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For Business

news and advice from Birkett Long

Spring 2012

Cautious contracting - prevention is better than cure

Difficult economic circumstances can often bring out the worst in human behaviour. It may not be that someone intends or wants to act in such a way to others, but in some situations people will feel they have no other option but to put self-preservation above all other priorities. It is behaviour borne out of necessity as opposed to choice.

This same principle applies to businesses just as much as it does to individuals, and in the current economic climate the risks of entering into contracts with other businesses are inevitably going to be heightened with the ever-present pressures on cash flow and finance availability. This leads to a conflict, as on the one hand, businesses will want to be taking on any new opportunities and clients that are available, yet on the other, there will be a concern as to the risks of committing precious resources to a client that might ultimately have difficulty in meeting their obligations. This can create a stressful balance for the decision makers in a business and it is important that all the available methods of reducing the risk of doing business are examined, especially with new clients that do not have much of a trading history.

A general rule should always be to thoroughly research any business you are planning to contract with to ensure you have a well informed understanding of what you are letting yourself in for. Possibly the best method is to research a company at Companies House and look at a prospective client's accounts and balance sheet.

If you are dealing with a partnership or sole trader then you should ask the director for a copy of their latest accounts. This should give you a good idea of the trading history of the business and whether there are any substantial creditors or debtors that may cause it some difficulty in the coming year. If there is anything that looks to be a cause for concern then you will at least have the opportunity of addressing it openly with the prospective client prior to entering into a contractual relationship.

If you are facing the prospect of doing business with a start up company, or a company with a limited trading history, then you should consider requesting a personal guarantee from the directors of the business. Whilst it might be perceived as an overly adversarial request, it is a good way to ensure contractual commitments are taken seriously and you will often have better prospects of recovery from a personal guarantee than you will from a start up company with limited assets or cash in the bank.

Making sure that your terms and conditions are well drafted and tailored to the specific requirements of a contract is vital to ensuring your interests are well looked after. You should consider including provisions for a higher frequency of invoicing, obtaining a deposit, or monies on account, and having a well drafted retention of title clause that allows you to take possession of any goods you have sold or loaned, if payment is not made when due. If a dispute does arise in the course of business then it is important that legal advice is sought at an early stage. It is often the steps that are taken at the outset of a potential dispute that will decide how it is ultimately resolved and any wrong moves can make it much harder to resolve an issue and preserve the business relationship. It is also often difficult for an individual who has been involved in the day to day dealings of a business relationship to look at a potential dispute objectively and assess where the fault lies.

If you have any issues regarding business disputes contact Keith Songhurst on 01245 453821 or email keith.songhurst@birkettlong.co.uk

BIRKETT LONG LLP

PHOENIX HOUSE, CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E BUSINESSNEWS@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK

Commercial & Corporate Finance

When the going gets tough...the tough get restructuring

Tougher economic environments often see a greater amount of restructuring within businesses, including a demerger. There are a number of reasons why a company may want to demerge:

- to unlock shareholder value (sometimes enabling an exit by one party);
- to separate business divisions that operate in different markets or that lack a common strategy;
- to divide a business between shareholders or in preparation for a sale out of the group; or
- to demerge part of a business which is subject to regulatory requirements that may hinder the operation of the remainder of the business

Current economic conditions are placing increasing pressure on companies to review their activities and, where appropriate, to restructure their businesses. Recent months have seen us assisting clients with various types of restructuring and this is a trend we expect to continue, given economic forecasts for the medium term. There are four main types of demerger structure:

- Direct demerger (direct dividend). This is effected by the distributing company paying a dividend to its members of shares in the subsidiary company to be demerged
- Indirect demerger - a variation on the direct dividend route: the distributing company declares a dividend which is satisfied by the transfer of the subsidiary to be demerged to a newly formed company (Newco), in consideration for which Newco issues shares to the distributing company's shareholders
- A demerger involving the voluntary winding up of one or more companies in the group, using a process permitted by section 110 of the Insolvency Act
- A scheme of arrangement under section 895 of the Companies Act 2006 (statutory demerger)

There are a number of practical considerations to be taken into account in identifying the appropriate method of restructuring and to ensure it is available and appropriate for the particular company in question. Which route to choose will usually be determined by the tax implications involved in implementing the restructuring. The tax costs of a demerger could be prohibitive but important tax reliefs exist if the demerger qualifies as a statutory demerger or "scheme of reconstruction" under the relevant tax legislation. Equally a demerger is likely to have an impact on share awards and options held by employees. Exactly how such share schemes will be affected will vary depending on the terms of the share schemes and the details of the demerger and will need to be considered if the company has such a scheme.

A key feature of many demergers is the payment of a dividend by the "distributing" company, which gives rise to a number of technical issues that need to be addressed:

- Distributable profits. The distributable profits position of relevant group companies will need to be checked. Whether or not there are distributable profits must be determined by reference to "relevant accounts" (usually the last audited accounts of the distributing company) which must comply with specified requirements under the Companies Act 2006 ("2006 Act"). Failure to follow the 2006 Act requirements can leave a member liable to repay the distribution (or the offending part) if he knows, or has reasonable grounds to believe, that the distribution contravenes the statutory rules
- Distributions in kind. If a company wants to distribute a non-cash asset to shareholders (for instance shares in a subsidiary in a demerger), the passing of these assets constitutes a distribution and can only be made if the company has sufficient distributable profits. It has always been clear that the transfer of an asset for market value is permitted. The 2006 Act clarified the position regarding the transfer of assets for consideration that is below market value
- Shareholder approval. If the demerger involves a dividend in specie, shareholder approval will invariably be required under the distributing company's articles of association

Demergers can be a useful tool to enable companies to restructure their business and, as always, early advice from your trusted legal adviser will enable you to make use of these schemes with confidence.

For advice and assistance on demergers and restructuring contact Tracey Dickens on 01206 217326 or email tracey.dickens@birkettlong.co.uk

Commercial Property

Your business property...it doesn't have to cost the earth!

David Rayner, partner from Birkett Long's Commercial Property Team discusses the "big themes" that are likely to affect commercial premises during 2012.

From the perspective of both landlords/investors on the one hand and tenants/occupiers on the other, sustainability and cost saving will top the priority list – indeed, the two are linked, because the more sustainable a building the larger the achievable cost savings, especially over the long term.

Sustainability has become an important factor for anyone involved in commercial real estate transactions. Historically, landlords and investors didn't pay much attention to how sustainable their buildings were nor did they look at ways to reduce costs and expenditure relating to that building, expecting that everything would fall on their tenants. Now, however, in a changed economic environment, there is a premium to be gained by landlords who hold sustainable buildings with lower costs of occupation.

It is understandable that business leaders want to concentrate their attention and efforts on running the business rather than the business premises. But the tough world in which all businesses now operate makes it prudent to look more closely at the terms under which the business is occupying its premises and see how costs could be saved.

Birkett Long has introduced a new service offering tenants a review and report on their lease. The firm also provides a wider review and advice service, designed for both landlords and tenants, which provides an appraisal of business premises and highlights any action – particularly urgent action – that may need to be taken. This appraisal looks at how costs and expenses can be minimised.

The following examples illustrate the type of issues such a review can address:

- A landlord providing common services to a building or an estate and a tenant looking at its own office or unit, will both be keen to reduce energy costs as far as possible. Both need to understand how any works to improve the sustainability of the building - or the smaller unit - can be carried out and by whom and, if different, at whose expense. Both also need to understand how such improvement works might influence the outcome of future rent reviews.
- Landlords and tenants need to appreciate how any break clause can be operate.
- They should know what tactics can be adopted and understand the essential points when negotiating lease renewal. In the current market, a key question is whether it is in the tenant's best interest to try to force the landlord's hand or whether the landlord should do all they can to retain existing tenants?
- The full extent of repairing and maintenance obligations should be understood. Both sides need to consider the tactics to adopt should the issue of dilapidations be raised.
- Many commercial leases relating to units within large estates or buildings will have provisions requiring the landlord to provide services for the benefit of all tenants, but allowing him to recover the costs of those services from the various occupiers. Landlords and tenants should understand exactly what has to be provided, or can be provided, and the consequences of not doing so. We have seen cases where attempts have been made to squeeze services not covered into the scope of 'service provision'.
- Insurance and the recoverability of insurance premiums is a vitally important area. Landlords and tenants should be aware of whether they can challenge the insurance provisions and where liability for making good damage from uninsured risks would fall.

In a difficult business environment, costs and cost savings will become increasingly important. It is only the well advised landlord or tenant who will know how best to meet the challenges of the forthcoming year.

For further details on Birkett Long's lease review and commercial property review services please refer to your usual Commercial Property contact or David Rayner on 01245 453826 or email david.rayner@birkettlong.co.uk

Succession Planning
A free seminar

This seminar should appeal to business owners who are thinking of selling or passing on their business now or in the next few years, and who wish to maximise its value.

The seminar will explain how to prepare for sale, MBO or succession to the next family generation and assist you to formulate an exit plan, which will increase the value of the business as sale approaches.

19 June 2012, Colchester - Venue TBC
22 June 2012, Basildon - Venue TBC
08.00 am to 10.00 am

For details or to receive the invitation please contact Yvonne Jenkins on 01206 217334 or email yvonne.jenkins@birkettlong.co.uk

Litigation

Insolvency Reforms

Shortly before Christmas 2011, the Insolvency Service published some proposals to reform bankruptcy and company winding-up processes – essentially to simplify those processes, particularly in the case of non-contested petitions.

The proposals include:

- **where there is no dispute between the parties, the court is to be removed from the process by which bankruptcy and winding up orders are granted. Instead, an applicant will complete an online form and then submit it to a newly created office within the Insolvency Service, known as the Adjudicator, who will have the power to make such orders;**
- **there will be a new pre-action process to encourage parties to attempt to resolve the matter before any application is submitted to the Adjudicator. The benefits to entering into discussions with the creditor and/or seeking debt advice will be promoted to the debtor; and**
- **the current mandatory requirement to advertise a winding-up petition in the London Gazette as a pre-requisite to any winding-up order being made will be abolished. Other creditors will not be given the opportunity either to support or oppose the petition.**

The proposals, which are currently undergoing a consultation process with stakeholders, have not been met with widespread support.

Some note that the processes will no longer be a class remedy but instead will become a debt collection action between the debtor and a single creditor decided by a (possibly) unqualified public official. There is also a fear that more bankruptcy and winding-up orders are likely to be made when this may not be the best solution for the debtor or their creditors. It remains to be seen to what extent the proposals survive in their current form.

For further information or advice on any insolvency matter, contact Kevin Sullivan on 01206 217376 or email kevin.sullivan@birkettlong.co.uk

Public Services and Discrimination

A recent case decided by the Court of Appeal illustrates that when services are offered to the public they must be offered in a non-discriminatory way.

In this case, a gay couple who had entered into a civil partnership booked a double room at a hotel by telephone. The hotel was run by a married couple with strong Christian beliefs. Their online booking form stated that they preferred to let double accommodation to heterosexual married couples only. The gay couple did not see this notice. On arrival at the hotel there were no twin rooms available and they had to seek accommodation elsewhere. The hotel owners refunded the deposit.

The couple brought a claim under the Equality Act (Sexual Orientation Regulations) 2007. The hotel owners denied direct or indirect discrimination, saying that the restriction was not based on sexual orientation but on a belief that sex outside a heterosexual marriage was sinful - a rule they applied to unmarried heterosexual couples also. They also argued that even if they had discriminated, they were justified by their right to manifest their Christian religion under Article 9 of the European Convention on Human Rights. The County Court Judge held against the hotel owners and they appealed. The Court of Appeal dismissed their appeal saying that although they refused to provide a double room to anyone who was unmarried, a gay couple could not be married and therefore the restriction discriminated against them on the basis of their sexual orientation. The Court also said that the hotel owners' freedom to manifest their religion or belief had not been breached and they were free to manifest their religious beliefs outside the commercial sphere.

In a nutshell, this means that individuals may manifest their religious beliefs but they must not let those beliefs interfere with their provision of services to persons with protected characteristics. Contact Reggie Lloyd on 01206 217347 or reggie.lloyd@birkettlong.co.uk

BIRKETT LONG LLP

PHOENIX HOUSE, CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E BUSINESSNEWS@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK

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