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Retail Line

Retail & Leisure Briefing • Black Friday 2019

Are agency workers entitled to the same number of hours as employees?

The Court of Appeal finds that an agency worker's right to equal treatment after 12 weeks does not include an entitlement to the same number of contractual hours as a direct recruit.

This is good news for end user hirers in retail and leisure businesses. These sectors rely on using agency workers in the crucial "golden quarter" trading period that starts at Halloween, and peaks at Black Friday and Christmas, but carries on to the end of the January sales. Compelling these businesses to offer agency workers the same hours as employees would hinder the flexibility and fluidity of resourcing that they need.

An agency worker's rights after 12 weeks

Regulation 5 of the Agency Worker Regulations 2018 (AWR) entitles agency workers who have worked for a hirer for 12 weeks or more to the same basic working and employment conditions as a directly-recruited employee.

In this case (*Kocur v Angard Staffing Solutions Ltd and anor*), an agency worker placed to work at Royal Mail complained that Regulation 6(1)(b) AWR (which defines "relevant terms and conditions" as including the "duration of working time"), meant that he was entitled to be allocated equivalent working hours as directly-recruited employees. In this case Mr Kocur was allocated less than 20 hours a week but Royal Mail's directly employed staff had standard hours of 39 hours a week.

The Court of Appeal rejected Mr Kocur's arguments and held that the reference to "the duration of working time" was intended to refer to terms that set a maximum length for a period of working time (e.g a shift) to ensure that agency workers do not have to work for longer periods than employees. It did not refer to the amount of work provided over the course of a week. The Court of Appeal held that this conclusion was reinforced when the purpose of the AWR is considered. Namely to ensure that agency workers receive equal treatment while they are at work, not to regulate the amount of work which agency workers are entitled to expect to be given.

What this means for agency workers and employers

A provision with the effect contended for by Mr Kocur would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of the workforce available to it from time to time.

Therefore the AWR 2010 does not entitle agency workers to the same number of contracted working hours as an appropriate and directly recruited comparator.

Contact an employment specialist

Our specialist solicitors are based in Birmingham, Bristol, Cardiff, London, Manchester, Southampton and Taunton and are ready to discuss your case.

For advice about the rights of agency workers or any other employment issues, contact Sharon Latham or Marc Long.

Sharon Latham
Partner
0345 209 1332
sharon.latham@
clarkewillmott.com

Marc Long
Partner
0345 209 1581
marc.long@clarkewillmott.com

Welcome

to the Black Friday edition of Retail Line

Black Friday is now a firm date in the UK retail calendar with consumers anticipating promotions online, in-store, in restaurants and throughout the retail and leisure sectors. With prices in shops falling, a pre-Christmas election and New Year Brexit ahead, many in the sector are embracing the four day shopping event this year.

In this edition of Retail Line our employment law experts review an important Court of Appeal decision for employers hiring agency workers over the busy trading period. With more Black Friday sales taking place online, we look at new guidance on the use of Cookies and our IP experts consider the Advocate General's recent opinion on the registration of broad terms such as "computer software".

Our litigation experts look at how a tied pub tenant successfully challenged the terms of a stocking requirement; and the lessons to be learned from the failed claim of a fast food franchise. Finally, for business owners concerned about losing key staff or their own incapacity, we suggest three areas where succession planning can ensure the continued smooth management of the business.

From everyone in the retail and leisure sector at Clarke Willmott we wish you a successful Black Friday and prosperous Christmas trading season.

William Juckes
Partner
0345 209 1340
william.juckes@
clarkewillmott.com

Peter Swinburn
Partner
0345 209 1539
peter.swinburn@
clarkewillmott.com

Pubs Code arbitration award:

challenging a stocking requirement

A long running, two part referral to the Pubs Code Adjudicator ("PCA") in relation to a proposed free of tie lease of a public house has finally concluded.

Doubt has been raised about the application of **The Pubs Code etc. Regulations 2016** ("the Code") since it came into force in August 2016 but, some three years on, this decision demonstrates that the Code can have a positive impact for a tied tenant going free of tie.

Clarke Willmott LLP ("CW") acted for the tied tenant in its challenge to the terms of a stocking requirement proposed by the pub-owning business ("POB"), Star Pubs and Bars, the leased pub business of Heineken UK.

The referral began in January 2017 and centred mainly on those terms of the proposed market rent only ("MRO") lease that were, in the tenant's view, not MRO compliant. One of those terms was the stocking requirement.

A stocking requirement is not a tie but is a contractual obligation in a lease that requires a tenant to stock the brewer POB's beer or cider, but does not require them to buy it from a particular supplier. The concept of a stocking requirement in a free of tie lease might seem paradoxical to a tenant. Nevertheless, an MRO compliant tenancy can include a stocking requirement (if reasonable); the Parliamentary thinking behind that being to protect a brewer POB's route to market.

The POB's initial stocking requirement offer was for the tenant to stock and make available for sale only (i.e. 100%) landlord keg brands. The Deputy Pubs Code Adjudicator ("DPCA") found the stocking requirement, amongst other terms, to be non-MRO compliant and ordered the POB to issue the tenant with a revised (and compliant) MRO proposal.

When the revised proposal was served, it was instantly apparent that the stocking requirement was still not MRO compliant. This time the POB stated that at least 75% of taps were to be landlord keg brands. The tenant made an immediate referral back to the DPCA in April 2018. Three more variations of the stocking requirement were proposed by the POB, none of which were MRO compliant. The tenant's position was that he would be worse off accepting any of these stocking requirements than staying in his current tied position, which flies in the face of the spirit of the Code.

The tenant has, finally, now been vindicated in his challenge of the stocking requirement. The DPCA's Final Award of 3 December 2018 found entirely in the tenant's favour that none of the POB's stocking requirements served on the tenant throughout the process had been compliant. The POB was ordered to serve a further revised MRO proposal with a stocking requirement, in line with that put forward by the tenant as being reasonable, of a minimum of three landlord brand products to be stocked and offered for sale from a minimum of four taps, with no "must stock" products.

The published final award is available to **view in full on the Pubs Code Adjudicator's website**.

If you would like more information about the Code or challenging a stocking requirement, please contact:

Laura Robbetts
Senior Associate
0345 209 1487
laura.robbetts@clarkewillmott.com

Pre-ticked boxes for cookies are invalid

Following the implementation of the General Data Protection Regulations ("GDPR") the Information Commissioner's Office ("ICO") updated its guidance on the use of cookies.

The guidance covers not just the use of cookies, but also similar technologies, whether used in connection with websites, mobile applications, wearable technology, TV's or other connected devices.

The use of cookies is primarily regulated in the United Kingdom by the Privacy and Electronic Communications Regulations, commonly referred to as PECR, but the changes to data protection legislation has had an impact on the use of cookies imposing high standards for cookie use.

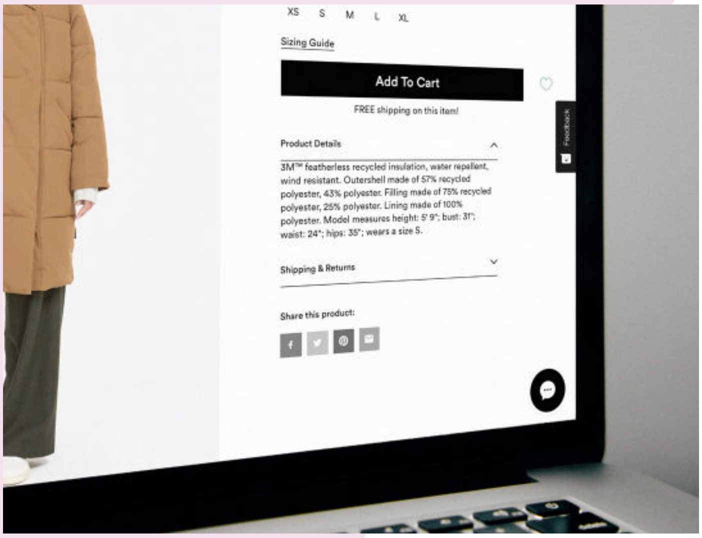
In a recent case the Court of Justice of the EU ("CJEU") has also declared that pre-ticked checkboxes cannot be used to gain valid consent from individuals. This decision further emphasises the fact that consent, for the purposes of GDPR, requires a positive action by the user.

Silence or failure to opt-out does not constitute valid consent for these purposes.

What do you need to know?

1. Pre-ticked boxes or equivalent **cannot** be used to obtain consent.
2. The consent required for the purposes of setting a cookie must be "consent" as defined by the GDPR. This means that *"a user must take a clear and positive action to give their consent to the use of non-essential cookies"*. It is important to note that where consent is required under PECR, one of the lawful bases from the GDPR **cannot** be used as an alternative.
3. The continuing use of a website by a user does not constitute valid consent. Users must take a clear and positive action to consent to non-essential cookies.
4. Clear information about the use of cookies must be provided to a user before consent is given. You cannot gain consent via terms and conditions; any consent that is bundled into a set of terms and conditions will not be compliant.
5. If you introduce a new cookie or change the purpose of a cookie, you will need to provide users with details of the change so they can make an informed choice about the use of this new or updated cookie.
6. When using third party cookies, the name of the third party must be provided and an explanation of what they will do with the information will need to be provided. If these cookies are non-essential cookies consent will need to be obtained.
7. The use of a full cookie wall i.e. requiring users to 'agree' or 'accept' the setting of cookies before they can access any online content does not represent valid consent on the basis that the consent is not "freely given". This means that non-essential cookies must not be used on a landing page, or otherwise dropped before a user has provided the necessary consent.
8. Any use of non-essential cookies, including third party cookies used for the purposes of online advertising or web analytics will require prior consent before they can be used.

Non-essential cookies are anything other than those that are strictly necessary to provide a service over the internet which has been requested by the user. The use of the cookie must be essential to fulfil their request i.e. without it the user would be unable to undertake certain activities.



Cookies that are helpful or convenient but not essential will still require consent.

These requirements will also apply to mobile applications ("Apps"). Most Apps store information on smart devices, and some Apps may also access information on the device (e.g. contacts or photos). Businesses will need to provide clear information to users about what the App does, and exactly how it uses their information, before users click to install the App. It is also important to consider user privacy controls and avoid switching optional features on by default.

What do you need to do?

All businesses should conduct a cookie audit, in order to fully understand the cookies that are being used and the reasons why. You need to identify not only your own cookies but also any third party cookies which are being used and then categorise these into essential and non-essential cookies. This audit will allow you to identify which cookies will trigger the PECR consent, so you can determine what consent mechanism you need to implement.

Businesses will need to ensure that:

1. they provide clear and easy to understand information about the cookies they use;
2. they implement a consent mechanism that allows users to control the setting of all cookies that are not strictly necessary;
3. the consent mechanism ensures the consent that is obtained is in line with the GDPR's requirements.
4. they keep any records of cookie consent for an appropriate period of time.

The ICO will look to see that businesses can demonstrate that they have done everything they can to clearly inform users about cookies and provide clear details of how to make choices about the use of such cookies.

For further information please contact:

Chidem Aliss
Partner
0345 209 1562
chidem.aliss@clarkewillmott.com

Amy Peacey
Senior Associate
0345 209 1329
amy.peacey@clarkewillmott.com

The evolving impact of Sky v Skykick on national and EU trade marks

The Advocate General has recently released his opinion on a case which considers broad trade mark specifications, lack of genuine intention to use and bad faith that could have significant impact on the system of trade mark protection in the EU (including the UK).

In *Sky Plc (& Others) v Skykick UK Limited (& Others) [2018] EWHC 155 (Ch)*, Sky, the telecommunications company, brought proceedings for trade mark infringement and passing off against Skykick, a business providing cloud migration information technology services. Among its claims, Sky relied upon a number of UK and EU trade marks for SKY in both word and logo forms which cover an extremely broad list of goods and services. In addition to terms which are in themselves broad, such as "computer software", Sky's trade marks also covered goods and services which, Skykick argued, Sky had no genuine intention to use the SKY mark in respect of (e.g. "bleaching preparations" and "whips").

Mr Justice Arnold (now Lord Justice Arnold) found that Skykick's use of its SKYKICK mark had infringed Sky's trade marks. However, this judgment was subject to the CJEU providing guidance on a number of points which could affect the validity of Sky's trade marks. If Skykick's arguments were correct, Sky's trade marks were invalidly registered and therefore could not be infringed. Among the questions referred to the CJEU by Mr Justice Arnold were:

- Are trade marks that are registered for broad terms, such as "computer software", invalid for lack of sufficient clarity or precision?; and
- Has a mark been applied for in bad faith if, at the time it was filed, the applicant did not have a genuine intention to use it in respect of some of the goods and services applied for?

Advocate General's opinion

In answering the first question, the Advocate General concluded that there is no free-standing provision in any of the relevant legislation for the invalidity of a registered trade mark on the ground that some or all of the terms in the specification lack sufficient clarity and precision.

However, the Advocate General found that a lack of clarity and precision may bring a registration within the scope of the public policy exception. In terms of computer software specifically, he noted that the term "computer software" is clear (it comprises computer code), but that it *"undoubtedly lacks precision in the sense of covering goods that are too variable in their function and field of use to be compatible with the function of a trade mark"*. Computer software is incorporated in almost every product imaginable and performs a diverse range of functions from word processing software to controlling heavy machinery. Under the current national and EU system, a trade mark proprietor can obtain a potentially indefinite monopoly over all types of software, thereby reducing the number of available trade marks and creating barriers for new businesses to enter the market. By contrast the US Trade Mark Registry requires applicants to specify the purpose or function of the software so the rights obtained are comparatively narrower.

The Advocate General was therefore ultimately of the opinion that *"registration of a trade mark for 'computer software' is unjustified and contrary to the public interest because it confers on the proprietor a monopoly of immense breadth which cannot be justified by any legitimate commercial interest of the proprietor"*.

The Advocate General also noted that this view could equally apply to "telecommunications services" and "financial services", which are both terms that are currently permissible under the national and EU trade mark systems.

In answering the second question, the Advocate General noted that the EU trade mark system is *"aimed at contributing to the system of undistorted competition in the European Union" as trade marks enable consumers to quickly and easily identify who is providing a particular good or service. In the Advocate General's opinion, where a trade mark is applied for covering goods and services for which there is no genuine intention to use, this "bears greater resemblance to an anticompetitive application to prevent third parties from developing their own commercial activities"* and thereby undermines the purpose of the system. It is therefore unsurprising that the Advocate General's recommendation for the CJEU was that it find that, at least in certain circumstances, applying for an EU trade mark without any genuine intention to use it for certain goods and services may constitute bad faith, leading the mark to be invalid (and the same principle should apply nationally).

On this final point, it was also necessary to clarify what the consequences of bad faith are, where the lack of intention to use only concerns some of the goods and services covered by the registration. The current position as stated in a previous General Court decision is that a finding that a mark is partly registered in bad faith (e.g. in respect of only some of the goods and services) is sufficient to taint the whole application, and that it should therefore be invalidated in full. In the AG's opinion, this position is incorrect and a finding of bad faith in part should result in the mark being invalidated in respect of only the goods and services to which that bad faith extends.

Thomas Kirby, a solicitor in the **Intellectual Property team**, comments *"We will obviously need to wait to see if the CJEU follows the Advocate General's opinion. If this is the case, new businesses will no doubt welcome the finding that broad monopolies over terms such as "computer software" could become a thing of the past. Trade mark owners and practitioners alike would also need to be wary of applying for goods and services for which there is no genuine intention to use, but the Advocate General's recommendation that this results in only partial invalidity takes much of the sting out of this as trade mark owners would lose only those goods / services for which they had a weaker rationale for seeking protection for in the first place. If adopted, the Advocate General's findings could also lead to infringing parties raising arguments about lack of genuine intention to use as a matter of course, thereby increasing costs for trade mark owners seeking to defend their intellectual property rights"*.

For further information please contact:

Roy Crozier
Partner
0345 209 1900
roy.crozier@clarkewillmott.com

Thomas Kirby
Solicitor
0345 209 1223
thomas.kirby@clarkewillmott.com

High Court cries 'fowl' on grilled chicken franchise claim

The recent case of *Pepe's Piri Piri v Junaid & Others* concerned a dispute over a fast food franchise.

The case does not deal with new or unusual legal issues but it teaches some interesting lessons about how **not** to run a franchising business, a franchise and for that matter, a court claim.

The total amount claimed exceeded £500,000 yet Pepe's managed to recover just £2,523.07. This spectacular failure boiled down to two things: serious defects with the franchisor's record keeping and a lack of basic preparation when it came to bringing the claim, all of which could have been avoided.

Background

The claimant, Pepe's Piri Piri, is the owner of a fast food franchise which specialises in the sale of grilled chicken. The dispute concerned the franchisee's "termination" of its franchise agreement with Pepe's prior to its shareholders going into business with a competing franchisor, Rio's Piri Piri.

Pepe's claim was brought on various grounds, but at its heart, the complaint was that the defendants were part of a conspiracy to harm Pepe's business, and as a result, Pepe's had suffered serious financial harm.

Do not just say it, write it down

The trial took place in May 2019, some five years after many of the material events. The judge took the view that the witness' recollections were likely to be so unreliable that, when it came to deciding factual disputes between them, he should rely primarily on the documentary evidence. There were, however, numerous failings by Pepe's on this front.

Failures in trial preparation

- The franchisee argued, and the judge accepted, that the franchise agreement relied on by Pepe's was not the version that had been signed by the franchisee. Pepe's could not explain why there were a number of versions of the franchise agreement and the judge, critically, found that this uncertainty raised so much *'doubt about the robustness and efficacy of [Pepe's] record-keeping'* that far less evidential weight could be placed on the documents relied on by Pepe's than would normally be the case.
- The franchisee said that Pepe's should not be allowed to recover damages to cover future management fees because the franchise would have failed anyway. The best way for the parties to evidence their position on this was to produce the franchisee's sales data, bank records and related invoices. However, Pepe's was unable to provide any documentation to the court.
- Parts of Pepe's accountancy evidence were found to be so inconsistent that they were rejected outright. It was impossible for the judge to assess the value of any additional marketing spend claimed and Pepe's was unable to produce any records of its marketing campaign.
- Pepe's could not produce any documentary evidence indicating that it was considering opening a second local franchise at any point prior to the events complained of.
- Finally, Pepe's could not produce any evidence that its business had been disrupted due to the diversion of management time as a result of the dispute.

As a result of these failings, all Pepe's managed to recover was the sum of £2,523.07 for the unpaid franchise fees due at the date of the "termination" of the franchise agreement. All other heads of claim were rejected.

It was a sorry affair for both sides. Leaving aside the derisory award of damages made (and some highly adverse comments concerning Pepe's record keeping), the franchisee's business affairs were described as having been 'bungled' from start to finish 'in an entirely disorganised and amateur way'.

The lessons

The lessons to be learned by franchisors are straightforward and arise in two areas.

Documentation and record keeping.

- A well drafted franchise agreement will anticipate potential disputes and may prevent them from arising in the first place.
- Once a franchise agreement has been agreed and executed, keep it in a safe place. Variations should also be clearly recorded and kept with the original agreement.
- If and when problems arise, document them. If management time is being diverted in trying to deal with the issues giving rise to a dispute, keep a careful record of time spent.
- Make sure that accounting records are retained and maintained in a centralised and well ordered manner. If you are making a claim against a franchisee you will be required to evidence your losses.

Selecting potential franchisees.

- Pepe's had failed to assess the suitability of the individuals who had applied to buy one of its fast food franchises. They had no experience in operating a franchise or, even more remarkably, running a fast food business. The franchisee's business plan was riddled with serious errors and inaccurate costings.
- In March 2016 the franchise was given a rating of 1 out of 5 on the National Food Hygiene Rating System. An inspection by the local authority found several incidents of "very poor food hygiene practices".
- Had Pepe's selected a franchisee with a proven track record in operating a fast food business, the dispute would have been unlikely to have occurred in the first place.

Click here for our full report and analysis of this case, and **here** for our report on the subsequent decision relating to costs.

Clarke Willmott's specialist **franchising solicitors** can assist both franchisors and franchisees in a wide range of fields, including health and fitness, education, fashion, travel and food and drink providing a complete legal service to our franchise clients.

For further information please contact:

Richard Moore
Partner
0345 209 1087
richard.moore@clarkewillmott.com

Susan Hall
Partner
0345 209 1498
susan.hall@clarkewillmott.com

Business succession planning:

business owners and key individuals

Succession planning is a crucial part of business and wealth protection, for both the business and the owner's family.

Having a strong succession plan in place will ensure the continued management of the business and minimise the impact of an unexpected event eg, the incapacity or death of the owner or if key staff leave the business.

What is succession planning?

Succession planning is the process of identifying those individuals who have the potential to be considered for key roles in the future. Although the focus tends to be on senior positions, it can be applied to any job that requires a particular set of skills or knowledge to ensure that the right people are in place at the right time.

Review of the business

The process starts by looking at:

1. Job roles that are hard to replace or of particular value
2. Who might be planning to retire in the next year
3. Which other key post holders could leave over the coming years
4. Areas of high staff turnover
5. Any skills shortages that can be anticipated.

Targeted training

Once the potential future skills gaps and candidates who could fill them have been identified, targeted training must be provided which steadily brings individuals up to the level of capability needed in the posts they are being groomed for.

This stage is vital for staff to smoothly transition into a key role when it becomes available. It is particularly important where longstanding staff have accrued significant personal 'know-how' of the business and its operations.

Top tip: This does not need to be an expensive exercise. Existing post holders and other key staff can provide coaching and mentoring. Secondments or job shadowing could also be introduced to help grow skills and knowledge.

Be open about it

For succession planning to work it is important to be clear about expectations with staff. This means being transparent about why it is being done e.g. to ensure that the business can be driven forward. It is also vital to inform staff of the criteria that will be used to identify those individuals with 'key role' potential.

Top tip: succession planning initiatives can be brought into the appraisal system. Interested and ambitious employees can be identified early and have an opportunity to put themselves forward for potential development opportunities. If done properly, existing staff will be motivated as they will see a future for themselves in the business and so be more inclined to stay.

What will happen to the business in the event of the owner's death or incapacity?

Succession planning is important to ensure that the business continues to be run smoothly in the event of the owner's own incapacity or death, rather than failing due to the absence of someone to pay suppliers and staff; but it can also address wealth protection issues.

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Business succession planning - continued

Cross-option arrangements

Typically this arrangement is relevant to small and medium sized businesses with 50:50 shareholders/partners. It is equally relevant to businesses with multiple shareholders or partners.

Under the arrangement the deceased's interest in the business passes to the surviving business partner and the deceased partner's family receives payment for that interest. This ensures that the surviving business partner can continue the business, while the deceased's family is provided for by receiving a cash sum.

This is achieved by each of the business partners taking out life assurance on their respective lives. The life cover is put in trust by each of them in favour of the other. On the death of a shareholder or partner, the life proceeds pass to the survivor, creating a cash fund to pay to the deceased's family for the deceased's interest in the business.

Cross-options are also useful for inheritance tax planning for the deceased's family. If the deceased's Will is drawn up in a tax efficient way, some or all of the cash received from the purchase of the deceased's share of the business can be put into a trust which ensures that no inheritance tax is payable when the deceased's partner dies. For this to work it is vital for the business owners to have the correct Will in place.

The cross-option document needs to work in a way which is consistent with the articles of association or the partnership agreement and legal advice should be taken on that point.

Often, these arrangements are put in place and forgotten, but as the value of the business grows it is important to review the level of life cover (every two years or so) to ensure that the cash sum generated on death will be sufficient to fund the purchase of the deceased's interest in the business.

Lasting powers of attorney

As well as confronting the fact of their own mortality, a business owner needs to plan for their possible incapacity. This is particularly important for a sole trader running a business without partners or directors.

It is possible to have two separate lasting powers of attorney (LPA), one appointing an attorney to deal with the business owner's personal financial affairs and one appointing a different individual as the attorney in relation to the business.

Again, it is important to consider the type of business and to check the articles of association or the terms of a partnership agreement to see what they provide in the event of the incapacity of a director or partner.

Need help?

Whether considering succession planning or drawing up a LPA it is essential to identify what is needed and ensure that appropriate measures are put in place.

For information about succession planning and HR issues, please contact Juliette Staunton.

For information about business succession and corporate matters, please contact David Robinson.

For information about estate planning and asset protection for business owners, please contact Carol Cummins.

David Robinson
Partner
0345 209 1443
david.robinson@clarkewillmott.com

Juliette Staunton
HR Consultant
0345 209 1126
juliette.staunton@clarkewillmott.com

Carol Cummins
Consultant
0345 209 1275
carol.cummins@clarkewillmott.com

If you would like to receive future editions of **Retail Line** or if you have any comments or suggestions for the newsletter please contact: news@clarkewillmott.com