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The Olympics are now a distant memory and back to school blues superseded by early Christmas gift promotions. It is business as usual then!



Please take a moment to read our round-up of legal news and developments arising during the Olympic period which may affect you. If you have a particular issue at hand, we can help on 020 8367 3999. We also have a number of special offers available to help you get started which are detailed below:

- Our employment team offer a **free half hour consultation** – available to employers only
- The family department charge an **initial fee of only £75 + VAT** for first appointments
- There is an introductory offer of **20% discount** on Wills for clients who have instructed V&S in any area of law (except Wills!) within the last month.
- **Free Will talks*** are available to groups or organisations in and around Enfield.
- We have a **Live Chat** facility which is accessible via our website Home Page where legal services' enquiries can be made between 8am and 4pm, Monday to Friday.
- **Credit and Debit card payments are now accepted from clients via our website.**

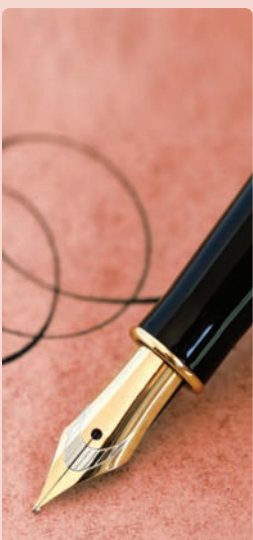
We are continuously looking for ways to improve our service and would appreciate your help in ensuring a service standard which is worthy of Olympic gold. Tell us what you think in the enclosed **Client Care Survey**, return it to **FREEPOST NATE958, Enfield, Middlesex, EN2 7BR** and you could be the lucky winner of our prize draw. A lucky entrant can choose from one of the following: £100 camera or Marks & Spencer vouchers or £100 towards Vanderpump & Sykes legal services.

Call Vanderpump & Sykes Solicitors on **0800 731 6124**

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Will Writers to be Regulated



Making a will is something everyone should do and it is important to have complete confidence in the person advising you.

The Legal Services Board has announced proposals to provide greater protection for consumers of will-writing and estate administration services by bringing these under the scope of legal services regulation. If enacted, this would mean that everyone who provides such services would have to be regulated.

Unlike solicitors, unregulated will writers do not have to be legally qualified or insured. As they do not come under the

auspices of any regulatory body, there is currently no mechanism for bringing a formal complaint and without insurance there may be no means of redress should things go wrong.

Solicitors, on the other hand, are professionally qualified to do the work, are bound by a stringent code of professional conduct and, in the very rare event of a loss to a client, clients are protected by the solicitor's professional indemnity insurance, which is compulsory.



Clare Wills

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Clare is also a member of Solicitors For the Elderly (SFE).

Agreement in Principle Insufficient to Create Binding Agreement

A recent case turned on the exact wording of an agreement between a prospective tenant and its landlord. It showed the importance not only of complying with the precise terms of an agreement but also of not delaying completion of any paperwork necessary for commercial transactions that are capable of being terminated up until such time as all the appropriate documentation is in place.

The prospective tenant, Rail Safety and Standards Board Limited (RSSB), failed to take an underlease on a building in Holborn, London, after agreeing to do so with British Telecommunications (BT), the prospective landlord, in September 2007. RSSB intended to do considerable works to the building and the superior landlord's consent (in the form of licences which had to be executed as deeds) was necessary for these and for the assignment of the underlease. The superior landlord was a subsidiary of the Prudential insurance company.

The reason RSSB did not take the lease was that the agreement entitled either side to 'determine' (the legal term for cancel) it with immediate effect if the superior landlord's consent was not obtained by 5 October 2007.

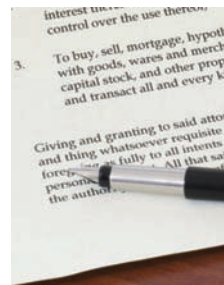
Everything appeared to go smoothly, although the superior landlord did not prepare the various licences relating to the underlease by the due date. However, when on 19 November 2007 BT asked RSSB to pay the

legal costs of the superior landlord's solicitors, RSSB responded the next day with a notice of termination.

BT sued RSSB, alleging that it could not withdraw from the agreement for the underlease because the superior landlord's consent had been given. The judge agreed with BT on the ground that the term 'superior landlord's consent' in the agreement referred to its consent and not to the completion of the various licences. In other words, agreement 'in principle' to grant the licences by the superior landlord was enough to commit RSSB.

RSSB appealed. The Court of Appeal noted that the solicitors for the superior landlord had never executed the licences. These remained undated and undelivered, apparently pending agreement by RSSB to pay the associated legal fees. The agreement specified that consent was to be given in the form of licences and this had not been done.

Accordingly, RSSB was entitled to withdraw from the agreement.



Stephen Quy

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MAINTENANCE PAYMENTS SHOULD BE BASED ON NEED

Helpful guidance on the calculation of periodical payments (popularly known as maintenance payments) in a divorce settlement has been provided by a High Court judge in a recent case.

In deciding a contested claim for maintenance, Mr Justice Mostyn expressed the view that the law relating to property acquired during the marriage is 'reasonably clear'. However, the law relating to periodical payments is, by comparison, not

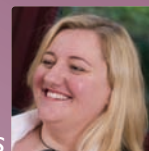
so clear. He therefore gave his views on how these should be calculated, in the hope that this will result in more cases being settled out of court.

In the judge's opinion, a claim for periodical payments should be settled by reference to the principle of need alone, although there should be some room for discretion in assessing those needs, which 'are elastic in concept'. His view is that the principle of sharing, which could give rise to additional maintenance over and above need, should

not be applicable other than in the most exceptional circumstances.

For the judge, one vital distinction between the division of matrimonial property, where the sharing principle is commonly used so that there is equal division of assets between the couple and the amount of maintenance to be paid, is that by definition the matrimonial property has been acquired during the marriage whilst periodical payments would be met from post-divorce earnings.

It remains to be seen whether the judge's guidance will be followed in future disputes, but any attempt to facilitate resolution of contested cases is to be welcomed.



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Mortgage Lender's Interest Superior to That of Occupier

If you are having difficulty paying your mortgage, you may be tempted to consider a sale and rent back (SRB) agreement. Under an SRB, the property is bought by a new owner, typically at a discount. The new owner becomes your landlord, leaving you in occupation of the house. The tenancy granted is almost always a shorthold tenancy, but that is not always the impression conveyed to the person undertaking the SRB.

SRBs have been regulated under the Financial Services Act since 2009, prior to which the market was unregulated. The courts are now beginning to see cases which illustrate the potential pitfalls of SRBs.

The main issue in many of the disputes is that the occupiers of properties that have been subject to SRBs are under the mistaken impression that the agreement they have entered into gives them the right to occupy the property for life. This can become particularly difficult if the mortgagor wishes to repossess the property because the new owner has defaulted on the mortgage. It then finds itself faced with a tenant who it believed

had only a shorthold tenancy who is claiming to have the right to remain in the property for life.

Recently, the Court of Appeal heard a number of test cases in which the main issue was whether a mortgage lender had the right to repossess properties under SRBs. In each case, the SRB company had ceased paying the mortgage and the tenant claimed to have been given the right to occupy the property for life.

The Court upheld the right of the mortgage lender to repossess the houses. The mortgage lender's interest in the properties was superior to that of the

occupiers. The tenants' rights are limited to the right to take action against the SRB provider who misrepresented their legal position to them.

This decision may yet be appealed to the Supreme Court.



Ruth Muthoni

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Double Tax on Share Sale Leads to Court Battle

A recent case heard in the Court of Appeal illustrates the importance of taking tax advice and planning as early as possible on a major transaction such as selling your business.



Christopher Swain was a 61-year-old entrepreneur who suffered from ill health, including heart problems and diabetes. He spent most of his time living in Thailand. In 2006, he decided to sell his shares in his company, Swain's International plc, in a management buyout.

The buyout was successfully completed on 31st January 2007, and in February Mr Swain went into hospital for a planned operation. Unfortunately, he died during the procedure, despite the alleged low risk attached to the operation.

As the sale of the shares was completed prior to his death, Capital Gains Tax (CGT) was due on the increase in their value during his ownership. In addition, the proceeds formed part of his estate and were thus liable to IHT at 40 per cent. By comparison, if Mr Swain had retained the shares at the time of his death, the increase in value during his ownership would not have been subject to CGT. Furthermore, the IHT payable on his estate would have been reduced significantly due to the availability of Business Property Relief in respect of the shares.

Mr Swain's daughters claimed that the family's solicitors should have advised their father to delay the sale of the shares until after the planned operation, but the Court of Appeal rejected their claim.

Selling your business is one of the biggest decisions you may ever make (for you and your family), and you need to take advice from a corporate lawyer with expertise in tax planning.



Jonathan Goldsmith

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Property Development Update

The government recently proposed a series of measures designed to provide a boost to house building, jobs and the economy. A number of proposals are designed to cut red tape preventing development from taking place and are of particular interest to small businesses, developers and homeowners.

The proposals include:

- Legislation allowing developers of residential land to appeal in cases in which development is not economically viable due to the number of affordable homes that would otherwise need to be built alongside private homes. Local planning authorities, working within their local development framework, can impose planning obligations on developers, including obligations to build affordable housing, as a precursor to the grant of planning permission. An appeals process does already exist, the difference with the proposals being that the Planning Inspectorate will be able to set aside existing planning agreements in favour of a new ones with fewer affordable homes.
- Legislation allowing planning applications to be decided by the Planning Inspectorate if the local authority is deemed to have a bad track record in dealing with applications in terms of the merits of the decision and the time spent to reach it.
- The extension of measures giving developers an additional year to start work on a site before planning permission expires.
- The amendment of permitted development rights (i.e. those rights which allow work without a specific planning permission having to be obtained) to enable change of use from commercial to residential purposes.
- Consultation on proposals to extend permitted development rights to homeowners and businesses wishing to extend their properties for a temporary three year period, meaning that larger extension can be carried out without the need for planning permission.

This last measure is likely to be of particular interest to homeowners. According to a BBC news report, the government's intention is that the plans will allow an increase from the current permitted development relating to residential land of three metres (four metres for detached homes) to six metres (eight metres for detached homes), but that the rule preventing an extension from covering more than 50% of the curtilage (excluding the original house) would remain. Businesses would be able to extend shops by up to 100 square metres (over 1,000 square feet) and industrial units by up to 200 square metres. A month-long consultation period is due to start shortly and the fact that the government has put this proposal to consultation highlights the sensitive nature of the issue.

At present there is very little substance in the proposals. The details will be eagerly awaited by those involved in development and those looking to expand their premises, or worried about others doing so.



James Porter

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Changes to Tenancy Deposit Rules

Landlords and tenants are reminded of changes to the law relating to tenancy deposits paid under shorthold tenancies. These came into effect on 6 April 2012.

Previously, measures introduced in April 2007 under the Housing Act 2004 meant that any shorthold tenancy deposit had to be paid by the landlord into one of three Government-approved deposit holding schemes within 14 days of receipt of the deposit and the landlord had to provide the tenant with certain prescribed information regarding the deposit within the same time period. The legislation was introduced to give tenants additional rights in such situations and to try to reduce the incidence of disputes over tenancy deposits.

If the landlord failed to comply with the provisions, the tenant could apply to the court, which had the power to order the landlord to repay the tenant the deposit plus a penalty of three times that amount. In addition, the landlord was prevented from seeking possession of the property by notice without some breach of the tenancy provisions by the tenant.

Over the years, cases have come before the courts that have to some extent diluted the reach of the original legislation. For example, it was decided in a 2010 case that if the landlord complied with the provisions after the tenant commenced court proceedings, no penalty payment would be ordered. Last year, it was also held that a penalty could not be imposed once the tenancy had ended.



The new rules, introduced by the Localism Act 2011, make the following changes:

- The landlord now has 30 days (rather than 14) from receipt of the deposit to comply with the rules and give the tenant the prescribed information;
- If the landlord does not comply, the tenant can apply for a court order, which can be made notwithstanding compliance by the landlord in the interim;
- The penalty payment is now set at a minimum of the amount of the deposit and a maximum of three times the deposit as decided by the court;
- It is explicitly provided that the tenant can apply to the court even if the tenancy has ended; and
- The landlord can determine the tenancy by notice in accordance with the usual rules once the deposit has been returned to the tenant, or the court has made an order or the matter has been otherwise settled.

Landlords should ensure that they comply with the amended regulations.



Jenny Howe

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Employment Law Round-Up

Employment Law Reforms

The Government has published for consultation, a package of reforms aimed at simplifying and speeding up the process of ending an employment relationship when it breaks down. This includes:

- a consultation on how settlement agreements (a simplified form of compromise agreement for use when employers wish to negotiate a termination package with an employee without there being any dispute between them) will work in practice; and
- a consultation that will examine the potential for reducing the compensation cap, currently set at £72,300, in unfair dismissal cases. The two proposals are a cap of up to 12 months' pay and a new, reduced, upper limit.

The closing date for responses is 23 November 2012.

Also, the Government will not be taking forward the proposal on 'no fault' dismissal, but will work with the Advisory, Conciliation and Arbitration Service to make the guidance to their code of practice on discipline and grievance more accessible, especially for small businesses.

Redundancy: headcount reductions

An Employment Appeal Tribunal (EAT) decision clarifying the statutory definition of redundancy will be welcomed by business owners. The EAT confirmed that it is not necessary to have a reduction in the number of employees carrying out work of a particular kind in order for it to be a true redundancy. Therefore, reducing the amount of work to be done

by the same number of employees can give rise to a redundancy situation.

However, the decision does not mean that a reduction in hours will always amount to a redundancy. The question of whether a change in working pattern or reorganisation leads to a redundancy is fact specific. In this case, an employee who provided book-keeping services to a company was asked to significantly reduce her weekly hours as a result of a downturn in business and the introduction of an accountancy software package. The employee refused to work reduced hours and was dismissed.

Drafting employment contracts and compromise agreements

A Court of Appeal decision highlights the need for businesses to take care when drafting employment contracts and compromise agreements. The court held that an employer that exercises an express contractual right to terminate with a payment in lieu of notice (PILON) must still pay up if it subsequently discovers that the employee had done something that would have entitled it to dismiss summarily.

However, an employer can take steps to avoid being in this situation, for example, by:

- Including a provision in its PILON clauses that enables it to recover the PILON (or avoid paying it) if any earlier repudiatory breach by the employee comes to light.
- Making it a condition of any compromise agreement that the employee has not committed any repudiatory breaches of contract.



TUPE service provision changes

Commercial property businesses and businesses involved in second generation outsourcing transactions should be advised of a significant EAT decision. The EAT held that a change in ownership of a building prevented a security guard, whose contract was terminated when his employer lost a contract to provide security services at the building, from relying on TUPE to claim unfair dismissal against the new contractor.

Where ownership or management of a commercial property changes and at the same time facilities services are changed, facilities staff (such as cleaners or security guards) will not transfer to the incoming facilities provider and liability for redundancies and other employment costs will remain with the outgoing provider. Facilities providers may need to consider this potential risk in the outsourcing agreement with the client.

Employment status and independent contractors

Businesses that contract with self-employed consultants will welcome a decision from the First-tier Tax Tribunal. The tribunal upheld an appeal by a company against a determination for PAYE and a notice for NICs for a self-employed engineer. After ending a five-year working relationship with the company, the engineer attempted (at the suggestion of his tax advisers) to claim back the tax that he had paid on a self-employed basis on the ground that the company should have taxed him as an employee. The fact that there was no written contract between the parties pointed to an ad hoc relationship and the tribunal found no evidence that the engineer had challenged the arrangement while it was ongoing. The judgment may prove useful for businesses when mounting a defence against similar claims.



Richard Stephens

Richard Stephens is a partner in the Employment department and can be contacted on: 020 8370 2875 or richardstephens@vanderpumps.co.uk.

No Fault Divorce



There is no such thing as a 'no fault' divorce. One party must be culpable for the breakdown of a marriage and the Courts will be asked to ratify the blame in allowing a divorce petition. Recently a wife's appeal of her husband's attempt to divorce her on trivial grounds came under intense scrutiny, with the proceedings going all the way to the Court of Appeal.

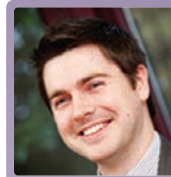
The couple married in 1989, before separating in 2008 and Mr Rae later filed a divorce petition. The ground on which he proceeded was unreasonable behaviour; citing Mrs Rae's removal of the fuse from the washing machine and various other seemingly trivial incidents.

Mrs Rae defended the petition, claiming that great importance had been placed on trivial matters and that normal everyday issues were magnified by her husband's depression, lending weight to their categorisation as 'unreasonable behaviour'.

Despite this, Mr Rae was successful and obtained Decree Nisi in June 2011. When the Decree was awarded and Mrs Rae tried to justify her allegedly unreasonable actions, the presiding Judge accused her of making the divorce 'unnecessarily complex'. Recorder Coe commented that it was extremely rare to see a divorce defended and that the evidence was 'overwhelmingly in favour of granting the petition'.

Mrs Rae appealed. The Court of Appeal blamed the current divorce laws for her predicament, which dictate that in divorce based on behaviour, one party must be at fault, requiring the Court to consider, analyse and deconstruct the marriage in minute detail. They said the divorce laws were no longer suited to society and represented 'the social values of a bygone age'.

Given the current divorce laws, however, upholding the Decree Nisi and the subsequent right of Mr Rae to apply for Decree Absolute was the only realistic outcome. Mrs Rae has maintained that whilst she knew her action would ultimately be fruitless, she felt obliged to object to the divorce, as the ground on which it was sought, in her mind at least, simply wasn't true.



Gary Beecham

Gary Beecham is a trainee solicitor in the Litigation department and can be contacted on: 020 8370 2870 or garybeecham@vanderpumps.co.uk.

Failure to Comply with Procedure Invalidates Will

One of the basic rules for creating a valid will is that it must be signed by the testator and the signature must be witnessed by two people. Failure to follow this or a number of other simple rules can lead to a will being successfully challenged in court.

Recently, the daughters of a Sikh man who left the large majority of his estate of nearly £900,000 to his sons won their legal battle to have their father's will declared invalid.

The man had three sons and three daughters. The daughters contested his will, which awarded all but £40,000 of his estate to his sons.

The daughters disputed that their father's signature had been witnessed correctly.

They produced as a witness his neighbour, who gave evidence that although he had signed the will as a witness when the testator signed it, the other witness was not present at the time.

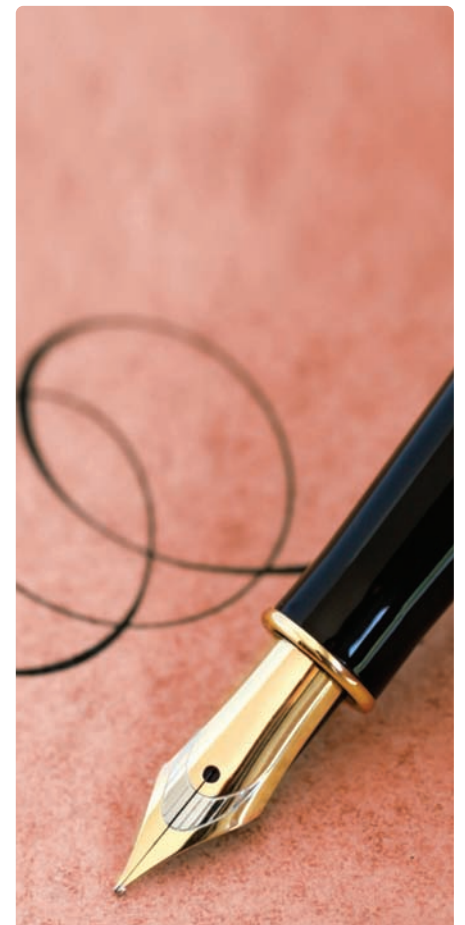
Although the legacies were in keeping with Sikh tradition, the court agreed that as the witnesses were not both present to attest to the man's signature when the will was signed, it was not valid and the man's estate should therefore be distributed according to the laws of intestacy.

Instead of the man's estate being divided as he intended, it will now be split equally amongst his children.



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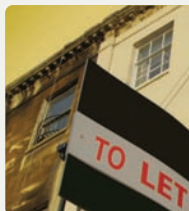
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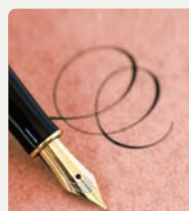
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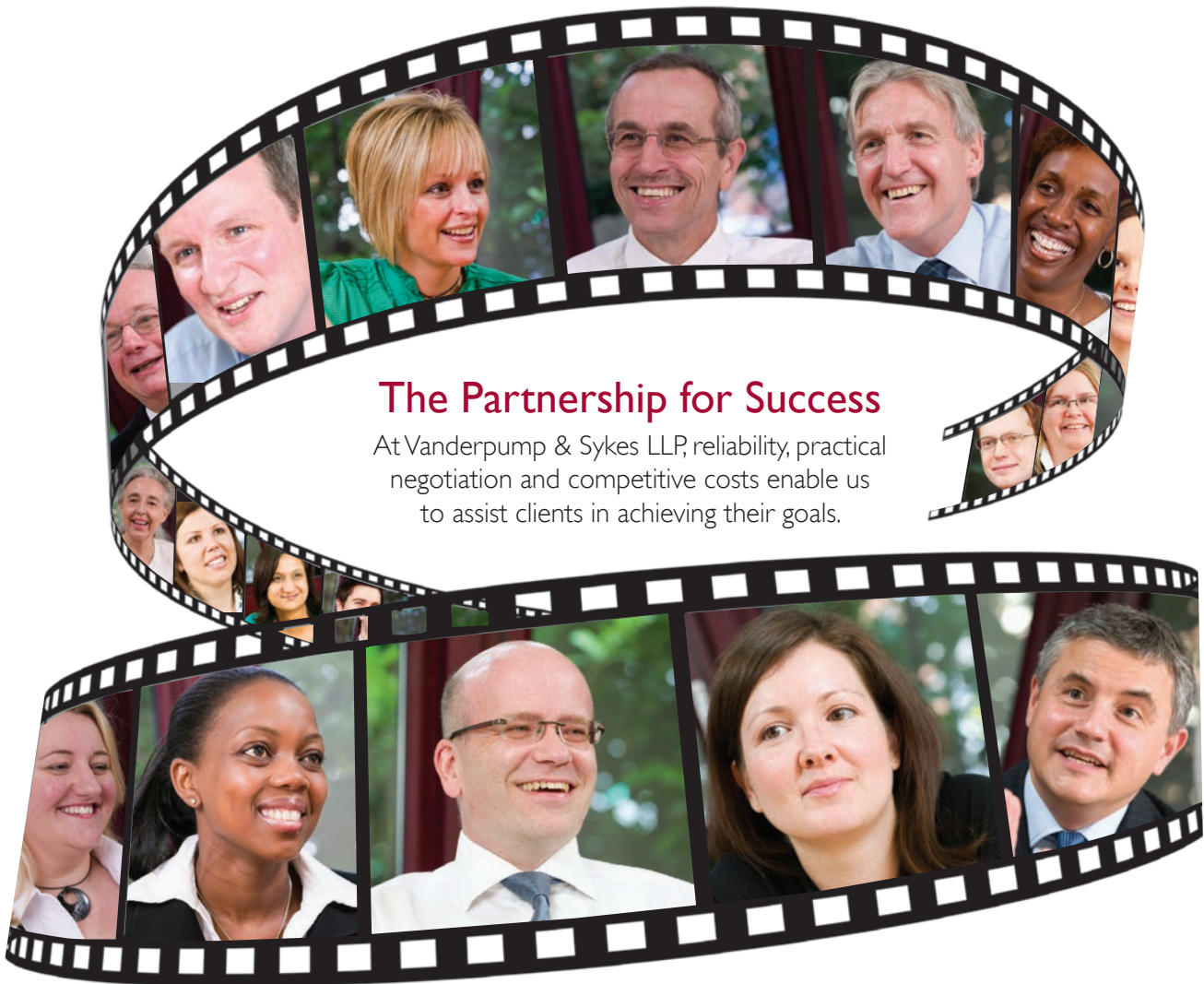
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