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CITATION

GDPR – GET READY AS IT'S NOT LONG NOW…

We first mentioned the General Data Protection Regulation (GDPR) back in our winter 2016 edition of Citation. The GDPR will replace the Data Protection Act 1998 (DPA) as the prevailing legislation in the UK for data protection, and will apply to all organisations that process, handle and store any personal data of EU residents.

There is now less than a year before it comes into force on 25 May 2018 and the enormity of its impact is starting to be recognised by UK businesses.

The purpose of the GDPR is to impose certain conditions on organisations to ensure that their customers and employees know what is happening to their personal data and can be assured that their personal data is kept secure and is not used in a way that is excessive or unfair. 'Personal data' includes any information by which a natural person (a 'data subject') can be identified e.g. name or postal/email address. The GDPR's definition of personal data is more detailed than the definition under the DPA, and provides that even an online identifier, such as an IP address, could be deemed personal.

Continued overleaf

[DATA PROTECTION]

Whilst the essence of the GDPR has the data subject's best interests at heart, the new set of obligations it enforces on all businesses, no matter how large or small, is huge:

- Businesses that require the consent of a data subject to process data lawfully will require such consent to be freely given, specific, informed and unambiguous by a statement or by a clear affirmative action i.e. consent requests must be separate from other T&Cs and pre-ticked opt-in boxes are invalid. For sensitive data, consent must now be explicit.
- It will be the businesses' responsibility to assess the degree of risk that processing poses to data subjects.
- In relation to a privacy breach, a data controller will be required to notify the Data Protection Authority within 24 hours.
- Businesses must record all processing activities in detail. The appointment of a data protection officer will be a mandatory requirement for larger companies.

Non-compliance is not an option.

The GDPR will also introduce dramatically increased maximum penalties for mishandling data. Under the DPA, the maximum fine Information Commissioner's Office can levy against a data controller is £500,000. Under the GDPR, this is increased to €20million (or 4% of global revenue, whichever is greater).

Organisations must plan now to avoid fines. Some changes will be simple and procedural but others may require alterations to infrastructure and processes, which can be both timely and costly.

Here are some basic steps businesses can use in preparation:

- Undertake an internal audit of the personal data your organisation holds so you can identify where changes need to be made in order to be compliant and the size of the impact of the GDPR on your business.
- Review how you seek, record and manage consent for data collection.
- Update privacy notices.
- Identify any third-party-data handlers and check their GDPR compliance.
- Review and, if necessary, negotiate all commercial contracts.
- Update staff guidance and train them on the new rules.
- Review IT and security measures to minimise the chances of data breaches.
- Consider if your need to employ/assign someone to the role of Data Protection Officer or if this position can be outsourced.

[GET IN TOUCH]

If you would like advice on company or commercial issues please contact

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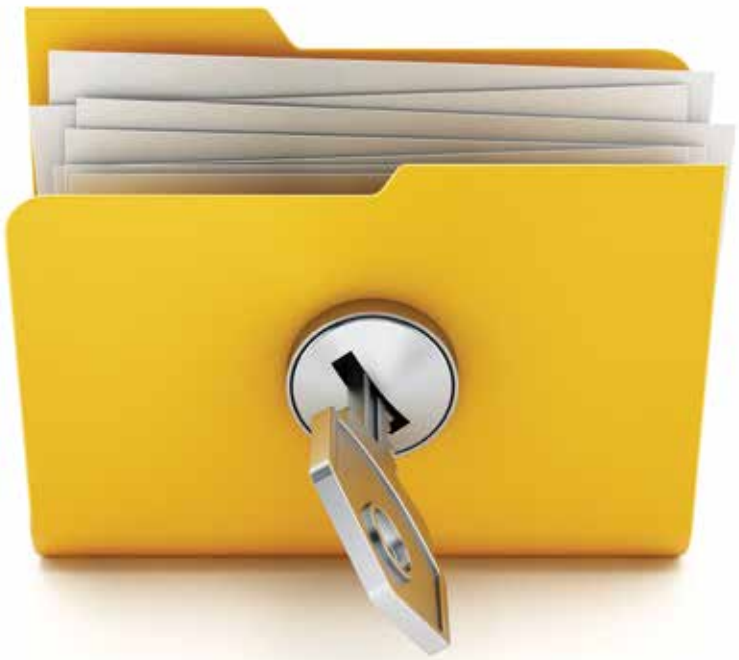
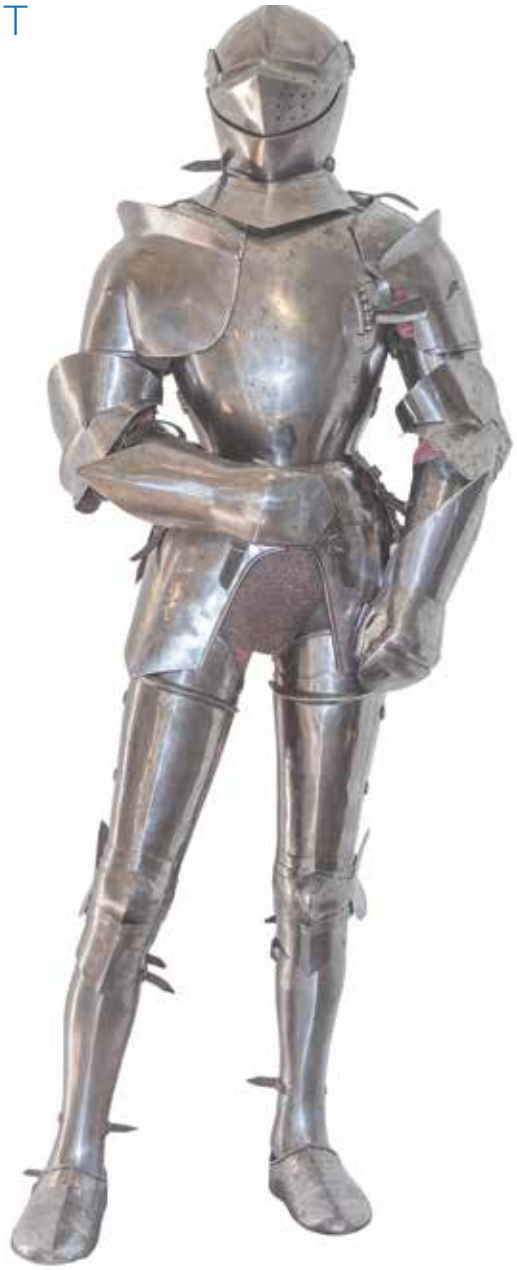


UNISON WINS TRIBUNAL BATTLE

UK SUPREME COURT RULES AGAINST GOVERNMENT AND DECLARES TRIBUNAL FEES UNLAWFUL



Unison's efforts succeeded on 31 July 2017 when the Supreme Court ruled that the Tribunal fees system was unlawful and also potentially discriminatory.

Since July 2013, employees who wanted to bring claims against their employers in Employment Tribunal have had to pay fees of up to £1,200.

Unison, the trade union, have pursued a long-running battle against the Tribunal fees system as they believe it has prevented employees, especially those on lower incomes, from accessing justice.

Certainly there has been a marked drop of around 70% in the number of Tribunal claims since the imposition of the fees system.

The ruling means that all Tribunal fees that have been paid since July 2013 will be refunded by the Government. The Government is still working on the refund arrangements and an announcement is expected later this month. It is not a straightforward issue as the Government needs to think about how to deal with refunds in claims involving multiple claimants and in cases where the Tribunal has ordered the employer to reimburse the employee for the Tribunal fees, for example.

The ruling also opens up opportunities for employees who were put off from bringing a claim due to the fees, with Tribunals now starting to reinstate cases which were struck out for non-payment of fees. They will also need to deal with cases in which an employee applies for permission to issue a claim now even if they are out of time under the normal rules of limitation.

It remains to be seen if the Government tries to impose a new fees system in the future. Our view is that they may well do so, but with lower fees, and there has also been speculation that they may look to impose a fee payable by employers when they file their response to the claim.

Vento

In cases of discrimination and whistleblowing, the Tribunal may make an additional award in relation to the employee's perceived injury to feelings. The level of such awards are based on what are known as the Vento guidelines, which are split into three bands depending on how serious the Tribunal considers the injury to feelings to be. The guidelines date back to 2002 and there has been uncertainty about how they should be increased to deal with inflation.

The President of the Employment Tribunals has now issued new Vento guidelines which will apply to any claims issued on or after 11 September 2017 and are as follows:

- lower band (less serious cases, for example, an isolated incident of discrimination): £800 to £8,400
- middle band: £8,400 to £25,200
- upper band (the most serious cases, for example a lengthy campaign of harrassment): £25,200 to £42,000
- exceptional cases: over £42,000

The bands will be reviewed in March 2018 and then annually.

[GET IN TOUCH]

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[COMMERCIAL PROPERTY]

BREAK CLAUSES – AVO

A break clause can be included in a fixed term commercial property lease allowing either the landlord or the tenant (or sometimes both) to terminate the lease early by giving a period of prior notice. Whether you are the landlord or the tenant, you should consider the terms of any break clause in your lease very carefully to ensure that you do not get caught out by the traps!

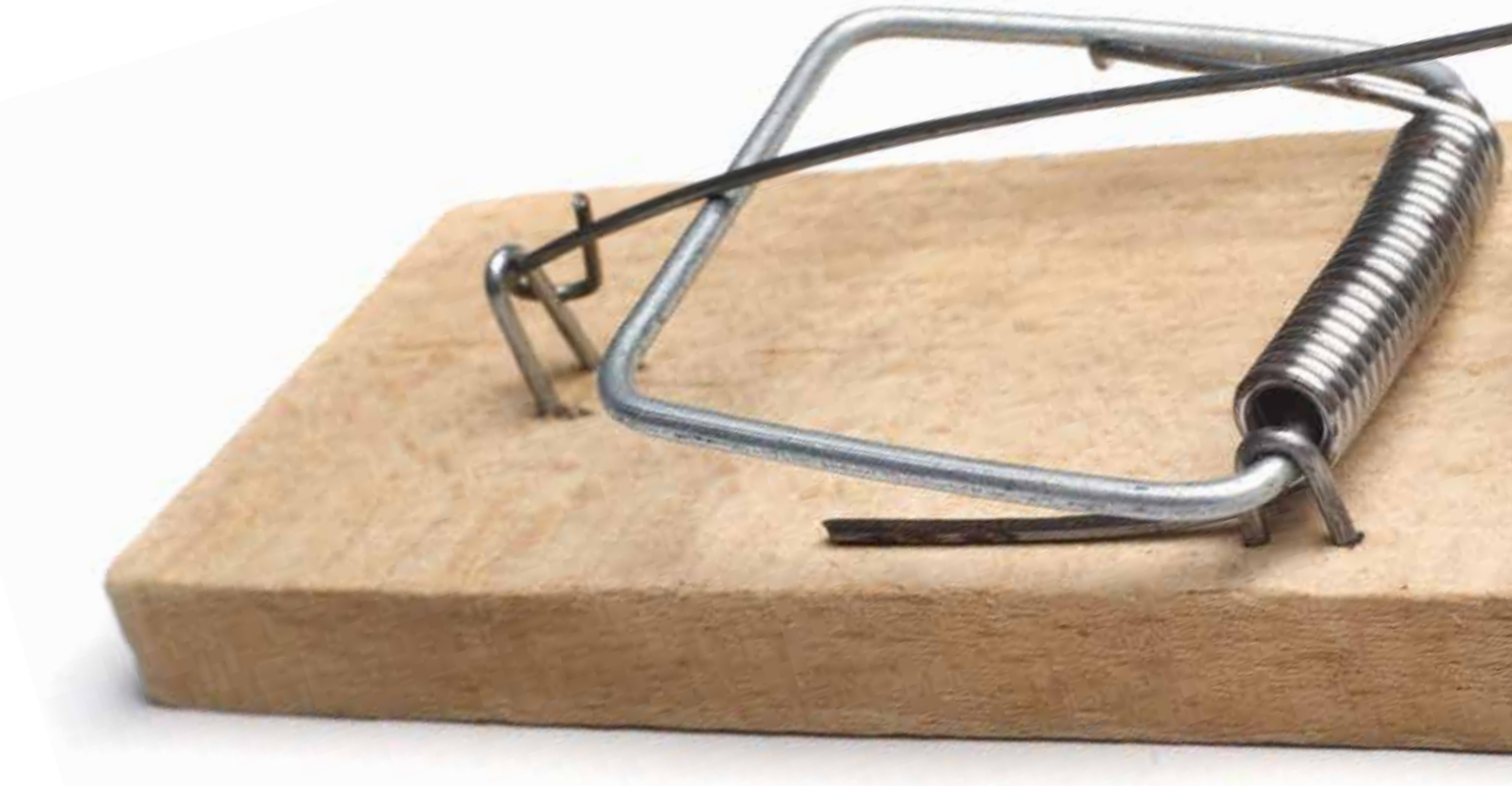
The right to break may arise on one or more specified dates or at any time during the lease period on a rolling basis. Conditions to a right to break are usually imposed and must be strictly performed to ensure that the break is correct and effective.

Specific conditions for the operation of the break may include:

- A specified period of prior notice.
- Payment of all the rent and other payments due under the lease.
- Performance of all lease covenants.
- Compliance with tenant repairing covenants.
- Vacant possession must be given by the tenant.
- Payment of a penalty to exercise the break.

Even a trivial breach of the conditions by a tenant can be fatal to the break right. Here are some examples:

In the legal case PCE Investors v Cancer Research [2012] the High Court considered whether a tenant had complied with a break clause where it paid rent up to the break date, rather than the full quarter's rent. The break clause required the tenant to give vacant possession and pay "the rents reserved and demanded by this Lease up to the Termination Date". The court held that the tenant should have paid the full quarter's rent to validly terminate the lease, even though this period would have gone beyond the break date. Even if the tenant had paid the full quarter's rent, they would not have been able to recover the overpayment unless the lease had expressly allowed it.



IDING THE TRAPS!

In Avocet v Merol [2011] the conditional break clause was held to be invalid because the tenant had paid rent late in the past, so interest was strictly due on the arrears. The tenant was not aware of the interest and the landlord was under no obligation to tell them, therefore the tenant had not paid all sums due under the lease by the break date.

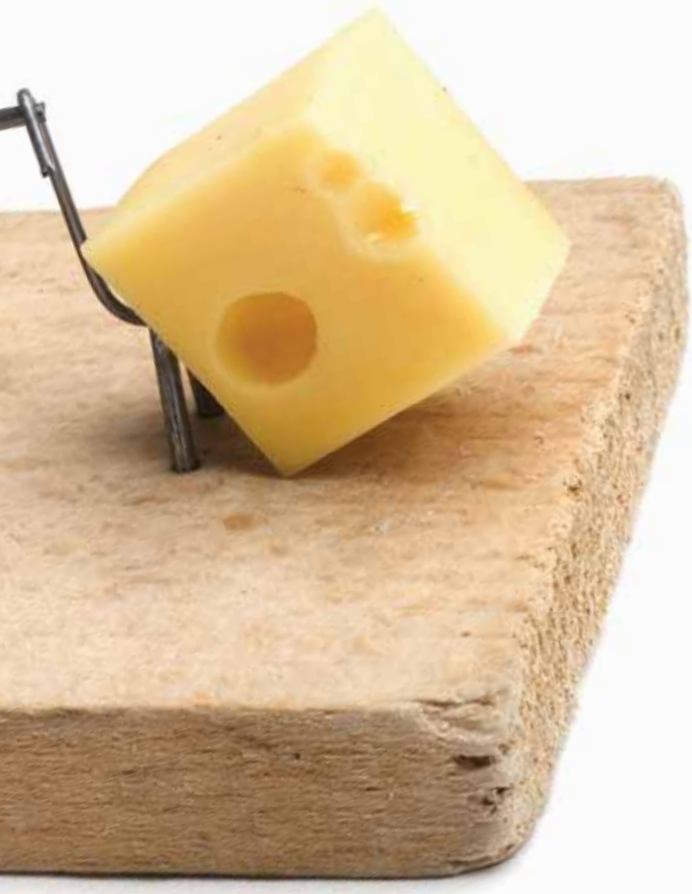
In Riverside Park Ltd v NHS Property Services Ltd [2016] the tenant had left behind internal non-structural partitions and the court decided that this meant that "vacant possession" had not been given and hence the break was held to be invalid.

One of the most common pitfalls of a break clause is service of the break notice. Who must serve the notice? On whom? At what address? Is the notice valid if served by email? What date must the notice be served on or by? Is there a prescribed form of notice which must be used?

In Prudential v Exel UK [2009] a break was held to be ineffective because the notice was served by only one tenant company, when the lease required notice to be given by both the tenant companies named in the lease.

The effective exercise of a break clause brings the lease to an end and the notice cannot be withdrawn unilaterally. The parties may mutually agree to the break notice being withdrawn but this is deemed, as a matter of law, to constitute the creation of a new lease.

With all of this in mind, it is important for the landlord and the tenant to keep evidence of their compliance with any break conditions, consider the consequences of service of any break notice and seek legal advice in good time before exercising a break clause.



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If you would like advice on break clauses or any other issues relating to commercial leases, please contact

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[WILLS]

WILLS: PLANNING FUTURE IN THE D

Electronic Wills

Wills have been in the news recently. Figures suggest around 40% of adults do not have a valid Will in place. This means a significant proportion of the population rely on the intestacy rules to dictate how their assets are distributed on death. These rules are adequate in certain circumstances, but, for many families, they will fail to provide appropriately for loved ones.

Current Wills laws are based on Victorian law and are seen by some as being outdated. The Law Commission has published a consultation paper putting forward proposals to modernise the rules. These include a controversial suggestion to introduce electronic Wills. For some, making Wills with paper and pen may seem archaic in our digital world, however, others consider risks of fraud and undue influence to be too great to allow the introduction of electronic Wills. We wait to see whether sufficient protective measures can be put in place to satisfy concerns regarding security, before electronic Wills are introduced.

Digital Assets

Regardless of the above, the digital age presents issues which should be considered when planning for the future.

The majority of readers of this article, if not all, will have digital assets. Some assets have financial value, for example, online bank accounts/investments/currency. There are digital assets connected with business, such as websites/domain names. Other digital assets have sentimental value, including photos, videos and emails.

When someone dies, their personal representatives have a duty to identify all estate assets and liabilities. There can, however, be complications when dealing with the digital world. Below are a few issues to consider now.

The primary question is will your personal representatives be able to identify your digital assets/liabilities? You will not be there to ask, so take steps now to ensure your personal representatives can identify both online and offline assets/liabilities. We do not advise leaving a list of passwords, as, by using these passwords, your Executors could commit a crime under the Computer Misuse Act 1990. Executors do, however, need to know what accounts are set up, to deal with these appropriately.

When making a Will, think carefully about who are appointed as Executors. If you have complex digital assets, consider whether your proposed Executors will know how to manage these assets. Appoint people with appropriate knowledge to deal with your online world.

If appointed as an Executor, you are personally responsible for collecting in all assets and settling all liabilities of the estate, including those online. Think about how you will find out this information and, if necessary, speak with your friend/relative who has named you Executor.

For personal accounts, consider how personal representatives will access digital photos/videos etc. Social media accounts should be dealt with, to reduce the risk of identity theft. Take steps now to ensure your personal representatives can identify all social media accounts, so they can take appropriate action.

FOR THE IGITAL AGE

[GET IN TOUCH]

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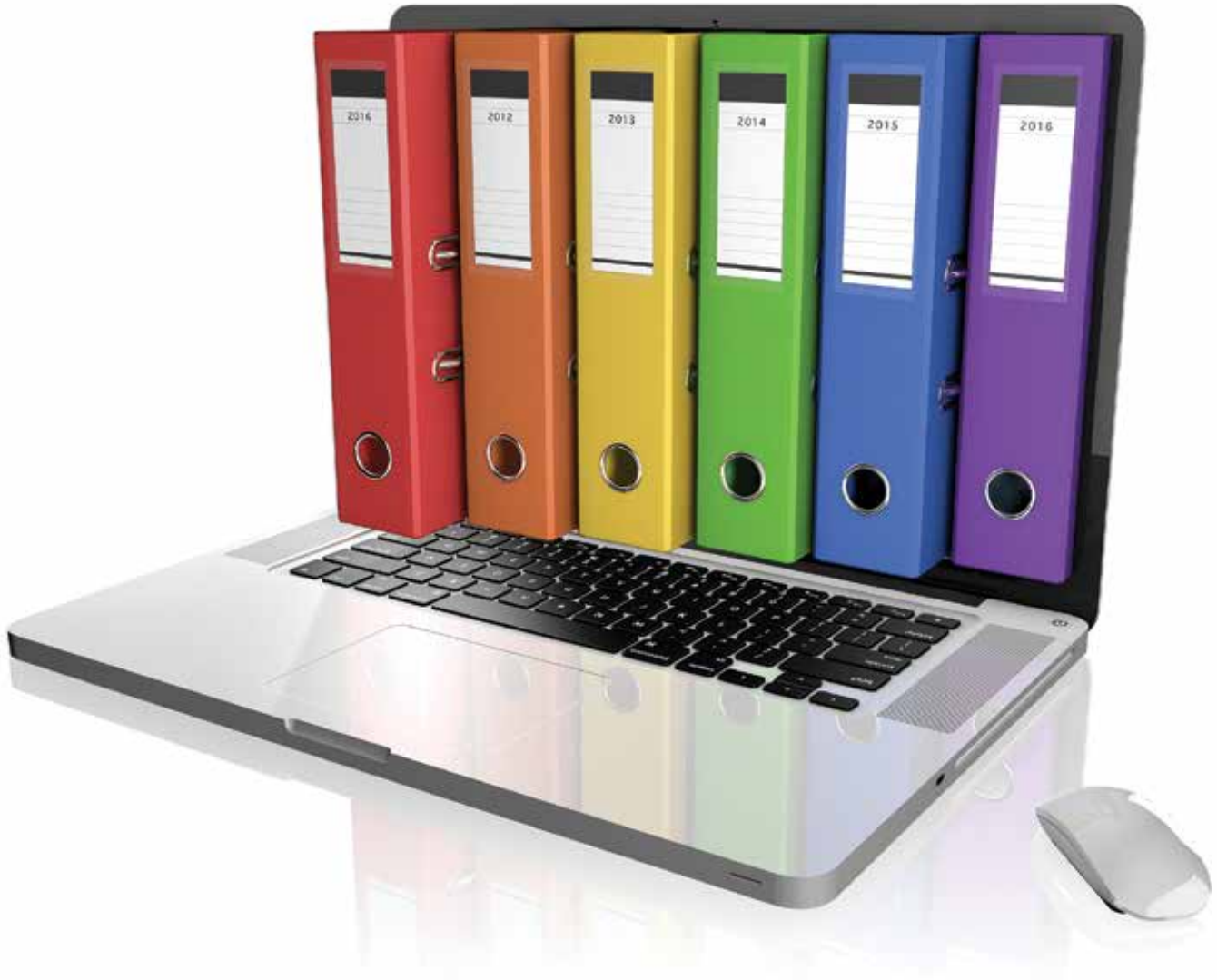


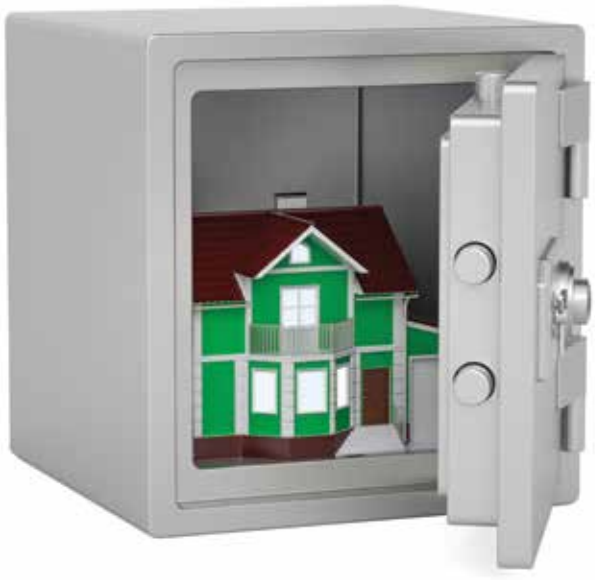
[PROPERTY]

THE IMPORTANCE OF TITLE DEEDS

The title deeds are the documents that show who owns land and property. If your property is registered, the title is held electronically at the Land Registry and therefore there are no paper title deeds for your property.

Over 80% of England and Wales is now registered at the Land Registry. Once land is registered, the Land Registry will maintain the register to keep a record of ownership changes, mortgages and leases that affect the property.

As the title register is stored electronically at the Land Register mortgage companies no longer require deeds to be deposited with them as security for their loan. Equally it is no longer necessary for you to store deeds with your bank or a solicitor for safe keeping. Up to date copies of the title deeds can be ordered directly from the Land Registry.



If your property is unregistered the paper title deeds remain important. The unregistered title can include conveyances, mortgages and leases. The paper title deeds are the only evidence of ownership and these documents should be stored securely. Certain dealings with land and property will trigger the requirement for the land to be registered, such as a sale of the land.

However it is also possible to apply for registration of land and property at any time, the Land Registry even offer a reduced fee for voluntarily first registrations. If the title to your property is unregistered we would recommend that you consider having the title registered to avoid the risk of the paper title documents being lost or destroyed.

A quick search at the Land Registry will establish whether a title to and or property is registered or not.

Please contact our expert conveyancing team here at Clifton Ingram if you would like us to check if your title is registered and if we can assist with a voluntary first registration of your title.

[GET IN TOUCH]

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