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# Commercial and Corporate Finance

news and advice from Birkett Long

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## Have Your Credit Card Purchases Lived Up to their Expectations?

Many of us now purchase goods over the internet. Unfortunately, some overseas purchases can lead to disappointment due to the inherent uncertainty of buying from an unknown supplier or because products are damaged in transit. However, making such a purchase with a credit card has the added protection of the Consumer Credit Act 1974.

One particular benefit for consumers is section 75, which provides for reimbursement from the credit card provider where the supplier is liable for misrepresentation or breach of contract, provided the cash price of the goods is between £100 and £30,000 (inclusive of VAT), and the credit limit is no more than £25,000. This might apply, for example, if the goods are faulty, were not delivered, or were not as described. (NB the protection does not extend to debit or charge card transactions.) Section 75 claims are generally possible within 6 years from the date of the breach of contract, and liability is not limited to the amount spent on the card. The section also applies where credit is used for only some of the payment such as a deposit, provided the total value of the transaction is over £100.

In a recent decision, the House of Lords confirmed that this section also covers foreign purchases, i.e.

- where a UK credit card is used to buy goods whilst abroad; or
- to buy goods which are ordered from a foreign supplier whilst abroad, for delivery into the UK; or
- to buy goods which are ordered in the UK from abroad via the internet, telephone or mail order; or
- where there are face-to-face dealings with a foreign supplier or its agents in the UK but the contract is not completed in the UK.

This protection is in addition to the 'cooling off period', which allows cancellation within 5 or 14 days under the Consumer Credit Act or 7 days under the Consumer Protection (Distance Selling) Regulations 2000. (These rights to cancel are limited and do not apply to all goods.)

Under the Act the consumer has the choice as to whether to claim from the supplier, the credit card issuer or both for the full amount of the claim, which is particularly useful where a supplier has gone out of business or cannot be traced. Evidence must be supplied that the goods were ordered, payment was made and of the non-delivery, damage or misrepresentation. It is therefore advisable to print off a copy of the order details and the supplier's confirmation e-mail or order number, and to calculate whether the sterling equivalent of the price falls within the limits at the time of purchase.

This is good news for consumers, but has obviously not been so well received by the credit card issuers. Although most card issuers have a policy of settling claims anyway, at least up to the amount charged on the card, this has been on a voluntary basis for foreign transactions to date and often required some persistence from consumers. Now that consumer rights in this area are crystallised, card companies are concerned that there will be rising claims and that people will rely on the security of the Act instead of buying insurance. This could affect consumers through a general increase in charges on credit cards, as losses are recouped by the card issuers. However, many cards add a foreign exchange rate premium for foreign transactions anyway and losses may be negated by an overall increase in the use of credit cards for overseas purchases.

Consumers are advised to continue to pursue the supplier first. If unsuccessful, the Act might then be used to make a claim against the card issuer.

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## Restrictive Covenants

So, your top salesman has just handed in his notice and rumour has it he is on his way to your main competitor and intends to take all your clients and half his team with him. What can you do?

You might start by putting him on garden leave (away from clients) during his notice period, and requiring the return of company property (although you may need an express contractual right to do this). Thereafter, you may seek to enforce expressly agreed post-termination restrictive covenants. Such covenants seek to prevent poaching of clients and staff, dealings with clients and suppliers and working for a competitor. Whether or not any such covenant is enforceable will depend on whether it is reasonable in scope and necessary to protect your legitimate business interests, including customer connections and goodwill.

Recent case law has demonstrated an increasing tendency for the courts to enforce such covenants:

**Thomas v Farr Plc 2007**, the court held that a covenant which prohibited the company MD for 12 months from being involved in a competing business anywhere where he had conducted business in the final year of his employment, was enforceable. Since the restrictive covenant did not prevent him from working as an insurance broker in other sectors, and as MD he would have been privy to a large quantity of information, the court deemed the covenant to be reasonable in all the circumstances.

**Beckett v Hall 2007**, the court ruled that a restriction which was stated to apply only to clients of a holding company, also applied to clients of the subsidiary company for whom the employees actually worked. The court ruled that the "law had to have regard to the realities of big business". Other examples of the trend towards enforceability include TFS Derivatives v Morgan [2005], Dyson Technology v Strutt [2005] and LTE Scientific Limited v Thomas [2005], all of which saw non-competition/area covenants enforced.

All of this is potentially good news for you as an employer. However beware, such decisions emphasise the need for the covenant to protect a legitimate business interest, only to the extent necessary and in respect of senior employees. Don't go over the top in your drafting! Better still, take good legal advice...

## Retention of Title

The recent case of CKE Engineering Ltd (in administration) [2007] considered the effectiveness of a retention of title clause where the goods supplied under the clause were said to have lost their original identity. It appears to suggest that title can be reserved in circumstances where the goods supplied have been mixed with others, and the nature of the goods supplied has therefore changed. However, a more detailed look at the reasoning behind the court's decision shows that this is unlikely to be the case.

In CKE Engineering a galvanising company had retained title to zinc it had supplied to its subsidiary. Both companies ceased trading and went into administration. When the administrators took office, the subsidiary was in possession of 265 tonnes of zinc which had been mixed and melted in a galvanising tank. This was sold and the proceeds of sale placed in a fund.

The court held that the fund was divisible by reference to the respective interests of the two companies in the zinc. The court concluded that the molten mass remained substantially zinc and therefore continued to exist as a raw material rather then being transformed into some distinct new product.

This case can therefore be distinguished with other cases involving "mixed goods", such as where resin was mixed with other substances to make chipboard and where leather was manufactured into handbags. In these cases the retention of title clauses were not effective as the raw materials had lost their identity and ceased to have significant value as raw materials.

## Companies Act 2006 Update

**Those of you who attended our highly successful seminars in September 2007 and March of this year will be fully aware of the provisions of the Companies Act 2006 that have already been brought into force.**

**In September 2008 we will be hosting the next stage of seminars to provide local businesses with practical advice on the changes that come into force in October 2008, and how they will affect you. For further information about these seminars please contact seminar@birkettlong.co.uk or 01206 217605.**

**In the meantime, if you would like to discuss any aspect of the Companies Act 2006, please contact us on 01245 453817 or send and email to commercial@birkettlong.co.uk.**


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