1947-2022 75 YEARS willans

Willans LLP | solicitors

Law News

Newsletter for commercial clients

Autumn / winter 2022

What's in this issue?

Welcome...

...to the autumn/winter edition of Law News.

As we approach the winter months, it's a good time to pause and reflect on what has been an exciting year for Willans. As well as beginning our office refurbishment, we've celebrated 75 years in business along with further growth across the firm. To end the year on a high, we've achieved some impressive legal guide results, of which we're incredibly proud.

In this issue, you'll find the latest updates from our lawyers in their areas of corporate & commercial law, property, disputes and employment. As always, please get in touch if we can help with any of your legal needs.

Bridget Redmond managing partner

Strong legal guide performance closes our 75th anniversary year

The 2023 edition of independent legal guide *Chambers UK* has revealed another set of impressive results. With five departments and a further eight lawyers ranked, Willans has achieved its best performance in seven years.

Our outstanding family law team has been top tier rated for an eighth consecutive year, with partners **Sharon Giles** and **Jonathan Eager** also ranked in the Cheltenham and surrounding area's highest band. Also featured in the department rankings for the South West are our agriculture & estates, corporate & commercial, litigation & dispute resolution and real estate teams.

Five recommended lawyers have moved up a tier, including solicitor **Robin Beckley** and partners **Nigel Whittaker, Paul Gordon, Matthew Clayton** and **Chris Wills.** Associate solicitor **Charlotte Cowdell** has also been recognised as an 'associate to watch' for the second year running. Congratulations all!

Raise your voice for Young Gloucestershire

Following a recent staff vote, we're pleased to announce **Young Gloucestershire** as Willans' 2022/23 charity of the year.

Working with disadvantaged young people across the county, Young Gloucestershire supports those with poor mental health, are unemployed, have been excluded from school, have drug and alcohol issues, who live in chaotic households or who are simply lost and don't know where to turn.

Our charity committee's fundraising plans include the highly anticipated return of **Willans' charity carol concert,** featuring festive readings and carols led by local choir Severn's Eight. The event takes place on Wednesday 14 December at St Luke's Church & Hall, Cheltenham. To reserve your seats now, visit: willans.co.uk/event/carol-concert/

International data transfers subject to new contractual clauses

Consultant solicitor **Kym Fletcher** and paralegal **Klára Grmelová** explain the implications of new standard clauses for organisations transferring data overseas.

Kym Fletcher
Consultant, solicitor, data protection

Kym has over 25 years of experience in advising businesses. She specialises in GDPR and data protection, as well as the law around sport, media and technology.

Klára Grmelová
Paralegal, employment law & business immigration

Klara is a paralegal and soon-to-be qualified solicitor. She helps clients with a range of matters including data subject requests and sponsor license applications.

New standard clauses mean organisations will need to incorporate either the International Data Transfer Agreement or the UK Addendum in all contracts concluded on or after 22 September 2022.

This is the case if the contract involves the transfer of data from the UK to a third country whose data protection regime has not been deemed 'adequate' by the UK Information Commissioner (known as a 'restricted transfer').

The International Data Transfer Agreement (IDTA) and the International Data Transfer Addendum (UK Addendum) came into force in the UK on 21 March 2022. Both can be used as a transfer mechanism to comply with the requirement under Article 46 of the UK General Data Protection Regulation (UK GDPR) when making restricted transfers.

> "Under Article 46, organisations making restricted transfers of personal data out of the UK must provide appropriate safeguards..."

Under Article 46, organisations making restricted transfers of personal data out of the UK must provide appropriate safeguards to ensure that data subjects are given the same level of protection as they would have been under the UK GDPR.

The IDTA and the UK Addendum replace the previous Standard Contractual Clauses for international transfers (SCCs), mainly reflecting the judgment of the European Court of Justice commonly known as "Schrems II". Although the UK has left the EU, the decision in "Schrems II" came ahead of Brexit and the UK is still bound by it.

The requirement to provide appropriate safeguards when making a restricted transfer also applies under the EU GDPR for personal data transfers from the EU/EEA to any country without an adequacy decision from the EU Commission.

The UK was the subject of an EU adequacy decision in 2021, so the new SCCs do not need to be used for data transfers from the EU/EEA to the UK. This may be reviewed if UK data protection laws move away from the EU GDPR, which they currently mirror. However, the UK government has signalled that the second reading in parliament of the controversial Data Protection and Digital Information Bill has been postponed, and that the legislation would be considered further.

As for organisations making restricted transfers out of the UK, they can choose whether to use the IDTA or the UK Addendum in their respective contracts. The main difference between the two is that the IDTA is a separate agreement to be signed by the parties whereas the UK Addendum is meant to be used together with the new SCCs, varying them ever so slightly to fit the UK GDPR narrative.

The IDTA is therefore appropriate in transactions where the use of the new SCCs is not necessary. The UK Addendum, on the other hand, would be valuable in multinational transactions where both the UK and the EU GDPR regime must be followed.

What should you do?

According to the transitional provisions in the legislation, organisations will need to incorporate either the IDTA or the UK Addendum into all contracts concluded on or after 22 September 2022.

Contracts concluded on or before 21 September 2022 may still use the old SCCs, which will provide appropriate safeguards for the purpose of Article 46 of the UK GDPR up until 21 March 2024.

We would therefore suggest considering including either the IDTA or the UK Addendum to all newly-formed contracts to avoid future need for any changes. Organisations should also identify any contracts already in place that will need to be updated.

If you'd like any guidance on this matter, please get in touch; we'd be happy to help.

kym.fletcher@willans.co.uk
linkedin.com/in/kymfletcher/

klara.grmelova@willans.co.uk
linkedin.com/in/klaragrmelova/

What our teams have been helping with recently...

Our **corporate & commercial team** has recently advised a provider of Software Defined Networking (SDN) solutions on a deal to provide a communications solution to a British satellite service provider.

More generally, they have also been helping a number of clients to rectify void share buybacks, as well as advising both lenders and borrowers on the legal aspects of financing property development projects.

A guide to the National Security and Investment (NSI) Act 2021

Buying a company? Solicitor **Helen Howes** introduces the National Security and Investment Act, which transactions could be affected and when you should be mindful of it.

When purchasing a company, or even some of its assets, the importance of a thorough due diligence process is well known, as is taking the time to agree the price, the other terms of the acquisition and what, if any, liabilities you are prepared to take on. However, it is now also important to consider whether the proposed transaction is likely to be caught by the National Security and Investment Act 2021 (the 'NSI Act').

The act came into force at the beginning of 2022 and sets out a new, stand-alone regime that allows the UK government to scrutinise, and potentially block, acquisitions and investments in sensitive sectors or locations which could impact upon national security.

As you might expect, the term "national security" implies that the scope of the NSI Act is very wide and can capture transactions that would not immediately spring to mind, including, for example, energy and transport.

If the transaction concerns an acquisition or investment in any of 17 specific sectors, then the act requires pre-transaction authorisation, which will impact on its timetable. There is also the risk that it may be 'called in' for review post-completion.

This is especially true if it involves the acquisition of shares, voting rights or the transfer of an asset such as intellectual property rights ('IP'), land, tangible assets, ideas, information or techniques with value, such as trade secrets, source code, algorithms, formulae, designs, plans, drawings and software.

A recent example illustrates how this might work. The case concerned the acquisition of IP by a Beijing tech company from the University of Manchester. The transaction was not a share acquisition, and therefore no mandatory notification was required and a notification was not made. However, under the licencing arrangement, the buyer would have secured rights to IP relating to the University of Manchester's vision-sensing technology. Consequently, the government considered it to have implications to the defence sector and exercised its powers to block it.

It is important to be mindful of the broad scope of the NSI Act, and appropriate legal advice should be sought at a very early stage to understand any implications it may have.

If you are involved in purchasing a company or some of its shares, and you're wondering if the transaction could be caught up by the NSI Act, we'd be happy to advise. Please get in touch.■

helen.howes@willans.co.uk
linkedin.com/in/howeshelen/

Helen Howes
Solicitor, corporate & commercial

Helen helps clients with their corporate and commercial needs, as well as drafting and advising on general terms and conditions of business and commercial contract queries.

Earlier this year, our **real estate** and **strategic land & development team** were involved in the sale of over 140 acres of agricultural land to an institutional investor and land promoter. They also acted for a client in a complex disposal of 18 acres of development land involving multiple parties. Following its promotion, the land received consent for 90 homes and a care home.■

Adam Hale
Partner, agriculture & estates; strategic land & development

Adam has 14 years of experience advising landowners on issues ranging from rural land management to the disposal of development land.

Advice for landowners – the advantages and traps of promotion agreements

What are the benefits of land promotion agreements and when should landowners be wary? Partner **Adam Hale** shares his insight.

Promotion agreements are joint venture arrangements under which a landowner and a promoter seek to maximise land value before sharing the profits of an onward sale.

Under the terms of such an agreement, the landowner contributes the land and relies on the expertise of the promoter, who must endorse the site for planning at its own expense and risk. Ultimately, it provides a framework for the marketing and sale of the consented site, before the net sale proceeds are then split between the parties in agreed proportions.

The collaborative nature of promotion agreements helps to overcome the potential for conflict between a landowner and developer inherent to an option agreement, however attention to detail is crucial to ensure the landowner's interests are protected.

What are the advantages?

- The landowner benefits from the skill and expertise of the promoter, who is required to do the legwork.
- The cost and risk of the planning process falls on the promoter, who will be motivated to achieve results as costs will only be recouped on completion of an onward sale.
- Both parties share the common goal of maximising land values and minimising planning and infrastructure costs. Under an option agreement, the landowner and developer are pitted against each other in agreeing the sale price, with the landowner wanting to keep land value high and the developer seeking a lower value.
- Sale of a consented site on the open market guarantees that the best price is obtained. An option agreement typically relies on a set of agreed assumptions to determine market value.
- The parties may agree to delay sale if market conditions are not favourable. Under an option agreement, a developer may take advantage by exercising its option to buy in a weak market.

Are there any traps to be aware of?

- Tax – the landowner will need to recover VAT which the promoter will charge on its promotion fee. This will necessitate VAT registration and "opting to tax" the land. You'll also need to consider the Capital Gains Tax implications of a sale and any reliefs which may be available, therefore early tax advice is critical in ensuring tax efficiency.
- Deductible costs – the promoter's costs will be deductible before division of the net sale proceeds. The agreement must ensure that deductible costs are reasonable and sensible caps are agreed, while a promoter's internal costs should be excluded.
- Competing sites – promoters often endorse multiple sites simultaneously. The agreement should prevent the promoter from endorsing other competing sites which could prejudice a successful outcome.
- Aligning objectives – there is often a balance to be struck between achieving the quickest results and maximising returns. Care should be taken to ensure the parties interests are aligned and controls are in place
- A weak market – the agreement must contain a minimum sale price below which the landowner is not obliged to sell. This will usually be based on price per gross (or net) developable area within a consented scheme.

As ever, every case is unique and advice at an early stage is key to ensuring the best outcome is achieved.

If you're a landowner looking for information or help with drafting a promotion agreement, please get in touch with our agriculture & estates, and strategic land & development teams. We'd be happy to help.

adam.hale@willans.co.uk
linkedin.com/in/-adamhale/

Our **corporate & commercial team** recently advised an existing client on establishing an Employee Ownership Trust, which gave the employees a significant stake in the company.

Throughout October, members of our **wills, trusts & probate team** donated their time to Gloucester Cathedral's 'Make a will fortnight.' It's anticipated that over £1,000 was raised for the Friends of Gloucester Cathedral, which aims to ensure this special place stays in the best possible condition for generations to come.

New rules for energy performance in non-residential buildings

April 2023 sees the introduction of new EPC regulations for commercial properties. **Nick Cox,** consultant solicitor in property litigation, discusses the potential implications for landlords.

There can be no more pressing issue for both domestic and commercial occupiers than the rising cost of fuel bills. So, in the pandemonium that is the current energy crisis, a change to the regulations relating to energy performance certificates, which comes into force in April 2023, may have gone unnoticed.

Most property owners and occupiers will be aware of the EPC (Energy Performance Certificate) as those letting residential premises are required to achieve a minimum E rating and have done for some time. In contrast, the rules regarding non-residential property have not been so strict, and even in the future, many non-residential premises may be entitled to exemptions from the regime.

From 1 April 2023 however, regulations state that non-domestic property will require an EPC rating of at least an E. This is the case for all properties, unless, for example, it is a listed building where the character and appearance would be altered if steps to comply were taken. In these instances, properties will be required to have a registered exemption and be listed on a statutory register of properties.

This will mean that landlords should take the opportunity to review their commercial lettings portfolio – particularly if any are currently vacant – to see how they can best address the new regulations.

Without at least an E rating, or a registered exemption from the scheme, a landlord will not be able to let a non-domestic property or renew a letting where the lease is due to expire after 1 April 2023. This is a statutory prohibition on letting any non-domestic property and cannot be contracted out.

What does this mean for commercial landlords?

Failure to comply – or ignorance – is no excuse. There could be penalties for non-domestic lettings of up to 10% of the rateable value of the property, starting at a minimum of £5,000 and rising to a maximum of £50,000 per property. And that's not all. Between 1 April 2025 and 31 March 2027, non-domestic properties will need to be improved to achieve a C rating.

The only alternative for landlords is to seek to register the property as exempt under one of the categories set out in the 2007 Regulations. An example would be if it is impossible to improve the property to meet the minimum standard of EPC band E, as per one of the scenarios set out below:

- Cost-effective improvements have been undertaken but the property remains below an E EPC rating.
- The landlord needs necessary third-party permission which is denied or unreasonable conditions apply.
- The landlord must take measures that would cause capital devaluation of the property of more than 5%.
- The landlord would have a potentially negative impact on the fabric or structure of the property (including insulation).

At the moment, it's unclear as to what the implications will be for tenants. For example, where a landlord needs to do works that might disrupt their occupation, or where the property they occupy cannot lawfully be let to them on a new lease before the work to improve the property is done.

If you're a commercial landlord wanting advice on this matter, please get in touch with our team of real estate experts.

nick.cox@willans.co.uk
linkedin.com/in/nicholas-cox1/

Nick Cox
Consultant, solicitor, litigation & dispute resolution

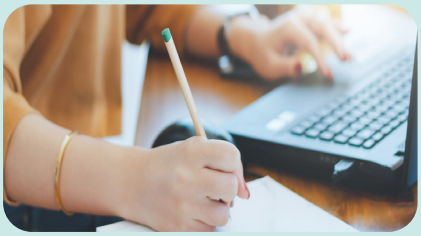
Nick provides support to our property litigation team.

Webinar date for your diaries: a guide to right-to-work checks for UK employers

Join our business immigration experts for a free webinar to guide you through the key points to consider when carrying out right-to-work checks.

Tuesday 29 November | 4 - 5pm

To book visit: willans.co.uk/events/



COVID-19: long covid could amount to a disability

Solicitor **Hayley Ainsworth** discusses the first case dealing with the status of long covid and what it means for employers.

In *Burke v Turning Point Scotland*, the employment tribunal found that the claimant, who was suffering from long covid, was disabled under the Equality Act 2010. This defines a disability as a physical or a mental impairment that has a substantial and long-term adverse effect on one's ability to carry out normal day-to-day activities.

In this case, Mr Burke was employed as a caretaker and after contracting covid-19 in November 2020, initially experienced mild symptoms. However, he later developed severe fatigue and headaches. He was unable to do basic daily chores like shopping or cooking. He struggled to stand for long periods of time, experienced joint pain, loss of appetite, and was not able to concentrate when watching TV.

Although he was keen to return to work, his symptoms were unpredictable. Mr Burke remained off sick and was dismissed by his employer in August 2021 on the grounds of ill health and the "uncertainty around a potential return to work date." As a result, Mr Burke claimed that he was discriminated against on the basis of his disability – long covid. The tribunal had to determine whether Mr Burke's long covid amounted to a disability under the Equality Act.

When they applied the criteria of the Equality Act to the symptoms that Mr Burke was suffering, they found that these were long term, had a substantial adverse effect on his ability to carry out normal activities, and he was therefore disabled. The claim was brought in the employment tribunal only, and was not appealed, so it is not binding. However, it's the first case dealing with the status of long covid and unlikely to be the last, given the prevalence of the condition.

The decision itself is not ground-breaking and certainly does not mean that all cases of long covid will amount to a disability, but it does act as an important reminder.

All employers managing sickness absence relating to any ongoing health condition should always bear in mind that it could amount to a disability if it fulfils the Equality Act's specified criteria.

Employers have a duty to make reasonable adjustments for disabled employees to undertake their role and failure to do so may result in a disability discrimination claim. It's therefore crucial for employers to establish whether an employee is disabled and what adjustments may be required.

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.

Ban on exclusivity clauses to include lower earners

Following a government decision to extend the ban on exclusivity clauses to lower income workers, **Hayley Ainsworth** shares the latest information.

In 2015, regulations were introduced to prevent employers from including exclusivity clauses in zero-hour contracts. However, with concerns growing around the treatment of low income workers (particularly following a significant reduction in some employees' hours during the pandemic), there have been calls for the ban to be extended.

On 9 May 2022, following a consultation, the government formally announced that legislation proposing to widen the ban would be laid before parliament later in the year.

The statement said: *"as well as supporting workers to increase their income, the reforms will also benefit businesses by widening the talent pool of job applicants to those who may have been prevented from applying for roles due to an exclusivity clause with another employer, and also helps businesses to fill vacancies in key sectors like retail and hospitality. The reforms will allow low-paid workers to reskill and make the most of new opportunities in existing sectors with growing labour demand."*

If this ban is adopted for workers earning less than the lower earnings limit (£123 per week in 2022/23), a contract provision will be unenforceable if it tries to prohibit the worker from doing work under another contract or arrangement; or doing work under another contract or arrangement without the employer's consent. Workers earning less than the lower earnings limit would have the right not to be unfairly dismissed (without two years' qualifying service) or be subjected to a detriment for failing to comply with such an exclusivity clause.

In July, a set of draft regulations – The Exclusivity Terms for Zero-Hours Workers (Unenforceability and Redress) Regulations 2022 – were laid before parliament, but have not yet been made statutory. Given the general ongoing uncertainties within parliament, it looks likely that progress will be delayed until 2023.

Should you be affected by these or any other related matters, our employment team are here to help. Please do get in touch.

hayley.ainsworth@willans.co.uk
linkedin.com/in/hayleyainsworth/

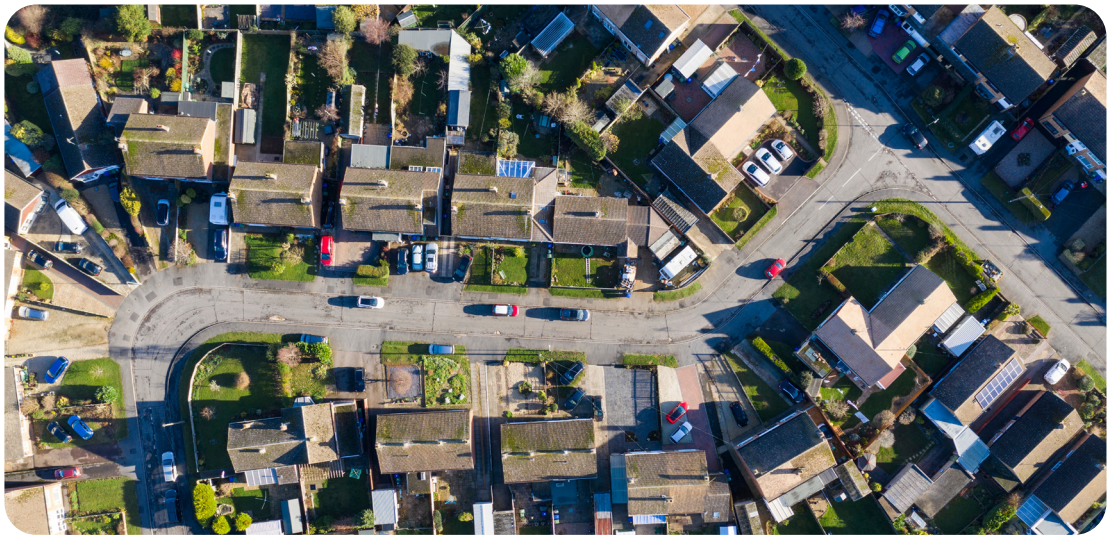
SoGlos Gloucestershire Business Award winners revealed

Willans was proud to be co-headline sponsors of this year's **SoGlos Gloucestershire Business Awards**, which recognises the county's most inspiring businesses and individuals.

The 2022 awards ceremony took place at the University of Gloucestershire's Oxstalls campus, was presented by Steve Knibbs and brought together 300 people from the Gloucestershire business community, after 382 nominations were made by 178 companies earlier this year.

Register of overseas entities (ROE) introduced

Real estate solicitor **Charlotte Cowdell** explains the new register introduced for overseas owners of UK property.



Charlotte Cowdell
Associate, solicitor, real estate & charity law

Charlotte advises on commercial property matters, as well as charity law issues. She was named an 'associate to watch' in the latest edition of national legal guide, *Chambers UK*.

The Economic Crime (Transparency and Enforcement) Act 2022 received royal assent on 15 March 2022, meaning that all overseas legal entities that own (or wish to buy) UK property must register with Companies House. The register was introduced on 1 August 2022 to create transparency of ownership and act as a deterrent for those hiding profits of crime in the beneficial ownership of UK property.

How to comply

Any legal entity governed by the law of a country or territory outside the UK is regarded as an overseas entity, including Jersey, Guernsey and the Isle of Man. Overseas entities must take reasonable steps to identify their beneficial owner(s) i.e. any individual, legal entity or government or public authority holding more than 25% of the shares or voting rights in that entity (or satisfying certain other ownership tests). The register follows the "people with significant control" register for UK companies.

As part of registration, details of the name, country of incorporation, legal form and registered office and correspondence addresses for the overseas entity will need to be provided, as well as details of any beneficial owners and the UK-regulated agent that verified the identity of those beneficial owners.

Upon registration, the overseas entity will be given an identification number and it is then their duty to ensure that the register is updated on an annual basis.

Are there any exemptions?

Registration is not required if the overseas entity became the registered owner of the property in England and Wales before 1 January 1999. Under the act, the secretary of state can exempt an individual from the registration procedure by written notice. This must be for the purpose of national security or the prevention or detection of serious crime. If an overseas entity does not own UK property or plan on owning property, it does not need to register.

What happens if an overseas entity does not register with the ROE?

The identification number issued by the registrar of companies will need to be submitted when registering an overseas entity as the owner of UK property, otherwise the application will be rejected by HM Land Registry. A restriction will also be placed on the title to the property following the purchase, which will prevent the registration of any future disposal of the property unless the overseas entity is registered at Companies House at the time.

Disposing of property between 28 February 2022 and 1 February 2023 without registering with the ROE will be a criminal offence and the overseas entity and its officers could be liable for daily fines of up to £2,500 and prison sentences of up to five years.

In the case of overseas entities that are already owners of UK property, they must register at Companies House no later than 1 February 2023. HM Land Registry will also add a restriction to the titles of all such property to prevent the overseas entity from dealing with that property if they do not have an identification number.

Should you need any advice on this matter, please get in touch with our real estate team; we'd be happy to help.

charlotte.cowdell@willans.co.uk
linkedin.com/in/charlottecowdell

An update on adopting model articles of association

Solicitor **Helen Howes** shares the latest update for small and sole director companies on reviewing articles of association.

Helen Howes
Solicitor, corporate & commercial

Helen helps clients with their corporate and commercial needs, as well as drafting and advising on general terms and conditions of business and commercial contract queries.

In the last edition of Law News, we reported on a significant decision of the High Court in *Re Fore Fitness Investments Holdings Ltd (2022).* In this case, the judge commented that 'model' articles – the default articles of association for use by private limited companies – cannot be used in an unmodified form if a company only has one director.

The implication of this decision was that a company which adopts the model articles must have at least two directors for any director-level decisions to be valid and binding. Consequently, many small companies have been left considering whether to adopt bespoke articles of association; either to enable them to continue with only one director going forward or to continue with the existing articles of association and appoint additional directors.

However, since our article was published, the High Court has provided some further clarity for companies with sole directors.

In *Re Active Wear Limited (2022)* the court had to consider the validity of a decision taken by a sole director to appoint company administrators. In looking at this, the judge stated that it is permissible for a company to have a sole director who conducts the affairs of the company on their own, so long as the model articles have been adopted in full and without any amendment that requires more than one director to be appointed.

This judgment doesn't appear to have changed the position where a company has chosen to use the model articles as its articles of association but with amendments that require the company to have more than one director in office or where a sole director has previously acted alongside another. Therefore, this judgment provides some clarity but leaves an element of uncertainty as to the validity of decisions taken by a sole director where they have previously acted alongside co-directors.

In such circumstances, directors should seek legal advice to help them to determine whether to undertake a review of their company's existing articles of association, or whether any practical steps can be taken instead – such as appointing additional directors.

If you are a director and your business is affected by this matter, please get in touch with our corporate & commercial team. ■

helen.howes@willans.co.uk
linkedin.com/in/howeshelen/

Contact

For advice on any of the issues covered in *Law News* or any other area of law, these are the partners to contact in the first instance.

Corporate & commercial

Chris Wills chris.wills@willans.co.uk
Rishi Ladwa rishi.ladwa@willans.co.uk

Employment law & business immigration

Matthew Clayton matthew.clayton@willans.co.uk
Jenny Hawrot jenny.hawrot@willans.co.uk

Litigation & dispute resolution/ property litigation

Paul Gordon paul.gordon@willans.co.uk
Nick Southwell nick.southwell@willans.co.uk

Rural business, agriculture & estates

Adam Hale adam.hale@willans.co.uk

Charities & not-for-profit

Nigel Whittaker nigel.whittaker@willans.co.uk

Real estate & construction

Nigel Whittaker nigel.whittaker@willans.co.uk
Alasdair Garbutt alasdair.garbutt@willans.co.uk

Residential property

Suzanne O'Riordan suzanne.oriordan@willans.co.uk
Simon Hodges simon.hodges@willans.co.uk

Divorce & family law

Sharon Giles sharon.giles@willans.co.uk
Jonathan Eager jonathan.eager@willans.co.uk

Wills, trusts & probate

Simon Cook simon.cook@willans.co.uk

Willans LLP | solicitors
34 Imperial Square
Cheltenham
Gloucestershire
GL50 1QZ

01242 514000
law@willans.co.uk
www.willans.co.uk

Supporting the WOODLAND TRUST