clarke willmott

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Retail Line

Sexual harassment in the retail and leisure industry

Allegations of sexual harassment have been widely reported in the news this year, and worldwide social media campaigns (#metoo, #timesup) which encourage victims to come forward have highlighted the extent of sexual harassment in particular industries, including the retail and leisure industries.

In 2016 the Trades Union Congress (TUC) **published a report** about sexual harassment in the workplace. More than half of the women who took part in the survey reported experiencing some form of sexual harassment in the workplace, but four out of five women had not reported it to their employer. Of those who did report it, only 10% felt their situation improved whereas 16% said their position became worse.

Although the term "sexual harassment" is widely known, in our experience there is a lack of knowledge and awareness about what actually constitutes sexual harassment and, in particular, quite how broad the concept is. The legal definition of sexual harassment is *"unwanted conduct of a sexual nature which has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them"*. It also includes less favourable treatment of someone who has rejected or submitted to conduct of a sexual nature. Importantly, it is based on the recipient's perception of the conduct (provided this is reasonable) and a one-off incident may be sufficient.

Obvious examples of sexual harassment include unwelcome behaviour of a sexual nature, asking for sexual favours and unwelcome touching. Less obvious examples include jokes, remarks or questions of a sexual nature which are often described as "banter" in an attempt to mitigate the seriousness of them. It is important to note that someone can complain of sexual harassment even it does not relate to them personally and the harasser could be cited as a party to any subsequent legal proceedings. In some instances, sexual harassment can also be a criminal act which should be reported to the police.

> ...there is a lack of knowledge and awareness about what actually constitutes sexual harassment...

The TUC reported that from the sample group polled for their survey, 67% of women in hospitality and leisure reported experiencing some form of sexual harassment, compared to an average of 52% across all industries. **Other recent research** found that women who work in the hospitality and catering or retail sectors were most likely to experience unwanted sexual attention.

The TUC report referred to a number of factors which contribute to staff being vulnerable to sexual harassment, some of which are particularly relevant to the retail and leisure industries:

- Staff demographic: in some areas of retail and leisure businesses the staff are predominantly younger women. The TUC found that age stood out as one of the characteristics to differentiate between groups of women, with young women more likely to experience sexual harassment.

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Welcome

to the September 2018 edition of Retail Line.

Despite the protracted barbecue weather, Royal Wedding and World Cup campaign which contributed to increased sales on parts of the high street, summer 2018 was sadly dominated by store closures and administrations.

Since the early days of recession in 2008 Retail Line has been reporting concerns about the controversial use of CVAs. Unfortunately we can't offer a quick fix for these situations, but we can give some practical advice for retail and leisure businesses coping with the continuing pressures affecting the sector. In this edition our property litigation experts look at some of the solutions businesses are pursuing with regard to their property portfolios.

Our corporate lawyers advise on the pros and cons of merger in difficult times. Our construction experts look at the benefits of modular hotel construction and our commercial litigation expert looks at recent developments to assist with debt collection. We start, however, with some guidance for employers concerned about allegations of sexual harassment in the workplace.

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Sexual harassment in the retail and leisure industry - *continued*

- Low wages: a large proportion of jobs in the retail and hospitality sectors are paid at or around the minimum wage. The TUC research found that staff who are fearful that they will lose their job if they report sexual harassment, may feel unable to do so if they cannot afford to be out of work for any period of time;
- Zero hours contracts: the TUC report found that women who were not on permanent contracts also stood out as a group which seems more likely to experience certain types of harassment and are less likely to report it. As zero hours contracts are used widely in the retail and leisure industries staff may feel vulnerable to a reduction in hours or loss of work which, again, may make them reluctant to report sexual harassment for fear of reprisal;
- Perpetrators: 20% of those surveyed cited their manager as the perpetrator of sexual harassment. Small retail and leisure businesses or branches may have no other senior member of staff on site to whom such a report can be made, deterring victims from reporting matters;
- Poor reporting procedures: there may be no reporting procedure or staff may not be aware of a reporting procedure. As many retail employers operate with numerous branches workers may have limited, direct communication with the head office;
- Union representation: parts of the retail sector have no trade union involvement meaning staff may have a limited awareness of their rights and may be less able to take a claim to employment tribunal without union representation or financial support;
- Dealings with the public: the TUC survey found that for 7% of the women who had experienced harassment, the perpetrator was a third party (customer, patient or client); this statistic grew to 11% for women who experienced harassment in the retail sector.

Advice to retail and leisure employers

In cases of reported sexual harassment, the cost to an employer is more an uncapped compensation award from the Employment Tribunal. There is the risk of damage to its reputation, a negative impact on staff morale and further claims of victimisation should the person who reported it (or anyone who supported them) subsequently be subjected to detrimental treatment.

In cases of unreported sexual harassment, the cost to employers is more difficult to measure; however, it is likely to result in poor performance, high turnover of staff, low morale and high sickness absence, all of which represent a negative cost for an employer.

It is common for employers to have an anti-harassment policy in place but often little is done to bring this to the attention of managers and staff. It is therefore prudent for employers to:

- ensure that all managers have training in anti-harassment and equal opportunities;
- actively encourage the reporting of inappropriate behaviour and assure staff that their procedure will be followed;
- reassure staff that they will not be victimised once they have made such a report (even if it is not substantiated, provided it is not malicious); and
- take steps to open up a line of communication with staff and other senior management or Human Resources.

For further information about putting in place an anti-harassment policy, or any other employment law issues, please contact:

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The future of the high street: finding solutions to property issues

More retail space has been left vacant following administrations or company voluntary arrangements (CVAs) in the first six months of 2018 than in 2008 (which saw the loss of Woolworths), or 2016 (which saw the demise of BHS).

High Streets and out of town shopping parks have been hit with the closure of stores; business rates are at an all time high; more of us are shopping online and retailers and investors are grappling with the changing dynamics.

What can be done?

High Streets Minister Jake Berry MP has **appointed a panel of experts** to identify the issues that are currently affecting our high streets and to advise on the best practical measures to help them thrive in the future; but as the panel chair admits, there is no quick fix solution. Some retail businesses are, however, looking for solutions with regard to their property portfolios.

Next is reportedly looking to level the playing field by negotiating into new leases a rent reduction if another retailer's nearby store enforces a reduced rent under a CVA. The BPF is calling on the government to conduct an urgent and independent **review of the use of CVAs**. Colliers are promoting a "radical re-shaping" of leases.

Key features of the **Colliers' proposal** are:

- Five year leases outside the Landlord and Tenant Act 1954 ("the 1954 Act")
- Turnover rents
- Mutual break options dependant on turnover thresholds
- Minimal fit out costs and limited incentives/rent frees

We are already seeing retailers actively seeking out the first three of these. With margins ever tighter, and the benefits of any location difficult to predict long term, actively seeking to swap 1954 Act protected leases with more flexible leases outside the 1954 Act can be a good strategy.

A 1954 Act protected lease enables the retailer to secure a new lease on similar terms on expiry of the contractual term, unless the landlord can prove one of the grounds specified in the 1954 Act. Giving up that right is a gamble, but increasingly it seems to be one that retailers are prepared to take where it enables a substantial rent reduction to be secured in return.

Of course it is not just retailers who are feeling the pinch. Retail landlords are also hit by trouble on the high street. Retailers do have leverage with landlords presiding over fragile portfolios.

Pro-actively operating break clauses or triggering renewal rights to improve terms forms a key part of the work undertaken in our property litigation team.

Whether or not a retailer is willing to give up security of tenure, any retailer paying over market rent should ensure that a section 26 request is served to coincide with the contractual termination of the lease so as to enable a reduction to market rent at the earliest opportunity. In the absence of agreement on the new lease rent, the court will determine an open market rent. On most unopposed renewals, interim rent at the level of the new lease rent is payable for the period between the contractual expiry of the old lease and the commencement of the new lease. If renewal is opposed, perhaps because the landlord has redevelopment plans, the interim rent is based on an open market letting from year to year.

A 1954 Act protected tenant whose landlord is looking to redevelop should be able to secure compensation equivalent to once or twice rateable value provided that the appropriate notices are served and the timing of the vacation of the store is properly managed. There have been cases of tenants losing statutory compensation by vacating too early.

Great care is also required when exercising a contractual break to determine a lease early. Late service or service on the wrong party will render a break notice ineffective. Failure to comply with break conditions, such as payment of rent, or the provision of vacant possession will render an otherwise valid notice ineffective. In the current market landlords can be expected to take every opportunity to avoid a break, unless they have redevelopment plans.

The Grimsey Review advocates alternative uses on our high streets. With increasing numbers of empty shops it is surely a matter of time before landlords look towards redevelopment.

Landlords may also look to challenge CVAs in the future. A pattern has emerged of CVAs categorising stores as:

- full rent and compliance with lease terms
- partial rent, invariably monthly rather than quarterly
- partial rent followed by assignment and closure
- immediate closure.

Such terms bind landlords if approved by 75% by value of unsecured creditors (not just landlord creditors). Landlords have generally accepted this, despite reservations about how a process in which they may not have actively participated can vary the terms of leases, even to the point of forcing them to take an immediate surrender.

There is an increasing feeling that landlords are being made the scapegoat for retailers' failure and that something needs to be done. Perhaps a legal challenge will come. We have considered the merits of such challenges previously. Invariably the costs outweigh the immediate benefits. If a challenge is to come it will be on a point of principle and with a view to setting a precedent going forward in much the same way that landlords successfully challenged the Powerhouse CVA which threatened to prevent them enforcing guarantees in 2007.

The fact that the House of Fraser landlords quickly dropped plans to challenge suggests landlords remain reluctant to commit substantial funds to legal challenges.

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Mergers: good news or bad news for business in difficult times?

Proposals for a merger between Sainsbury's and Asda made headlines recently, but generally, outside the financial press, little attention is paid to M&A news.

Perhaps this is a mistake; according to the Office for National Statistics M&A activity was higher in 2017 than the historic average and the value of UK domestic M&A in the first quarter of 2018 was £5.9 billion. This upward trend seems set to continue, but economic studies have consistently reported that between 60% and 80% of M&A transactions fail to deliver the expected benefits to shareholders. Does such M&A activity provide a boost to business or should companies be more cautious?

Why a merger?

A merger is an acquisition in which all or part of the payment is made in shares, so that shareholders of two companies become shareholders in a new company which then combines the businesses of both. Arguments in favour of such M&A activity promote the positive message that the merged Newco has an increased market share which delivers economies of scale so the company is more efficient and profitable, while able to deliver to the customer, goods or services of the same quality at lower prices. The negative alternative view is that mergers invariably result in job losses, strained relations with suppliers and the increased market share actually reduces competition which leads to higher prices for customers.

The way in which any M&A transaction will be evaluated depends on a particular set of pros and cons specific to the circumstances of the businesses. In practice, a wide range of factors must be considered, for example:

- How much will competition actually be reduced as a result of the merger? Will the new company have a dominant market share or are there other new businesses developing the sector?
- What are the economies of scale? Bulk buying can represent significant cost savings and the new business is likely to be in a stronger negotiating position vis a vis suppliers. (Although a "strategic alliance" not a merger, the advantage of such consolidation was illustrated by the recent announcement by Tesco and Carrefour to use their joint buying power to cut costs.)
- Can the merged business be streamlined? There may be administrative savings in relation to IT systems, warehousing, head quarters and other "back office" functions.
- Will the bigger Newco be more efficient? In certain sectors such as the pharmaceutical in which research and development (R&D) costs are considerable, merging businesses to increase profitability to re-invest in joint R&D may be key to success. Alternatively, in a declining industry, a merger may benefit organisations struggling to stay afloat.
- Are competition regulators likely to become involved? In the UK, for bigger transactions or those in particularly niche sectors, the Competition and Markets Authority (CMA) has jurisdiction to examine a merger (including acquisitions and joint ventures) if the target's turnover exceeds £70 million or if the merged business's market share exceeds 25% of the same goods or services supplied in the UK. The CMA has options either to block (or unwind) the merger, to allow it, or to allow it after imposing specific conditions. Businesses can notify the CMA in advance, but the merger regime is voluntary and no prior clearance is necessary. However after its review, the CMA has the power to unwind a completed deal if it determines there has been a "substantial lessening of competition" as a result of the merger.

Sainsbury's and ASDA

If it proceeds, the merger between Sainsbury's and Asda will create a new market leader in the grocery sector. Following the announcement, the CMA launched a "phase one" inquiry into whether or not there is likely to be any substantial lessening of competition in the UK grocery business; and earlier this month it confirmed that the deal raises sufficient concerns to be referred for a more in-depth review. The combined business is expected to have a 31% market share, which is significant, as currently Tesco's share is approximately 30%. The CMA's review is keenly anticipated as this sector has history; in 2003 Asda's proposed takeover of Safeway was blocked by the then Competition Commission, but in 2017, the merger between Tesco and Booker, the wholesalers, was approved. In statements, Sainsbury's and Asda have argued that the combined mega business is good news; it will mean lower prices for customers and is prudent strategic planning both in response to the increasing popularity of discount retailers like Lidl and Aldi, and in anticipation of Amazon's suspected ambitions in the grocery sector. Public reaction has been mixed; whatever the perceived benefits for the two supermarkets, there are concerns for suppliers, warning of job losses, store closures and wry comment on Sainsbury's CEO Mike Coupe's untimely rendition of "We're in the Money"... The CMA investigation has been welcomed and, for the moment, the jury is out.

The way in which any M&A transaction will be evaluated depends on a particular set of pros and cons specific to the circumstances of the businesses.

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What to do with a damaging review?

Is your business or product reviewed on sites like TripAdvisor or Trustpilot? Perhaps you are using AirBnB to advertise your holiday lets? Or your business might be mentioned on a local community group page on social media. If so, you may benefit from great, honest reviews but may also be the recipient of false, negative comments published on an online forum.

When someone makes a false statement about another person or company, the injured party can make a claim for damages and/or obtain an injunction against them making **defamatory statements** or statements which constitute malicious falsehood (or indeed both).

Alternatively you may not want to incur the costs of formal action but would like the statement removed, or an apology.

It is important to act quickly, even if you do not want to take formal action.

There is more information in **this article**, but if you are concerned about any publication relating to you or your business, **Greg Saunders**, greg.saunders@clarkewillmott.com and **Laura Mackain-Bremner**, laura.mb@clarkewillmott.com can advise whether or not you have a claim against the publisher for malicious falsehood or defamation.

Hotel Developments: The future is prefabricated

Modular construction is not a novel method of procurement.

In an industry acknowledged to be "contractor friendly" when it comes to pricing and delivering construction projects, this more innovative route is quickly gaining momentum.

Modular construction involves various methods and processes (generally heavily automated) which take construction of a project away from the traditional "construction site" and, instead, place it in a system where components are constructed and assembled off-site, then delivered "ready made" for installation at the site.

The hotel market in particular is engaging with modular construction, with support for this form of procurement from industry giants such as Hilton, Premier Inn and Jury's Inn. In an increasingly competitive market, a method of construction that offers long-term savings without a compromise on quality is understandably a "no-brainer" when it comes to the growing burden of providing sustainable accommodation. Other areas of the construction industry are taking note – the concept of modular construction has a long history in the campus, education and distribution arenas, but the potential benefits are now being seen across a number of wider industry sectors such as social housing and major projects.

Clarke Willmott's construction team has first-hand experience of modular construction being utilised for workforce accommodation at Hinkley Point C Power Station. There are clear benefits in manufacturing "modules" (sometimes known as "pods") off-site, using the same materials and designs as would be used in more traditional construction, but often in far less time. This concept is particularly advantageous when developing fairly commoditised footprints within a project, as will often be the case with hotel, student, campus or housing projects. Taking the production off-site enables the developer to minimise some of the risks that would otherwise be "at large" (and the subject of lengthy contract or tender negotiations), such as bad weather and site conditions. It also provides the backdrop for more robust, easier-to-manage procurement and quality control processes.

Modular construction has obvious benefits when it comes to testing. Taking the construction process away from site, to a climate-controlled, secure facility allows the testing process to be as vigorous and/or as repetitive as required, without needing to factor in site-specific anomalies traditionally present on-site. While some testing and co-ordination will be required at site as the project nears completion, the modular process should reduce last minute surprises (and extension of time claims) where it transpires that things do not quite work as expected.

With a growing focus on sustainability, modular construction also scores "green" points, with manufacturing facilities better able to deliver environmentally-friendly processes than a traditional site. Facilities can be specifically designed to be as sustainable as possible – this is not true of a traditional site, where things have to be taken as found.

There has been nervousness in the market around the quality of modular products, with early critics querying how a "production line" approach could deliver the same quality as something built under developing conditions on site. However, this mind-set is now emerging as a misconception, thanks to the continuous improvement of technology informing design and manufacturing. Technology advances in the industry over the last decade have been far-reaching. The design process now utilises sophisticated CAD and BIM technologies, enabling designers to accurately design and programme to ever more achievable tolerances.

Cost

This inevitably comes at a price. Developers wanting to turn to long term modular construction will often need significant upfront investment to research appropriate technology and designers. However, if this investment process is well managed, the result can be a streamlined, highly technical process that is fully bespoke.

The flow of funds on a modular construction project is likely to see a move from valuation-based payments to milestone payments. Modular construction often requires large orders being placed at the outset, requiring materials and designs to be available at the early stages of a project. While this should level out as the project gets underway, there is inevitable unease around high front-ended costs in an industry not used to these. Requests for advance payments are likely to grow in frequency as the market embraces modular methods, with contractors looking to lock in funds to get production underway. Construction contracts will need careful consideration to allay developer concerns about a change in procurement structure from one they may have used for decades. Interested third parties may also need to be guided through the process in detail to better understand its nuances and longer term benefits.

To assist developers in benefitting from process innovations and economies of scale longer term (and to assist emerging modular construction facilities), there needs to be a suitably large scale of modular construction projects. Certain markets are ahead of others here. There is appetite for this model in hotels, accommodation and housing developments but some markets and locations remain behind the curve.

If a developer takes the ultimate step in embracing modular construction and builds its own fabrication facility, an initial and substantial outlay is required, but a developer can then develop and refine its own particular product and methodology of construction, allowing for quicker completion of future projects. Labour may be cheaper if this model is followed as many methods of modular construction utilise semi-skilled labour for the majority of the processes, with the skilled (more expensive and more scarce) labour required only towards the end of the project; unlike traditional construction which requires a constant presence of skilled labour.

Is the investment worth it?

In an evolving construction industry which has a backdrop of market uncertainties and a recognised skills shortage looming, it seems inevitable that more developers will pursue more control and use modular construction to keep project delivery efficient and sustainable.

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Commercial litigation: recent developments in debt collection

A number of important developments have recently been introduced to help with effective debt collection. We look at the changes that will assist retail suppliers.

Pre-Action Protocol for Debt Claims (the debt PAP)

In the **autumn edition of Retail Line** we looked at the introduction of a specific pre action protocol aimed at debt recovery, which came into force in October 2017. The debt PAP does not generally apply to business-to-business debts but importantly does apply if the debtor is a sole trader.

A key change for retail suppliers is that the debt PAP now extends the time it takes to issue court proceedings by four to five weeks. Under the debt PAP, 30 days need to be given for a debtor to respond and the supplier is required to give at least 14 days' notice of their intention to start court proceedings where the debtor has responded to the letter of claim but agreement has not been reached.

Retail suppliers may wish to consider shortening their credit control process to account for this extension of time. It is also noteworthy that the debt PAP requires more extensive information to be provided in the initial letter of claim and requires certain financial statements to be provided.

New online court service

Seeking to make it quicker and easier for creditors to claim money owed, resolve disputes out of court and access mediation, HM Courts & Tribunals Service has made public a new online court service for money claims under £10,000. The service went live in "public beta" on 6 April 2018. Although the service has different and more advanced features than Money Claim Online (MCOL) it currently does not take the user any further than MCOL. The stage presently available is limited to the issue and response to the claim. It is intended that the online court will be structured in such a way so that there is no need for a person to refer to the new procedure rules relating to the online court at all unless they actively want to do so. Each stage of the online court is being trialled and tested before moving to the next stage. We will see in due course how this service improves access to justice. A recent HMCTS report states that more than 80% of early users (which includes individuals and small businesses) found the service very good and easy to use.

Be vigilant regarding litigation deadlines.

Following reforms to the court rules and case law the courts continue to be firm about the need to comply with any timeframes set out in directions and/or the rules. The rules do provide the parties with the ability to extend time frames for the completion of certain procedural steps but they can be fairly complex and, importantly, severe consequences can arise if deadlines are not complied with.

Suppliers need to ensure that they request any required extensions of time well in advance (keeping in mind any limitations to that ability in the rules) and respond appropriately to any requests for extensions of time which may be sought by debtors. Extensions of time relating to disclosure and witness statements are often agreed, but such agreements are often "give and take" in litigation.

The Insolvency Rules 2016

The long awaited changes to the insolvency rules came into force in April 2017. A key amendment has affected the way in which creditors collectively make decisions. Physical meetings were previously held but, recognising that proxy voting was common (rather than actual attendance), the new rules have removed default physical meetings. The new standard is the use of new qualifying decision procedures.

The Insolvency Rules 2016 introduce correspondence, electronic voting, virtual meetings and any other decision-making procedure that enables creditors to participate equally for collective decision making. Physical meetings can now generally only be requested (with exceptions) by either 10% of the creditors in value, 10% of the total number of creditors or 10 individual creditors.

There is also a new decision making procedure: the deemed consent procedure is where an officeholder provides creditors with a notice stating the deemed consent procedure is being used and gives directions on how to object. If the officeholder does not receive the required number of objections the proposal is deemed to be approved. Although this deemed consent procedure cannot be used in all situations (including importantly officeholder's remuneration) it is a new mechanism which suppliers need to be familiar with. We will see in due course if the modernisation of the decision making procedures increases the engagement of creditors.

GDPR

The European General Data Protection Regulation reminds us, as per the Data Protection Act 1998, that comments recorded about customers will be personal data and therefore may be requested as part of a subject access request. Suppliers should have **clear policies in place to prevent inappropriate comments being made** which can damage brand and customer relationships.

Future developments

In the future we may see the introduction of a wholly new intermediate-track for claims with a monetary value between £25,001 and £100,000 (although it is acknowledged that value cannot be the sole criterion for allocating cases to this track). It is suggested that cases allocated to this potential new track will be managed under a new streamlined procedure and would generally involve cases which could be tried in three days or less, with no more than two expert witnesses giving oral evidence for each party. Once a case is allocated to the intermediate track claims will be assigned to one of four bands depending on the complexity of the case. This banding is important, not least because it will impact upon the costs that can be recovered. It is proposed that cases in the intermediate-track be subject to a fixed costs regime with recoverable costs being specified depending on the band. As part of this proposed reform banding an associated fixed costs regime is also expected for fast track cases.

It is important for suppliers to keep up to date with changes that affect the collection of debts and to regularly review their debt collection strategies, procedures and standard terms to keep them current.

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