

Law News

Newsletter for commercial clients

Autumn/Winter 2021

What's in this issue?



- Beware of unused trademarks
- Normality resumes for property possession claims
- The Charities Bill – what's new?
- Buying & selling a business – where a lawyer comes in



Welcome to the autumn/winter 2021 edition of *Law News*.

In this issue, we introduce new members of the team, celebrate exceptional achievements and hear from our lawyers on the latest changes in business immigration sponsorship, property possession and charity law.

Our team also shine a light on the key areas a lawyer can help with in the sale or purchase of a business, discuss unused trademarks, explain why tenants and landlords should have a license for alterations, and consider if more flexibility is needed in employment contract clauses.

As ever, we'd be happy to help with these or any other issues you face, so please get in touch.

Bridget Redmond managing partner

New faces join the team

As Willans continues to grow, we're pleased to welcome some fresh faces to the firm.

Partner **Rishi Ladwa** joined our corporate & commercial team in September and brings with him over a decade of experience across the leisure and hospitality, retail, professional services and healthcare sectors.

We've also been joined by senior associate solicitor **Sarah Richardson** in our agriculture & rural affairs team, solicitor **Hayley Ainsworth** in our employment law & business immigration team, as well as licensed conveyancer **Tina Caster** in our residential property team.

I'm sure you'll join us in wishing them all a very warm welcome. ■



Willans lawyers recognised in *Chambers UK* and *The Legal 500*



Many of our outstanding lawyers and departments have been recognised in the 2022 editions of *Chambers UK* and *The Legal 500* – both independent guides to leading lawyers and law firms.

Six teams were recognised in the *Chambers UK* 2022 guide – family law, agriculture & rural affairs, wills, trusts & probate, corporate, dispute resolution and commercial property – as well as eight individual lawyers.

The Legal 500 also listed 27 'outstanding' recommendations at the firm, with mentions in the 'leading lawyers', 'rising star' and 'leading individual' categories.

We are extremely proud of the teams and individuals named, all of whom deserve such prestigious recognition. ■

Trademarks – use them or lose them!

Do you have an unused registered trademark? Litigation and dispute resolution partner **Paul Gordon** explains why brands should beware.



In the UK, a trademark may be registered for different classes of goods and services. However, registered or not, if the mark is not used as intended, it's possible for the registration to be revoked. The owner of a trademark is also at risk if its use cannot be shown within a period of five years of it being registered, or if subsequently it has not been used for five years. In that event, a third party – such as a competitor who may benefit from undermining the brand – can apply to have it revoked.

This strategy is frequently deployed by competitors when responding to claims. For example, if you were to bring a claim for infringement against a competitor using an identical or similar brand, relying on your registered trademark, then it is inevitable that you will have to provide evidence that your trademark has been used. Your claim will fail if you cannot prove that the trademark has been used for the intended goods and services within the five-year timeframe.

In the case of *easyGroup Ltd v Easylife* and another [2021], the claimant brought a case to prevent

Easylife Limited and its director from using various brands which use the word 'easy'. However, the claimant not only lost its case for infringement but also suffered revocation of some of its trademarks. The High Court ruled that easyGroup's trademark registrations for easyLand and easy4men should be revoked for non-use, and further ordered limitations on the extent of the registration for its easyJet trademark.

Therefore, good practice suggests you should maintain records of use, which clearly demonstrate how the trademark is used in relation to the goods and services it's registered for. Should you or your business have any queries on this, we'd be happy to help. ■



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Paul Gordon

Partner, litigation & dispute resolution

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

Get involved | January webinars

Tuesday 11 January | 4.30pm - 5.30pm | Commercial property update

Join our experts to hear more about the latest goings on in the commercial property sphere.

Thursday 20 January | 6pm - 7.15pm | Managing your investment portfolio

Join our residential property and property dispute teams for practical tips on how to boost and protect your investment property portfolio.

Subscribe to receive our event invitations in your inbox: willans.co.uk/subscribe/



What we've been advising on...

Earlier in the year, corporate & commercial partner Chris Wills advised accountants **Randall & Payne** on their acquisition of Gloucester accountancy firm Little and Company.

The merger saw Little and Company's team of 14 staff moving to Randall & Payne's premises as of 1 November, which will further strengthen its services for clients. ■



With the property market booming, **Helen Howes**, solicitor in our corporate & commercial team, has been supporting property clients with their property management companies. ■

When is a post-termination restriction unreasonable?

Recent cases suggest employment contract clauses would benefit from greater flexibility and clarity, argues senior associate solicitor **Jenny Hawrot**.

Post-termination restrictions are a constant source of debate and controversy. It is often unclear whether they are enforceable, and in late 2020 the government ran a consultation on reforming post-termination non-compete clauses in employment contracts.

However, as we await the outcome, the issue continues to be brought to the courts. This year's standout case was *Quilter Private Client Advisers Ltd v Falconer & Anor*, which highlighted the challenges of enforcing post-termination restrictions.

What are post-termination restrictions?

They are clauses within employment contracts that prevent exiting employees from taking key clients, employees or suppliers from their former employer. These are often called non-solicitation or non-dealing clauses. They can also prevent former employees from working for a competitor, often referred to as non-compete clauses.

Why are there issues with enforcing them?

These clauses are only justifiable if they go so far as to protect a "legitimate business interest", for example to prevent confidential business information being divulged to a competitor. As such, clauses that go further than necessary, for example by covering too broad a geographic area or business interest, are unenforceable.

What happened in Quilter?

Ms Falconer had only recently started work as a financial advisor at Quilter. Her employment contract contained a 12-month non-solicitation and non-dealing clause, along with a nine-month non-compete clause. As a new employee, she was subject to a six-month probationary period, with a notice period of two weeks. Ms Falconer resigned before the end of her probationary period and joined a competitor, so Quilter brought a breach of contract claim against her and her new employer.

The High Court found the non-compete clause to be unenforceable for three main reasons:

- It failed to consider how long Ms Falconer had worked at the business; she had very little opportunity to build a client base but would still be bound for nine months.

- The shortness of the notice period was a reflection on the company's view that Ms Falconer's services were not that important to the business until she'd worked for them for longer.
- The scope was found to be too broad, as it sought to prevent Ms Falconer from working in competition with Quilter for prospective clients.

This case draws attention to the need for more nuance in post-termination restrictions. Employers

should consider what is suitable for the employee in question, taking their length of service and seniority into account, rather than a one-size-fits-all approach.

If you believe your business would benefit from a review of employment contracts, our employment law team would love to hear from you. ■

"Employers should consider what is suitable for the employee in question."



Jenny Hawrot

Senior associate solicitor, employment law

Jenny was named a 'rising star' in *The Legal 500* and is experienced in advising a range of businesses, from SMEs to multinational organisations, on all employment-related matters.



Listen again to our free webinar

Hear top tips from our employment law & litigation teams on how to protect your business using restrictive covenants in employment contracts.

The session focuses on the key elements to consider when drawing up restrictive covenants, how to enforce them and what to do following a breach.

Visit willans.co.uk/webinars to listen.



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Our **business immigration team** continues to be busy post-Brexit, helping businesses apply for sponsor licences for skilled workers.

The team has also been

advising international businesses on how to apply for their 'representative of an overseas business visa' enabling them to send a representative to the UK to establish a business presence.

Hayley Ainsworth recently assisted a well-known US-based artificial intelligence software company through this process as part of their expansion into the UK and Europe. ■





Alasdair Garbutt
Partner, commercial property

Alasdair advises on sales acquisitions, development transactions and property management matters. He also has a passion for working with local businesses and supporting them with their property portfolios.

License for alterations – do I need one?

When it comes to making changes to their premises, it's in the interest of both tenants and landlords to document the works. Commercial property partner **Alasdair Garbutt** explains why.

As a team, we're regularly asked by tenants proposing to carry out work at their premises if they really need to document the plans. Often, the landlord has already told them that the works are approved, so the question is understandable. However, there are good reasons why both parties should document the details, not least for tenants to protect their future interests should the landlord sell its freehold or the tenant want to assign the lease.

Of course, the landlord's concern is to protect the value of their premises and prevent permanent alterations that would make it difficult to let the property in the future or require the landlord to remove them at their own cost. On the other hand, the tenant's main concern is to configure the premises to suit its own business and, in the case of an assignment of the lease, to allow a new tenant to completely remodel the property.

It is therefore in the interest of both parties to enter into a licence for alterations documenting the works required by the tenant.

There are two main elements that should be included:

- the obligation for the tenant to reinstate the premises to its original state when the lease ends. This is key and needs to be carefully considered to ensure that the landlord can require the tenant to remove all alterations when the tenant's lease expires, and that they are not considered "improvements" under the Landlord and Tenant Act 1927. If this is the case, the landlord would need to pay the tenant for the works. Also, for example, the landlord may not require certain items to be reinstated if he is happy for them to remain, as they may benefit an incoming tenant. The details of the lease should also be considered as to when reinstatement should occur and to check that this matches the provisions of the licence.
- when the lease includes an open market rent review, it's important that the impact of the tenant's alterations is disregarded. Obviously, it would be completely unfair if the works that the tenant had carried out and paid for, which

may have improved the premises, increased the rental value.

Other provisions in the lease relating to alterations should also be considered. For example, general compliance with law, which requires all tenants' works to comply with statutory provisions to include building regulations and planning requirements.

Furthermore, the works should comply with the building's insurance requirements and, often, the insurer's recommendations. The tenant should always check these before commencing work to ensure they are not in breach.

There are several other provisions in leases and many further details in any draft licence for alterations. These should be thoroughly considered by both landlords

and tenants before any work begins, so if you are affected by this matter, please do not hesitate to get in touch. ■

"...there are good reasons why both parties should document the details, not least for tenants to protect their future interests..."



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Our **wills, trusts & probate** team hosted a free drop-in event on the opening day of this year's Times and Sunday Times Cheltenham Literature Festival, offering tips on how to plan for the future. ■



Corporate & commercial partner **Chris Wills** has been advising the shareholders of a company that owns a well-known business park on the sale of their shares, as well as advising some long-

standing clients on the sale of their wind turbine projects. ■



The new Charities Bill – 10 years on

From providing more flexibility to giving greater powers to trustees, charity law solicitor **Charlotte Brunsdon** shares the latest on the new Charities Bill.



Published on 26 May 2021, the Charities Bill implements various recommendations of the Law Commission's 2017 report, which came out of Lord Hodgson's review of charity law back in 2011.

The bill aims to simplify processes for charities and clarify grey areas in the law. By way of summary, the key proposed changes include:

- access to a wider pool of professionals that charities can seek advice from when disposing of charity land (i.e. not just those that meet the strict definition of a "qualified surveyor") and a change to the format of that advice so it is less prescriptive
- more flexibility regarding permanent endowment (i.e. intended to be held by a charity forever). For example, a new statutory power has been granted for charities with permanent endowment to borrow up to 25% of it without needing to obtain consent from the Charity Commission. There is also a new statutory power to make certain social investments using permanent endowment, which may see a negative or uncertain financial return
- making the rules concerning amendments to governing documents consistent so that the same test and criteria applies to all charities, whatever their legal structure
- extending the statutory power for charities to pay trustees for services supplied to a charity (even if not expressly stated in a charity's governing document) to the provision of goods by a trustee to a charity
- a new statutory power for trustees to make small "ex gratia" payments up to a certain level and dependent upon the gross income of the

charity (e.g. £1,000 or less for charities with a gross annual income of up to £25,000), without needing to obtain the prior consent of the Charity Commission, and the ability for trustees to delegate the decision to make such ex gratia payments

- amending the rules surrounding the register of mergers to avoid the need to maintain a shell charity to receive ongoing legacies
- clarifying as to when it is necessary to seek Charity Commission approval to change the purpose of a gift where the charitable purpose cannot be carried out e.g. a failed fundraising appeal
- enabling the Charity Commission to authorise trustees to be paid for exceptional skill and work they have carried out for their charity, where it would be unjust not to do so
- giving corporate charities "trust corporation status" automatically if they administer charitable trusts, so that appointment by Charity Commission scheme does not need to be sought.

While the changes have been under consideration since 2011, it is hoped that the bill will be introduced in the current Parliamentary session.

If you are a trustee and have any questions about the bill or how it might affect your charity, please don't hesitate to speak to us. ■



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Charlotte Brunsdon

Solicitor, charity law

Charlotte specialises in advising charity and not-for-profit clients on commercial property matters. She also assists with other charity law matters, such as helping charities to comply with regulations.

Litigation solicitor-advocate James Melvin-Bath has been assisting on a variety of commercial matters for **Trades Exhibitions and M Squared Media**, who produce two of the largest business-to-

business exhibitions in the UK – Professional Beauty London and Salon International. The combined 2021 events hosted over 40,000 professionals from the salon and spa market at ExCeL London. ■



Our commercial property team have been helping the charity, **Shelter** with their regional office and shop lease renewals, alongside advising on their property portfolio UK-wide. ■



Buying and selling a business is a two-way street

How can a solicitor help to ensure a smooth business sale or purchase? Corporate & commercial partner **Chris Wills** has the answer.

Whether you're buying or selling a business, the process can be complex and nuanced. Enlisting help from solicitors and accountants at the earliest opportunity will enhance both parties' chances of success. Here are some of the areas they will help you navigate:

• Confidentiality

Even during initial discussions, a potential sale can be highly sensitive for a business. Therefore, we'd recommend both parties sign a confidentiality (or non-disclosure) agreement to ensure negotiations are kept confidential and to protect information passing between parties.

• Structure of the transaction

Be clear about what is being bought and sold: will it be shares in a company that owns the business, or will it simply be the assets which make up the business? There are fundamental differences in the legal effect and tax treatment of the two transactions, so seeking legal and tax advice is essential.

• Funding

It's important for all involved to understand how a buyer intends to fund the acquisition, as this can impact the deal structure, the extent of the due diligence and the overall transaction timetable.

• Heads of terms

Although not legally binding, well-drafted (and well-considered) heads of terms (with input from both legal and tax advisors) can be extremely useful for setting out key terms. This can help to save both time and costs when drafting and negotiating the deal documents.

• Due diligence

This is often a crucial part of the process and can be the most time-consuming. Understandably, a buyer will want to scrutinise the business that it is considering buying to ensure that it is comfortable with the price. Depending on the size and nature of the business, this can include legal, tax, financial, commercial, and technical due diligence. If the buyer is obtaining debt finance to fund the acquisition, their lender may also want to undertake their own due diligence. Clearly, managing this flow of information will be critical and having an online data room (usually controlled by the seller's solicitor) can ease this process.

• Sale and purchase agreement

There may be several legal documents required for the transaction, but the main one will be the sale and purchase agreement. They're usually drafted by the buyer's solicitor and, for the most part, will set out the protections expected to ensure that the company or business is worth what they

are prepared to pay. To enable a buyer's solicitor to prepare a well-considered first draft, it is best practice to wait until the due diligence process is well underway. This will enable the buyer's solicitor to communicate any matters that have arisen out of the initial due diligence investigations.

• Warranties and indemnities

A buyer will want to include in the sale and purchase agreement protections against circumstances where it may be overpaying for the business because it has taken on an unknown liability or it had made an assumption about the company or business that was not true. These protections take the form of warranties and indemnities, often form the bulk of the sale and purchase agreement and are the subject of most of the negotiations. The extent of the warranties and indemnities required by the buyer will often only be known once the due diligence process is at an advanced stage.

• Disclosure letter

Arguably, the second most important legal document will be the disclosure letter. This, together with the disclosure bundle, forms the seller's main protection against a claim for a breach of the warranties. The letter documents the disclosure of all information that could otherwise give rise to such a claim.

• Other documents

Depending on the deal structure, there are other legal documents to be drafted and agreed. In very simple deals there may only be one or two, but in complex transactions there may be many more. The drafting and negotiating of these documents needs to be factored into any sensible transaction timetable.

If you're considering selling your business or looking to purchase one, contact our team of experienced solicitors for clear, expert guidance. Willans has a highly-regarded multi-disciplinary team led by its corporate and commercial department who can advise you at every stage of a transaction. ■



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Chris Wills

Partner, corporate & commercial law

Chris was recently listed as a 'leading individual' in *The Legal 500*. As a corporate & commercial specialist, Chris advises a range of businesses, from start-ups to multi-million-pound companies.



Free to download:

Reasons for making a will

According to Law Society figures, most people have not made a will.

If you're buying or selling a business, or your circumstances have changed, download our guide to find out why making a will is so important:

www.willans.co.uk/document/reasons-for-making-a-will/

Normality resumes for property possession claims

As possession claims return to pre-pandemic normality, the government prepares to make the process quicker and easier, explains solicitor-advocate **James Melvin-Bath**.

There's no doubt that the past 18 months have been difficult for businesses and individuals, both financially and personally. Residential property landlords have been particularly impacted by the ban on possession orders, changing notice periods and various requirements put in place to prevent possession orders being granted, or to delay them.

Thankfully, from 1 October 2021, the coronavirus regulations regarding residential possession notice periods have been suspended and the notice periods have returned to pre-pandemic levels. This means that landlords who require possession of their property following a fixed term lease, for rent arrears or some other breach can finally proceed with those claims.

However, that may only represent a short reprieve. The government is also in the process of reforming the rental market generally, with tougher EPC requirements, harsher penalties and the potential abolition of the non-fault eviction process.

There is a potential light at the end of the tunnel, though. With private rental being such a high percentage of the UK housing market, the government has accepted that as part of any reform, they need to make it quicker, cheaper and easier to regain possession of a property. This could include new online property courts and a more streamlined possession process for rent arrears.

In any event, with the ever-changing obligations and hurdles placed in front of landlords, it is even more important to seek advice before a tenancy is set up, as well as throughout and when something goes wrong.

For advice and support on a residential possession claim, please do get in touch. ■



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James Melvin-Bath

Solicitor-advocate,
dispute resolution &
litigation

James advises clients across a range of litigation areas and has particular experience in landlord and tenant, contentious probate and commercial matters.



What's happening in commercial property

All current restrictions broadly remain in place for commercial property until 25 March 2022. But since 1 October 2021, a landlord can petition to wind up a tenant if it can demonstrate that any money owed is unpaid for any reason other than the financial effect of coronavirus.

In the meantime, the government intends to introduce legislation to ring-fence rent arrears accrued during periods of forced closure since March 2020. In the event repayment terms can't be agreed the dispute will go to binding arbitration. However details of these proposals are awaited.

For our help on this, visit willans.co.uk/people to contact our [commercial property team](#). ■

Willans on stage at SoGlos Gloucestershire Lifestyle Awards



For the second year running, Willans was delighted to be headline sponsor of the SoGlos Gloucestershire Lifestyle Awards – an event that celebrates the best attractions, entertainment venues, eateries and lifestyle businesses across the county.

As well as welcoming guests to the awards, we were honoured to present the inaugural 'Business of the Year' award to Gloucester Cathedral and we send our congratulations to all winners and highly commended businesses recognised on the night.

We're also excited to close this year's awards season by confirming our sponsorship of the SoGlos Gloucestershire Business Awards in 2022. ■

Roadmap revealed for business immigration sponsorship system

Our employment law & business immigration solicitor **Hayley Ainsworth** shares the latest on the Home Office's proposed improvements.

In response to a 9% increase in applications in the past year to March 2021, the Home Office aims to streamline and simplify the sponsorship system, making it easier for businesses to apply for and maintain sponsor licences.

Changes in 2021

Throughout Q4 2021, the government intends to:

- establish a service to support small and micro businesses
- review current fees for use of the sponsorship system
- introduce an enhanced skilled worker eligibility checking tool, making it easier for prospective employers and workers to understand if a particular job is eligible under the skilled worker route
- pilot a salary check feature with HMRC to check employees are being paid the amount the employers committed to pay them.

2022 and beyond

After 2021, the Home Office plans to undertake a range of further reforms to streamline the application process, such as:

- implement a system where UKVI can re-use information already held by the government on new workers
- create a single online dashboard for the management of sponsorship licences

- reduce the time it takes to receive a decision on applications
- offer a shorter service for straightforward, compliant applicants
- introduce more ways to address the barriers to SMEs making sponsor applications
- build and roll-out a new IT management system between mid-2022 and early 2023. The roll-out will be split into three phases and will give workers and prospective sponsors the tools to manage visa applications, licenses and checks more efficiently.
- introduce a new 'Global Business Mobility Route' for overseas businesses seeking to establish a presence in the UK, which will be launched in spring 2022. The new sponsorship system will make it easier for overseas businesses to assign and manage workers coming to the UK.

Our business immigration lawyers have extensive experience in advising a wide range of businesses on all aspects of business immigration law in the UK.

If your business would benefit from advice on the above or another business immigration matter, we'd be delighted to help. ■



Hayley Ainsworth

Solicitor, employment law & business immigration

Hayley helps clients with a wide range of business immigration and employment matters, from tribunal proceedings to employee relations.



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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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