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Willans LLP | solicitors

Law News

Newsletter for commercial clients

Autumn / Winter 2023

Welcome...

to the latest edition of our newsletter for commercial clients, **Law News**. With insight into the worlds of employment law & business immigration, corporate & commercial, real estate, agriculture & estates and litigation & dispute resolution, 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 issues you're facing, so please don't hesitate to get in touch.

Bridget Redmond | Managing partner

What's in this issue?

Legal directories: Rankings revealed for 2024 guides

Prestigious independent legal guides, *Chambers UK* and *The Legal 500*, have released their latest set of rankings for 2024, revealing yet more strong results for Willans.

Recognising exceptional departments and lawyers at our firm, this year we received a total of 67 recommendations from the two directories, with our business teams shining both collectively and individually.

Partners Paul Gordon (litigation & dispute resolution), Chris Wills (corporate & commercial), Matthew Clayton (employment law & business immigration) and Nigel Whittaker (real estate) all retained their rankings, including their 'leading individual' status in *The Legal 500* for their respective work areas.

There were new *Chambers UK* recommendations for partners Adam Hale (agriculture & estates) and Jenny Hawrot (employment law & business immigration), as well as a highly regarded accolade for real estate's Charlotte Cowdell that highlights her standout ability in her field in the south west region. There was also a new *Legal 500* ranking for litigation & dispute resolution's Megan Bullingham.

Topping off another excellent year for Willans, our business teams all retained their positions in both 2024 editions of the guides, however there was new *Legal 500* recognition for our business immigration team.

Congratulations to all! For a full recap of both directories and their latest results, please visit our website. ■

Higher fines for illegal working announced for 2024

Employment law & business immigration partner Matthew Clayton & solicitor Klára Grmelová update us on the higher fines coming in the new year for illegal working.

On 7 August, the Home Office announced its plan to significantly increase fines for employers found to be hiring illegal workers.

Under the proposal, the civil penalty for the initial violation of relevant legislation is set to rise to a maximum of £45,000 per illegal worker, up from the current £15,000. Repeated violations could lead to fines as high as £60,000 per migrant worker, in contrast to the current £20,000 fine.

Employers issued with a penalty will continue to be listed in the Home Office quarterly report that is available online.

Additionally, employers should be aware that the Home Office intends to further bolster measures against licensed businesses that hire illegal workers in the future. While any details regarding the government's actions remain undisclosed, consultations on this matter are anticipated later this year.

This increase in fines is part of the government's effort to deter illegal migrants from entering the UK, ensuring that only eligible individuals can engage in employment, receive benefits and access public services. The changes are scheduled to be introduced in early 2024, but no dates have yet been confirmed.

It is essential to emphasise that the duty to prevent illegal working in the UK applies to all employers, regardless of whether they employ migrant workers. Therefore, it is crucial to carry out the correct right to work checks on all employees, including British nationals, EU citizens and non-EEA nationals.

Adhering to the Home Office's guidance and codes of practice when conducting these checks allows the employer to acquire a statutory excuse, which can be either permanent or temporary. This represents the sole means by which employers can avoid the imposition of a civil penalty in case it later comes to light that they have hired an illegal worker.

If you have any questions or queries about the upcoming changes, be sure to contact our Legal 500-rated business immigration team. ■

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.

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Klára Grmelová

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Klára helps clients on a range of employment law and business immigration-related matters, including sponsor licence applications and management, as well as data subject requests.

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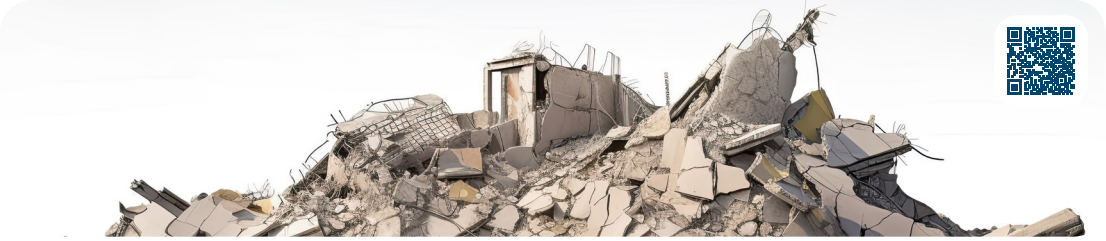
Right to work checks webinar | 21 November

Join our employment law & business immigration team on Tuesday 21 November for a refresher session focused on the right to work checks. We will delve into the proper procedures for conducting right to work checks, what actions to take and what to avoid.

Secure your spot at our free webinar by registering your interest on our website. Click here or scan the QR code (right).

RAAC: How the concrete crumbles

Real estate associate, solicitor Emma Thompson looks into a topic that's recently come to the public's attention, and how it could affect businesses across the country.



The discovery of failing reinforced autoclaved aerated concrete (RAAC) in schools just before the beginning of term certainly caught the attention of the public and the media. The problem of RAAC is, however, much more widespread. In this article, we consider the impact for those who own or lease property which may be affected.

What is RAAC and what are the problems?

RAAC is a lightweight form of precast concrete that was primarily used in the construction of various public buildings between the 1950s and 1990s. It was also utilised in commercial construction – particularly flat-roof structures – and buildings originally developed by local authorities.

Research has shown that the lifespan of RAAC is 40-50 years, with some estimates putting it as low as 30. RAAC installed in the UK is therefore reaching the end of its lifespan and those buildings containing it could now be at risk of collapse. Perhaps most concerning is that collapse can happen with little to no warning as deterioration is often invisible. A government report suggests if RAAC collapses then "injury or death is very likely, and the risk is critical."

For schools, this left many buildings unoccupiable for the start of term as it was not considered safe to allow children inside until the RAAC could be assessed. Many people occupying commercial buildings built between the 1950s and 1990s are also questioning if their building is safe and what steps may need to be taken if it becomes clear that RAAC is present.

What's next?

How RAAC will be treated in future property transactions remains to be seen. Whether RAAC is present in a building may in the future be a question raised in Commercial Property Standard Enquiries before entering into a new lease. However, unless it becomes a statutory requirement to provide full information in that regard, it is likely landlords will require tenants to rely on their own surveys.

There are suggestions that it may be considered a property defect – much like asbestos – and sellers or landlords may be obliged to provide surveys showing a property is free from RAAC, or that any necessary remedial works have been undertaken. This is, however, an evolving situation and it is likely more guidance will follow.

For the full article which covers the impacts of RAAC on leasehold and freehold commercial property, please visit our website by clicking here or scanning the QR code (above).

Our specialist team of real estate lawyers will be happy to discuss the legal interpretation and drafting of commercial property documents with you, as well as talking you through any questions you may have about the topics discussed above. ■

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Emma Thompson

Associate, solicitor

Real estate

Recognised by independent legal guide *The Legal 500*, Emma helps local and national clients with all aspects of their real estate legal needs.

Our real estate team are currently assisting Winchcombe Community Arts Hub (WACH) in their purchase of Winchcombe Methodist Church. The church was placed for sale last year and WACH was formed with the aim of saving this important community asset for the locals. WACH will keep the church as a community hub for the town, whilst there are plans to use it for hosting youth activities and to stage live events.

Charity land: A widening of the pool

We have previously reported on the new Charities Act 2022. The first wave of provisions in relation to charity land are now in force, with more expected to be in force later this year.

The provision covering the disposal (selling, transferring or leasing) of charity land has now been simplified to make it easier for charities. Simply, the act widens the pool of people who can deal with charity land and removes archaic restrictions, giving the charities greater flexibility and autonomy.

To see what new provisions have now come into force and which are expected by the end of the year, please read the full article on our website by either clicking here or by scanning the QR code (right).

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Act to combat economic crime has received royal assent

Partner and head of corporate & commercial, Chris Wills, looks into The Economic Crime and Corporate Transparency Act 2023, which has now received royal assent.

In January 2023 we reported on the register of overseas entities, which was created under the Economic Crime (Transparency and Enforcement) Act 2022. This move formed part of a significant and comprehensive series of reforms which recognised the increase of sophisticated fraud in the UK.

In ongoing legislative changes designed to respond to threats of economic crime in the UK, the government is continuing to place an increased obligation on companies to take active steps to mitigate fraud with the introduction of new legislation in the form of the Economic Crime and Corporate Transparency Act 2023 ('ECCTA'), which received royal assent on 26 October this year.

The ECCTA – complementing the Economic Crime (Transparency and Enforcement) Act 2022 – introduces various reforms, ranging from an extension of corporate liability where an offence is committed by a senior manager of a company, to the inclusion of a new 'failure to prevent fraud' offence.

ECCTA has been widely acknowledged as a crucial and long overdue addition to the government's arsenal of measures designed to challenge fraud and enhance corporate transparency.

Reforms

In what Companies House has called "one of the most significant moments for [us] in our long history," ECCTA expands the registrar's powers to check the validity of information on the register, to reject filings and to remove information where necessary.

Part 1 of ECCTA introduces a focus on identity verification. New and existing directors and persons with significant control (amongst others) will need to verify their ID either directly to Companies House or via an authorised provider. Individuals who file documents at Companies House will also need to have verified their identity.

The most significant reform under ECCTA is the introduction of a new offence for failing to prevent fraud. Under this offence, large organisations (aggregate turnover of more than £36M net, aggregate balance sheet of more than £18M and more than 250 employees) will be liable if an employee or third party associated with the company commits a specified fraud offence which is intended to benefit the company. The company may have a defence if they can show that they had reasonable preventative measures in place. The Secretary of State will produce guidance about potential preventative procedures.

What next?

It is important to be aware of the significance of this legislation. The new measures will place stringent demands on companies to mitigate the risk of fraud, and therefore appropriate legal advice should be sought at an early stage to understand any implications the ECCTA may have on the running of your business. Companies should future-proof themselves now by identifying gaps in compliance and ensuring that their internal fraud prevention processes are effective.

Changes will not be implemented immediately as certain measures will require new secondary legislation before rolling them out. However, Companies House has advised that some measures could come into force in early 2024, which may include greater checks on company names, the requirement for all companies to supply an email address and the enhanced powers of the registrar to scrutinise and reject inconsistent information. Businesses should also anticipate an increase to Companies House fees.

If you have any questions or queries regarding the latest changes, please contact our highly rated corporate & commercial team. ■

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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.

Rishi Ladwa, partner in our corporate & commercial team has busy advising on share re-structuring and group re-organisations for multiple clients, as well as the sale of shares in a wealth management company.

The advantages and traps of option agreements

Adam Hale – partner and head of our agriculture & estates team – explores option agreements, discussing the different aspects one may need to consider.

An option agreement can be utilised when a developer is considering purchasing land for development. It grants them the 'option' to purchase land for an agreed-upon price (or price mechanism) within a certain time period.

Why use an option agreement?

An option allows the developer to take on the risk and expense of applying for planning permission, safe in the knowledge that – if they are successful within the given time frame – they will be able to purchase the land at a pre-determined price. On exchange, an upfront sum (or 'option fee'), is normally payable to the landowner. This is typically deducted from the purchase price if the option is exercised, but non-refundable if the option is not exercised.

The purchase price may either be an agreed fixed price, or market value at the date the option is exercised subject to a percentage discount to reflect the developer's investment. Either way, it will generally reflect the increase in land value attributable to the planning permission balanced with the developer's time, money, risk and expertise in obtaining it.

Things for both parties to consider

- Should the option period be extendable, and – if so – should another option fee become due from the developer at that date?
- What longstop date should be put in place (so that the land will be released from the option at a certain date)?
- Should the purchase price be fixed, or should it instead be determined by a price mechanism? How will this figure be calculated?

Things for the landowner to consider

- Typically, the developer must apply for planning permission which maximises the development value of the land.
- How much control will you retain over the planning application? This may be particularly important if you wish to retain land surrounding the development site, as you will want to ensure that its value – both amenity, monetary and for potential development – is preserved.
- Is a ransom strip to be retained restricting future development on adjoining land and what rights will need to be reserved to preserve the development potential of any retained land?
- In the event the option is not exercised, will the developer be obliged to assign the benefit of any surveys, reports and drawings to the landowner?
- Does the developer have a good track record of obtaining planning permission? This is important as you will be restricted in what you can do with the land throughout the option period.
- How will your tax position be impacted? For example, VAT, capital gains tax and inheritance tax. Advice will need to be taken at an early stage to ensure tax efficiency.

Things for the developer to consider

- What restrictions on use and occupation of the land need to be put in place to ensure that the land remains viable to purchase throughout the option period?
- Will the landowner be able to deliver vacant possession on exercise of the option?
- Which costs will be deductible for the final purchase price on exercise?
- What compensation will need to be paid to the landowner in the event they lose out on subsidies/grants as a result of exercising the option, or disturbing the site during the option period?

Options are technical and often high value agreements. Advice should therefore be obtained by both sides to ensure that the best outcome is achieved. Please contact us if you have any questions or require support. ■

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.

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What does the law say?

Section 8: What are the differences between mandatory grounds & discretionary grounds?

In a new series, property litigation specialists Nick Southwell and Bethen Abraham discuss the key parts of residential possession law landlords and tenants should be aware of.

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.

Bethen Abraham

Trainee solicitor

Litigation & dispute resolution

Bethen helps clients with residential possession issues, building disputes and disputes involving vehicles, but also works on other contract-based claims.

Section 8 notices under the Housing Act 1988 are currently used for assured shorthold tenancies where the tenant is at fault and the landlord wants to recover possession of the property, due to rent arrears, anti-social behaviour or breach of the tenancy agreement. There are also some grounds covering very specific reasons the landlord needs to evict the tenant which is outside of the tenant's control, such as the property being required for a minister of religion, the property requiring redevelopment or the landlord needing to move back into the property.

Section 8 grounds are split into two categories: mandatory and discretionary grounds. Where a mandatory ground is relied upon and the court agrees that the requirements have been satisfied, it is mandatory for the court to grant a possession order. However, where only discretionary grounds are relied upon, it is for the court to decide whether or not to grant a possession order.

If you are a landlord looking to recover possession of the property, you can rely upon as many grounds under Section 8 as you can satisfy and, wherever possible, should always look to rely upon at least one mandatory ground.

In brief, the most commonly used grounds are currently as follows:

Mandatory grounds

Ground 1: The landlord wants to move back into the property which they used to occupy as their main home, and the tenant was previously notified of this being a possibility.

Ground 6: The property requires redevelopment.

Ground 8: The tenant is in at least two months' rental arrears.

Discretionary grounds

Ground 10: The tenant is in at least some arrears.

Ground 11: The tenant has persistently delayed paying rent.

Ground 12: An obligation under the tenancy agreement has been broken, other than payment of rent.

Ground 13: The tenant has caused the property to deteriorate.

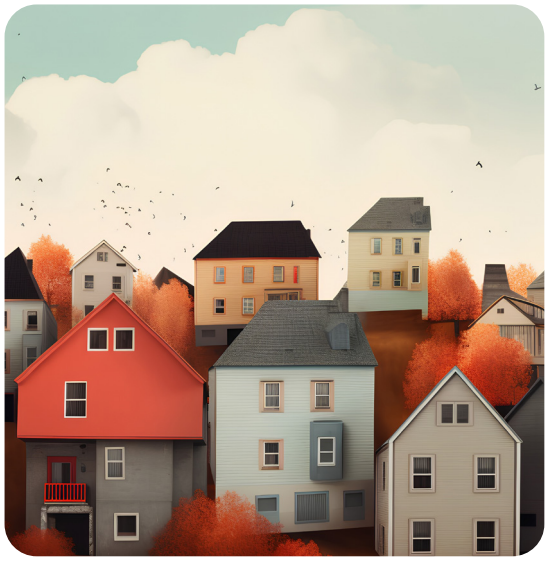
Ground 14: The tenant is causing nuisance or annoyance to people residing in the property, visiting the property and/or the landlord.

For some of the grounds, there is further documentation or particulars which should be served with the notice in order to comply with all of the requirements for that ground.

Each ground also has a specific notice period to be given to the tenant. It is important that, for your notice to be valid, you provide the correct notice period. You certainly do not want to serve a notice which you believe to be correct, then wait for the notice to expire, only to be told by a legal adviser or the court that it was incorrect. To avoid this situation, be sure to get some advice before serving a notice.

If you are looking to serve a Section 8 notice on your tenant, please contact our team of property dispute specialists.

We would be happy to assist and can advise you on the relevant grounds and requirements. ■



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Unearthing the implicit duty of cooperation in commercial contracts

Commercial law expert and associate, solicitor Richard Holland delves into the unwritten rules of commercial contracts.

In the world of business, contracts are the bedrock upon which deals are built. These carefully crafted documents are a testament to the mutual understanding between parties, outlining their respective roles and responsibilities in detail.

There also exist critical implicit elements that underpin the commercial relationship; the 'implied terms'. One of these is the implied duty of cooperation. The classic summary of this duty dates back to an historic Victorian case from 1881, where the judge commented that *"…where in a written contract it appears that both parties have agreed that something shall be done, which cannot be effectually done unless both parties concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."*

In other words if the performance of the contract cannot take place without the cooperation of both parties, it is implied that the parties' cooperation will be given. This duty of cooperation isn't just a legal technicality – it's grounded in a fundamental truth. Contracts are not static pieces of paper; they are living, breathing agreements that must adapt to unforeseen circumstances. This is where cooperation becomes indispensable. This duty encompasses being open, sharing essential information, and working collaboratively to overcome the challenges that may arise during the contract's lifespan.

Courts meticulously examine the behaviour of the parties involved. Have they made genuine efforts to work together and resolve issues before resorting to litigation or arbitration? If not, they may find themselves facing legal consequences for breaching this implied duty.

Of course, the extent of cooperation isn't a one-size-fits-all concept. It varies depending on the specific contract and industry in question. However, in most cases, it entails maintaining transparent lines of communication, promptly sharing critical information and actively seeking mutually acceptable solutions when obstacles arise. This duty holds particular significance in long-term contracts, where ongoing collaboration is the linchpin of success.

A good example of how this works out in real life is in the relationship between a building contractor and a sub-contractor. It's evident that they must cooperate, as construction projects cannot progress without it. However, the level of cooperation is dictated by what their contract stipulates. The sub-contractor can't be compelled to perform tasks the contract excuses them from, nor can they be expected to achieve the impossible. Similarly, there's no duty to cooperate in areas where the contract does not explicitly require it.

In essence, the implied duty of cooperation is the hidden ingredient that spices up many commercial contracts. It underscores the value of collaboration, transparency and adaptability in business relationships. Those who wholeheartedly embrace this duty are better equipped to tackle challenges, nurture robust partnerships and uphold the integrity of their contractual commitments.

It's important to note that there are limits to the law's power in enforcing cooperation. Legal measures can only compel cooperation to the extent necessary to make the contract function as intended. Any additional cooperation hinges on the shared desire of both parties to see the business venture through, transcending the strict confines of the law.

In conclusion, the implied duty of cooperation is a silent force that shapes the landscape of commercial contracts. It underscores the importance of working hand in hand, transparently sharing information and adapting to unforeseen circumstances in the ever-changing world of business. It's not just about fulfilling a legal obligation – it's about getting the job done, together.

If you have any questions relating to contracts or any other commercial query, please don't hesitate to contact our expert team. ■

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Richard Holland

Associate, solicitor

Corporate & commercial

Highly versatile and with over a decade of experience, Richard has advised on numerous commercial, contractual, charity, procurement and telecommunications and cyber-related matters.

Richard has been assisting an existing client with various contracts relating to the provision of their bespoke IT services.

Reasonable adjustments in the recruitment process

Employment law & business immigration associate, solicitor Hayley Ainsworth highlights the importance of making reasonable adjustments for employees and candidates.

Hayley Ainsworth

Associate, Solicitor

Employment law & business immigration

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

The Employment Appeal Tribunal (EAT) recently upheld a tribunal's finding that a recruitment process solely relying on an online application put a job applicant with dyspraxia at a substantial disadvantage.

In AECOM Limited v Mallon, Mr Mallon applied for a position with AECOM and requested that the required online application be supplemented in his case by a telephone interview as a reasonable adjustment to accommodate his disability. He did not disclose any further details about his disability, merely confirming that he had difficulties with the online application. His request was refused and, consequently, he brought a claim against AECOM for failure to make reasonable adjustments.

Both the employment tribunal and the EAT sided with the claimant and held that AECOM had constructive knowledge of his disability and, therefore, had a positive duty to make reasonable adjustments. Although it was acknowledged that AECOM did not know the details of Mr Mallon's disability and the difficulties he experienced with the online application, they failed to make reasonable inquiries about its nature. If AECOM had wanted further details, they ought to have asked Mr Mallon for them over the phone when he failed to explain the situation further in the emails.

According to the Equality Act 2010 (EA 2010), when a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter compared to people who are not disabled, the employer has a positive duty to make reasonable adjustments to avoid such a disadvantage. However, this duty is only triggered if the employer has constructive knowledge of the disability, meaning that the employer knows – or could reasonably have been expected to know – that the person has a disability.

What should you do?

This case serves as a timely reminder to employers to be vigilant when considering the duty to make reasonable adjustments. When there is an indication that a person may have a disability, they should conduct detailed inquiries to establish whether a duty to make such adjustments has arisen. Employers should also be aware that their obligation not to discriminate applies to both their employees and job applicants.

Our employment law specialists are here to help if you require assistance. ■

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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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