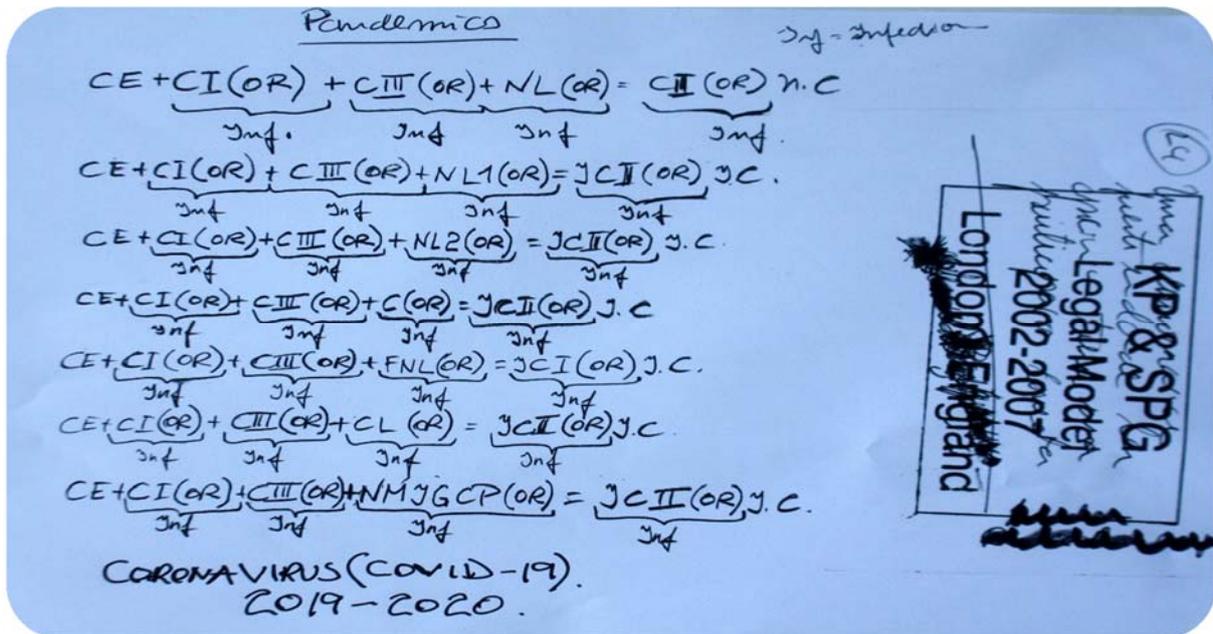


# Press Release 275 Pysdens Solicitors London 2020

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## The Late Payment Commercial Debts (Interest) Act 1998 (the Act) and the Subject of Historic Late Payment by Customers.

### PYSDENS COVID-19: LATE PAYMENT OF DEBTS

Covid-19 has forced governments around the world to help commercial entities and individuals. We do not know yet how long COVID-19 will stop the normal functioning of the world economy. One of our suggestions is that we as legal entities learn how to protect

ourselves in order to activate each nation's economy to the best of our abilities as the crisis continues and to be ready for when normality begins to emerge. Washing hands, social/physical distance, cleaning surfaces, having areas to disinfect shopping in households and deliveries in warehouses could be reviewed in order to create standard practices. Another possibility would be to know what materials are recommended and approved so we can make our own re-useable masks and to see if the protection of eyes and hands and bodies could set a prevention-plan and re-start the mobility of humans around the world. If a cure for COVID-19 takes time, we suggest that governments need to consider how quickly the mobility of people could be achieved under world standard prevention techniques.

Another issue with reference to the economy is which commercial entities should be helped. This is a difficult task. There are businesses that perhaps should not be helped but it is possible that they will ask for assistance. What is moral and what is legal are two challenges which governments and individuals are facing at this time.

It is likely that the number of commercial debtors will increase and **The Late Payment Commercial Debts (Interest) Act 1998 (the Act)** needs to be revisited here in the UK by commercial entities experiencing problems with late payment by clients as will similar legislation in other countries which commercial debtors are bound by.

This Act has been in place for some time now in the UK and was designed to act as a weapon that could be used by commercial entities to stop serial late payment of their charges in commercial contracts. The Act provides that interest will run in respect of late payment of qualifying debts on which compensation may be claimed as well. The Act provides a definition of qualifying debts as being "*A debt created by virtue of an obligation under a contract to which the Act applies to pay the whole or part of the contract price*". It is being suggested by some that this means that as long as the obligation is there it does not matter when the debt arises and it does not have to be a live debt for the sums to fall due and could be an historic one but is this right?

When a Court in England and Wales interprets a statute or indeed the terms of a contract it applies the ordinary and natural meaning to words and in doing that a Judge will generally make reference to the Oxford English Dictionary definition. Therefore one has to ask first "what is a debt?" The Oxford English dictionary states that this is "money owed or due; the state of owing money". Owed or due means current, not future or past. Therefore can a party claim interest and compensation under the Act once the debt has been paid, albeit late? This must surely depend on whether the claiming party has made a demand for late payment interest and compensation during the existence of the debt or if there has been any implied waiver or estoppel. In the case of the freight forwarding Clause 21(D) in the BIFA 2017 standard terms and conditions (the BIFA Terms) provides that the Act shall apply to all payments due from the Customer and that there shall be no waiver unless agreed in writing by authorised officers of the parties. It is therefore worth reviewing one's contractual terms whether standard terms or not to see what these provide.

What happens in the case of the operation of the BIFA Terms if the creditor has a late paying customer and demands the payment making no reference to 21(D) under those terms and then receives the payment and takes no action to point out that the customer needs to pay interest and compensation or has not incorporated the BIFA Terms? The reality is that if the creditor has tight credit control procedures and presses for payment early after the credit period has

expired the amount of interest and compensation will be negligible but what if the position is repeated over and over again? The sum that would have been due for all breaches will begin to mount up. Can it be claimed or has the creditor waived any rights? Not under the BIFA Terms as they contain a non-waiver clause. However if the creditor forgets to incorporate the BIFA terms the Act will still apply but there could be waiver in such a case if the creditor does not make it clear each time the debt arises that interest and compensation is still owing on prior debts as each time the debt is cleared by a payment of the invoice sum with no interest and compensation and no action is taken this may be an implied acceptance of the payment in full and a waiver of the additional sums due.

It is of course a business decision for each creditor as to whether they would want to sue a serial late payer or even claim interest and compensation whether on a current or historic debt which could end in the loss of that client or at least create an unhappy client. Managing debtors is not anything new but this Act can assist in that management. The question is can it be used after the event i.e. after a debt has been paid without including any interest or compensation under the Act?

What if a customer goes into Liquidation or Administration? The Liquidator/Administrator has a duty to collect in the sums due for the benefit of the creditors. Should they check payment terms of their client and see if any suppliers have been historic serial late payers and put in a claim for interest and compensation owed on debts that had been paid late? The Act provides that interest ceases to run when the interest would cease to run if it were carried under an express contract term which is not particularly helpful but appears to suggest application of any underlying time limit in the relevant contract or the default position under the Limitation Act 1980 for contract of six years.

Is any party including Liquidators and Administrators entitled to go back that long and claim late payment interest and compensation for up to six years in the Limitation Act? The time limit for bringing claims under the BIFA Terms in clause 27 applies against customers but not to claims of the company against its customers which are only limited in respect of time for bringing claims under the provisions of the Limitation Act. This means that if you are sub-contracting and pay sub-contractors late and they are also operating under the BIFA Terms you are their customer and they can sue you for claims they have against you for up to six years from the date or knowledge of cause of action if latent under the Limitation Act.

The Act does have a clause permitting remission or extinction of interest claims if the interests of the debt demand it given the conduct of the Claimant at any time before or after the debt was created and conduct would include any act or omission of the claimant. Remission or extinction can be for a period of time or the rate of interest. This provision rather suggests that the Act is all about interest on current debt otherwise the remission section would also deal with conduct after the debt is paid. There is a reported case on remission in the Court of Appeal in which the Judges considered circumstances where remission may be applied and dealt with cases where the claimant did not provide supporting evidence to enable the paying party to understand what it was being asked to pay but only in respect of parts of any debt that were unclear, not the whole of the debt if some was clear. In the event that full substantiation is provided but the calculation appears to be wrong then the correct sum in the payer's eyes should be paid and a request to confirm the error should be made. In both cases the court expected

remission would apply. In other words a paying party can withhold a sum reasonably in doubt or not yet properly clear in terms of supporting evidence of payment being due.

There was no discussion about cases where the debt had been paid albeit late and that may have been because the case was about withheld sums. However, as said earlier, conduct after the debt is paid is not dealt with in the section on remission in the Act. This is why it appears that one has to at least make the claim clear regarding interest and compensation before or while the debt is in existence and if the debt is paid without interest or compensation it would be advisable if you do want to claim it at a later date to assert positively that the payment is not accepted in full and final settlement of the debt as owing to late payment it should have included due interest and payment. The BIFA terms are good support as they specifically assert reliance on the Act concerning late payment interest on all sums outstanding and contain a non-waiver clause so absent your agreement in writing with the Customer by authorised officers such claims would not be waived and the claim would be available to be made for up to six years from cause of action arising.

If you are paying suppliers and are paying late without good reason then from time to time it would be advisable to ask for confirmation that the account and any claims in relation to the account are up to date and no sums due in respect of any debts including historic ones on a regular basis with a view to blocking any claims in the future under the Act for interest and compensation either by the supplier or their administrators or liquidators of the supplier were to become insolvent.

Statutory assistance may be very effective in terms of assisting companies with debt management but it does need to be complied with to be able to provide that assistance and we at Pysdens are able to assist in relation to application of your contractual terms governed under the laws of England and Wales in line with the statutory assistance available.

*We at Pysdens Solicitors make every effort to keep our expenses to a minimum in order to pass our savings to our clients. Our fees are very competitive which, in times of economic difficulties, is important to consider. Our policy is to resolve disputes early rather than to litigate.*

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Note: In producing this press release by Pysdens Solicitors, the models published in books entitled "GUIDELINES TO CONSIDER IN RESPECT OF COMMERCIAL DEALINGS" (CI); "GLOBAL ENVIRONMENTAL LEGAL & COMMERCIAL STRATEGY" (CIII) and the draft "THE DARWIN PROJECT: UNIVERSAL CODE" (CIV) by S. Perez-Goldzveig and K.Pysden forming part of the research and development

programme "COMMERCIAL GUIDE INITIATIVE" by S. Perez-Goldzveig and K.Pysden being part of "TheHouseofBranchofGold" were used with the authorisation of the authors. Artwork by Pysdens Solicitors, PGB Artistic Productions and Miss Paz González Cofre.

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