1947-2022 75 YEARS willans

Willans LLP | solicitors

Law News

Newsletter for commercial clients

Spring 2022

Celebrating 75 years of Willans

Welcome to the spring 2022 edition of *Law News*. In this issue we share our latest insights into the world of employment & business immigration, commercial property, dispute resolution and corporate & commercial law, as well as kick off our 75th anniversary celebrations.

In 1947, Gloucestershire-born lawyer Alec Willans established a law firm at the heart of Cheltenham, having returned from serving in the second world war not long before. Fast-forward 75 years and we're still based in the town, employing nearly 100 people – including 17 partners. In 2022, we received 27 outstanding recommendations from national independent guide *The Legal 500*.

We are immensely proud of the firm that Willans has become, 75 years after Alec Willans first opened his doors for business. While in many respects, we have evolved into a firm that he probably wouldn't recognise, we hope Alec would be proud of what has become of the firm he started.

We're still evolving; an exciting refurbishment of our Imperial Square offices is soon to be complete, with a brand new reception space due to open in late spring and staff social areas soon to be unveiled to support our growing team and hybrid working policies. True to our tradition of social responsibility, we've also recently become the first law firm to pledge our support to CheltenhamZero.

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

Bridget Redmond
Managing partner

To follow our updates, photos and 75th celebrations, search the hashtag #willans75 on LinkedIn, Facebook and Twitter.

Menopause and the workplace

Employment law partner **Matthew Clayton** discusses one of this year's hot topics.

While COVID-19 is still dominating life for many employers, another topic at the forefront for many is menopause and the workplace.

The structure of the workplace has changed dramatically in the last 50 years. Women between the ages of 40 and 55 are currently the fastest growing demographic in the workplace. In 2022, one in six workers will be a woman aged 50 or over – many of them at a senior level.

Menopause is getting increased media coverage and in October 2021 was debated in the House of Commons. Employment tribunals are also seeing a growing number of cases of unfair dismissal and sex and age discrimination claims brought by employees experiencing menopausal symptoms, who have suffered poor treatment by their employers.

Women undergoing the menopause or perimenopause can experience a wide range of symptoms including insomnia, headaches, anxiety, 'brain fog' and palpitations. Some women experience very mild symptoms, but for many the symptoms are more severe and can make working life challenging. According to a 2019 survey carried out by BUPA and the Chartered Institute for Personnel and Development (CIPD) three in five women (usually aged between the ages of 45 and 55) were negatively affected at work due to their menopausal symptoms, and almost 900,000 women in the UK left their jobs for the same reason.

A number of commentators have suggested that the menopause and its symptoms may become a recognised protected characteristic in the near future, providing greater protection for a significant section of the workforce.

Many businesses have already gone a long way towards creating a more flexible and inclusive workplace, and addressing issues that can arise for menopausal women is a next logical step on the way to creating a modern organisation that values female staff at the peak of their careers, which often coincides with menopause. Offering flexible working hours, the option to work from home or even a different workplace set-up can provide solutions to the problems caused by the menopause.

The best way to start to address the issues is to normalise menopause as a topic of consideration and discussion, which will help to create an inclusive working environment for employees at every stage of their working lives. Starting an open conversation about menopause and putting in place an effective menopause policy is the best way to engage employees and maintain their wellbeing and growth.

Pre-empting the inevitable future developments of the law surrounding menopause can be cost effective in the long term in respect of hiring costs, and unnecessary tribunal costs, but it can also help you to maintain a strong and successful workforce, enabling you to get the most of out of your employees. ■

Matthew Clayton
Partner, employment & business immigration

Matthew leads our employment law and business immigration team and has over 20 years of experience in the field.

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Webinar: working with the menopause

Thursday 23 June
9.30am

This free webinar is a must for employers, directors and HR professionals looking to understand and explore the impact of the menopause on their employees.

Join our experts to learn more about common workplace pitfalls to avoid, as well as the policies and procedures to effectively support colleagues going through the menopause.

Register at willans.co.uk/events

What we've been advising on...

Our corporate & commercial team, together with BPE solicitors, recently advised on an AIM-listed deal worth £1.3million. Totally plc acquired workplace wellness provider, **Energy Fit-Pro**, allowing Totally plc to expand their fitness and wellbeing services. On the seller's side, the transaction was led by Willans' corporate partner, Rishi Ladwa, supported by solicitor, Helen Howes,

and partner, Chris Wills. The commercial property matters were handled by solicitor, Emma Thompson, and partner, Matthew Clayton, advised on the employment law aspects. ■

Additional regulation changes to see rise in energy efficiency standards for commercial properties

Associate solicitor **Charlotte Brunsdon** discusses upcoming MEES regulation changes and how commercial property landlords can prepare for what's in store.

The Minimum Energy Efficiency Standards (MEES) Regulations were introduced in 2015 to target the least energy efficient buildings and to help the UK reach its targets for reducing carbon emissions.

Since April 2018, landlords of qualifying commercial property have needed to ensure that their properties comply with these regulations, meaning that new leases with an Energy Performance Certificate (EPC) rating lower than an 'E' cannot be granted.

From 1 April 2023, the MEES regulations are set to become even stricter as they will apply to all existing commercial leases, and it will be unlawful for landlords to continue to let commercial property with an Energy Performance Certificate (EPC) rating of 'F' or 'G'.

How can landlords prepare for the changes?

It will be important for landlords of qualifying commercial property, which are subject to existing leases, to consult with experts in MEES. Specifically, they should consider getting updated EPCs for properties that could be at risk, to establish whether action needs to be taken.

Energy efficient improvements may need to be carried out or an exemption may need to be registered on the Private Rented Sector (PRS) Exemptions Register if the property cannot be improved to meet the minimum standard. For example, a landlord will be able to continue to let a substandard property where it can be shown that efficiency measures would decrease the property's value by 5% or more, or a temporary exemption of six months can be granted to new landlords.

What happens if landlords don't act now?

Failure to make the necessary improvements or register an exemption could see landlords fined up to £150,000, depending on the type of property and length of the breach.

Our commercial property team can advise and support on engaging with existing occupants of properties where works need to be done, or ensuring that existing and/or new leases include relevant EPC provisions. Please do get in touch; we'd be happy to help.

Charlotte Brunsdon
Associate solicitor, commercial property & charity law

As well as commercial property law, Charlotte specialises in advising charity and not-for-profit clients.

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Nominations open for Gloucestershire Business Awards

Nominations are now open for the 2022 SoGlos Gloucestershire Business Awards, now in its second year.

After presenting the award for 'Growth business of the year' in 2021, we're proud to return this year as co-headline sponsors alongside Gloucestershire accountants, Hazlewoods.

Award categories include 'Most innovative business of the year', 'Family business of the year' and 'Best place to work', and **winners will be announced at an awards ceremony in October 2022, with finalists revealed in July 2022.**

To view the award categories and nominate your organisation, visit soglos.com/awards-business. Best of luck everyone!

On Wednesday 6 April, the first change to divorce law in over 50 years was introduced. Replacing the old system completely, no-fault divorce means couples no longer have to attribute blame or provide evidence of their marriage breaking down. Under the new system, divorcing couples do not have to wait to apply for a divorce on a no-fault basis until they have been separated for two years, as has been the case until now. Our **family law** team have been helping clients who have significant business interests and financial investments with no-fault divorce applications and family business exit talks.

The balancing act of corporate group structures

When it comes to group company structures, it's important to balance the benefits and the challenges, says corporate & commercial partner **Chris Wills**.

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.

There are a number of issues to consider when thinking about putting a corporate group structure in place, from commercial and legal to regulatory, tax and financial.

Protecting assets

A group company structure can be a useful way of protecting specific assets against the risks associated with ongoing trading activities. Where a company has developed valuable intellectual property rights or has bought its own premises or investment properties using the profits that it has accumulated over time, those assets can be at risk if the company experiences a downturn in trade and starts to accumulate losses. If that company were to become insolvent, those assets may be sold by a liquidator to satisfy creditors. Holding those valuable assets in a separate company allows the trading company to continue to use them, thereby protecting the assets.

We regularly see this as the main reason for considering a group structure.

Centralisation

One useful consequence of seeking to protect assets by holding them in a separate company is that those assets can be centralised and shared throughout a group of companies. This can make it easier to re-allocate resources in the group.

Preparing for sale

Implementing a group structure is a useful way of preparing a company for sale. Any assets or liabilities that a buyer will not want to acquire, or which the shareholders do not want to sell, can be transferred to a separate company. This leaves the underlying trade held in the original company, which may be more attractive to a buyer. In recent months, we have seen a marked increase in clients using this approach to enable deals to proceed that may otherwise have stalled.

Tax

We always recommend that clients seek tax advice at the earliest opportunity when considering any changes to a company's structure. There will almost always be tax consequences to consider, and taking pro-active, early steps can help to mitigate their impact. For example, the implementation of group structures often benefits from seeking clearance from HMRC. For this reason, we regularly work alongside accountants and tax professionals when setting up group structures.

Financial

If a company has any borrowing in place, particularly if it has been secured, it may be necessary to involve the lender as part of the process. As with the tax position, engaging with the lender at an early stage to understand their requirements is crucial.

Is it worth it?

That all depends on the circumstances and the ultimate objectives. It is important, however, to seek appropriate advice at the earliest possible opportunity so that the various factors can be considered, and a plan put in place. The temptation is often to involve the fewest number of professionals as possible until there is some certainty over whether to proceed but, in our experience, this can then lead to significant delays to the implementation of the project.

Should you be considering a corporate group structure for your business, please get in touch; we'd be happy to help.■

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Our **employment & business immigration** team have been helping Silicon Valley technology companies with sponsor license applications, as the businesses look to expand their European client base.■

Our corporate & commercial team recently assisted on the sale of Tewkesbury-based childcare provider **Skallywags.** Feedback from the owners included praise for Helen and the team's "reliably knowledgable, supportive, calm and reassuring, as well as efficient and highly professional" advice.■

What's on the agenda for employment law?

2022 is set to be a busy year for changes to employment law. **Hayley Ainsworth** shares the key developments that employers should look out for.

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.

Employment Bill

Perhaps the most significant change is the long-awaited Employment Bill and we're expecting it to cover:

- a ban on restaurants, cafes and pubs retaining tips and service charges for staff
- the right for employees who work variable hours to request a more predictable and stable contract after 26 weeks' service, including minimum guaranteed hours and fixed days of work.
- a single market enforcement agency to increase awareness and access to rights for vulnerable workers, including rights relating to anti-slavery, statutory sick pay and enforcing unpaid tribunal awards.
- a proposal to extend the period of redundancy protection from the point an employee informs her employer she is pregnant, to six months after her return from maternity leave.
- extended neonatal leave and pay for up to 12 weeks for parents with babies in neonatal care.
- one week's leave for unpaid carers as a 'day one' right for employees.

Flexible working

The government looks set to make flexible working the default position, unless an employer has a good reason to object.

It's also speculated that flexible working may become a 'day one' right, although this doesn't mean an employee would have an automatic right to work flexibly; simply that they can request it sooner.

Ban on exclusivity clauses extended

Exclusivity clauses are already banned in zero-hour contracts, but it's thought that this could be extended to cover workers earning under £120 per week. This update comes after some people were unable to work due to the national lockdown, and prevented from seeking other employment due to exclusivity clauses in their contracts.

Workforce reporting

April 2022 marks five years since the introduction of gender pay reporting regulations and the government is expected to review the extent to which the requirement is achieving its aims. There's also an ongoing consultation on disability workforce reporting for large employers with 250+ employees, which closes on 25 March 2022.

Minimum wage rates for 2022

From 1 April 2022, the National Living Wage (NLW) for workers will increase as follows:

	New	Current	Increase
National Living Wage	£9.50	£8.91	6.6%
21-22 year old rate	£9.18	£8.36	9.8%
18-20 year old rate	£6.83	£6.56	4.1%
16-17 year old rate	£4.81	£4.62	4.1%
Apprentice rate	£4.81	£4.30	11.9%

Similarly, there are increases in statutory benefits such as maternity and paternity pay from £151.97 to £156.66 (or 90% of the employee's average weekly earnings if less than the statutory rate) per week. The same rates apply to shared parental pay and adoption pay and also to parents on parental bereavement leave. Statutory Sick Pay will also increase from £96.35 to £99.35.

Please contact our employment law team for assistance with any upcoming changes.

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As home improvements are at an all-time high, our **dispute resolution and litigation** team have been busy helping clients to resolve disputes over new builds, extensions and other building projects.

The team has also been advising landlords in light of the change in coronavirus regulations regarding residential possession claims, as well working with clients to resolve vehicle disputes.

Our **commercial property** team have been advising a number of large industrial estate and warehouse distribution centre owners on the renewal of their commercial leases.

The higher cost of proceeding to trial

What are some of the commercial risks involved in proceeding to trial in an IP infringement case? Dispute resolution partner **Paul Gordon** discusses.

In trademark infringement and passing off cases, we often find that claimants are prepared to enter into a settlement if the defendant agrees to a rebrand of some kind, in order to achieve a quick resolution.

The reason for this tends to be because the claimant wants the infringing products and services out of the marketplace as soon as possible. It also helps to limit legal costs, as taking a case through the courts can sometimes lead to their own registered intellectual property (IP) being challenged.

Often, there is tension in the settlement negotiations on certain issues, such as:

- whether the defendant should disclose its sales. This is so that the claimant can assess if a payment should be made, either as damages or account of profits
- whether the defendant should pay a contribution towards legal fees, which can frequently escalate if the case is not dealt with quickly
- whether the claimant is prepared to contribute to the cost of the defendant's rebranding, depending on the circumstances of the case
- whether the defendant is allowed to sell through stock (which has the alleged infringing branding) and the terms relating to that process
- the timing of the rebrand.

This last point is often the most significant as it relates to other terms of the settlement.

The claimant will usually want the rebrand to take place immediately on the basis that the defendant is not allowed to continue gaining an unfair advantage and benefit from infringing the claimant's IP. A defendant on the other hand, will often seek to buy time to sell products, deescalate the dispute and negotiate its way out of it.

In the recent case of *Combe International LLC v Dr August Wolff GmbH and Co KG Arzneimittle [2022]*, the court found a trademark infringement had taken place and refused the defendant's application for a 21 week stay to the injunction, which they requested so as to enable them to rebrand. This case highlights the risks of proceeding to trial and that unlike the staged period they would be afforded in a settlement, the defendant will not necessarily have an opportunity to rebrand if an injunction is made for infringement. Proceeding to trial means the defendant will have to immediately stop trading in the infringing products and services.

> "This case highlights the risks of proceeding to trial and that unlike the staged period they would be afforded in a settlement, they will not necessarily have the chance to rebrand."

As well as the risks associated with litigation costs and compensation, a defendant should assess the likely commercial loss in having to take their products and/or services off the market immediately. In all cases, they should be aware of lost turnover, goodwill and market presence.

Willans' dispute resolution team assists clients to both enforce and defend IP claims, and we take time to understand our clients' businesses to achieve the best possible outcome. If we can help, please get in touch.

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Paul Gordon
Partner, dispute resolution & litigation

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.

Webinars on catch up: Is IR35 a pain in your neck?

Hosted by our employment law team, this webinar and Q&A is designed for chiropractors, clinic owners and health care professionals affected by the off-payroll working rules.

The session includes guidance on how to navigate IR35, employer responsibilities, the risks involved and the options available.

Visit willans.co.uk/webinars to listen.

Landlords are off the hook rules tenancy case

Associate solicitor-advocate **James Melvin-Bath** and paralegal **Bethen Abraham** discuss a key detail landlords should consider in light of a recent court ruling.

A 2021 Court of Appeal decision suggests that landlords are off the hook if they failed to serve the energy performance certificate (EPC) or gas safety certificate (GSC) for an assured shorthold tenancy (AST), which began before 1 October 2015.

In a recent case, *Minister v Hathaway*, the tenancy began in 2008 as a one-year fixed term and later became a statutory periodic tenancy. The landlord then started the process to evict the tenant in 2018.

This sparked a dispute after the tenant argued that the eviction notice (known as a section 21) was invalid because the landlord had not provided the EPC at the start of the tenancy. However, the landlord argued that this was not applicable for shorthold tenancies (under Regulation 1(3) of the Assured Shorthold Tenancy Notices and Prescribed Information (England) Regulations 2015 ("the 2015 Regulations")).

Consequently, it was decided that where an EPC and/or GSC was not provided, eviction notices are still valid for shorthold tenancies which started before 1 October 2015 (under Regulation 2 of the 2015 Regulations under the Housing Act 1988).

If you're a landlord with an assured shorthold tenancy, it's worth considering the following:

- did the tenancy commence before 1 October 2015?
- is it a periodic tenancy?
- are you off the hook for not providing the EPC and/or GSC?

If you have any questions in relation to the above, or you're affected by a similar issue, our team of dispute resolution specialists can help. Please get in touch.■

James Melvin-Bath and **Bethen Abraham**

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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.

Court rules that 'hidden' terms can't be relied upon

A High Court decision has emphasised the importance of resisting the temptation to bury an 'unattractive' term in your standard terms of business, says solicitor **Helen Howes**.

It's a general legal principle that once a contract is signed, a person is bound by the terms of that contract and any terms incorporated into it (such as standard terms of business posted on a company's website). This principle applies whether the person has read those terms or not, and underpins sales and ordering processes. This is why it's so important to ensure any order forms or quotes attach, or at least identify, a company's standard terms of business.

In *Blue-Sky Solutions Limited v Be Caring Limited*, the High Court considered whether this principle applied to the contract in place between the parties. Blue-Sky Solutions Limited's standard terms of business included a term which permitted them to charge an administration fee to a customer and the point of contention was the fact that in this instance, the fee accumulated to £180,000.

The court upheld that the standard terms were incorporated into the contract between the parties. However, it went on to decide that the specific term regarding the administration fee was not. This was due to it being penal and onerous in its nature which, in turn, required it to have been specifically brought to the attention of customers.

Rather than highlighting the term to customers, the court believed it to have been deliberately hidden away in the standard terms commenting, that it was "cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate…" As a consequence, it didn't apply.

What does this mean for your business?

This decision serves as a sharp reminder that businesses should take care to ensure processes and customer communications incorporate standard terms of business. It also highlights that any term with the potential to be regarded as 'onerous' or 'unusual' should still be included, despite the temptation to bury it.

If your business needs assistance with this or another matter, our corporate & commercial team would be happy to help.■

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Helen Howes
Solicitor, corporate & commercial

Helen works with companies, from start-ups to family-run businesses and LLPs, advising on corporate and commercial law.

Obscure legal terminology – forfeiture, waiver and relief

What happens when a tenant defaullts, say by falling behind on rental payments? **Nick Cox** discusses, bringing obscure legal terminology into the picture.

Those of you young enough to remember childhood may recall games where if you lost, you had to "pay a forfeit". In more general parlance, a forfeit is a penalty or fine.

The word comes from the Old French "forfet" – one of many terms brought across the channel by the Normans, who were very keen on laws and even more so on the penalties for transgression!

Forfeiture in law is a concept usually applicable in property law. It's especially relevant in a landlord and tenant relationship, which permits the landlord to prematurely end a lease due to a default on the part of the tenant, such as failing to meet rental payments. It can be a powerful weapon in the armoury of a landlord and if exercised can be hugely disruptive to a tenant who may find that they no longer have a lease.

In residential scenarios, statute law has come to the aid of the tenant by imposing some stringent requirements on landlords before they can bring a residential tenancy to an end. However, in the commercial field the tenant who has committed a default has only two options.

First, the tenant may be able to show that the landlord has lost (waived) the right to forfeit because s/he has done something, after the right to forfeit has arisen, that shows that s/he acknowledges the existence of a continuing tenancy, like sending out a rent demand for future rents. Computerised generation of rent demands can be a boon for tenants and a bane for landlords sometimes.

Secondly, if the tenant can right their wrong, perhaps by paying all the outstanding rent or removing the unlawful subtenant or licensee, then s/he may seek relief from forfeiture. This will involve a prompt application to the courts and speedy rectification of the issue.

In the current climate, few commercial landlords will want an empty property so they may be willing to turn a blind eye to a tenant's transgressions. Not all landlords will be quite as lenient however, so tenants need to be wary of default, and not approach their obligations in a cavalier fashion; the protection of the Coronavirus Act from forfeiture of the lease will not last forever.

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Nick deals mainly with disputes over commercial properties and supports the commercial and residential property teams.

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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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