must demonstrate (amongst other things) that the distribution employees are on ‘common terms’ within the meaning of the legislation.

ASDA applied to dismiss the shopworkers’ claim on the basis that the two sets of workers could not be compared, as the distribution employees are not employed on ‘common terms’ within the meaning of the legislation. Both the Employment Tribunal and the Court of Appeal ruled in favour of the shop workers, but ASDA persisted in their application to dismiss the shopworkers’ claim and appealed to the Supreme Court.

In its judgment, the court made a unanimous and landmark decision that the (mostly female) shop workers at ASDA supermarkets can be compared to the (mostly male) warehouse workers, finding that they were indeed on ‘common terms’.

In coming to their decision, the Supreme Court relied on the statutory test which must be satisfied for ‘common terms’ to exist. Namely, 1) do the two groups of employees have broadly similar terms and, if so 2) would the male distribution workers

be employed on the same or substantially the same terms as their existing terms, even if they were employed at the supermarkets?

The Supreme Court found that both aspects of the test were satisfied, and that the female workers were entitled to pursue their equal pay claims against ASDA.

However, while this is good news for the female shop workers, it is just the preliminary battle. This decision does not mean that the female shop workers will definitely succeed in their equal pay claim, it just means that they are able to proceed with their claim in the Employment Tribunal, using the warehouse workers as their comparators. A full hearing on the merits of their equal pay claim, considering all requirements (including the requirement of ‘equality’) is yet to come and they still have several hurdles to overcome.

Nonetheless, the Supreme Court’s ruling could open the flood gates to more shop workers (who tend to be women) to bring similar equal pay claims against other supermarkets and retailers, where their (mostly male) warehouse staff are paid more. This is certainly something to keep an eye on over the next 12 months. ■

“...while this is good news for the female shop workers, it is just the preliminary battle.”



**Jenny Hawrot**  
Senior associate solicitor, employment law

Jenny has an extensive track record in advising businesses ranging from SMEs to multinational organisations, on the full range of employment-related matters - including TUPE, contractual issues and employee relations.



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The new off-payroll working rules (IR35) came into action on 6 April this year. Being caught by these rules (often referred to as ‘inside IR35’) can have major financial consequences for a

contractor. Consequently, a company which deems its contractors to be ‘inside IR35’ may lose those contractors to a competitor which organises its affairs so that they fall ‘outside IR35’.

Avoiding being subject to IR35 and/or the off-payroll working rules ultimately involves consideration of the legal tests for employment. We have assisted numerous clients with this

assessment, in various contexts, so please get in touch with our **employment law team** if you need advice on your business’s situation. ■





**Nick Southwell**  
Partner, litigation & dispute resolution

Nick, who is recommended in *The Legal 500*, leads our property litigation team. He helps businesses and individuals to resolve issues including property claims, landlord and tenant disputes, contract and shareholder disputes, professional negligence claims and IP disputes.

## Ending a commercial lease: Key takeaways for tenants from our recent webinar

There is no one-size-fits-all guide to ending a commercial lease, but partner **Nick Southwell** shares some general tips for tenants, following on from our recent webinar.

Your business's property needs won't always align perfectly with the expiry of your commercial lease, so it's common for tenants to want to exit their lease early. In this scenario, tenants may choose to exercise their 'right to break' (provided that there is a clause in their commercial lease which allows early termination).

There are lots of ways in which to end a commercial lease, and the options available to you will depend largely on the circumstances and timing - which is why we'd always recommend getting bespoke advice from a legal professional. There are, however, some general, helpful guideposts to follow.

### Pay attention to the 'small print'

If there is a "subsisting breach of covenant or condition", no matter how trivial or small it may seem, you could be prevented from exercising your break right. The rules around break clauses are very strict, and you'll need to have your lease checked thoroughly (preferably by a professional) to make sure you're complying with all of your obligations. There are also likely to be strict time limits, so pay close attention to the finer details.

When it comes to serving a notice to terminate, thorough checks should be carried out to make sure the landlord's details are correct. For example, if the landlord is a company, you should be checking for their registered office (and that the company is still active).

### Understand your ongoing requirements

Giving vacant possession or giving up occupation are common conditions of exercising a break, but they will also be requirements at the end of any leases.

Care needs to be taken though, as if a stripping out of the property goes too far it might make the property unusable and be a breach of covenant.

Remember, a break notice or a section 27 notice isn't a "free pass" - the lease and its obligations for a tenant continue until the lease is at an end.

This will mean, for example, paying the rent on time, keeping up the property in accordance with the terms of the lease and ensuring that you continue to adhere to any relevant covenants.

### Make an exit plan with your landlord

This is the best possible advice to tenants, who will want to ensure that their exit is as smooth as possible. It may also be important for a landlord to know how much, and more important when he is likely to get paid in relation to any terminal dilapidations claim.

A simple document recognising that a compromise of the parties' respective rights has been agreed is sufficient but look out for the potential "tenant traps" where there may not be a right to recover over-paid rent paid in advance of the break date.

### Catch up on our recent webinar on 'Giving Effective Notice'

You can watch a free recording of a recent webinar at [willans.co.uk/webinars](http://willans.co.uk/webinars), in which we take you through the options available for ending a lease early and the pitfalls to avoid on commercial property.

For bespoke advice on your property legal needs, get in touch and we'd be delighted to help. ■

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### In dispute with a residential tenant? We're ready to help

If you are a landlord and want to recover possession of your residential property, whether due to problem tenants, late payment of rent or for some

other reason, you will need to ensure you address all necessary landlord requirements, as well as relevant court applications and enforcement notices.

If you need legal assistance or simply a 'sounding board', we offer a free initial 15 minute

discussion with one of our property experts, and a variety of fixed fees depending on your needs.

Visit [www.willans.co.uk/landlord-disputes/](http://www.willans.co.uk/landlord-disputes/) to find out more and get started. ■

A range of corporate & commercial clients, including a market leader in the secure communications sector, are already benefiting from our fixed-price retainer. This offers prompt access to our

solicitors for ad hoc advice, as well as for more involved projects. Under this scheme, clients are invoiced for the same amount each month, no matter how much advice is required. Contact **Chris Wills** to learn more. ■



Members of our **wills, trusts & probate team** have once again donated their time and expertise in creating wills for clients as part of Cobalt Make a Will Month, raising around £4k. Medical diagnostic imaging

charity Cobalt helps over 100,000 patients a year at its imaging centre in Cheltenham, has its own research centre in Birmingham and a fleet of mobile MRI and CT scanners which travel across the country. ■

# Trusts: A useful tool to protect your family & business

Trusts are an often-overlooked method of protecting assets, including family business interests. Partner **Simon Cook** explains more about how trusts can prove versatile and useful.



People will come across trusts without even realising it. Mr Bennett in Jane Austen's *Pride and Prejudice* is desperately trying to find "suitable" husbands for his daughters because the family home is held in trust and can only pass down the male line. If David Copperfield's father had used a trust, then some protection could have been provided for David rather than him being left penniless after the second marriage and subsequent death of his mother.

So, what is a trust?

There are three parties to a trust:

- the settlor who puts assets into the trust,
- the trustees who manage the trust, and
- the beneficiaries who receive benefits from the trust.

The use of a trust is to transfer assets to the trustees, who then control those assets for the benefit of someone else (the beneficiaries). The person transferring the assets (the settlor) can be one of the trustees, allowing great flexibility and control but without those assets remaining in their own name.

A trust also enables the beneficiaries to have access to those assets, but again without those assets being in their names. This can provide several advantages for the settlor and the beneficiaries; assets can be held in a vehicle outside their names, but with flexibility over control and benefit.

"...a class of shares can be created in a business and those shares are then transferred to a trust. The growth in the business is then attributed to the new shares..."

Trusts are generally looked upon with great suspicion, with the perception that they are used by the wealthy to avoid tax and protect that wealth. However, there are thought to be more than two million personal trusts in the UK being used for a variety of reasons, including succession planning, providing funds for education, asset protection, marriage and divorce, protecting vulnerable parties and protecting the family business.

We are all aware of the huge financial burden that has been placed on us due to what has happened over the last 12-18 months. World governments are facing massive financial deficits, and these must be addressed in some way in the future.

In the UK there have been recent reports regarding potential changes to Capital Gains Tax (CGT) and Inheritance Tax (IHT), and more are due shortly. It was widely believed that changes would come about in the last Budget, but those reforms were kicked down the road. There are suggestions for aligning the rates of CGT with those of Income Tax and abolishing many of the reliefs for IHT.

It would, therefore, seem to be a very sensible time to consider setting up a lifetime trust to take advantage of the current rates available for CGT and reliefs for IHT.

For example, a class of shares can be created in a business and those shares are then transferred to a trust. The growth in the business is then attributed to the new shares rather than the original shares. If the IHT relief for business assets is reduced/abolished at a later date, then the adverse effect will have been avoided because the value is now held in the trust, but control can remain with the business owner.

Trusts can be extremely flexible and useful. If you would like more information, please get in touch. ■



**Simon Cook**

Partner, wills, trusts & probate

Simon leads the firm's wills, trusts & probate team and is recommended in *The Legal 500* and *Chambers High Net Worth*. With 25 years' experience in the field, he specialises in complex estate and tax planning and the creation and administration of trusts.



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Our **corporate team** provided advice to a client on the funding and structure of a property development joint venture. The team drafted detailed heads of terms to enable the project to proceed to

the planning phase, then drafted the joint venture documents as well as advising the client on the debt funding that was being secured by the joint venture vehicle. ■



Our **corporate team** advised a business-selling client on the suitability of a draft asset purchase agreement, with the client being particularly concerned to ensure that the earn-out mechanism was robust enough to

protect their position. The team responded to the client's instructions speedily and efficiently, and completed the deal within three weeks of being instructed. ■

# The ultimate peace of mind for you and your business

Many people have heard of lasting powers of attorney (LPAs) for their health and personal affairs, but did you know you can put LPAs in place for your business, too? **Helen Howes** explains more.



Many of us plan for the future by having a lasting power of attorney (LPA) in place. This document names an individual (or individuals) we trust to take on our personal affairs, in the event that we lose our mental capacity.

A 'business LPA' essentially does the same thing but only within the parameters of our business interests; it nominates an individual who a business owner trusts to take decisions regarding the running of the business, when they are no longer able to.

## Why should key business people have a business LPA?

In a nutshell, having a nominated attorney to make decisions, authorise payments, and enter contracts enables business continuity. Consequently, it safeguards the future of the business and your family's income.

## Do I need to have a business LPA in addition to the LPA covering my personal affairs?

It is possible to have a single LPA for both your business and personal financial affairs. However, this is not recommended unless the individual who you have nominated to look after your personal affairs has the relevant skills, knowledge and expertise to run and protect your business. You will also need to consider if appointing the same person could potentially create a conflict of interest for them.

## Is there anything else I need to consider?

It is important to consider the structure and nature of a business in deciding how essential a business LPA is.

If you are a sole trader it is likely that essentially you 'are the business'. Consequently, any loss of capacity is likely to mean your business is no longer able to trade - placing you and your family's income at risk. In this scenario, having someone who knows your business and is able to 'step into your shoes' to make decisions is likely to be essential. This can be particularly important if you have an accident, for example, and are only temporarily unable to make commercial decisions.

If you are a partner and part of a partnership, you may find that your partnership agreement already has provisions in place for what would happen should one of you become incapacitated. If this is the case, you can still have an LPA in place to deal with your business affairs, but you will need to ensure the wording of the LPA does not conflict with the wording in the partnership agreement. If you do not have a written agreement in place, you will need to seek advice to ensure the wording of the LPA does not conflict with the relevant legislation governing partnerships.

Similarly, if you are a shareholder you will need to refer back to any shareholder agreements to (1) see if incapacity is dealt with and (2) ensure your LPA does not conflict with it. If there is no shareholders' agreement or LPA in place, your family members or the business will need to make an application to the Court of Protection for the appointment of a deputy to act on your behalf, which is expensive and can take several months to be dealt with.

If you are a director, you should check the company's articles of association as these will often state that appointment as a director will be terminated in the event of the loss of mental capacity. Also, articles of association often do not allow a director to delegate their responsibilities, so if this is the case then an LPA is unlikely to be much help. This can be particularly problematic in the event of a company with only one director.

Unexpected incapacity can have the potential to damage and risk your business, so it is important to consider what contingency measures you need in place. Forward planning is vital if you need your business to still operate, in the event you are unable to make decisions yourself. ■



**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.



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## Free to download: LPA legal guide

Our wills, trusts & probate team help many clients to put lasting powers of attorney in place, whether that's from a health, financial or business perspective (or all three).



Download a free **LPA legal guide** **here**. Contact senior associate in our wills, trusts & probate team, **Rachel Sugden** ([rachel.sugden@willans.co.uk](mailto:rachel.sugden@willans.co.uk)) to find out more about how an LPA can give you and your business peace of mind. ■



# Lockdown business rent arrears are recoverable, says High Court

Commercial landlords will welcome a recent High Court decision, in which an application for a judgment against a tenant in arrears was upheld. Partner **Nick Cox** explains more.

In the first judgment of its kind since the national lockdown was imposed, a landlord has made a successful application for summary judgment against its tenant, who owed many months' rent and multiple instalments of service charges.

As a result of UK government restrictions owing to the pandemic, the tenant had been forced to shut its premises at the Westfield Shopping Centre. Unlike many tenants it appears that it had not formally agreed a rental holiday with its landlord at that point in time.

The tenant argued that the landlord's claim against them was unjustified, on the basis that:

- the claim was issued too soon, going against the Code of Practice for Commercial Property Relationships (a voluntary Code introduced in June last year to help preserve landlord & tenant relationships during the pandemic);
- the landlord was trying to find a loophole in measures the government had put in place to protect tenants and prevent the use of particular remedies by landlords, such as commercial rent arrears recovery, forfeiture and winding-up petitions;
- the court should imply a term that the landlord should have insured against rent loss arising from the unavoidable closure of the business due to the pandemic.

In response, the court found that the voluntary Code of Practice was not able to change or suspend the terms of the lease, and that there was nothing to prevent the landlord from claiming for lost rent and asking for a summary judgment.

The court interpreted that the rent suspension clause only removed the obligation to pay rent if there were actual physical damage to the landlord's building, which was not the position here.

This case may concern tenants who do not have business interruption insurance in place, or those who felt that they would be protected from all rent claims by virtue of the Code of Practice.

For landlords, on the other hand, this will give hope that summary judgments for unpaid rent claims are still achievable, despite the raft of protective measures introduced by the government during this emergency period.

If you are a landlord or tenant and would like a review of your lease to clarify your obligations in this scenario, please do get in touch for advice. ■



**Nick Cox**  
Partner, litigation & dispute resolution

Property litigation expert Nick is recommended by *The Legal 500 UK*. He deals mainly with disputes over commercial properties, acting for a wide range of landlords and tenants.



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**willans**  
data protection | services

Now the Brexit transition period is over, **new data protection requirements apply.**

Failure to meet these requirements could result in your data processing activities being banned – effectively putting your whole business on hold. If you are...

- based in the UK but selling directly to consumers in the EU;
- based in the EU but selling directly to consumers in the UK; or
- based outside the UK or EU, but selling directly to consumers in the UK or EU

...you may need to appoint a data protection representative.

To find out about what your business needs to do, take a free self-assessment at [willansdataprotectionservices.com/self-assessment](https://willansdataprotectionservices.com/self-assessment), and contact our data protection specialists:  
[matthew.clayton@willansdps.com](mailto:matthew.clayton@willansdps.com) | [kym.fletcher@willansdps.com](mailto:kym.fletcher@willansdps.com)

**Are you making homeworking measures across your business more permanent?**  
**Let our experts help you.**

Contracts, policies, risk assessments & other documents drafted/amended by our employment solicitors for a fixed fee, from **£500 + VAT**. Contact: [jenny.hawrot@willans.co.uk](mailto:jenny.hawrot@willans.co.uk)

Office lease review and legal consultation with our commercial property solicitors for a fixed fee of **£250 + VAT**. Contact: [emma.thompson@willans.co.uk](mailto:emma.thompson@willans.co.uk)

# New flexibility for commercial buildings as rules allow empty premises to be changed into homes

Commercial property partner **Alasdair Garbutt** discusses new rules which allow unused commercial buildings to be turned into housing.

In a further relaxation of planning regulations, new rules allowing commercial premises to be converted into homes kicked in at the end of March this year.

The government claims this will help give high streets “a new lease of life”, with other new rules also allowing for bigger extensions to existing public buildings.

The new homes will be delivered through a simpler ‘prior approval’ process instead of a full planning application and will, the government claims, be subject to high standards, ensuring they provide adequate natural light and space.

The move is part of a series of measures introduced with the goal of aiding the post-lockdown recovery of high streets. Other recent developments include allowing pubs and restaurants to operate as takeaways, more freedoms for outdoor markets and summer fairs, extended retail opening hours and the extension of provisions for licenses that enable outdoor dining.

Under the scheme that enables unused commercial premises to be turned into homes, local authorities will be able to consider the impact of issues such as flooding, noise, and the adequacy of natural light. The building which is changing use will need to have been vacant for 3 months prior to the application, and size limits will apply.

Time will tell whether the scheme will successfully breathe new life into ailing high streets, but some organisations have already expressed concern over how the quality of residential accommodation will be ensured.

The increased footfall to high streets as a result of more residential dwellings may help to provide a boost to retailers, pubs and restaurants, restoring a buzz to town centres which struggle to compete with out-of-town retail parks. ■



**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.

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## 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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