Lanyon Bowdler SOLICITORS

Update

Your quarterly bulletin on legal news and views from Lanyon Bowdler

Extreme weather affecting your business?

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The first two months of 2014 have seen exceptional downpours which has led to widespread flooding across the country. This extreme weather will undoubtedly be cause for many businesses to seek out their contracts and standard terms of business to see what legal protection, if any, they have from these uncontrollable forces.

The worst impact of the flooding is likely to be felt by agricultural businesses and those businesses to which they supply produce. For example, if a wheat farmer suffers a poor harvest he may be unable to make the promised delivery to a cereal manufacturer which may, in turn, then have difficulties supplying its products to a supermarket. Each business in the supply chain which is unable to meet its obligations under a contract will need to consider whether they are able to delay or avoid fulfilling their obligations without facing a potential claim for breach of contract.

Generally there are three ways in which a party's obligations under a contract can be delayed or suspended:

1. The parties can mutually agree to alter the terms of the contract. Whether or not this will be acceptable to both parties will depend on their relationship and the particular circumstances which are affecting one party's performance of the contract.
2. The party unable to perform its contractual obligations may claim the contract has become "frustrated", that is, an event (such as flooding) has caused its performance to become impossible or something fundamentally different to that which the parties originally intended. However, the courts have typically only applied this principle very narrowly and a frustration

Dedication

Partner and Head of Dispute Resolution Brian Evans on how his dedication to his work can get him into difficulties...

If, like me, you are of a certain age, you'll probably remember children's TV programme from the 1970s and 1980s called "Record Breakers". The show used to finish with the presenter, Roy Castle playing his trumpet and singing a song called "Dedication" which finished with the words "Dedication's what you need….if you want to be a record breaker".

Dedication might help you win records, but I've found it can also get you into difficulty.

For a couple of days I'd been trying to get hold of a barrister to discuss a case we're working on together, in advance of a hearing at court in a few days' time. We'd been missing each other on the phone and I left a message asking him to ring me in the evening, any time.

I was on my way to collect my son from a brass band rehearsal at a local primary school when my mobile rang. Not wanting to take the call while driving I waited till I got into the school car park, switched off the lights and the engine and checked my phone. Sure enough, it had been the barrister. I rang straight back and we discussed what we needed to, while my son got into the car and waited patiently. Call done, I started the engine and turned the car round… to find that while I'd been on the phone someone had closed the school gate and padlocked it, trapping us in the car park.

My not-too-chuffed wife came to pick us up and we climbed out over the fence, leaving my car behind to be collected in the morning.

I like to think that I provide a good service to my clients, but I hope that's the last time I get locked up for being dedicated to a client's case.

"Efficient and professional service, willing to go the extra mile. Always available to discuss matters"

Norman Quin Developments Ltd, Telford

- claim will rarely be available when performance is possible albeit very costly or uneconomic. For example, if the subject matter of the contract concerns food commodities which are available around the globe, such as wheat, a frustration claim will generally be unsuccessful.

3. The contract may contain a "force majeure" clause. Generally force majeure clauses are designed to excuse one party (or both) from performance of their contractual obligations in certain circumstances. Typically force majeure clauses are drafted to include the following sorts of occurrences: earthquakes, floods, drought, civil war, riots, fire and import / export restrictions. It is also usual to find "sweeping up" provisions to extend the reach of the clause, for example, "all other natural disasters" or "an act of God" may be included. However, there are complex rules of law which need to be carefully considered before drafting and subsequently seeking to rely on a force majeure clause.

It is generally advisable that a contracting party should only seek to rely on options 1 and 2 (above) as a fallback position. A business should almost always ensure its general terms and conditions of business contain force majeure protection and that when entering into a commercial contract it seeks to negotiate the inclusion of a force majeure clause which caters for most foreseeable problems they might face with that particular contract.

If you would like a contract or your current terms and conditions of business reviewing please contact the Corporate and Commercial team on 01952 291222.

Lisa Blair, Debt Recovery Manager

Late payers for SMEs

Since last summer unpaid/overdue invoices to SME's have increased by 52%, amounting to some £55bn, thus having a consequence on cash flow and also restricting growth.

According to the European payment systems provider, Sage Pay, the average business is now owed in the region of £11,500 with amounts increasing to upwards of £30,000 for one in five SME's.

If you are an SME have you considered emailing invoices in order to reduce time thus aiding cash flow and allowing more time for new projects? Research has found that 67% of SME's still send out paper invoices and can spend, on average, two weeks per year in just chasing unpaid invoices.

If you are experiencing any problems in collecting overdue invoices, please contact Lisa Blair, Debt Recovery Manager/Chartered Legal Executive on 01952 211024.

Mortgage arrears fear

In a recent poll commissioned by the homelessness charity Shelter, it was found that more than a third of people either renting or with a mortgage in Britain are expected to struggle to keep up with payments during 2014.

The charity suggests those with children are worst affected. The poll of around 3,600 people showed that 70% of these have said they are already finding it tough to keep up with payments or have already fallen behind. It also highlighted that a worrying one fifth of people said that they had deliberately not opened post in case it was a bill or a late payment reminder. One person revealed that they had arrived home to their rented flat to find the locks had been changed. She had not realised that a court hearing had even taken place because she had not felt able to open her post after falling into arrears with her rent.

Paying your rent or mortgage is a priority debt and if you are struggling to pay either of these or have indeed already fallen behind then you need to take urgent legal advice so that steps can be taken in an attempt to avoid the possibility of you losing the roof over your head.

Meet the team

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Supply UK Hire Shops Limited

People are still struggling to pay their bills

Recent research carried out by Money Supermarket.com has shown that one in five people have missed an essential bill payment in the last 12 months which would equal over 15 million bill payments across the UK in total.

Two in five people admitted they missed paying a bill because they simply could not afford it and one in three said they missed a certain bill because they had to prioritise paying another. One in four is paying more than £500 per month on mortgage or rent payments, and most admitted that this is the hardest bill to cover whilst one in ten has missed at least one rent or mortgage payment in the last year which amounts to a staggering 2.2 million people.

The research showed that the most common bills to be missed are credit card and loan repayments, closely followed by paying for childcare. More than two in five have incurred extra charges and interest penalties which has affected their individual credit ratings and, worryingly, one in ten has been served with a County Court Judgment. It is, therefore, important that if you are falling behind with your bill payments, especially any priority bills such as your rent or mortgage then you should seek advice as soon as possible which will then hopefully avoid you receiving court papers which may lead to you losing the roof over your head.

Commercial rent arrears recovery

Sue Haylock, Solicitor

The new procedure for recovery of commercial rent arrears comes into effect on 6 April 2014.

After 6 April 2014 it will no longer be possible for a landlord to instruct a bailiff to levy distress for commercial rent arrears.

Landlords must follow the new Commercial Rent Arrears Recovery system (CRAR) introduced by the Tribunals, Courts and Enforcement Act 2007.

A considerable number of changes have been introduced, including the following:

- Landlords can now only instruct an authorised enforcement agent. The landlord can only use the CRAR to recover the rent arrears and VAT on the outstanding rent, the new procedure cannot be used to recover any other money due such as insurance or the cost of repairs, even if these items are reserved in the lease as "rent".
- At least seven days rent must be unpaid.
- The CRAR can only be used in relation to commercial premises and not mixed use premises.
- The tenant must be given at least seven clear days written notice before the CRAR is exercised unless the landlord has good evidence that the tenant would try to dispose of the goods.
- The tenant is to be given prescribed information at each stage of the process.
- If the provisions of the CRAR are breached the court may order that the goods are returned to the tenant or the tenant is entitled to damages for any loss suffered as a result.
- The CRAR can only be used where the lease is in writing.

The CRAR will make the recovery of rent arrears for commercial premises far more difficult for landlords.

If you'd like further information on any aspects of the above, contact solicitor Sue Haylock on telephone 01743 280212, email sue.haylock@lblaw.co.uk or Debt Recovery Manager Lisa Blair on telephone 01952 211024, email lisa.blair@lblaw.co.uk.

We provide a comprehensive range of corporate and commercial law services to large, medium sized organisations as well as owner managed businesses.

Contact 01952 291222 or email info@lblaw.co.uk

Valuation of partnership property -

Ham v Ham & Another [2013] All ER (D) 356 (Oct)

Understandably most people embarking on a business venture together as a partnership will be reluctant to put thought to what will happen if their relationship breaks down or if a partner simply wishes to leave the partnership. However, it is very important that these issues are considered and agreed upon at the earliest opportunity whilst the partners' relationship is still strong to avoid costly and time consuming litigation.

The Court of Appeal was recently asked to consider how a partner's share of a family-run business should be valued after he gave notice of his intention to leave the partnership.

The defendants were a married couple who ran a dairy farm. The farm was comprised of a large amount of land, a sizeable dairy herd, machinery and other equipment. Their son (the claimant) subsequently joined them in partnership and entered in to a deed of partnership with them. The deed entitled any partner to dissolve the partnership on three months' written notice. Upon receiving such notice the continuing partners would have the option to buy the leaving partner's share of the partnership as an alternative to dissolution. Regrettably the deed did not make it clear what the leaving partner's share was in (i.e the capital or property of the partnership) or on what basis the share was to be valued. In 2009 the claimant gave notice to terminate the partnership and a dispute arose as to how his share was to be valued and later, on appeal, as to what his share actually consisted of.

The case was first tried in the High Court in which the judge determined the partnership deed intended for the valuation of the claimant's share to take place on the same basis as the annual accounts (as if the partnership was an ongoing business). The claimant appealed the decision at the Court of Appeal, maintaining that the value of his share should be assessed as it would on a notional winding up of the partnership.

The Court of Appeal agreed with the claimant and overturned the High Court judge's decision. It first confirmed the reference to a partner's "share" in this particular agreement meant a share of the partnership property (rather than the capital and profits). This finding entitled the claimant to a share of the value of the assets of the partnership rather than just its profits and the capital he had contributed or been credited with. This is a very important distinction as a dairy farm, by its very nature, is likely to be asset rich but cash poor.

The Court of Appeal then decided the value of the claimant's share of the partnership property would be the "nearest reasonable approximation" as to what he would receive on a notional winding up of the partnership (rather than on the basis it was an ongoing partnership). This essentially meant what amount of money the son could reasonably expect to receive for his share of the assets if they were sold. Again, this was an important distinction as it entitled the claimant to the unrealised profits of the partnership property which had not been recorded in the annual accounts. Most notably, the land recorded in the partnership accounts had not been revalued since the commencement of the partnership.

It is, therefore, important for partners to think about their contributions to a partnership (be it cash or assets) and how these contributions should be recorded. Furthermore, partners should consider how their "share" will be valued in the event they wish to leave and also how their share will be repaid by the ongoing partners; for example in a cash poor asset rich partnership it may be wise to repay an outgoing partner in instalments to avoid disrupting cash flow.

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