Commercial Litigation

Commercial Litigation Newsletter:

Our monthly updates on what matters to you

January 2016

Welcome to this our 1st edition in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do please let us know…

Access to Justice: can you afford it?

On 9.3.15 there was a massive increase in Civil Court fees in England & Wales for specified money cases. The hike means that claims valued at £10,000 to £200,000 now incur a Court fee of 5% of the amount claimed. Under the old charging regime, the fee payable to sue for £100,000 was £910. Now it is £5,000. That's a 549% increase…

Whilst there is a cap of £10,000 for the issue fee, the discount available for online issue (which might have softened the financial blow for some) does not apply to claims over £100,000. The impact such expense will have on SMEs trying to recover monies owed to them, and especially by bigger entities, raises real concerns.

The increase and cap will likely not even register with the bigger entities but it will hit SMEs hard. Larger companies will have significantly less incentive to admit liability and settle out of Court because SMEs might never issue so the threat to them is no real threat at all and can be ignored. That this could happen runs contrary to the idea, introduced in 1999, that litigation is supposed to be a level playing field where deep pockets don't win out.

If you are a SME it is likely the bigger entities will make you issue proceedings, to see if you will, to see if you can. Cash is king, we all know that. Anything which affects cash flow is a problem, and having

unresolved claims, unpaid invoices and then having to pay far more to pursue them than before simply exacerbates the problem.

The long term impact of these changes remains to be seen but if you are a potential litigant, you have an additional up front cost factor to weigh up when considering the merits of Court action. Late last year, the Ministry of Justice responded to the consultation on possible further increases in Court fees. The response confirmed that the government intends to:

- Retain the maximum fee cap for money claims at £10,000 for the time being
- Implement fee increases of 10% across the **full range** of civil proceedings
- Introduce fees in other tribunal proceedings

Currently, there is no indication of when the changes will come into effect. Best of course to avoid litigation if you can. Should you have no choice, we will explore with you the full range of funding options available, to help make the decision which is right for you and your business to resolve your dispute cost effectively.

Paying the penalty?

It is a fundamental tenet of English law that penalty clauses are unenforceable. What then is a penalty? In essence it is the exertion of undue pressure on a party to perform a contractual obligation, with the threat of a fine or punishment for failure to perform. That the Courts will not enforce a penalty against the defaulting party is an interference with freedom of contract but one justified on grounds of public policy. This we call the penalty rule.

In recent years the Courts have considered some clauses in commercial contracts that were neither a clear penalty nor wholly based on a genuine pre-estimate of loss. The liquidated damages they fixed as compensation did not just reflect the likely loss to the innocent party, but had some commercial justification and were not merely a deterrent.

The high point in this consideration came last November in the judgments of Cavendish Square Holdings BV v El Makdessi and ParkingEye v Beavis, heard together by the Supreme Court.

The parking case made the national news and involved a situation in which many of us could find ourselves: overstaying the 2 hour 'free' car parking at a retail park and getting hit with an enormous fine for the privilege. In Mr Beavis' case it was £85, which he did not much like and challenged. He argued it was an unenforceable penalty but the highest Court in the land disagreed. The Supreme Court also agreed '*the charge in question is not disproportionately high, and insofar as it exceeds compensation its amount is justifiable, and not in bad faith or detrimental to the consumer*'.

On a personal level we probably side with Mr Beavis but the case certainly means that when you are next taking advantage of the 'free' parking, you will not want to overstay your welcome!

Mr Beavis may have argued over paying just £85, no doubt on a point of principle, but the Cavendish case involved rather more: as to whether 2 clauses in a commercial contract were penalties and on which turned the payment, or not as the case may be, of over US$100m.

Whilst Mr Beavis had agreed to park his car on certain terms and pay if he breached those terms, Mr Makdessi had agreed to sell a controlling stake in the largest advertising and marketing communications group in the Middle East and face certain financial consequences if he breached the terms of the sale. Those terms were carefully negotiated over 6 months by City lawyers for all parties. It was agreed if he undertook competing activities, first he would not receive the final instalments of the purchase price being US$65.5m and second, he had to sell his remaining shares to Cavendish at a loss to him of US$44.1816m.

Mr Makdessi argued those clauses were unenforceable penalties. The Supreme Court disagreed and held they were enforceable. The fundamental principle and the now restated legal position is that the penalty rule regulates only the contractual remedy available for the breach of primary contractual obligations, and not the fairness of those primary obligations themselves.

The law will not generally uphold a contractual remedy where the adverse impact of that remedy significantly exceeds the innocent party's legitimate interest. The true test for establishing whether a contractual provision is penal is whether the clause you challenge is a secondary obligation which imposes a detriment on the contract-breaker out of all

proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

The decision may not be entirely novel but this remains a complex area of law. The decision has the potential to impact all your contracts but is especially relevant in construction contracts. Our corporate and commercial team will be pleased to discuss how this may affect you and your business.

The Financial List

October 2015 saw the introduction of a new specialist Court list set up to deal specifically with complex, high value financial disputes and known as the Financial List. The list operates in the Commercial Court and the Chancery Division. Proceedings may be issued in either, however the list itself is run as a single list and claims are issued in the Rolls Building, London.

The Financial List has been introduced to provide suitable resources for the ever-changing international financial community with claims worth in excess of £50m, ensuring their needs are met appropriately. Cases assigned to the Financial List will be heard by specialist judges, who will oversee each case through to enforcement. The judges will have an appropriate level of expertise in the relevant financial markets, providing the necessary experience for complex claims but will also be provided with updates on developments in the market.

The intended focus and outcome for the list appears to be fast, effective and economic dispute resolution within financial cases of a complex nature. Consequentially this will build upon the reputation of the English Court system to manage dispute resolution in the financial market.

This may not be directly relevant to your business but it's good to know such complex cases are dealt with outside the normal lists, freeing up Court time for your business matters to be decided more quickly if and when the need arises.

And finally…to B (ankrupt) or not to B (ankrupt)? That is the question…

Being owed money is a situation in which you may find yourself from time to time. When you are owed money, sooner or later you are going to want, or need, to do something about recovering it. Threatening bankruptcy (or winding up for corporate debts) can be a great way to get what you are owed without too much effort and expense.

However, the law on financial limits for bankruptcy changed on 1.10.15 so here is what you need to know on the current limits for undisputed debts. *Please note: for disputed debts you should take specific advice from our litigation and dispute resolution team.*

If you are owed more than a certain amount of money, you can ask for that money back using the Insolvency Act 1986 (IA 1986) by making a statutory demand i.e. a demand pursuant to statute, namely the IA 1986. A statutory demand is a written demand for payment of a debt, in a prescribed form, served on either:

- An individual, under section 268(1)(a) of the IA 1986.
- A company, under section 123(1)(a) or 222(1)(a) of the IA 1986.

Once served, in broad terms a debtor (the one who owes the money) who for 21 days fails to comply with a statutory demand for a debt of more than £5,000 (for individuals) is at risk of having bankruptcy proceedings issued against them. If the debtor is a company and it owes more than £750, then the company is at risk of winding up proceedings issuing against it and worse the petition being publicly advertised. So serving a statutory demand can be a great means of exerting pressure on a person or company to pay a debt.

This is why it is often the first step taken by a creditor (the one who is owed the money) who intends to present a bankruptcy or winding up petition against the debtor. It need not go that far however: there is no obligation on a creditor who has served a statutory demand to commence insolvency proceedings against the debtor.

This is because a statutory demand doesn't commence Court proceedings and it doesn't need to be issued at Court. You will find a number of potential advantages in serving a statutory demand, which include

- Not involving the Courts from the outset
- Preparation and service of a statutory demand being relatively quick and inexpensive

- Prompt payment of a debt or discovering details of any dispute or cross-claim.

On the other hand, serving a statutory demand may have a negative impact on an ongoing trading relationship. It may be perceived as an aggressive step and can lead to Court proceedings, for example, if an individual applies to set aside the statutory demand or the company seeks an injunction to prevent the presentation of a petition because in fact the debt is disputed.

Not every demand of course will result in payment. Demands generally work well where the debtor has the means to pay but was simply being dilatory. If the debtor has no money, they may welcome a formal insolvency order, implemented at your expense and you will become just one of a number of creditors standing in line!

We hope you have enjoyed reading this newsletter. We really would like to hear from you with any feedback, comments, suggestions and of course if we can assist on any specific issue you have, just give us a call.

At Gardner Leader we understand you need a law firm which you can trust, which understands your priorities and delivers practical, exceptional value legal solutions. We will work closely with you to ensure that we can deliver the results you need. Legal situations can be stressful, but we are committed to giving you peace of mind with the reassurance that your case will be handled sensitively and professionally by our legal experts.

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