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Retail Line

Retail & Leisure Briefing • Summer 2020

The end of lockdown

and data protection requirements for the hospitality sector

On 23 June 2020 the Prime Minister announced further easing of the coronavirus (COVID-19) restrictions as part of the government's plan to return life to as near normal as possible.

The loosening of the lockdown restrictions comes as a welcome relief to businesses within the retail and food & drink sector. However, the ability to reopen will impose upon business owners' additional responsibilities and requirements. In addition to ensuring effective social distancing measures are in place for both employees and customers; business will also need to review and update their data protection knowledge.

The easing of the lockdown measures has been made possible in part by the NHS Track and Trace scheme. The Government has requested that businesses assist this service by keeping a temporary record of their customers for 21 days, in a way that is manageable for the business, to assist the NHS Test and Trace scheme with requests for that data if needed.

Many businesses who take bookings will already have systems in place for recording customer details such as restaurants, hotels, and hair salons. There will be several establishments who do not collect customer details currently such as pubs, cafes etc. and will need to change their processes.

It is likely that many businesses will come across customers who will not co-operate with the Governments proposed requirements. It is unclear at this stage the specific obligations that will be imposed upon businesses in relation to the collection of customer data and the transfer of such data to the NHS Test and Trace scheme.

The Government is working with industry bodies and the Information Commissioners Office to provide detailed guidance on how businesses should design their customer data collection systems to be compliant with data protection legislation and these new requirements. The Government has said that it will provide detailed guidance to businesses "shortly".

With the lack of guidance at this stage and many businesses looking to open in early July we have set out below a few points to assist businesses with their obligations under the Data Protection legislation. As a reminder personal data will include amongst other things name, address, telephone number and email address for your customers.

1. You must make sure that any personal data collected for compliance with Covid-19 requirements is not used for any other purpose such as send marketing communications about offers or promotions.
2. When collecting the personal data from your customers only take what you need such as a name and telephone number/email address.

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Welcome

to the Summer edition of Retail Line

As retail and leisure businesses begin the hard work of opening up the sector after the unprecedented lockdown, many of us are making adjustments and looking at issues we have never had to consider before.

In this edition of Retail Line our commercial experts advise how businesses can ensure they comply with data protection requirements imposed following the pandemic, new solutions for collecting debt and possible options for terminating a contract.

Our property experts look at new restrictions on commercial forfeiture and rent collection, and the difficulties in granting green leases for existing buildings.

Our litigation expert looks at a case being brought by the FCA to test the validity of Business Interruption insurance claims; and our intellectual property experts look at the IPO decision to extend deadlines due to COVID-19.

Clarke Willmott's retail and leisure teams are here to support businesses in meeting the challenges of extraordinary market conditions. Our **legal hub** offers a range of free online tools for you to establish what legal advice you may need, or you may prefer to contact a retail and leisure specialist.

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The end of lockdown - continued

3. You must provide your customer with a privacy notice setting out why you are collecting the data and what you will be doing with it. This will need to include amongst other things, details about using the information to contact them in the event of a Covid-19 outbreak and passing the information to the NHS (if required) for the purposes of the NHS Test & Trace scheme.
4. You need to have in place clearly documented processes for how your business will collect, store, and dispose of customer personal data. You will also need to make sure that all your employees are aware of and follow the required processes.

If you would like any further information about your obligations under the Data Protection legislation in connection with the collection of customer personal data or the drafting of appropriate privacy notices, please contact Amy Peacey.

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Commercial Court to test validity of Business Interruption insurance claims

The Financial Conduct Authority (FCA) has issued legal proceedings against a number of leading UK insurers which will lead to a test case in the Commercial Court concerning Business Interruption ("BI") insurance policy wording and coverage

Arguments over BI coverage (or the lack of) have been widespread since the outbreak of the coronavirus pandemic, which has seen an across the board shutdown of many business sectors in the UK. Thousands of businesses now have severe cash flow problems. Many have already entered into formal insolvency arrangements. The retail, travel and leisure industries have been particularly hard hit with little to suggest that their positions will improve any time soon.

In April 2020, the FCA wrote to a large number of insurance companies seeking clarification about whether they are declining, or intend to decline, BI insurance claims.

Based on the information obtained from this exercise, the FCA issued legal proceedings in the Commercial Court on 10 June 2020 which will seek declarations as to the scope of cover under the relevant business interruption policy conditions. Judgment is expected to be handed down in early August 2020 after an eight-day trial before Lord Justice Flaux and Mr Justice Butcher.

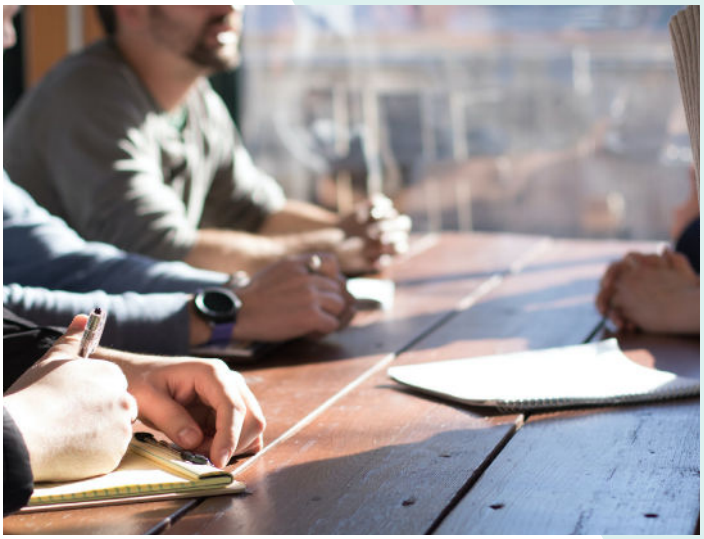
Clarke Willmott is handling a number of high value claims against several of the insurers targeted by the FCA's legal action. We welcome and strongly support the FCA's move on behalf of our clients and will be watching matters closely.

Christopher Woolard, Interim Chief Executive at the FCA said:

"The court action we are taking is aimed at providing clarity and certainty for everyone involved in these BI disputes, policyholder and insurer alike. We feel it is also the quickest route to this clarity and by covering multiple policies and insurers, it will also be of most use across the market. The identification of a representative sample of policies and the agreement of insurers who underwrite them to participate in these proceedings is a major step forward in progressing the matter to court."

The following insurers will have their policy wordings examined by the Commercial Court.

- Allianz Insurance plc
- American International Group UK Limited
- Arch Insurance (UK) Limited
- Argenta Syndicate Management Limited
- Aspen Insurance UK Limited
- Aviva Insurance Limited
- Axa Insurance UK plc



- Chubb European Group SE
- Ecclesiastical Insurance Office plc
- Hiscox Insurance Company Limited
- Liberty Mutual Insurance Europe SE
- MS Amlin Underwriting Limited
- Protector Insurance UK
- QBE UK Limited
- Royal & Sun Alliance Insurance plc
- Zurich Insurance plc

Policyholders should not assume that inclusion of their policy wording in this case will mean their policies will provide them with cover. The FCA is seeking a judgment that will help policyholders and insurers have a much clearer view of which BI policies respond to the COVID-19 pandemic and those that don't.

Many businesses across the UK, particularly in the leisure, hospitality and retail sectors, will anxiously await the outcome of this process. The Commercial Court's ruling is expected to supply much wanted guidance to both insureds and insurers alike concerning policy coverage.

For further information about business interruption insurance claims, please contact:

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Further restrictions on commercial forfeiture and rent collection

On 19 June the Government made further announcements in an effort to protect the economy which may find favour with some and consternation with others.

The central message is that landlords and tenants are encouraged to be transparent with each other and co-operate when discussing rent payment issues.

Further updates were announced on 19 June which kick the can down the road for various non-payment of rent enforcement options including:

- Restricting bailiff (CRAR) action against tenants to cases where the rent is more than 189 days overdue (extended from 90 days);
- A Landlord's ability to forfeit for non-payment of rent has been delayed to 30 September 2020 (previously the moratorium extended to 30 June);
- Proposals to restrain the use of statutory demands and winding up petitions for COVID-19 related debts until 30 September.

The Corporate Insolvency and Governance Bill 2020 (CIG Bill) is expected to become law on or shortly after 23 July. It will bring into law the restrictions on statutory demands and winding up petitions. Although not law yet, the courts are treating it as if it is in force. On 2 June the High Court granted an injunction to prevent a winding up petition being presented based on the clear intention of government to pass legislation with retrospective effect.

These measures come too late to prevent a number of CVA proposals aimed at reducing rents or escaping lease liabilities entirely. It remains to be seen whether these measures or the proposed moratorium under the CIG Bill will prevent more formal insolvencies. It is clear that landlords and tenants need to think differently if they are to survive and thrive moving forward.

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Sector comment

Tentative steps are at last being taken to drive life back into society and high streets, but the retail and hospitality sectors will feel the economic disruption of coronavirus for some time and they face particular challenges as they return to normal trading.

Both Landlords and Tenants have suffered during lockdown. Intu (owner of some of the best known shopping centres in the country) has gone into administration following a sharp decline in rental receipts. Tenants have only recently been able to open doors in certain sectors and while some pubs and restaurants are planning to open this weekend, they will have to comply with social distancing guidelines and strict limitations on numbers.

Does this 'new normal' offer any opportunities for the landlord/tenant relationship to be evaluated? Already some tenants have been able to vary their existing lease terms to provide for greater flexibility (including reduced rent or a change to rent review methods) and landlords will be keen to retain existing tenants where possible, rather than run the risk of empty units. The impact of COVID-19 on property valuations remains, at present, unknown. However, Gareth Smyth of Hilton Smythe (a commercial property and business broker) does not expect future pandemics to be factored in to valuations. "A pandemic is a one off and exceptional circumstance that is unlikely to repeat itself. If anything, adjustment will be made the other way so as to reduce the impact this pandemic has had on the business or yields during the pandemic".

What is clear at this stage is many retailers will need to consider and revise their operations and supply chains. For many at this stage, the focus will be on preserving cash, however to accommodate the systemic shift in retail shopping retailers will need various modes of satisfying consumer demand (via online platforms and delivery where possible).

Hospitality faces the critical issue of capacity within social distancing guidelines. Whether pubs and restaurants will be able to survive while limiting the numbers they are permitted to serve remains to be seen.

The fragility of lockdown easing will be a concern for the sector for some time, as has been demonstrated by the first "local lockdown" in Leicester, so strengthening relationships between landlord and tenant to allow for greater flexibility and co-operation will be key to the real estate market.

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Can you terminate? Should you terminate?

A practical consideration of the effect of the coronavirus pandemic on contracts.

Protecting and safeguarding your business has never been more important. With uncertainty about the length of business closures and social distancing policies, we urge individuals and businesses to undertake a thorough analysis of existing contracts to identify their rights and liabilities during these testing times.

Consumers and businesses exposed to financial constraints may think that ending a contract on the grounds of coronavirus will help cut costs. However, unless there is a very clear and applicable force majeure clause in your contract you should be wary about ceasing to act (whether short or long term) or claiming the contract is at an end. The reason for this is that you may not have any contractual or legal grounds to do so, and if that is the case you could be sued for damages for breach of contract.

Force majeure

If your desired outcome is to bring the contract to an end, it is best to begin by checking whether a termination mechanism exists that avoids having to rely on the current pandemic. For example, some contracts may be terminated with notice or in response to a breach. If no such mechanism exists, checking for a force majeure clause ought to fall next on your review. Force majeure clauses aim to excuse one or both parties from their contractual obligations following the occurrence of unexpected events or circumstances outside of the party's control.

Force majeure cannot be relied on unless it is an express term of the contract. Even when it is, the specific clause must be either specific in catching COVID-19, or wide enough to catch the crisis on the basis that it could for example fall within the definition of a pandemic, epidemic or acts of governmental authorities, such as the closing of businesses. If a force majeure clause appears to apply, reliance on the clause will require a consideration of the specific performance obligations under the contract, the specific facts of each case and will also normally require service of a force majeure notice on the other party.

Not all force majeure clauses give an automatic right to terminate the contract. Instead they may allow extensions of time or suspension of performance whilst the force majeure event continues.

Other options?

If force majeure does not apply or does not give you a right to terminate, do you have any other options in light of the coronavirus pandemic?

Frustrated contracts

It could be possible to argue that the crisis, which was unexpected and out of the parties' control, has impacted on the contract so badly that performance is impossible. Alternatively you might be able to argue that the contractual obligations are now radically different to those which were contemplated at the time of entering the contract. This looks attractive, as the pandemic has of course caused businesses to close and created supply chain issues throughout various industries. That said, the fact that a business may incur additional expense in meeting its existing obligations is not itself a ground for claiming frustration, nor force majeure. This means that if you could honour the supply of goods, but at extra expense, the contract is unlikely to be frustrated.

If a contract is frustrated it will be automatically terminated at the point of frustration and future obligations will be discharged. Ordinarily sums due and payable prior to the date of frustration will be legally due, however it may be possible to argue that the other party should account for any value which it received before the contract was discharged.

Repudiation

The other option is to consider any existing performance issues. You can evaluate whether any shortcomings or failures are so serious that they go to the root of the contract and substantially deprive the innocent party of the absolute benefit that the contract was intended to provide. Such repudiatory breaches of contract enable the innocent party to either treat the contract as ended and seek damages, or affirm the contract and seek damages (as keeping the contract in place may be important for other valuable reasons). Repudiation is a complex area of law and something which is regularly litigated and should not be pursued without legal advice.

Suspension, extension, or termination

If these legal options for terminating are not available, or carry too much risk, an alternative practical option would be to speak with the other party and attempt to agree a way forward. It may be mutually beneficial to bring a contract to an end during this crisis. Alternatively, you may be able to suspend performance or extend time for performance. Varying the contract could in the long run be a less risky and cheaper option, but of course relies on an agreement being reached and, crucially, the variation being legally binding.

Wrongful or premature termination of a contract could result in you being in repudiatory breach of contract and therefore it is advisable to seek legal advice before taking any action. Given the uncertainty surrounding the crisis and the likely period of business closure, it may well be difficult to rely on force majeure or frustration. Ultimately the impact of the crisis will vary from contract to contract and a case by case risk assessment will be necessary.

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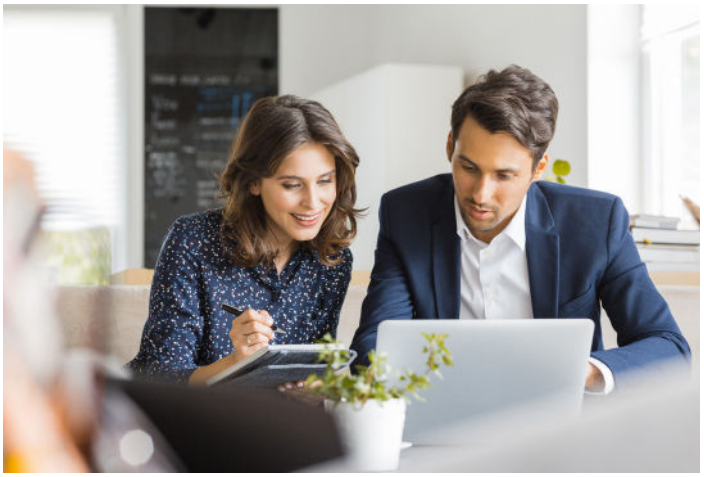

The difficulties in granting green leases of existing buildings

The 'green lease' first emerged in Australia in 2006, where the government insisted on their use for all government-owned and government-occupied buildings.

In the Australian government's tenant's guide to green leases (2012), the green lease is defined as:

A lease between the landlord and tenant which aims to ensure that the ongoing use and operation of the building minimises environmental impacts.

The Better Buildings Partnership published its **Green Lease Toolkit** in 2009 but the use of its provisions by commercial property owners has been limited. Since the passing of the Energy Performance of Buildings (England and Wales) Regulations 2012 (the Regulations), landlords have been more concerned to ensure their commercial property portfolios will meet the minimum energy standard (currently E). More information about these requirements is set out in our update: **Is the minimum enough?**

A green lease requires a collaborative approach: the landlord and tenant working together with the aim of reducing and then minimising the environmental impact of a building. The main reason why this collaborative approach fails is because of the different level of interest that the parties have in the premises. Statistical data suggests retail lease lengths have been rising and currently average ten years. Nevertheless even a decade of occupation on a rack rent lease does not match the freehold interest of the landlord when it comes to considering and financing the work needed to improve energy performance.

2019 was generally regarded as a poor year for retail and this raises the possibility that the interests of landlords and tenants are being pushed further apart. Tenants continue to seek as much flexibility as possible including break clauses in leases. Landlords favour granting leases which are contracted out of the Landlord and Tenant Act 1954 so the tenant can be required to leave at the end of the term if the landlord wants to change the occupier.

Leases now frequently contain provisions which prevent a tenant:

- obtaining a new EPC unless required by the Regulations;
- carrying out alterations which will have a downward effect on the energy rating of the property; and
- using an assessor to prepare an EPC (when needed) unless they are approved by the landlord.

These provisions barely scratch the surface of what might be regarded as a 'green lease' and are centred on securing that the landlord does not fall foul of the Regulations. Even then, this approach is unlikely to provide assistance, as the government plans to increase the minimum energy rating; by 2030 commercial property will be required to have a minimum efficiency rating of C or B before landlords will be permitted to let it.

It seems that landlords will need to take the first step in pressing for green leases in the retail sector; the increase in the permissible minimum energy rating will also drive this. This does not mean that landlords must meet the cost on their own or that tenants will be let off the hook. **The RICS Service Charges in Commercial Property (first edition)** recognises that the sustainability debate has been focused on how to develop more sustainable buildings, but it has ignored two issues:

- what to do with existing buildings; and
- the role of the occupier in reducing emissions.

Existing buildings means existing leases and the terms of the lease will be paramount. Some existing leases contain clauses loosely committing the parties to improving the energy performance of the building but without obligation to take any particular step. The landlord and tenant can do this without the need for a prompt from the lease. Tenants need to acknowledge that their occupation of the premises has a significant effect on power used. Lighting and heating are two areas where tenants can consider their practice.

To significantly improve energy performance of existing buildings will, however, require a high level of investment in alternative energy sources and replacement of inefficient fixtures in existing buildings. Landlords bound to improve a building's energy performance will need to find the right time to make that investment in the hope of attracting tenants who are either encouraged by lower utility costs or keen to show green credentials. Once presented with a more energy efficient building, lease terms can commit both parties to maintain them.

Future-proofing your property estate will be essential. For information about exemptions or assistance with drafting, please contact:

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Are your business terms and conditions sufficient?

Most businesses are being severely disrupted by the coronavirus pandemic.

Once immediate concerns are resolved, many businesses may find they have more time on their hands to focus inwards on the internal policies and the contractual terms on which they operate. This time could be used as an opportunity to review and update your business' terms and conditions.

Why are terms and conditions important?

The importance of sufficient terms and conditions goes beyond the standardisation of the terms used in the business. They provide legal certainty and reduce risk by clearly setting out in black and white the rights and obligations of each party. This means that there is less scope for legal disputes, which could be costly and harmful to a business' reputation. In turn, this gives both parties confidence that expectations will be met and increases the likelihood of customers returning to use your goods or services.

In addition, the current crisis may have identified previously unforeseen gaps in your current terms and conditions that should now be reviewed to protect your business and provide certainty in the future.

What should a comprehensive set of terms and conditions include?

Of course, each set of terms and conditions will depend on the type of business which they relate to and the type of goods or services being provided. There are, however, some provisions which are common to all sets of terms. These include (but are not limited to):

- clear payment terms and provisions for a failure to pay;
- provisions which clearly set out the type and extent of goods or services to be provided;
- consequences of a breach of the agreement as a result of either party failing to carry out their obligations;
- the term of the agreement and provisions for ending the contract; and
- a choice of law clause.

It is important to note that the terms and conditions should be properly incorporated into all contracts in order for them to be effective.

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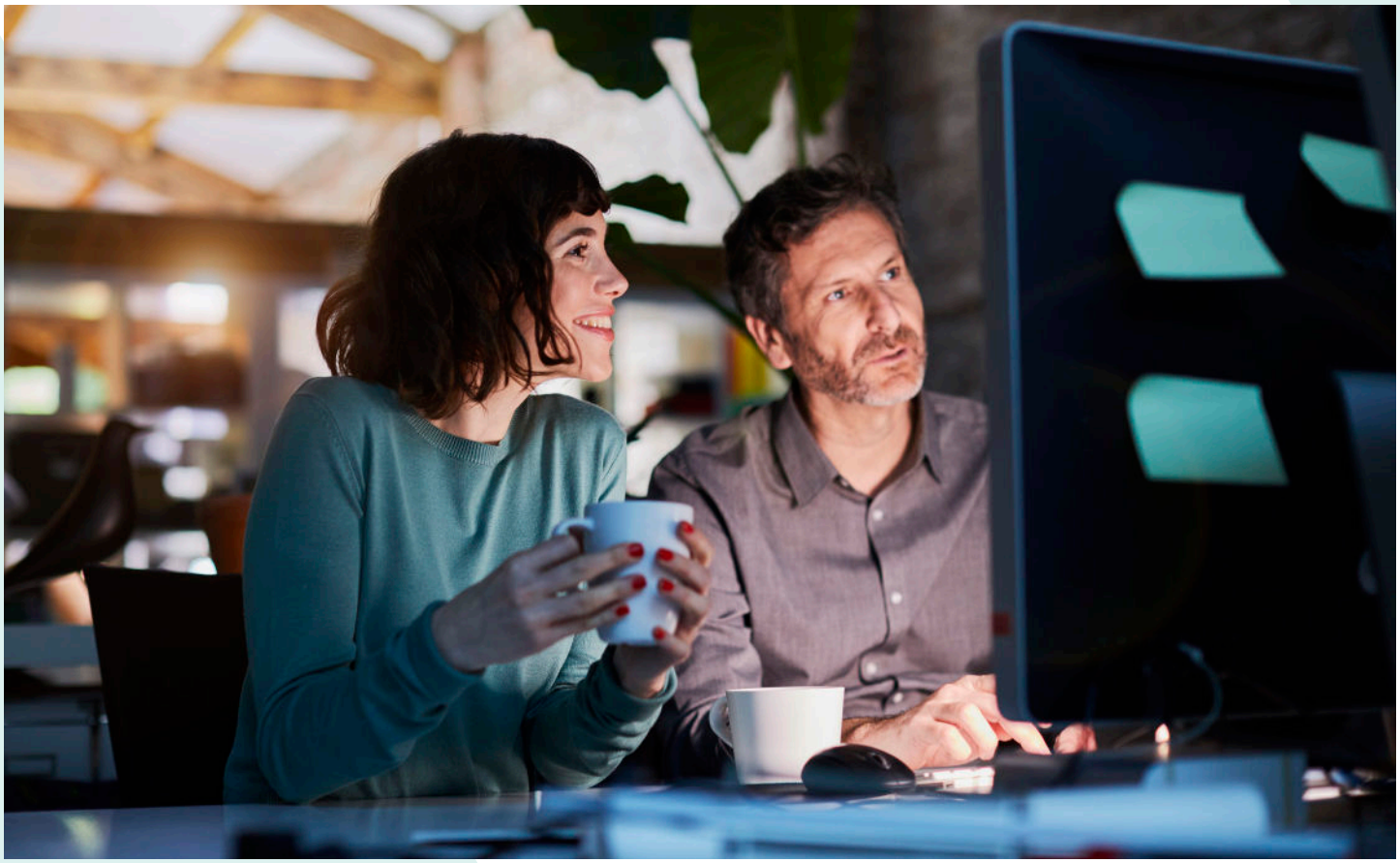

Debt recovery: how should businesses tailor strategies during coronavirus

The coronavirus pandemic has created numerous challenges for businesses. Some are thriving but others are struggling to stay afloat. Many creditors are themselves being hit hard.

This means that the support they can offer their customers before they hit financial problems is likely to be limited. Creditors must consider how to maintain their income at a time when many of their customers are struggling.

Specialist debt recovery lawyers at national law firm Clarke Willmott LLP say prompt and straightforward communication is key and that some thinking outside the box as well as professional advice may be needed to stay afloat during these unprecedented times.

Phil Roberts, head of Clarke Willmott's debt recovery team, said:

"Creditors are facing many challenges during the coronavirus pandemic. Some businesses have furloughed staff and do not have the capacity to contact debtors. Others have found that alternative working practices means they are so busy there is no time to consider outstanding debts.

"The general approach of the credit industry has demonstrated a willingness to help and support customers with debt where possible.

"In line with this, we recommend creditors should engage with customers to try to find solutions for the repayment of debt. Honest, sensitive and straightforward communication is likely to help both parties find a way forward.

"Creditors need to look to alternative arrangements that they may not have previously considered such as temporary payment breaks, payment plans, the freezing of interest or negotiating reduced balance full and final settlements.

"Recourse to the courts should always be the last resort, and now more than ever creditors should be mindful of the additional costs of court action and whether these will ultimately be recoverable. Where achievable, customer engagement and amicable settlement agreements are clearly preferable."

However, where does this leave creditors whose customers are not willing to engage?

With current circumstances being far from usual, creditors may be reluctant to ask their customers for payment of monies owed. In turn, this may put their own businesses at risk.

Phil continued: *"It's important that creditors do not delay in asking for payment, especially as it can mean crucial conversations can begin sooner rather than later. More than ever, there should be a real focus on making prompt customer contact and engagement.*

"There are some simple and obvious steps which can be taken. If you have email addresses and telephone numbers, then use these to contact customers in addition to standard lettering processes. If your customer is a business, a simple internet search could reveal whether they are trading or provide alternative contact details if the business is closed.

"Many businesses will already have procedures in place and the additional steps that can be taken to prompt customer engagement will vary. However, taking a pro-active approach will prompt a better outcome in terms of keeping cash flowing. If court proceedings become necessary, it will also provide evidence that the creditor has done all that could reasonably have been expected to obtain payment."

Clarke Willmott's Debt Recovery team are experts in helping businesses develop tailored debt recovery strategies and aim to help businesses find sustainable, sensitive solutions. For information on how they can help you during this difficult time, please contact:

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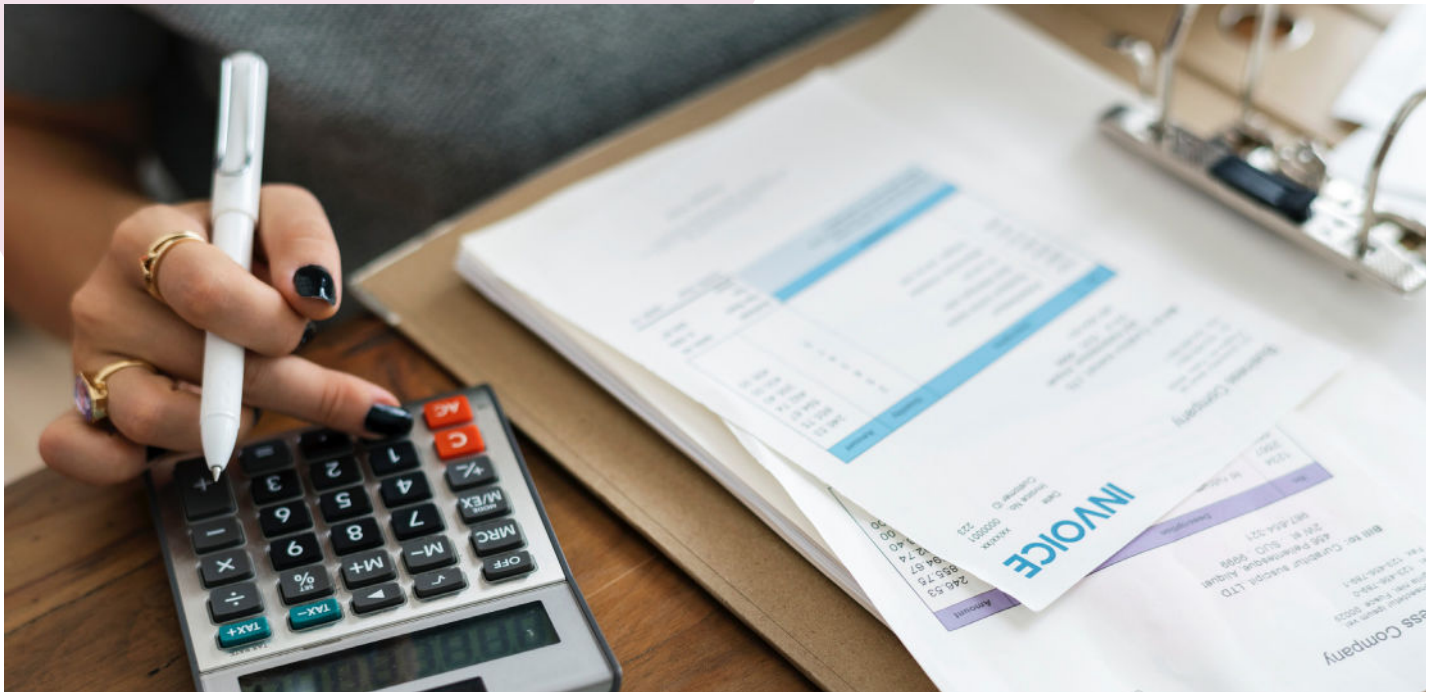

UK IPO extends deadlines due to COVID-19

"Interrupted Days"

The UK IPO has reviewed its decision in relation to "interrupted days" and has declared that its "interrupted days" period will end on 29 July 2020. Therefore, the first non-interrupted day will commence on 30 July 2020 and all normal operations will resume. The UK IPO has stated that it is working to put measures in place to ease burdens on businesses following the end of the "interrupted days" period. This includes seeking parliamentary approval in order to temporarily remove the fees for extension requests.

This follows previous announcements on 27 March 2020 and 7 May 2020 where the UK IPO declared that 24 March 2020 and subsequent days were to be "interrupted days" until further notice. This means that any deadlines which fall on an "interrupted day" will be extended to the next non-interrupted day.

In order to keep work moving and to avoid a surge of work once the interruption period ends, where possible Clarke Willmott will continue to meet the original deadlines rather than wait for the end of the period of interruption.

This period of interruption does not apply to time periods set out under the Madrid System, where the UKIPO may be acting as a Receiving Office.

New filings

New Trade Mark and Design applications will not have their filing dates affected by these interrupted days where they are filed at the UK IPO and do not claim priority from a previous application. These will continue to be assigned a filing date under the usual rules.

Examinations and hearing reports

The UK IPO has also announced that it will allow four months to respond to new examination reports issued in relation to Trade Mark applications, not the current two months, removing the need for an extension.

It is not possible to extend the reply period for Designs examination reports but extensions are available.

Most accepted Trade Marks will be published for opposition purposes. There may be a delay for some because of the need to notify owners of any earlier UK marks (and international marks with UK designation) identified within the search report as this is currently only done by post.

There will be a delay in receiving postal versions of Trade Mark and Design registration certificates.

The UK IPO will continue to receive and process international applications and registrations and correspond with holders by email where possible.

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