

RISK MANAGEMENT UPDATE

Riding the economic roller coaster

With the financial downturn prompting a winter of discontent, businesses large and small are having to think carefully and act quickly to lessen the impact of the economic storm. With a daily avalanche of media information on interest rates, currency values and unemployment figures, businesses feel under pressure to react promptly and look closely at how to maintain a strong order book and implement cost-cutting measures.

But as well as having to make hard business choices, there are a range of legal compliance, regulation and general 'housekeeping' measures that companies can take to ease the strain of the slowdown. For example, would your business be better off, legally and financially, if it was incorporated as a limited company rather than continuing to trade as a sole trader or partnership? The benefit of transferring your business to a limited liability company may offer little comfort as far as the bank is concerned since they will inevitably require personal guarantees from directors, especially if the company has a less than proven track record. But it may offer some shelter from remaining creditors should the worst happen.

Are your standard Terms of Business robust enough to withstand the current tough trading environment? A review of your Terms of Business could be key to both avoiding a dispute with customers or suppliers while also strengthening your debt recovery procedures should you need to enforce debts due.

Outdated Shareholders Agreements and company Articles of Association which no longer properly regulate a business owner's relationship with his or her fellow shareholders or partners can also present real dangers. Companies can rectify these pitfalls by restricting the free transfer of a share in the business, the regulation of key decision making and enhancing the protection of minority shareholders. Businesses

could also introduce legal measures to avoid disputes and possible deadlock between fellow owners which can be costly to resolve and have a devastating impact on the business.

Recession is a time when financial and commercial disputes between trading partners can quickly develop. There are ways in which businesses can manage disputes effectively and reduce their impact on the business. At a time when cash flow is crucial, managing and recovering debts with robust credit control procedures and sensible negotiation and settlement techniques are essentials in preserving valuable trading relationships.

If you would like to discuss risk management or a potential business dispute please contact Jonathan Kitchin, solicitor on 01392 685246 or email jonathan.kitchin@foot-ansteys.co.uk



Building and construction disputes - serve the notice or pay up

If you retain a builder to undertake construction work at your premises and want to withhold sums because you are not happy with the work undertaken, it is vital that you serve a valid withholding notice in accordance with section 111 of the Housing Grants, Construction and Regeneration Act 1996. A failure to do so will usually mean that the builder is entitled to his money.

It is a sad fact of commercial life that one of the most common occurrences for a business becoming embroiled in a dispute is when it undertakes any form of construction operation at its premises. This may not necessarily be a major building project but could simply be a small-scale renovation, extension or fit out.

A recognition that the construction industry was beset by a claims culture, and a particular acknowledgment that issues of payment often lay at the heart of building disputes, led Parliament to enact the Housing Grants, Construction and Regeneration Act 1996. The 1996 Act, as well as providing a statutory scheme for adjudication in construction disputes, also provides a number of specific obligations in relation to payment which are required to be included in all construction contracts, failing which default provisions in the legislation apply.

One of the key payment provisions is section 111 which prescribes a regime in construction contracts whereby a party to a construction contract cannot withhold a payment after the final date for payment unless it has first given notice of its intention to do so. To be valid, the notice must state the amount which is being withheld and the ground or grounds for withholding. The notice must also be served within an agreed period before the final date for payment or alternatively within the period prescribed within the Scheme for Construction Contracts under the 1996 Act. The Scheme provides that, in the absence of a contractual date, the final date for payment is 17 days from the date upon which payment becomes due and that any withholding notice must be served at least seven days before the final date for payment.

Parties need to be aware that notices are time critical. If they are served outside the periods prescribed by the contract or the Scheme they are going to be invalid.

The Technology and Construction Court has recently considered withholding notices again in the case of *Pierce Design International v Mark Johnston & another* where Mr and Mrs Johnston had failed during the course of works at their property to make several interim payments to the contractor. Neither did they serve valid withholding notices. The contractor applied for judgment in relation

to the sums withheld and contended that the sums in question had been “unreasonably not paid” under the JCT 1998 contract. Whilst Mr and Mrs Johnston argued that they were not acting unreasonably in light of their own claim for defective work, this was rejected by the court. The withholding of sums in the absence of valid withholding notices constituted “unreasonable non payment” under the contract and the contractor was entitled to a judgment for its interim payments.

The message therefore is if you are going to withhold payments, get valid notices in on time. A failure to do so will invariably be fatal and you will have to pay up even if you have grounds for not doing so.

If you need advice, either as employer or contractor under a building contract please contact Chris Hoar, partner on 01392 685393 or email chris.hoar@foot-ansteys.co.uk

Chris has recently joined Foot Anstey from niche construction lawyers Shadbolts. He heads up Foot Anstey’s construction team and is able to provide specialist legal advice relating to all building and engineering matters.



Extended warranties - your rights

It always pays to be aware of consumer rights when spending your hard-earned money in the shops, particularly those who do their Christmas shopping for the next Christmas in the January sales. But if you're tempted by the sales to splash out on something more substantial, such as a new washing machine or fridge, your glee at finding a bargain may turn to uncertainty when you are asked whether you want to buy "an extended warranty".

It is always a moment of indecision, isn't it? On the one hand, you so want to believe that the shiny new product you've bought is going to last for years without a glitch. On the other, it would be nice to have peace of mind that you are covered as far as possible – if only the extended warranty were a little cheaper.

It is not our job here to say whether it is money well spent to take out such warranties. However, when you are invited by stores to take out warranties, please remember that you have various rights provided by the snappily-named Supply of Extended Warranties on Domestic Electrical Goods Order 2005.

For example:

- There should be leaflets available in the store describing the warranty
- You can insist on a written quote

- The price of an extended warranty should be detailed next to the product on show
- The warranty quote is valid for 30 days so you do not have to rush to take out the warranty
- You do not have to take out the warranty through the store from which you bought the item
- Having taken out the warranty, you have 45 days in which to cancel it.

The Office of Fair Trading is responsible for enforcement of the 2005 regulations.

If you want to know more about your rights please contact Angus McNicol, partner on 01392 685240 or email angus.mcnicol@foot-ansteys.co.uk

Bad Service

Suffering from that 'back-to-work' feeling and need cheering up with a trip to your favourite hairdressers or getting someone to fix your vintage car? Go ahead. You're worth it. But make sure you know your rights in case your trader has an off-day, whether they be a stylist or mechanic.

Vintage car enthusiasts, salon and beauty customers are protected by The Supply of Goods and Services Act 1982. This law requires a trader to carry out services with reasonable care and skill, within a reasonable time and make no more than a reasonable charge. If the trader doesn't provide the service with reasonable care and skill, the law treats the matter as a breach of contract and the consumer can seek compensation, usually repair or replacement. Which for salons means giving you a new cut, perm or colour.

So, what should you do if you come out of the salon looking like you've been dragged through a hedge backwards, or your brakes fail and you drive through a hedge backwards? If you're not pleased with the service, offer to pay a reasonable amount only, which you both agree on. If you feel pressurised to pay in full, state that you are paying 'under duress'. Say you will be seeking to get your money back and other compensation for distress and inconvenience.

Go to another beauty salon or car restorer and get their opinion, preferably in writing, as to what went wrong. Then, send a photocopy of the opinion to the salon or garage that served you. Ask them if they are prepared to compensate you. Give them 14 days to respond. If they don't reply, or refuse compensation, you may want to consider legal action.

The easiest way to do this is through your local County Court. It is cheap and easy to start a claim. You might also get in touch with your local Trading Standards Office to help you make your claim. Remember to include any out of pocket expenses you may have incurred as well as additional compensation if you think it is appropriate.

For further information or advice contact Italo Cerullo, solicitor on 01823 625614 or email italo.cerullo@foot-ansteys.co.uk

Feeling the economic pressure?

The law is often opposed to interfering in a commercial bargain struck by two consenting parties – even if the terms are stacked heavily against one party. However, many businesses may be experiencing financial pressures in honouring their existing commercial agreements and people may be tempted to take advantage of the situation.

In such turbulent economic times, it is worth knowing that the law can offer some help to a party who has lost their 'freedom of contract'. This can occur when that party has agreed to do something only because they have been subject to undue financial pressure from the other contracting party.

For example, a supplier may hike their prices for goods desperately needed by a business where there are no or few alternatives available; or a party may threaten or refuse to do something until a variation is agreed by the other. In both scenarios, the suffering party would need to show that they had no choice but to agree i.e. it was not a voluntary act.

This is known as 'economic duress' and can, in limited circumstances, result in that agreement being set aside. There are four recognised elements that must be satisfied to prove an economic duress:

1. The pressure on the suffering party must leave them with no realistic alternative other than to accept the agreement on the terms offered. An alternative may include taking legal action.
2. The pressure must be illegitimate. A court would consider whether there has been an actual or threatened breach of the agreement. It would also look into whether the dominant party has acted in good or bad faith. Illegitimate pressure

must go further than the everyday pressures of commercial negotiations.

3. The pressure must be a significant cause for the suffering party to enter into the agreement.
4. The suffering party must not affirm the agreement by their conduct. Agreements entered into under economic duress are not automatically void. They are voidable. This means they are valid until a party seeks to avoid its terms. It is important, therefore, that a suffering party acts quickly if they consider that they have been a victim. However, making payment under an agreement does not automatically mean it has been affirmed.

Although it is historically difficult to prove, economic duress is certainly something to watch out for now that businesses are feeling the effects of the credit crunch. A successful party in a claim of economic duress is generally entitled to recover any money paid into an agreement; or for their losses arising from the duress.

If you would like to discuss your commercial contracts or arrangements please contact Ben May, solicitor on 01872 243336 or email ben.may@foot-ansteys.co.uk



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Senate Court
Southernhay Gardens
Exeter
EX1 1NT

t: +44 (0) 1392 411221
f: +44 (0) 1392 685220
DX: 8308 EXETER

21 Derry's Cross
Plymouth
Devon
PL1 2SW

t: +44 (0) 1752 675000
f: +44 (0) 1752 675500
DX: 118102 PLYMOUTH 2

The Quad
Blackbrook Park Avenue
Blackbrook Business Park
Taunton
TA1 2PX

t: +44 (0) 1823 625600
f: +44 (0) 1823 625678
DX: 97177 TAUNTON (Blackbrook)

Princes House
Princes Street
Truro
Cornwall
TR1 2EY

t: +44 (0) 1872 243300
f: +44 (0) 1872 242458
DX: 81200 TRURO

enquiries@foot-ansteys.co.uk
www.foot-ansteys.co.uk

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