

one step ahead



Wortley Byers
Solicitors

SUMMER 2008

EFFECTIVE DEBT RECOVERY



Where a Buyer fails to pay invoices on time, the Supplier may be entitled to recover enhanced interest (currently 13.5%) and may also be entitled to a fixed sum of up to £100 under the Late Payment

of Commercial Debts (Interest) Act 1998 ("the Act").

The Act applies to contracts for the supply of goods and services made between parties in the course of business. If these contracts remain unpaid after the agreed date for payment, then the Supplier

may charge interest at the enhanced rate thereafter. The Supplier may also recover a fixed sum of £40 where the debt is less than £1,000, £70 where the debt is between £1,000 and £9,999.99 inclusive and £100 if the debt is £10,000 or more.

With the current change in the economic climate it is important to collect money quickly and the Act can assist in doing this. It also provides an unpaid Supplier with a means to recoup some of the losses suffered as a result of bad payers.

If you need any assistance in collecting debts or require any more advice on the Act, please do not hesitate to contact Christopher Everett on 01277 268365.

MEDIATION

The family bakery business had always made money; but the Directors of Make a Lot of Dough (UK) Ltd had fallen out.

Bob and Tom mixed between themselves a bitter soda bread of claim and counterclaim. It was a bread and butter case for the crusty lawyers. The courts' newly appointed 'Mediator/Judge' suggested a different recipe, mediation. Bob hoped the Mediator would decide in his favour and Tom wanted the Mediator to fight his corner. Both had half-baked ideas about the Mediator's role.

A Mediator has no power to impose anything on the parties and will not take sides; he does not have a finger in their pies! A Mediator would, however, provide a process that was private and confidential, non-confrontational and smoothly managed.

A facility was made available to help the parties resolve the dispute themselves. Bob and Tom were given the opportunity to save the cost, time, risk and trauma of a trial before a Judge who would not understand how to make bread out of bread as they did. Delia, the Mediator, helped Bob and Tom realise what the important issues were between them, what options were available and explored with them what choices were open. The recipe proved successful and they think that mediation is now the best thing since sliced bread.

If you would like to know more please contact David McGuire in our Litigation department on 01277 268312.

POSSESSION

Bank repossession will happen where your monthly mortgage payments are not being met on time. Repossession proceedings can happen very quickly following the accumulation of arrears on a mortgage account. The bank has the right to do this if it feels that you are unable to clear the arrears and keep up to date with your mortgage payments.

The CML warned that the number of repossessions was likely to rise again in 2008 as the credit crunch tightened. Added cost pressures on homeowners are expected this year, owing to higher energy and food bills, while more than a million people are coming off fixed-rate mortgages. All of this means the general public will have less money to meet their mortgage repayments.

It can also be argued that banks are not doing all they can to help borrowers in trouble. All too often they are piling on extra charges and being too quick to take court action, rather than being prepared to negotiate affordable repayment arrangements. Due to the state of market conditions, banks are eager to ensure they do not make further losses in the mortgage sector. Despite the latest rise in repossessions, figures are still much lower than the numbers in the early 1990s, when they reached 75,500 repossessions a year.

If you need any advice on what to do when facing repossession proceedings or any advice over insolvency issues, please contact Michael Callaghan on 01277 268362.

DEEDS CAN BE SIGNED BY ONE COMPANY DIRECTOR

Due to parts of the Companies Act 2006 coming into force in April, documents signed as deeds now, in most cases, only have to be signed by one company director.

Documents signed as deeds sometimes include non disclosure agreements or undertakings, Deeds of Variations, powers of attorney and Deeds of Assignment of Intellectual Property Rights.

Simple contracts require "consideration" (usually payment but can be "money's worth") to be enforceable.

If there is doubt about whether benefits are passing to the right party, or if there is no consideration, then it is better to sign documents as a deed, state they are a deed and intended to be executed as such, and have a director sign.

In most cases however, if there is no doubt about consideration and money is paid for goods or services sold, it would not be necessary to sign a document as a deed. The director who signs as a deed must sign in the presence of a witness.

Some companies will wish to retain two signatories however, as this is useful protection against fraud. A requirement for two signatures remains acceptable as an internal corporate rule.

Many have internal rules about who can and cannot sign all contracts, although unless the other third party knows there is any restriction, usually the individual who is "held out" by the company as having authority will bind the company. This is even if internally the "rules" said no authority to sign contracts over £20,000. As the supplier or buyer would not be aware of that restriction, the company is still bound.

CHOICE OF LAW

Most international contracts state which country's laws apply to the agreement (and where disputes will be heard). Most countries then respect that "choice of law".

However, many companies contract without written terms, or do not deal with the issue of choice of law, so then the general international law in this area has to be considered.

In the UK, this is under the Contracts (Applicable Law) Act 1990 which resulted from the international Rome Convention in the UK. The EU is seeking to agree a regulation on choice of law in contract matters at present to be known as Rome I. Confusingly Rome II was agreed last year before Rome I. Rome II however, just deals with choice of law in noncontractual matters so is less relevant than the new regulations will be.

The new draft of Rome 1 continues to allow companies to choose which laws apply.

COHABITANTS' RIGHTS



The Government this year announced that its proposals to give cohabitants similar rights on divorce to those who are married, has been abandoned.

Although in some cases, cohabitants have been found to be entitled to a share of their partner's assets, the position is by no means straightforward, nor automatic as with married couples. Yet many believe there are 'common law marriage' rights under English law, which do not, in fact exist. It is important that our clients do take some advice on their rights before moving in with a partner. It is wise to ensure wills are drawn up, and in some cases, for properties to be owned jointly and the shareholding clearly set out.

For those contemplating marriage, it may be wise to enter into a pre-nuptial agreement. Although they are not legally binding in this country they can sometimes have persuasive force and in the Crossley case, saved the higher earner a considerable sum. However, in May, one case laid down rules for unmarried couples who have bought a property in joint names.

Although this does not give cohabitants the same rights as those involved in a divorce, it could make it easier for some unmarried

couples to claim money from their partner, if there is any property they jointly own, when the relationship breaks down.

The 73 year old man in this test case was ordered to sell his home, which was in joint names with his partner, and divide the proceeds with the partner who had broken up their relationship after 23 years together. Mr Carl Barron was told his former partner was entitled to half the £150,000 property which was in his name, even though she had not paid a penny towards the mortgage. In other words, the fact they had put it into joint names was evidence of intention they would jointly own the property in equal 50% shares, not some other percentage.

Anyone proposing to put a property into joint names can easily have a lawyer draw up a document setting out the percentages they will own, and indeed Land Registry forms now allow those registering properties to indicate what percentage shares are owned.

For more information on this case or other family law related matters, please call us for advice.

DIVORCE IN THE NEWS - MILLS V MCCARTNEY

Although most divorces involve much smaller sums of money, the recent judgment in the Heather Mills/ Paul McCartney divorce is of general interest in a number of areas.

This was a case involving a 'short' marriage of four years, but with a child. In general, where marriage is short, the courts look at the assets built up during the marriage rather than applying a straight 50% split of assets as a starting point. This case also involved a marriage where there were enough assets to achieve a clean break, without on-going maintenance for the lower earning spouse, which is not always the case for most divorces.

Ms Mills was awarded a capital sum that would yield her £600,000 a year in income, which was what her needs were determined to be. She received about £24m including properties which was more than the £15m pre-hearing offer, but less than potentially she might have been awarded.

Also of general relevance in short marriages is whether there was a cohabitation period before marriage which increasingly is added on in ascertaining marriage length. Here the court did not accept the parties lived together before the marriage. In short marriages, if this period where they do live together before marriage is taken into consideration, a longer period is considered with implications for asset division.

The court also found there was over spending by the lower earner of the higher earner's money after the separation and £500,000 was taken from the award to compensate the husband for that sum.

The other relevant issue was proof – keeping paperwork, being able to show how much was spent on what items is very helpful in proving issues in a divorce case. The judgment appeared to show that Ms Mills was unable to prove a number of aspects. Whether she might have done had she not represented herself in person at the trial, remains to be seen. Please contact us for information or advice in this area.

INHERITANCE TAX - SISTERS LOSE TEST CASE



For 30 years, Joyce and Sybil Burden, aged 90 and 82, have been battling to ensure that when one of them dies, the other does not need to sell the home they share in order to pay the inheritance tax (IHT) bill, but without success.

However, when civil partnerships became lawful they thought they might be able to use discrimination legislation to aid their case. Were they not related they could have formed a civil partnership and no IHT would be payable when the first sister dies, but as they are related, they are not permitted to do so. They have, however, now lost their appeal in the European Court of Human Rights (ECHR).

The ECHR held by 15 votes to 2, that the Civil Partnership Act does not breach the prohibition of discrimination under Article 14 by not giving them exemption from IHT. The court said that as a marriage or Civil Partnership Act, union is forbidden to close family members so it was right the sisters were denied the exemption.

The sisters have written to the Chancellor of the Exchequer every year since 1976 asking to be treated as a married couple.

Although it is within the Government's power to make an exception, it is unlikely they will choose to do so.

However, there are a number of steps individuals can take to minimise IHT, which in some quarters, has been described as a voluntary tax on those not wise enough to plan to avoid it. For a start, assets given away more than 7 years before someone dies are entirely exempt and many individuals give their assets and houses away to avoid the tax entirely. There are complex rules against "reservation of benefit", but with legal advice, many lawful arrangements which completely avoid the tax are possible.

Secondly, for spouses, there is no IHT until the second spouse dies and even then that spouse has the benefit of both their and their spouse's IHT exemption band.

Thirdly, most of those who die do not pay IHT simply because they are well below the threshold. For 2008-09, this is £312,000. It is only those with assets worth £312,000 or more, who have to pay IHT.

Fourthly, even with recent legal changes it is possible to put some assets in trust to avoid the tax. Many individuals put their life insurance policies into trust for their children which avoid IHT in most cases. In addition, life policies can be taken out and put in trust and the proceeds used to pay the tax. Finally, all the IHT does not have to be paid at once. HMRC allow payments over 10 years.

If you would like advice on reducing the impact of IHT on your estate when you die contact us for further information.



TOLERATED TRESPASSERS - LAW CHANGE

An amendment to the Housing and Regeneration Bill is likely to see the end of "tolerated trespassers" in property law. Since 1996, this term has been used to describe tenants whose tenancies are over because of a possession order, but have not yet been evicted and are still paying rent. Often the rent is paid by housing benefit.

The result of the change will be that no tenancy can be ended by the landlord until the tenant is actually evicted by enforcement of a possession order. Those with that status, when the law changes, will have their tenancies reinstated. Tenancies, both domestic and commercial, can lead to complex legal issues particularly where the tenant does not pay the rent, or otherwise acts in breach of the lease. We can advise on issues arising from your private and commercial lease arrangements.

We often find small businesses entering into long term commercial leases for their business premises without taking legal advice. Often this is the biggest commercial commitment of their business and taking legal advice on the lease can ensure problems are avoided later. In addition, any local business which operates as a partnership, even if just with family members or via a limited company, really ought to have a partnership agreement or shareholders' agreement to ensure all those involved know where they stand. Please contact us if you would like us to draw one up for you.

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PRE-CONTRACT NEGOTIATIONS

Where contract terms are unclear, then the surrounding circumstances are relevant in working out the meaning.

Frequently therefore, solicitors need to look at contemporaneous emails, notes of meetings and obtain oral evidence from both sides, in cases of doubt.

In a recent case, a property developer was refused the right to use evidence of contract negotiations to change the definition of a term in the contract, even though the evidence was in the developer's favour.

Persimmon Homes was developing flats under contractual arrangements with the owner of the land, Chartbrook. There was a dispute over what a term meant on a schedule to the contract. The high court and court of appeal both agreed that Persimmon might not look at other evidence than the contract.

"[The term] is clear, certain and unambiguous and its arithmetic is straightforward," said Lord Justice Rimer, one of the three judges in the case. "The phrases which are elsewhere defined are accepted as meaning what

their definitions provide, and no other word or phrase is said to bear any meaning other than its ordinary one... I can see no basis for re-writing the agreement as invited by Persimmon," he said. "I would reject any suggestion that this is a case in which it is legitimate, as part of the construction exercise, to have recourse to the pre-contract negotiations. The basic rule is that they are out of bounds."

This is consistent with long standing English law, but it is useful to have it confirmed. Persimmon argued that under the disputed clause it owed Chartbrook £900,000. Chartbrook's interpretation of the clause, which gave a formula defining how the profits from flat sales were to be divided between the two companies, meant that it was owed £4.6 million. The term was defined in the contract so any dictionary definition was not relevant.

The answer is to ensure contracts are clear and carefully checked before signature. Sometimes it pays to have a lawyer give a final quick check over an agreement, even if the business has drawn it up internally.

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