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Retail Line

Retail & Leisure Briefing • December 2020

Brexit and your intellectual property rights

What happens next and what you need to know

On 31 December 2020 the Brexit transition period will come to an end which will mean that EU Trade Marks ("EUTMs") and Registered Community Designs ("RCDs") will no longer extend to, and be enforceable in, the UK. But what does this mean for rights holders?

EUTM and RCD registrations and applications

All EUTMs and RCDs registered before 1 January 2021 will be automatically cloned into UK national registrations which will then need to be managed and renewed separately.

All EUTM and RCD applications pending before the end of the transition period *will not* be automatically cloned into UK national trade mark applications and rights holders will have nine months within which to re-file the application in the UK and maintain the original filing date of the corresponding EUTM application.

Where an international registration has registered protection designating the EU, this right will be automatically cloned into a UK national registration rather than a UK designation of an international mark. Pending EU designations will have the same nine month window as EUTM applications within which to re-file in the UK.

EUTM and RCD renewals

If an EUTM or RCD is due for renewal on or before 31 December 2020 and the renewal is completed, then the UK clone will be created as a renewed registration and no further action is required.

However, if the renewal date of the EUTM or RCD is *after* 31 December, then both the EUTM and the UK clone will need renewing separately.

EUIPO disputes

Pending EU oppositions will not transfer to the UK so it will be necessary to file an opposition to the UK clone application (if such an application is made).

Pending invalidity and cancellation actions at the EU Intellectual Property Office ("EUIPO") may result in cancellation of the new UK clone only if the grounds for cancellation applied in the UK at the time of filing the action.

While the EUIPO will disregard UK rights, even for pending actions, the UK Intellectual Property Office ("UKIPO") will not disregard EUTMs in pending actions. Hence, any EU right relied on in pending UKIPO opposition proceedings will still be valid for those proceedings.

UK litigation

As of 1 January 2021, UK courts will no longer act as EU courts and will no longer be able to grant EU-wide injunctions or grant other remedies in respect of EUTMs or RCDs, nor will they be able to revoke them or declare them invalid.

Any ongoing UK court proceedings will continue solely on the basis of cloned UK rights arising from EUTMs and RCDs, and remedies will relate solely to those UK rights.

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Welcome

to the December edition of Retail Line

In our pre-Christmas edition we usually try to cheer on the sector at its most important time of trading. We had hoped to look forward to fewer challenges and more opportunities in 2021, but just as we were to publish this edition of Retail Line the strictest measures were imposed in many parts of the country. It's impossible to predict the long term impact, but the inevitable loss of trade at this time is likely to be distressing across the whole of the sector and supply chain. Clarke Willmott's retail and leisure teams are here to support businesses facing these extraordinary market conditions.

In this edition of Retail Line we consider some of the changes that businesses can expect as the Brexit transition period comes to an end. Many issues that arose during the coronavirus pandemic continue to be a problem; our commercial expert advises suppliers who have provided goods and services to struggling retail and leisure businesses; and our property experts comment on the extended protection for business tenants.

Many retail and leisure businesses were forced to diversify their operations in 2020. We talk to one of our clients about the challenges they faced and how they have adapted their business to meet the needs of their customers.

It seems we must expect a few more bumps in the road but we hope Christmas brings a successful end to the year and a return to prosperity in 2021.

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Brexit and your intellectual property rights - continued

Existing EU-wide injunctions will remain in force in the UK but subject to any UK court order to the contrary so these could be challenged. However, future EU-wide injunctions will no longer cover the UK.

Additional points

Unregistered design rights – Designs that are protected in the UK as an unregistered Community design ("UCDs") before 1 January 2021 will be protected as a UK continuing unregistered design and will be automatically established on 1 January 2021.

Such UCDs will continue to be protected in the UK for the remainder of the three year term attached to them.

The fact that a corresponding UCD was established before 1 January 2021 through first disclosure in the EU but outside of the UK will not affect the validity of the continuing unregistered design.

Rights of representation – UK representatives can continue to act in all "ongoing proceedings" before the EUIPO.

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Pubs Code update: Beer giant, Heineken, fined £2m by the Pubs Code Adjudicator

Star Pubs and Bars, the leased pub business of Heineken UK, has been fined £2m for serious and repeated breaches of the Pubs Code etc. Regulations 2016 (the Code), following an investigation by Fiona Dickie, the Pubs Code Adjudicator (PCA).

The Code's aim is to regulate the relationship between tied pub tenants and their landlords, the pub-owning businesses, as, historically, tied tenants have had no real power in the arrangement and no recourse to right abuses.

Star Pubs and Bars (Star Pubs) runs 2,500 pubs in the UK, making it one of the biggest operators in this country. Heineken is the second largest brewer of beer in the world.

Between January 2017 and December 2018, Clarke Willmott acted for The Garden Pub Limited, a tied pub tenant of the Woodman in London, who wished to exercise its right to go free of tie from its landlord, Star Pubs. Star Pubs insisted upon the inclusion of an onerous stocking requirement in the proposed free of tie lease. A stocking requirement is not a tie but is a contractual obligation in a lease that requires a tenant to stock the brewer landlord's beer or cider, but does not require them to buy it from a particular supplier. A free of tie lease can include a stocking requirement (if reasonable) in order to protect a brewer pub company's route to market.

The particular issue with the stocking requirement in The Garden Pub's case was that Star Pubs required our client to stock 100% of Heineken brands. We argued this was not reasonable and were ultimately successful in our challenge, with our client achieving its goal of three Heineken brand products to be stocked and offered for sale from four taps, with no "must stock" products.

The PCA investigation, decision and enforcement

The PCA's investigation found that, despite the outcome of our case and repeated interventions and rulings from the PCA, Star Pubs continued to force tenants to sell unreasonable levels of Heineken beers and ciders when they requested to go free of tie. Up to August 2018, 96 tenants who requested a free of tie option were told that 100% of the keg beer they sold had to be Heineken brands.

The PCA concluded:

- Star Pubs did use unreasonable and non-compliant stocking obligations in its proposed MRO tenancies; the impact of Star Pubs' non-compliance was significant and multi-layered;
- there was a fundamental failure of culture and oversight in respect of Code duties;
- the policies and practices adopted by Star Pubs would have acted as a deterrent to Star Pubs' tenants seeking to access their Code rights to go free of tie;

The PCA set out a series of enforcement measures including making recommendations, imposing information requirements on Star Pubs and imposing a financial penalty.

The final amount of the penalty imposed was reduced to £2m to reflect the individual circumstances of Star Pubs, the likely need for Star to support its tenants during the ongoing COVID crisis and in recognition of the period of unprecedented uncertainty in the industry.

Ms Dickie said: "*The report of my investigation is a game changer. It demonstrates that the regulator can and will act robustly to protect the rights that Parliament has given to tied tenants*".

It is clear from the investigation report that The Garden Pub's case (Helliwell 1 and 2) contributed substantially to the findings.

The full text of the PCA's investigation **can be found here**.

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Post-Brexit food labelling deadline looming

Food producers, manufacturers and retailers are being warned to prepare for new requirements for food labelling coming into force on 1 January 2021.

The changes are necessary to reflect the fact that the UK is no longer a member of the EU.

Responding to industry concerns over the scramble to comply with the new rules in time for transition on 1 January, the UK government recently revised its guidance for the labelling of food produced and sold in Great Britain and food imported from the EU. The new guidance extends the original 1 January deadline for the labelling changes to **30 September 2022**.

This is welcome news for any food business producing and selling in Great Britain because existing "origin EU" wording on labels can continue to be used until September 2022. Similarly, for this extended grace period, labels on food imported from the EU can continue to include an EU, rather than a UK, address.

However, for food and beverage exporters the clock is still ticking. So far, the EU has not updated its guidance and, consequently, new labelling rules will apply to food exported from Great Britain from 1 January 2021. From this date, exporters will need to have in place new packaging compliant with EU regulations in order to sell their goods legally to customers in the EU. There is a limited exception for food products placed on the market *before* January 2021 which can continue to be sold, distributed or transferred in the EU without labelling changes until stocks are exhausted.

What does this mean in practice for any business intending to export food or beverages from Great Britain to the EU?

From 1 January 2021 food exported to the EU must follow these requirements:

- Food and drink products may not use any EU emblems or markings on their labels;
- UK food must not be labelled as origin EU from 1 January 2021; and
- The address of an EU importer or food business operator will be required on labels of pre-packaged food;

In addition, producers of organic food products face export restrictions and other labelling requirements until such time as the EU approves the UK's organic food regulatory regime. If the UK does not achieve recognition equivalency from the EU, exporters of organic food will not be able to export organic food or feed to the EU from 1 January 2021.

This transition period is a challenging time for food manufacturers who need to be compliant with new labelling rules and alert to the different requirements depending on where their goods are to be sold. If you are a food manufacturer and are unsure of what is required, we recommend looking at the Government website for guidance or talking to a specialist lawyer who can help.

*Producers in Northern Ireland will not follow the specific food labelling rules applicable in the rest of Great Britain but will continue to follow food labelling rules applicable in the EU.

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Supply chain: extended protection measures for small retailer suppliers

A number of temporary changes, designed to protect struggling businesses from insolvency during the coronavirus pandemic, were introduced by Corporate Insolvency and Governance Act (CIGA) as well as various permanent changes.

Temporary provisions were due to expire on 30 September 2020. However, with a second wave of coronavirus cases, further legislation (The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020) has come into force. This extends an important temporary protection which is specifically designed to protect small businesses involved in the supply of goods or services.

Many commercial contracts for the supply of goods and services contain clauses to allow for termination of the contract in the event that a party enters into any insolvency proceedings (or if such action is threatened). A supplier would often refuse to continue supplying the other party with goods or services in an insolvent situation, unless it settled outstanding debts. These types of clauses are known as ipso facto clauses and much coverage has already been given to this reform.

Following CIGA suppliers of goods and services are unable to rely on such contractual clauses that allow termination in the event of a 'relevant insolvency procedure'. This is defined in CIGA and it can include anything from administration, the appointment of a receiver, liquidation, moratorium and a restructuring plan. The provision is broad as a creditor is also unable to do 'any other thing' as a result of the insolvency or restructuring, for example, increasing its prices or insisting on less favourable payment terms. CIGA also prohibits the termination of a contract where the creditor had a pre-existing right of termination which arose before the relevant insolvency or restructuring but was not exercised by the creditor. The restriction remains in place throughout the insolvency procedure. It remains possible to terminate for grounds other than insolvency/restructuring if the contractual right to terminate did not arise pre-insolvency.

Despite this radical reform being implemented small suppliers in the retail sector (companies, LLPs and individuals) should be aware of an important exemption that may assist if they find themselves supplying to a party that enters into any insolvency provisions (or if such action is threatened). For small businesses (defined by turnover (£10.2m), balance sheet total (no more than £5.1m) and/or employee numbers (no more than 50)) there is a temporary exemption. Small independent retailers or smaller chains of shops who satisfy at least two of these criteria in their last financial year are exempt from the changes and can choose to take advantage of an exemption to terminate (or amend terms in) a supply contract until 30 March 2021. This could be very important for small businesses struggling in the coronavirus environment. The Federation of Small Businesses (FSB) indicates that 5.8 million small businesses in the UK make up 99.3% of all private sector businesses and that poor payment practices, such as late payments, affects 80% of the UK's small business community. FSB also calculates that late payments to SMEs costs the UK economy as much as £2.5 billion every year and causes 50,000 small firms annually to close their doors. This temporary relief therefore will benefit a huge number of businesses.

Whether we see this period extended further will, no doubt, depend on the coronavirus and how it is spread or contained within the next few months. For now small businesses may be able to take advantage of the protective measures to navigate the challenges ahead. Unless extended again, once the temporary period ends small suppliers will no longer be able to terminate a supply contract or changing contractual terms due to insolvency related reasons unless they seek an order from the court on the basis of hardship. So now is the time for smaller businesses to look at their customer base and consider renegotiating credit levels, payment terms and other contractual provisions which will allow them to terminate when insolvency of the customer is no longer a means to exit the contract.

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Leisure focus: Sutton Harbour Marina

When we published our summer edition of Retail Line the country was beginning to re-open for business after the first lockdown. Many businesses had to adapt their business models and create new ways of providing services to their customers but the leisure and hospitality sectors faced particular challenges in managing social distancing and strict limitations on numbers.

We spoke to Mark Brimacombe, Marina Manager of Sutton Harbour Marina about how the company has adapted its business in 2020, and its plans for the future.

Sutton Harbour Marina is a 5 Gold Anchor marina in the historic heart of Plymouth, Britain's ocean city. The 420-berth marina is operated by Sutton Harbour Group plc which is also developing major residential, office and leisure schemes in Plymouth, transforming the city's waterfront quarter into one of the UK's finest visitor destinations.

Q: How have the periods of lockdown affected Sutton Harbour Marina?

A: Sutton Harbour Marina is renowned as a safe haven thanks to the double lock gates at Sutton Lock, which provide ultimate shelter. Our calm, protected environment was especially appealing both during and in between the lockdown periods, as boat owners could be confident that their yachts were being looked after.

During lockdown, Sutton Harbour Marina remained fully open and operational but many berth holders were unable to visit their vessels owing to the Government restrictions. Most berth holders were dependent on our team to take care of their boats for them for some months.

Staff worked around the clock to check lines, fenders, security and keep a watchful eye on the yachts, keep-ing in touch with often anxious berth holders by phone, email, and social media.

We also developed new safety protocols, increased hygiene standards, installed sanitising stations and im-plemented social distancing measures ahead of the marina reopening.

Our staff worked hard to provide a safe environment and we have had an overwhelmingly positive response from our customers.

Q: How has this impacted on the marina's business?

A: After 4th July, berth holders were able to stay overnight on their yachts and we have been extremely busy since then.

Sadly, many of Plymouth's popular events were cancelled, and our own well-attended berth holder events programme had to be put on hold. We did manage many socially distanced catchups with our berth holders.

Travel restrictions throughout the summer increased the demand for domestic tourism generally, and boating specifically was a COVID-safe leisure activity, so we have seen Sutton Harbour become increasingly popular as a visitor destination. We saw many new customers who bought a boat to enjoy a UK staycation instead of a holiday abroad. We've also seen many customers bring their boats back to the UK from elsewhere.

We also held our first ever 'Virtual Open Day' via social media so potential new berth holders could 'visit' us safely to find out more, and have connected more with berth holders remotely via social media.

Q: How has the marina evolved in recent years?

A: The marina has always been popular thanks to its proximity to great UK sailing, its location in the centre of the city and Plymouth's famous historic Barbican area. As the destination has grown to a world-class visitor destination home to a wealth of harbourside restaurants, bars, visitor attractions, leisure amenities and high street shopping just a short stroll away, the attractiveness of the offer has grown.

Sutton Harbour Marina has a very strong retention rate from loyal berth holders who come back year after year. Recently we've seen that nearly all our customers stay with us for as long as they own a boat.

Sutton Harbour Group has also made major investments in the harbour. We've recently reconfigured the marina adding 15 brand new berths to accommodate more vessels up to 14 metres long. All of these new berths were snapped up right away.

Sutton Harbour Group also established an events department to enhance the range of social events for berth holders and the wider community working in partnership to deliver events such as the Mayflower 400, major yachting events such as Sail GP, concerts, festivals and much more.

Q: What plans do you have for the future?

A: Sutton Harbour Group is delivering new developments in and around the harbour which will offer more restaurants, shops and amenities for boat owners to enjoy.

We're also investing in the harbour by introducing a public walkway along the waterfront and floating event pontoons to increase and enhance Plymouth's capacity to host events. This project was due to be installed this spring but was postponed following the COVID-19 outbreak.

We also continue to invest in our dedicated customer service team to ensure we deliver a first-class service.

For more information about Sutton Harbour Marina, **visit their website** or call 01752 204702.

Property update

Restrictions on landlords extended as the Government moves to provide further protection to struggling business tenants

Clarke Willmott's property series webinar on 1 December debated whether the Government would further extend the restrictions on landlord action for non payment of rent by business tenants, having done so twice previously following the introduction of restrictions in March 2020.

Communities Secretary Robert Jenrick brought a swift end to that speculation on 9 December 2020 by announcing that the restrictions will be extended until the end of March 2021. Repeating the mantra that businesses which can pay rent should do so, while offering support to the businesses worst affected by the pandemic, he confirmed that:

- Landlords will not be permitted to forfeit business leases for non-payment of rent until the end of March 2021.
- CRAR will not be permitted until the end of March 2021.
- It will not be possible to petition to wind up a company based on a statutory demand served on or after 1 March 2020 until the end of March 2021.
- It will not be possible to wind up a company for any reason other than failure to comply with a statutory demand without a reasonable belief that the company has not been affected by the pandemic or that the relevant basis for the petition would have occurred anyway.

The announcement makes co-operation and communication between landlords and tenants ever more important as we all look to emerge from the pandemic with viable businesses. No doubt we will see more discussions about payment plans and rent holidays as tensions rise among landlords who increasingly feel they are being unfairly treated. It remains to be seen whether this extension will stop the rush to CVAs as a means to force landlords to accept changes to lease terms and rents. The announcement made no mention of that increasingly popular practice.

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Developer De-Brief

In November Clarke Willmott launched **Developer De-Brief**, a new quarterly newsletter with a focus on development and commercial property issues.

The November edition included articles about changes to Use Classes, Third Party Rights in Developments and the effect of restrictive covenants on development proposals.

If you would like to subscribe to De-brief please **click here**.

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