SIMON BURN SOLICITORS

Autumn 2008

Commercial Law UPDATE

Contract Ceases When Small Breaches Repeated

Customers who don't pay their bills are bad enough, but customers who don't pay their bills and then attempt to sue when the supplier stops work could be considered to be very bad news indeed.

This situation can occur if a customer suffers a loss because their supplier has not done the work contracted and the contract is still 'live'.

In a recent case, a consultant engineer was retained to advise another consulting firm which had successfully tendered to manage a project to remove radioactive waste. The payment for his work was based on an agreed hourly rate with monthly billing. For more than 18 months the consulting firm failed to pay his invoices when they fell due and the delays were substantial. After making repeated complaints, the engineer refused to continue to work for the firm, which then instructed another firm. The consulting firm brought a claim against the engineer for the losses his cessation of work caused them and, not unexpectedly, he counterclaimed for the amount of his outstanding bills.

The engineer argued that the consulting firm's repeated failure to pay him with reasonable promptness meant that it had repudiated its contract with him. The consulting firm argued that it had not breached the contract, because the payments were made eventually and the breaches of the agreed terms were not sufficient to justify bringing the contract to an end.

The case reached the Court of Appeal, which upheld the engineer's argument. It was of particular importance to the decision that the consulting firm had repeatedly and cynically breached the agreement regarding payment terms despite numerous complaints. He was therefore entitled to consider that there was every likelihood this would continue to be the case.

One of the reasons why this affair resulted in a prolonged court battle was that the contract terms were agreed verbally, without the benefit of a proper contract being put in place. A written contract in the right form would have allowed each side to understand where they stood and would have provided a mechanism for the termination of the contract which was unequivocal.

If you are entering into contractual negotiations, we can advise you.

Insolvency in the Internet Age

On 1 October 2008, the Companies (Trading Disclosures) (Insolvency) Regulations 2008 came into effect, bringing insolvency law into the Internet age.

The Regulations require a company that is in administration, receivership or operating under a debt moratorium to indicate the fact clearly on its website as well as on its letterhead, invoices and so on.

The Regulations can be seen at http://www.opsi.gov.uk/si/si2008/uksi_20081897_en_1.

Limitation of Auditors' Liability – Take Care What You Sign

It is when times get tough that problems which might have been easy to gloss over in better times start to make themselves visible. When serious problems that have remained undiscovered for a substantial period come to light, a company's auditors may well find themselves facing a writ.

The sections of the Companies Act 2006 which allow auditors to limit their liability in relation to audit work, with the agreement of their audit client, are now in force and the Financial Reporting Council (FRC) has issued guidance on the use of such agreements.

Any agreement setting a limit on the liability of a company's auditors must be approved by the company's shareholders. An agreement cannot cover more than one financial period and will only be effective insofar as it is 'fair and reasonable'. In practice, whether or not the limit on liability is fair and reasonable will be determined by the courts, depending on the particular circumstances of each case.

The FRC guidance:

- explains what is and what is not allowed under the 2006 Act;
- sets out some of the factors that will be relevant when assessing the case for an agreement;
- explains what matters should be covered in an agreement and provides specimen clauses for inclusion; and
- explains the process to be followed for obtaining shareholder approval and provides specimen wording for inclusion in resolutions and the notice of the general meeting.

Many company directors can expect to receive a letter from their auditors, enclosing a liability limitation agreement, before their next financial year end.

This seemingly small change could have a significant impact and directors should give thorough consideration to the ramifications of signing any agreement limiting the liability of their auditors. Directors have the same responsibilities to a company's shareholders and creditors in this situation as they would when entering into any other agreement on the company's behalf.

If your auditors propose a liability limitation agreement of any kind, we can advise you on your individual circumstances.

Agency a Matter of Fact

Under EU law, agents have a degree of protection which mere resellers do not. For example, when an agency is lost, the agent is normally entitled to compensation from the principal. This does not apply where the relationship is one of a supplier and reseller. It is therefore important when a business relationship comes to an end to know whether it is one of agency or supplier and reseller.

In a recent case, a man who sold jewellery in the UK on behalf of a German firm claimed that he was a commercial agent as defined by the Commercial Agents (Council Directive) Regulations 1993. When the business relationship ceased, he sought compensation for the loss of his agency. His argument was based on the fact that he was the only UK supplier of the jewellery and ordered goods from the manufacturer only when he had received an order from a jewellery shop.

However, the arguments against a commercial agency being in effect were strong. The man bought and sold through his own accounts, invoicing his customers in his own name and accounting to the supplier as a principal. His accounting records reflected that position. In addition, he had no authority to negotiate on behalf of the supplier.

The court could find no reason to impute into the business relationship something that was not there. As a matter of fact, there was no agency and no compensation was therefore due.

When making reseller arrangements, it is important to make sure the nature of the business relationship is clearly understood. We can assist you in drawing up the necessary agreements to establish an agency or a supplier/reseller arrangement.

Impractical Insurance Terms Not Invalid

The conditions attached to your insurance policies are important, so it is vital that you read and understand them. Where significant conditions are not met, it is usual for the insurer to refuse to pay what might appear to be a reasonable claim.

Recently, the owner of a trawler valued at over £120,000 claimed on his insurance policy when the vessel was destroyed by fire whilst tied up in port. There were no crew members present on the trawler when it caught fire.

The policy contained a provision that there should be a 'Warranted Owner and/or Owner's experienced Skipper on board and in charge at all times and one experienced crew member'. As there were no crew members present at the time of the

fire, the insurer refused to pay. The claimant argued that the clause only applied when the vessel was at sea and, if applied literally, would lead to absurd results, especially given the cramped nature of the accommodation on board.

The court supported the insurer, agreeing that the clause had to be interpreted literally. The fact that the clause was practically very difficult indeed for the insured to comply with did not relieve him from his legal obligation.

For the court to make a ruling that insurance cover should be based on what seems to be common sense, rather than what the policy actually says, would be a very risky approach and challenges could proliferate. The courts are not inclined to interpret policies in ways that differ from their strict meanings.

If you have any doubts as to the legal effect of your insurance arrangements, contact us for advice.

Disabled Tenant Not Discriminated Against

The House of Lords has ruled that a disabled council tenant who was evicted from his flat for breach of the terms of his tenancy agreement had not suffered disability discrimination. The judgment overturned a previous decision by the Court of Appeal in favour of the tenant and has far-reaching implications.

The case concerned Courtney Malcolm, a tenant of Lewisham London Borough Council, who suffered from schizophrenia. He sublet his flat, in breach of the tenancy agreement, and so was served notice to quit. Mr Malcolm contended that he was disabled under the Disability Discrimination Act 1995 and that the Council had discriminated against him.

In determining whether or not Mr Malcolm had been treated less favourably on account of his disability, the Law Lords considered the nature of the treatment to which he had been subjected. The Landlord had sought to repossess the flat and it was agreed that the reason for this decision was the tenant's having sublet the property.

Lord Bingham pointed out that Lewisham Council, as a social landlord with a long waiting list, could not allow a tenancy to continue when the tenant was absent. He concluded that the Council's decision was based purely on housing management criteria and had nothing to do with Mr Malcolm's mental disability. Indeed, at the time of the decision, the Council was not aware that he was disabled.

In deciding whether Mr Malcolm had been treated unfairly, Lord Bingham stated that the correct comparison to be made was with a tenant who did not have a mental disability but who had breached the terms of their tenancy by subletting. In such circumstances, a non-disabled tenant would have been equally in breach of their tenancy agreement and would have been treated in the same way.

For these reasons, the Law Lords held that Mr Malcolm had not been treated less favourably and had not suffered disability discrimination.

Landlords should not be afraid to stick to the principles of the tenancy agreement, providing it has been properly worded. A landlord will only fall foul of the Disability Discrimination Act if they know that a tenant is disabled and treat that person less favourably than they would a tenant without a disability in the same circumstances.

Rent Payable During Notice Period

The courts often have to deal with disputes over the payment of rent and charges for the period after a tenant has given notice to vacate a let property. A recent case concerned just such an issue.

The circumstances were that premises were occupied under licence, with the licensee paying £450 plus VAT per month. The licence could be determined by either party by giving a month's notice. After a short period, the licensee and the landlord agreed that the licensee could make a one off payment of £6,000, to cover the VAT inclusive charge for occupancy for the next 12 months. This represented a discount of approximately £25 plus VAT per month.

The licensee emailed the property owner to confirm that during the 12 month period for which the charge was prepaid, the property owner's right to give a month's notice, as provided for in the licence, would be suspended.

About eight months later, the licensee gave notice to terminate the agreement and claimed the balance of his prepayment back from the landlord.

In court, it was ruled that the licensee's email had only suspended the landlord's right to terminate the arrangement on a month's notice, not his own. Therefore, the balance of the payment was refundable. The landlord appealed to the Court of Appeal.

The Court of Appeal took account of the email, but considered that it must be regarded as preventing either party from exercising the right to terminate the arrangement on a month's notice. The occupier had secured the right to occupy the property for the full 12 months by making the payment, but could not then demand a refund for leaving the premises earlier, nor could the owner of the property compel him to vacate it before the 12 month period was up.

Contact us for advice on any commercial property matter.

SIMON BURN
SOLICITORS

123 PROMENADE, CHELTENHAM, GLOUCESTER, GL50 1NW
TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888
DX 7404 CHELTENHAM E-MAIL: SIMON.BURN@SIMONBURN.COM