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Willans LLP | solicitors

Law News

Newsletter for commercial clients

Spring 2023

Welcome...

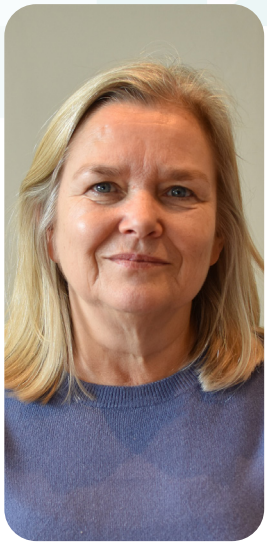
to the spring edition of our newsletter for commercial clients, ***Law News***. With insight into the worlds of employment law & business immigration, corporate & commercial, real estate, litigation & dispute resolution and agriculture & estates, this issue provides plenty of legal perspective on the topics affecting you and your business.

As ever, we would be happy to help with any matters you're facing, so please don't hesitate to get in touch.

Bridget Redmond | Managing partner

What's in this issue?

Welcome to our new lawyers



In the first quarter of 2023 we welcomed two new lawyers to our commercial teams.

Commercial property associate solicitor, Nancy Battell joins our *Legal 500*-rated real estate team. Nancy was part of the real estate team at CRS (formerly Charles Russell) in Cheltenham for many years. A great addition to our strong team, Nancy has broad experience and is looking forward to assisting our clients across a range of sectors.

Associate solicitor Richard Holland joins our corporate & commercial team, which is also *Legal 500*-rated. Richard will be focussing on supporting our clients with a variety of commercial matters. A highly versatile lawyer with wide ranging experience; as well as having worked in private practice, Richard has worked in house for a charity, and most recently as the principle legal advisor to the government of St Helena in the South Atlantic. We are pleased to welcome Richard back to his hometown of Cheltenham.

Should you wish to get in touch with Nancy or Richard, contact details for all of our lawyers can be found on our website which you can visit by clicking here or by scanning the QR code (left). ■

Nominations now open for the SoGlos Gloucestershire Business Awards

Following the buzz of last year's awards, we return once again alongside our friends at Hazlewoods to co-sponsor the 2023 SoGlos Gloucestershire Business Awards. Described as the county's leading business awards, the SGGBA recognises and champions innovative and successful businesses across Gloucestershire.

For more details – including how to enter and tips on what makes a good nomination – visit our website or scan the QR code (right)! ■

UK employment law: Trends & topics for 2023

Employment law & business immigration partners Matthew Clayton and Jenny Hawrot look ahead to the topics that could be about to affect your business this year.

Matthew Clayton

Partner, head of department

Employment law & business immigration

Matthew heads our highly rated employment law & business immigration team and has over 25 years' experience in his field.

Jenny Hawrot

Partner

Employment law & business immigration

Jenny helps clients with a full range of employment legal needs and is recognised by prestigious guide *The Legal 500*.

New regulations on exclusivity terms for lower income workers

On 5 December 2022, the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 came into force. These regulations mean that, for workers earning less than the lower earnings (currently £123 per week), employers will not be able to enforce an exclusivity clause in their contracts.

Updated guidance published surrounding suspensions

In September 2022, Acas published new guidance on how to consider and handle staff suspensions. The guidance confirmed that suspension is a serious step and should only be used if it is needed to protect the business, employee under investigation or other staff. It also considers topics such as the length of investigation, alternatives to suspension and provisions on pay.

Flexible working is becoming the default

The government has given its support to the Employment Relations (Flexible Working) Bill, which is currently in the report stages in the House of Commons and will likely receive royal assent later this year.

The bill introduces several changes to the current flexible working request process, including:

- making a flexible working request a 'day one' right
- allowing employees to make two requests in a 12-month period instead of one
- shortening the time that employers have to respond to these requests to two months
- requiring employers to discuss a potential alternative with the employee before declining their request.

Fire & rehire: Government consultation underway

The government has published a draft Code of Practice on the use of the so-called 'fire and rehire' practice. The draft code sets out steps an employer should take when it is considering making changes to employees' contracts and the employer believes that – if the changes cannot be agreed – it may dismiss them and re-employ them on new terms, or engage new workers.

The consultation closed on 18 April 2023. At the time of writing, the government has yet to propose a timeframe for bringing the Code of Practice into force.

Pro-rated holiday entitlement for part-year workers: New government consultation

Last year, we reported on the controversial *Harpur Trust v Brazel* case. Our previous article can be found on our website.

As a reminder, the Supreme Court found that part-year and casual workers should not have their paid holiday pro-rated, and that holiday pay should be calculated referring to the hours worked over a 52 week average, excluding weeks without any work, as provided for by the Working Time Regulations. Many employers with part-year or casual workers were surprised by the ruling, and hurriedly undertook audits to assess their financial liability.

However, the new government consultation paper calls the ruling a "disparity" that it wants to address. The reasoning for this is that "part-year workers are now entitled to a larger holiday entitlement than part-time workers who work the same total number of hours across the year."

The outcomes of the current consultation may result in legislation that would make holiday leave and pay proportionate to time spent working, which is considered a rational solution by many.

If you have any questions on the topics discussed above as we look forward to the rest of 2023, be sure to contact our employment law experts for the answers. ■

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Are you fire safety ready?

Associate solicitor James Melvin-Bath and solicitor Jordan Evans take a look at the recent updates to fire safety regulation, explaining how your obligations may have changed unknowingly.

The Fire Safety (England) Regulations 2022 came into effect on 23 January this year. These new regulations will materially impact landlords, managers and operators of buildings in England that contain two or more residential units that share communal spaces.

The aim of these regulations is to greatly improve fire safety following the Grenfell Tower inquiry. As a result, the government is imposing criminal sanctions for non-compliance with fire safety regulations, as well as widening the scope.

Essentially, if you are one of the 'responsible persons' for a property then you are liable for the criminal or civil sanctions for non-compliance. Those relevant responsible persons are:

- employers, where the common part of a residential building is a workplace and the employer is in control of it, such as where a caretaker or receptionist is employed
- people who control the common parts of the premises in connection with the carrying on of a trade or business, such as operators of student accommodation or a property management agent
- the owner.

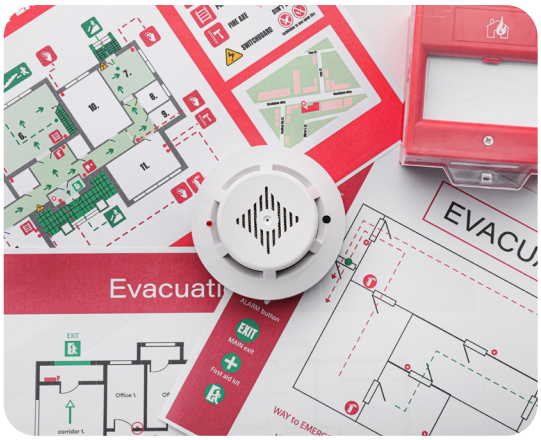
These regulations therefore expand the number of those that are ultimately responsible for fire safety, such that many of them may not currently be aware of their obligations. It is therefore vital that those that deal with residential properties are aware of their potential obligations and liability.

Broadly speaking, the level of those obligations will depend upon the nature of the building and vary from merely ensuring fire safety instructions are provided including, but not limited to:

- ensuring their local fire service with electronic floor plans and ensure hard copy plans are stored in a secure location on site
- providing their local fire service with details as to the design and construction of the buildings, including an assessment of risk created by the materials or design
- undertaking monthly checks on fire evacuation equipment and reporting any issues
- installing and maintaining a secure information box containing the required information and details for the responsible persons
- installing required signage.

Should these requirements not be complied with, the responsible persons can be personally liable to civil claims and/or criminal sanctions.

If you are unsure as to your obligations under these regulations – or the impacts they may have on your business – please get in contact with our property specialists. We'd be happy to answer any of your questions or queries. ■



James Melvin-Bath

Associate, solicitor-advocate

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James advises clients across a range of litigation areas, particularly landlord & tenant and contentious probate matters.

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Jordan Evans

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Jordan primarily advises clients on property litigation matters, including boundary disputes, residential repossession and tenant deposit disputes.

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Quit drafting the notice to quit

The Court of Appeal has recently deemed a notice to quit invalid as it was addressed incorrectly.

Highlighting the importance of accurate preparation, this case proves the stricter approach courts are taking against landlords. Visit our website for the full article by clicking here or by scanning the QR code (right).

If you need specialist advice on landlord disputes, please do not hesitate to contact our expert team.

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An update on the Register of Overseas Entities (ROE)

Real estate associate solicitor Charlotte Cowdell and corporate & commercial partner Chris Wills provide an update on the ROE.

Following our article regarding the introduction of the new ROE in the previous autumn edition of ***Law News***, overseas entities that already have an interest in UK property should be aware that the transitional period requiring registration in the ROE came to an end on 31 January 2023.

HM Land Registry restrictions are also now fully in force preventing any registerable disposition of UK property – which includes transfers, charges and leases of seven years or more – by an overseas entity where the ROE registration requirements have not been complied with.

Overseas entities already registered on the ROE should remember to comply with their duty to annually update their information at Companies House. For those overseas entities that have not yet registered, they and their officers could be subject to the civil and criminal sanctions outlined in our previous article – as well as an inability to deal with their property at HM Land Registry – and we recommend that an application to register is completed and submitted to Companies House as soon as possible to register. Overseas entitles looking to acquire UK property in the future should also familiarise themselves with the ROE requirements and register in plenty of time.

For lenders, buyers and potential tenants of property held by an overseas entity, it is important to check at an early stage that they have fully complied with ROE requirements (including registration and the subsequent annual update referred to above) to ensure that your interest in the property can be registered at HM Land Registry and legal title properly vested.

If you require any support, please do not hesitate to contact our dedicated real estate lawyers or our highly rated corporate & commercial team. Both departments will be more than happy to help. ■

Charlotte Cowdell

Associate solicitor

Real estate

Charlotte helps a range of clients on all types of commercial property transactions. She also has experience in charity law and is recognised by prestigious legal guide *Chambers UK*.

Chris Wills

Partner, head of department

Corporate & commercial

Recognised by *The Legal 500* and *Chambers UK*, Chris leads our highly rated corporate & commercial team and has over a decade of experience. He works with a range of clients, from start-ups to multi-million pound companies with a global reach.

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Why business owners should think twice before disposing of assets

When looking to the future – or going through a change in circumstances – it's likely that business owners will wonder whether selling or disposing of assets and interests is the right step to take.

Many are aware that some or all of their business assets might qualify for Business Property Relief (BPR), which reduces their estate's overall liability for inheritance tax when they die.

However, if appropriate advice isn't taken when approaching retirement – or perhaps when downsizing a business premises in the wake of the pandemic – it can often be overlooked that the sale or disposal of business assets can restrict the availability of BPR.

Read the full article here or by scanning the QR code (above). If you have any questions, please don't hesitate to contact our wills, trusts & probate team – they will be willing to help.

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Key things to consider before helping a friend or family member's start up business

Is a family member or close friend looking to start a business? Are you thinking about helping them out with some funding? Corporate & commercial partner Rishi Ladwa provides some crucial points you need to think about before you go ahead and do so.

When a new business venture or start up is looking to get off the ground, it is often the case that the founders know of some friends and family who are willing to provide some initial funding so they can avoid starting out with debt owed to a corporate lender.

Borrowing from friends and family is perceived to be less risky and quicker, whilst having the benefit of a funder who is less demanding, more forgiving and likely to be more flexible should there be a problem further down the line. Consequently, the parties often do not see a written agreement documenting the loan or investment as necessary.

Unfortunately – in our experience – it is that same emotion that can result in the funder and the founder failing to discuss key terms fully. This – along with other circumstances arising that have not been planned for, such as the death of someone involved – can result in an unnecessarily stressful and expensive situation occurring should it transpire that there has been a misunderstanding.

Like most contractual agreements, an important benefit of clearly documenting the terms on which the funding is to be provided is that it guarantees certainty in all respects. It will help to prompt communication between the parties about specific scenarios or terms applicable to the funding which may not otherwise occur. For example:

- are both parties aligned regarding the amount of funding being provided?
- when will it be available? Will it be as a lump sum or in tranches?
- how will the money be used and how it will be repaid or returned?

If you are thinking of providing funding to a family member or friend, please take the time to consider the terms on which you are prepared to do so. Some initial issues to consider are:

- do you expect the money to be repaid within a specific period? Alternatively, are you happy for the funds to be tied up on a longer-term basis, effectively buying you a share of that business?
- what sort of return are you expecting to make on your funds (for example, in the case of a loan, what interest will you charge)?
- are you expecting the return of your funding to be secured against anything?
- is the business going to be run as a limited company, partnership or sole trader?
- what will happen if the business fails?

These are just some of the issues that parties should have discussed before any funding is provided. Given the potential for complexity even in the most seemingly simple – and informal – of funding arrangements, it is important that everyone involved seeks appropriate advice and clearly documents the terms first.

If you have any questions about best practice when it comes to investing in friends and family, or you're looking to draft something but don't quite know where to start, please get in touch with our corporate & commercial experts – we'd be happy to help. ■

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Rishi Ladwa

Partner

Corporate & commercial

With over a decade of experience, Rishi helps a variety of businesses big and small on a range of corporate and commercial needs.

Rishi Ladwa, partner in our corporate & commercial team has recently advised a local accounting firm on their acquisition of another business.

Solicitor Helen Howes and associate solicitor Richard Holland have also been advising a leading manufacturer of specialist mobility equipment on their terms & conditions.

Business immigration updates

Are you and your business aware of updates taking place in the business immigration world? Our expert Hayley Ainsworth covers the changes to the guidance for sponsors in an article that can be found on our website (top QR code). Our recent webinar covering more changes to the field can also be watched for free here (bottom QR code).

Article

Webinar

Adam Hale

Partner

Agriculture & estates

Adam's varied client base includes rural businesses and private landowners. He advises on issues affecting landowning clients, ranging from rural land management to transactional work, with a particular focus on the disposal of development land.

Grazing licence or Farm Business Tenancy: Which is right for you?

Grazing licences and Farm Business Tenancies (FBTs) are both occupational arrangements available to landowners – but which is right for you? This will largely depend on the activities to be carried out on the land, but consideration should also be given to other consequences like tax implications. It is vital that landowners are certain which arrangement they are granting to ensure their interests are protected and headaches are avoided.

Both have their own advantages and consideration needs to be given to which is appropriate in each individual situation.

Specialist advice should be sought to ensure that opportunities are maximised and interests are protected.

For the full article found on our website, click here or scan the QR code (above).

Get in touch with our agriculture & estates team if you have any questions or queries. ■

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Alasdair Garbutt

Partner

Real estate

Recognised by the *Legal 500*, Alasdair heads the highly regarded real estate team and works closely with many local and national clients.

Break clauses: A case for careful drafting

The *Capitol Park Leeds Plc v Global Radio Services Ltd* case has further highlighted the importance of the careful drafting of break options in commercial leases.

The break clause in this case was conditional on the tenant giving "vacant possession of the premises to the landlord on the relevant tenant's break date." The definition of 'premises' in the lease was arguably wide as it included fixtures and fittings "whenever fixed."

Shortly after the grant of the lease, the tenant carried out significant work to strip out numerous fixtures and fittings at the property that included ceiling tiles, lighting, radiators and electrical equipment.

In anticipation of the break date, the tenant began to reinstate the premises but subsequently stopped in the hope that a commercial deal would be agreed with the landlord to avoid needing to complete the works. A deal, however, was never struck and the premises were returned to the landlord as an empty shell.

But what was the view of the court? To find out, read the full article on our website. Access it by clicking here or scanning the QR code (below).

If you require assistance with a commercial lease, please do not hesitate to contact our dedicated team of real estate lawyers. We'd be more than happy to help. ■

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Our corporate & commercial team recently assisted an existing client with the sale of assets of their Cheltenham-based electrical insulation product supply company for £1.8 million. Jenny Hawrot from our employment team advised on the employment law aspects.

Partner and head of department Chris Wills has also been advising the shareholders of a company that delivers products and solutions to the global energy market on the sale of their shares for £1.2 million.

Does 'good faith' between shareholders exist?

Fair play doesn't always make an appearance when it comes to business. Corporate & commercial solicitor Helen Howes talks us through a recent case.

A recent Court of Appeal decision has clarified the English law principles surrounding contractual duties of good faith, emphasising the importance of the context of circumstances upon which a 'good faith' clause is agreed.

What is good faith?

It is generally agreed that good faith – at a minimum – represents an obligation to act honestly and 'play fair' when entering a contractual agreement.

Traditionally the courts have been reluctant to imply the duty between parties to an agreement and the default position was, therefore, not to imply it into shareholders' agreements or other contracts. This was on the basis that, under English law, the parties to a contract do not owe each other any duty of good faith unless there is an express provision stating so in the document.

Recent developments

However, despite the court's reluctance, there has been a growing notion that parties are required to act within the spirit of the contract, resulting in there being notable pressure on the English courts to imply a duty of good faith where no express term exists.

For example, recent trends in claims made by employees who consider themselves to have been unfairly dismissed appear to suggest a shift in the courts' approach. They now seem to show more willingness to imply a general duty of good faith between the employer and the employee (as parties to the employment contract) and apply a broader interpretation of what it means.

Recent judgments also suggest a broader approach is being taken and that a more objective test is being applied. For instance, in a recent High Court case the judge observed that an express duty of good faith requires parties (in this case, shareholders of a company) to adhere to certain 'minimum standards', thereby signalling the courts' emphasis on – and adoption of – a set formula approach.

Current position

Despite this, the Court of Appeal unanimously overturned the High Court decision by finding that minority shareholders were not unfairly prejudiced by actions of the majority shareholders and that the previous judgment had interpreted the duty too broadly.

In making its decision, the Court of Appeal was careful not to define it in contractual arrangements and emphasised the importance of consideration of the context in which the clause is agreed.

The court cautioned against a formulaic approach to the duty of good faith and instead emphasised that it should be construed based on the background of the case.

Therefore, precisely what a duty of good faith means will continue to be left somewhat open to interpretation and it will be implied – or not – on a case-by-case basis, taking into account the original purpose of the contract and the circumstances in which it was made.

It is evident that 'one size does not fit all' when it comes to this subject and parties entering contracts with such clauses should ensure that they seek appropriate legal advice.

Our highly rated corporate & commercial team can help. Get in touch if you have any queries. ■

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Helen Howes

Solicitor

Corporate & commercial

Helen assists local, national and overseas clients on a variety of corporate and commercial needs.

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Lateness: A fair dismissal?

In *Tijani v House of Commons Commission*, the Employment Appeal Tribunal (EAT) explored whether a series of minor misconduct incidents – such as lateness – could amount to grounds for dismissal.

Ms Tijani worked as a cleaner for the House of Commons. She received her first written warning for lateness in December 2017 after arriving late on 17 out of 20 days. She continued to arrive late for work – sometimes only by a couple of minutes, other times by up to 44 minutes.

As a result of her repeated lateness, she received a final written warning and was subsequently dismissed in May 2019. She brought an unfair dismissal claim, arguing that dismissal was a disproportionate approach to her being "sometimes late for work."

The employment tribunal (ET) rejected her claim finding that her employer acted reasonably in saying that "enough was enough". The EAT upheld the ET's findings stating that Ms Tijani was on her final written warning and was well aware that dismissal was the likely consequence of the persistent lateness.

This case is a good reminder that employers should be confident in exercising their disciplinary sanctions for even a minor misconduct where such misconduct is long-term and repeated.

If you need advice before acting, however, be sure to contact our employment law experts.

Don't get burnt with service charge disputes

Partner and property litigation specialist Nick Southwell looks into a recent case that could interest landlords, managing agents and tenants.

It is a common term in a lease that a certified service charge sum demanded by the landlord is 'conclusive'. But what should you do if the service charge is disputed? Should the service charge be paid in any event and then disputed, or do tenants risk having to pay the costs and interest incurred by the landlord as they seek to recover the disputed sum?

In *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd*, the Supreme Court recently answered this question and the outcome will be of interest to landlords, managing agents and tenants alike.

The landlord in the case argued that the certificate must be conclusive, other than in cases of manifest error, mathematical error or fraud. On this basis they suggested that the tenant needed to pay up, with no later right to dispute.

The tenant argued that the certificate was conclusive that the landlord had incurred costs, but not conclusive of the proportion of those costs to be paid by the tenant. The tenant therefore argued that they were entitled to dispute the service charge and then only pay upon determination of the sum.

The Supreme Court disagreed with both parties' approach and concluded that:

- the certificate for the service charge was conclusive of the amount that the tenant was required to pay
- the tenant could still challenge whether it was liable to pay the sums sought. If that challenge was successful, the landlord would then be required to repay any overpayment.

The tenant was therefore required to pay the sums demanded in accordance with the terms of the lease, then seek to challenge those sums claimed at a later stage.

Service charge disputes are increasingly common as the costs of operating shared buildings or estates has vastly increased in recent years. It is therefore vitally important that parties obtain legal advice before entering leases or tenancies, and when dealing with disputes over service charge.

If you require legal advice in relation to any dispute regarding property, please contact our property litigation specialists. ■

Nick Southwell
Partner
Litigation & dispute resolution

Nick is a partner in the litigation team who advises both businesses and individuals on resolving disputes, particularly those concerning property.

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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 partners to contact in the first instance.

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