

PRESS RELEASE

**COMPETITION AND MARKETS AUTHORITY ("CMA") GUIDANCE CHALLENGED
BY WEDDING VENUE SUPPORT GROUP**

- OVER 200 WEDDING BUSINESSES FUND LEGAL ADVICE ON CMA GUIDANCE
- CMA GUIDANCE AN EXERCISE IN CONSUMER ADVOCACY AND YET LIKELY TO BE COUNTER PRODUCTIVE TO COUPLES' INTERESTS
- NOT A FAIR ANALYSIS OF THE RIGHTS OF CONSUMERS, TRADERS AND INSURERS
- COVID 19 NO EXCUSE FOR FAILURE TO CONSULT THE INDUSTRY

The CMA issued guidance in April and September to couples with weddings impacted by Covid-19 that included analysis of the law of frustration containing material errors of law, according to a leading QC.

The pre-eminent consumer law silk, Jonathan Kirk QC, has since provided an Opinion critical of the CMA's guidance. His analysis concludes there was 'no excuse' for failing to consult the £10billion industry, which employs half a million people, before issuing its erroneous guidance to the public.

Where wedding venue agreements were incapable of being performed (or 'frustrated') as a result of the Covid-19 lockdown, CMA guidance encouraged couples to seek full refunds from their wedding venue with a very limited scope for venues to offset their costs. This guidance is now relied upon by insurance companies to resist making pay outs to couples on their wedding insurance. Mr Kirk concludes that the CMA's approach as to the costs which may be offset by venues is 'too narrow', incorrectly excluding any allowance for fixed or indirect costs.

With many venues facing financial catastrophe, some 210 members of the Wedding Venues Support Group crowd funded the legal analysis of the CMA guidance. Mr Kirk's resulting 26-page Opinion advised that the CMA guidance contained 'material errors of law' in its analysis of the law of frustration, may have been 'counterproductive to the interests of consumers' and was 'not balanced'

Mr Kirk also concluded that the CMA's approach as to whether contractual terms, such as cancellation clauses, were unfair was 'far too rigid'.

On receipt of Mr Kirk's Opinion, WVSG promptly requested that the CMA suspend its guidance and consult with the wedding sector before taking any further steps. The CMA has, to date, declined to do so.

Duncan Clark, Director of WVSG and Chair of the Venues Committee of the Association of British Wedding Businesses, said: "This is a stark critique by the leading consumer law QC of a CMA that seems out of touch with the wedding industry and the severe crises it is facing.

"CMA's guidance, although well intentioned, is poorly-informed causing relationships between venues, suppliers and couples to be strained, weddings and livelihoods put in peril, and an entire industry jeopardised. Meanwhile, insurance companies have avoided their obligations to insure."

"We ask again that the CMA suspend its guidance and agree to work in consultation with all parties to restore stability, justly allocate the losses caused by Covid-19, and lay a sound contractual basis that is fair to all."

WVSG retained the services of leading law firm, Michelmores LLP, to instruct Jonathan Kirk QC. Lead solicitor, Freya Lemon, commented:

"During these unprecedented and disruptive times for the wedding sector, and all other sectors ravaged by Covid-19 cancellations and postponements, businesses and customers need clarity on consumer and contract law. Unfortunately, CMA did not consult, as it should have done, before issuing guidance that contains a number of errors.

"With implications well beyond the wedding industry, Jonathan Kirk QC's Opinion identifies the correct principles to apply where contracts are frustrated to ensure that both businesses and consumers are treated justly going forward and, particularly, that insurance companies bear their share at these challenging times."

Jonathan Kirk QC is currently ranked as the star individual silk in Chambers & Partners for consumer law. He is also the only tier-1 QC in consumer law in the Legal 500.

In his Opinion, Mr Kirk said the CMA guidance may have been counterproductive to wedding couples' interests, and notes that insurers have 'cited it to avoid paying consumer claims'. He also commented that the CMA guidance may have 'unfairly placed the burden of Covid 19 compensation on smaller traders as opposed to national insurance providers'. Mr. Kirk's conclusions are summarised in paragraphs 2, 3 and 68 of his Opinion, which are extracted and annexed hereto; his Opinion alongside WVSG's letter to the CMA are also appended.

Hamish Shephard, founder of Bridebook, said: "Ever since the CMA Guidance first issued in April, the wedding industry has been abandoned by wedding insurers. Despite being underwritten by multi billion pound corporations, many insurers have used CMA's mistaken advice to abdicate their responsibilities, chase recovery of any payouts they have made, and leave it to local, often family owned, venues to bear the brunt of this crisis. We call on the government and CMA to compel insurers to do the right thing for couples, suppliers and venues."

Alison Hargreaves, Guides for Brides director, said: "Over the past months the CMA has shown a lack of understanding of a sector where businesses work with their couples on an intimate journey that lasts months, with the wedding day itself being the culmination of an experience they deliver.

"The wedding industry is a complex ecosystem, including a variety of venues and suppliers providing a huge diversity of weddings. The CMA's arbitrary approach disregards the need for a just solution that will help couples and venues now and in the future."

For more information or interviews please call Richard White: 07920 582515.

Ends

ANNEX

SUMMARY AND CONCLUSION OF OPINION OF JONATHAN KIRK QC

Summary of Opinion

2. In my opinion the CMA Guidance (collectively) is not balanced and may have been counterproductive to the interests of consumers because insurance companies have cited it to avoid paying consumer claims on the basis that the Guidance means that the trader is wholly responsible for Covid 19 refunds. This is contrary to the expectation of most consumers, who would ordinarily rely on their insurance cover to protect them against such unforeseen events. It may also have unfairly placed the burden of Covid 19 compensation on smaller traders as opposed to national insurance providers.
3. In my opinion there are three bases upon which the Guidance can be challenged:
 - a. The CMA ought to have consulted upon the Guidance before publishing it. The Covid 19 restrictions do not justify that failure, particularly in relation to the specific guidance for the wedding industry. Government consultation on Guidance usually now occurs online or using other remote methods such as email.
 - b. It is arguable that the Guidance on the Law Reform (Frustrated Contracts) Act 1943 (**the '1943 Act'**) and 'just' expenses is outside the ambit of the CMA's statutory jurisdiction to provide guidance on consumer law. The 1943 Act is not specified consumer protection legislation for the purposes of Part 8 of the Enterprise Act 2002.
 - c. The CMA Guidance is likely to be wrong as a matter of law because it is imbalanced and suggests that:
 - i. A contractual term apportioning financial responsibility between trader and consumer on the occurrence of an unforeseen event will always amount to an unfair term.
 - ii. It is "rare", under the 1943 Act, that a trader's expenditure before the unforeseen event can be deducted, and even when a deduction may be made, its amount will be very limited.
 - iii. The categories of 'just' expenses recoverable by a wedding event provider from a consumer are very restricted, essentially limited to direct expenses such as bespoke goods already made and expenditure incurred in wedding planning.
 - iv. The fact that a consumer had effectively insured, or had been contractually required to insure, against the risk of an unforeseen event does not appear to be relevant in the Guidance to either the application of the unfair terms provisions or the deduction of expenses under the 1943 Act.

Conclusion

68. In my opinion, Guidance of this nature should have been the subject of consultation. In modern times, the COVID 19 pandemic can provide no excuse for failing to do so. In my opinion there are material errors of law in its analysis of the unfair terms provisions and 'just' expenses under the 1943 Act. The Guidance is not balanced and seems to have been written more as an exercise in consumer advocacy, rather than a fair analysis of the rights of consumers, traders and insurers in what are obviously unprecedented times.

APPENDIX

MICHELMORES' OCTOBER 14 2020 LETTER TO CMA
ENCLOSING OPINION OF JONATHAN KIRK QC