

Corporate Law Firm of the Year 2008

Winner of Lancashire
Dealmakers Awards 2008



Protecting your Business in the Current Economic Climate

Business Law
Commercial Litigation
Commercial Property
Employment Law



Funding

Daniel Milnes
Business Law



Sources of Funding

- Debt versus Equity
- Debt is money
 - Interest, Security, Repayment
- Equity is ownership
 - Control, Income, Exit



Types of Debt Funding

- Overdraft
- Term Loan
- Purpose Loan
- Factoring or Invoice Discounting
- Trade Loans (Brewery, Oil etc)



Borrowing From Your Pension

- Why not use your own money to help your business?
- Because it isn't yours any more
 - Pension assets owned by trustees
 - Scheme rules apply
- SSAS Loans to Sponsoring Employer
 - Highly regulated
 - Security and Interest
- Taxation consequences?



Security (for the Lender)

- Debentures
- Charges/Mortgages
 - Property and Chattels
 - Fixed and Floating Charges
- Guarantees
 - Parent/Group
 - Personal
 - Backed?



Equity: Who Owns What?

- Shares in a company
- How much?
 - Voting
 - Income
 - Capital/Sale Proceeds
- Different classes of shares
 - Preference
 - Redeemable



Making Co-ownership Work

- Have an agreement or modified constitution
- Consider day-to-day management
 - What decisions need investor approval?
- Plan ahead for Exits
 - The Investor's
 - Yours?



Grant Funding

- Is it still out there?
- Some limited grant funding can be
 - For specified projects with outcomes
 - With strings
 - Changing rules and policies
- Special Loans
 - SFLG Scheme
 - LCDL Microloans



Commercial Litigation


Robin Stephens




Credit Squeeze

Limited overdraft → You ← Bad/late payers





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Free Stuff!

Forbes Debt Collect Toolkit

- Late payment interest and charges
- Interest at 8% above base
- Debt recovery charges
 - £40 up to £1,000.00
 - £70 up to £10,000.00
 - £100 over £10,000.00

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Illustration

- £3,950.00 over due 60 days
- Claim:
£3,950.00 plus £81.16 interest plus
£70.00
= £4,101.16

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Two Questions?

- What have they got to lose?
- How do you make yourself a priority?



Big Issues in Litigation

- Delaying tactics/post contract negotiation
- Misrepresentation claims
- Fraud
- Funding
- ADR
- Distraint




More Free Stuff!

A free pre litigation letter from Forbes Debt Collect
– worth £17.50 plus VAT




Premises

Adam Bromley
Commercial Property



New Premises: Buying or Leasing

- To buy or not to buy...that is the question!
- Buying or Leasing
- Compromise
 - Sale and Leaseback



Moving On: Getting out of Leases

- Why Go?
- Your basic choices:
 - Surrender
 - Assign
 - A third option?
- Break Clauses



Moving On: Getting Out of Leases

- Market Conditions
- Negotiating position
 - Tenant/Landlord
- Avoiding disputes
- What will it cost?



Repairs and Dilapidations

- Repairs
- Responsibility
 - Who and when?
- Dilapidations
 - What happens at the end of the lease?



Rent Reviews

- The initial position
- Negotiation
- Using a third party



Monthly Rent Payments

- Credit Crunch – Knock-on effects
- Agreeing to Monthly Rent Payments
 - Specific terms?
- Variation and Risk
 - Guarantors



Employment

Peter Byrne



Employment Contracts

- Agency Workers
 - Employee of the employment business?
 - Employee of the end user?
 - Neither?



Employment Contracts

- Usually two separate contracts
 - Between the individual and the employment business
 - Between the employment business and their client (end user)
 - Never usually between individual and end user



Employment Contracts

- Unless a contract can be implied between the end user and the individual, the individual is not able to claim employment rights against the end user



Employment Contracts

- Take care – Harlow District Council v O'Mahony and APS Recruitment
- Even if no contract at the outset, conduct of parties did point to the conclusion that a contract was created.



Redundancies/lay offs

- If employee cannot provide work, an employee may be entitled to a guarantee payment
- Maximum is £20.40 per workless day
- Payable for maximum of 5 workless days in a 3 month period



Redundancies/lay offs

- Should always be an express clause providing the employer with the right to lay-off
- Tribunal can order payment if not made



Redundancies/lay offs

- Three key points
 - Selection
 - Consultation
 - Availability of suitable alternative employment



Redundancies/lay offs

- Also subject to Employment Act 2002
- Letter inviting to meeting giving details
- At this stage only a risk of redundancy



Redundancies/lay offs

- Hold consultation meeting
- Employee has right to be accompanied
- Should be minimum of two meetings with reasonable time between
- Only at end of process should redundancy be confirmed



Redundancies/lay offs

- Must give right to appeal
- If not correct, unfair dismissal
- Entitled to contractual notice and redundancy payment
- Service x age Factor x gross week's wage



Protection During Employment

- Whole Employment Clauses
 - Prevents working for two or more masters with potential divided loyalties, if any at all
 - If an employee is contemplating leaving, prevents them setting up a new business when you are paying them to work for you
 - Prevents them acquiring an interest in a competing business



Confidentiality

- Acknowledge that the employee will be aware of confidential information during the course of employment
- Identify what constitutes confidential information
 - Customers
 - Suppliers
 - Pricing Strategy
 - Operating profit levels



Confidentiality

- Restrict the use of employer's information other than in the course of employment
- Prevent the disclosure of any such information for the use of a future employer



Confidentiality

- Prevent the public disclosure of such information
- Provide for the return of all confidential documents when requested by the employer



Pay in lieu/Garden Leave

- If you want to “pay in lieu” there must be a contract term giving you the power to do so
- The power should always be discretionary in favour of the Employer



Pay in lieu/Garden Leave

- Recommended to have an express clause providing that the employee does not have to be provided with work during his notice period
- Can also provide that the employee is required to work on a designated “special project”



Post Termination

- Ordinarily, no restrictions on employee once left your employment unless contained in the contract
- Clauses must protect a legitimate trade interest
- Should be no more protective than what is regarded as reasonably necessary



Post Termination

- Status of Employee is crucial in every case
 - Must look at realistic harm that the employee can cause
 - Senior executive can do more harm than a trainee
 - Level of protection that would be permitted would differ
 - Industry standard



Post Termination

- Types of restrictions permissible
 - Non competition
 - Poaching customers
 - Attempting to interrupt line of supply
 - Poaching staff
 - Geographical restrictions but only where justified



Post Termination

- Must be certain
 - Employee must be able to clearly identify what he or she can and, more importantly, cannot do
 - Must not allow for breach without employee's knowledge



Post Termination

- Must be certain
 - Must be limited in time to a reasonable period
 - If geographical restriction, this should be necessary and for no larger area than is reasonable



Post Termination

- Cannot prevent the departing employee from working at all
- Always include clear definitions
- Can include prospective clients or customers



Post Termination

- A Breach of Contract by the employer may prevent the enforceability of any post termination restrictions
 - Paying in lieu when there is no clause to that effect in the contract
 - Placing an employee on Garden Leave when no contract term exists to that effect



Post Termination

- A Breach of Contract by the employer may prevent the enforceability of any post termination restrictions
 - Claims of Constructive Unfair Dismissal, if upheld, will render post termination restrictions unenforceable



Trading Through

Charlotte Wood & Alexandra Sagar
Business Law



Making Your T and C Work

- Making your terms part of the contract
 - Publication and awareness
 - Inclusion in offer and acceptance
 - Industry standard or course of dealing?
- The Battle of the Forms
- Or scope to negotiate?



Price Adjustments

- Are you in a fixed-price contract?
- Is a price change formula possible?
 - Whole price list on timing
 - Indexation of all or part
 - Price matching
- DIY Hedging
- Shop around?



Retention of Title

- Aka Romalpa clauses
- What does it do?
 - Ownership stays with seller
 - Risk moves to buyer
 - Take back the goods if not paid
- Specific or "all goods/all monies"?
- Allow sales by buyer?
- Enforcement



Late Payment

- Interest
- Extra charges
- Late Payment of Commercial Debts (Interest) Act 1998
- Other Contractual Remedies
 - Retention of Title
 - Suspension
 - Loss of Credit
 - Termination – cut your losses



Beware Wrongful Trading

- What is wrongful trading?
 - Insolvency Act 1986 s213
 - Consequences
 - Get advice early
- Don't get burnt by a Phoenix
 - Insolvency Act 1986 ss216-7
 - What qualifies as a Phoenix?
 - Consequences



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Questions?




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