

DBRIEF

Issue 47



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After the Event Insurance - Risk Free Litigation

A litigator's job description could increasingly be said to include the skills of bookie mixed with those of a salesman – assessing the most likely odds of winning a case whilst advising clients on the evolving market of funding their litigation.

Lord Justice Jackson's review of costs in litigation was supposed to deliver recommendations for a fairer, more proportionate access to justice. One year and nearly 600 pages later, his hot off the press report looks set to turn the funding of claims on its head. Insurance for litigation may be removed, success fees may be recoverable from client's damages and costs may be capped for some claims, even contingency fees may be introduced but there will be no return to legal aid (there is just no budget for it).

Lawyers and insurers alike are currently digesting the proposals and changes are inevitable. With a general election this year it could be 2011 before all the changes are implemented, but some could be brought in as soon as April. Now is as good a

time as ever to look at the current funding options and to take advantage of them before they disappear.

they are made aware that the solicitor is acting in the case at risk and is confident of success. Under such a CFA, the solicitor's base fees and success fee are only payable if the case is won and, thereby, by the losing party. If the claim is lost the client pays none of the solicitor's fees.

CFAs are becoming better understood and their use is increasing. However, many clients are unaware of a relatively new (and growing) way to fund claims with little or no risk to them - win or lose.

Due to the previously prohibitive costs of court proceedings in the UK after-the-event (ATE) insurance is available.

Usually ATE covers:

- the client's own disbursements (including counsel's fees)
- the opponent's costs
- and in many cases even the premium itself

“However, many clients are unaware of a relatively new (and growing) way to fund claims with little or no risk to them - win or lose.”

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time as ever to look at the current funding options and to take advantage of them before they disappear.

More than ever with the current economic downturn, clients are conscious of costs and limiting risk. Litigation is on the increase as companies seek to recoup losses. However, faced with the prospect of notoriously high legal costs, some companies are being put off from bringing the claims they are entitled to.

For now, the law allows both solicitors and barristers to act on a Conditional Fee Agreement (CFA - often referred to as No Win No Fee agreement).

CFA agreements can be entered into where a claim has a better than 50% chance of success. If solicitors advise good prospects of success and back that advice by entering into a CFA, they can earn a success fee if the case is won. This sends a powerful message to opponents in a case as

In some instances it can even be possible to also insure all or a proportion of the client's own solicitor's fees.

Premiums are usually available on a deferred and self-insured (or contingent upon success) basis, which means that the premium is only payable at the conclusion of the case, and then only if the case has been successful. If the case fails, a claim can be made under the policy for the insured legal costs and the insurer does not collect a premium.

A deferred and contingent upon success litigation insurance premium, sometimes referred to as a deferred and self-insured ATE premium, means that the client is only liable to pay a premium if the case is successful. Accordingly, there is no premium to pay upfront and no premium to pay if the case is unsuccessful.

If the case succeeds, and English law applies, then the premium ought to be a recoverable cost

in the litigation from the opponent and so again shouldn't cost the client anything. Essentially, not having funds is no reason not to take out insurance!

When coupled with your solicitor acting for you on a CFA then, win or lose, you will never have to pay anything to either your own solicitor or the other side.

All types of litigation pursued in England and Wales that have reasonable prospects of success such as Commercial Disputes, Professional Negligence, Personal Injury, Clinical or Dental Negligence, Defamation, Breach of Contract, Probate etc. can be funded by ATE insurance.

Any party to a dispute whether a company, corporation, charity, partnership or individual may apply for cover through Devonshires.

Devonshires Solicitors have been operating no win - no fee litigation for many years and have been one of the pioneers of ATE insurance.

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Clamping Down on Tenancy Fraud: Are the Courts Lagging Behind?

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While the government looks to clamp down on tenancy cheats, the Appeal Courts have been grappling with tenancy fraud with little success – at least from the landlord's perspective.

December 2009 saw the launch of the government's crack down on tenancy fraud and an initiative to recover possession of up to 100,000 housing association homes which are believed to have been fraudulently sublet. The National Fraud Initiative enables housing associations to pass information on tenants to the Audit Commission so it can in turn identify suspicious individuals and activity involving social housing tenancies.

In the meantime, two legal cases in the last 18 months have illustrated some of the difficulties faced by social landlords in proving tenancy fraud before the Courts in order to obtain possession.

In the case of London Borough of Islington v Uckac [2006] EWCA Civ 340 the Court of

Appeal refused a claim for possession based on common law fraud and decided that the grounds for possession in the Housing Act 1985 were exhaustive. Thus Islington were forced to rely on Ground 5 (the ground for possession based on obtaining a tenancy by misrepresentation) to obtain possession of Ms Uckac's secure tenancy. However Ground 5 was of no use to them because the tenancy had been assigned after the misrepresentation relied upon was made to obtain a tenancy. Ground 5 could not therefore be used against the current tenant. Despite the fact that this left the Council in an impossible position the Court of Appeal refused to allow the Council to rely on the doctrine of common law fraud in the alternative.

More recently, there has been further disappointment – this time for Birmingham City Council – in trying to obtain possession of properties fraudulently let by an allocations

officer in the Council to acquaintances of his. In Birmingham City Council v Qasim & 11 Others [2009] 43 EG 104 the Court of Appeal refused to accept Birmingham's argument that secure tenancies granted outside the Council's letting scheme and its powers of allocation under Part VI Housing Act 1985 were ultra vires and therefore void and unenforceable. The Appeal Court said that the allocation of a secure tenancy and the grant of a secure tenancy were distinct concepts and a secure tenancy could still exist under the Housing Act 1985 even if granted in breach of the Council's allocations scheme. Birmingham had considered bringing a straightforward fraud case arguing that the tenancies were void because granted fraudulently but of course the Uckac case prevented such an argument being advanced.

Together, the cases of Uckac and Qasim highlight the difficulties faced by social landlords in seeking possession of properties where tenancies have been obtained by fraud. The government's latest initiative focuses on unlawful subletting but tenancy fraud goes much further and the Courts

have not been willing to take a more interventionist approach in order to further the battle against tenancy cheats.

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4 When Should a Deposit be Returned to a Defaulting Buyer?

In the current economic climate it is more likely that a seller will come across a potential buyer who has encountered financial difficulties and cannot complete a purchase, having paid a deposit. It is therefore worth reviewing the circumstances where a seller is entitled to keep the deposit and when the buyer may be able to retrieve its money.

In a recent case (Midill v Park Estates) the Court of Appeal affirmed the general rule that a buyer/tenant will only be entitled to retrieve its deposit in "exceptional circumstances".

The rule comes from Section 49(2) of the Law of Property Act, 1925 which provides the Court with a discretion to order the seller/landlord to return the deposit to the potential buyer. Arguments have been made over many years as to how this discretion should be used. Those in favour of a liberal view have pointed out that a 10% deposit often far exceeds the loss incurred by the seller as a result of the buyer's failure to complete.

However case law over the years has determined that forfeiture of a deposit should not be treated as a penalty (which would be void under certain other legal principles) and that the Court should only use its discretion in exceptional circumstances. This, of course raises the question of what constitutes exceptional circumstances.

In the Midill case a £400,000 deposit was paid towards an agreed purchase price of £4,000,000. Midill, the buyer, failed to complete after the seller had served a notice to complete and the seller refused to return the deposit. The seller subsequently sold the property for a higher price of £4,300,000 and Midill sought an order from the Court under Section 49(2) LPA to return the deposit on the basis that the seller had not suffered any loss.

The High Court declared that there were no exceptional circumstances and refused to grant Midill the order. On appeal, the Court of Appeal

agreed with the original judge and confirmed the fact that the seller had been able to achieve a better price was not an exceptional circumstance. It concluded the price rises generally were not unusual and there was no obvious reason why Midill should have the benefit of such a price rise. It was the seller who had borne the risk and the cost of holding the property until it had been subsequently sold.

On general policy grounds the Court of Appeal also agreed that to use its discretion in these circumstances would create a precedent which would cause “undesirable uncertainty” in all future events where the buyer failed to complete, i.e. it would be unclear whether or not the seller would achieve a higher price and therefore unclear whether the deposit should be returned.

What then are “exceptional circumstances”, where the Court may exercise its discretion? The Court of Appeal distinguished the Midill case from an earlier case (Tennaro Limited v Mayorarch [2003]) where, in relation to three flat sales in one building,

- In the third case, the buyer had offered to complete on the final flat but the seller insisted that the contract was tied to the second flat and the buyer must buy both or neither. The judge noted the seller had the opportunity to complete the sale of the third flat at the contract price and could not properly explain its insistence on tying the two contracts together. Additionally, the flat could have been sold at 15% above the contract price so the seller would not have made a loss. This latter point however does not appear fundamental to the judgment.

Therefore, we can see that if a buyer defaults, it needs to do more than show that a seller would not make a loss in order to persuade a Court to use its discretion under Section 49(2) LPA. In order to be successful in an application for the return of the deposit the buyer must show exceptional circumstances, for example, a better offer on the table at the time, or unreasonable

“Those in favour of a liberal view have pointed out that a 10% deposit often far exceeds the loss incurred by the seller as a result of the buyer’s failure to complete.”

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the Court refused to order the return of the deposit in one of the cases but decided that the deposit should, in principle, be returned in the others. The facts in Tennaro were complicated but it is clear that:

- The case where the deposit was not returned was straightforward. The flat was losing value and the seller would have incurred losses through the buyer’s failure to complete;
- In one of the two cases where the Court did use its discretion to return the deposit, a third party, who had taken an assignment of the purchase contract, had offered a higher price for the flat at approximately the same time as completion was due, which the seller had, for unexplained reasons, refused. The timing of this offer appears key in distinguishing this decision from the Midill case;

behaviour on behalf of the seller.

In most straight forward circumstances a seller can be reasonably confident that it can retain the deposit. From a practical point of view it must ensure that it has complied with all the necessary conditions in the contract, be “ready willing and able to complete” and have served a valid notice to complete. This is a topic for a future article but, interestingly, in the Midill case the Court found that the seller was able to serve a notice to complete before it had procured some of the documents which were to be handed over on completion. This was on the basis that the seller would have been able, within the time required, to set up the necessary administrative arrangements for completion to take place. A seller can therefore start the completion clock running before it has everything it needs to complete but it needs to be sure of its ground, or else the notice may be invalid.

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Q: When is a lease assignment not an assignment?

A: When it is a “Virtual Assignment”.

The recent decision in the case of *Clarence House Limited v National Westminster Bank Plc* (“Nat West”) ([2009] EWCA Civ 1131) may lead to changes in standard forms of drafting the provisions which restrict dealings (such as sub-letting and assignment) in commercial leases. The full impact remains to be seen as virtual assignments remain rare but it is now important to recognise what virtual assignments are and the issues behind them.

What is a virtual assignment?

A standard assignment (or sale) of a lease is a transfer of a legal interest in land and commonly a commercial lease will require the prior consent of the landlord.

A virtual assignment could be used to save time and cost or where obtaining the landlord’s consent may be difficult in circumstances such as a complex sale and lease back transaction involving many properties.

from Nat West’s sub-tenant. New Liberty would also pay rent directly to Nat West’s landlord and generally observe and perform the obligations under the lease. New Liberty was appointed agent in connection with all dealings under the lease. The landlord’s consent to these arrangements was not obtained.

The High Court originally found that there had been no legal assignment, declaration of trust or sub-letting in breach of the lease terms. However, it held that the virtual assignment breached a restriction that prevented the prohibition on parting with or sharing possession of the premises. This caused concern as the decision meant that leases subject to virtual assignments could be at risk from forfeiture or landlords could sue for damages.

The Court of Appeal has now reversed this decision to the relief of tenants who entered into virtual assignments. The decision came down to the legal interpretation of “possession”. This

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“A virtual assignment could be used to save time and cost or where obtaining the landlord’s consent may be difficult in circumstances such as a complex sale and lease back transaction involving many properties.”

Instead of effecting a legal transfer of a lease, the virtual assignment transfers the obligation to pay rent to the landlord, other lease obligations (including management obligations) and the right to collect rent from sub-tenants as a contractual package to a third party. The tenant still remains ultimately liable to its landlord and sub-tenants and the new arrangement is a type of agency agreement. The extent and nature of the tenant’s occupation would remain unchanged which limits the application of a virtual assignment.

Accordingly, it has always been thought that a virtual assignment should fall outside the usual restrictions on dealing with the lease and that the landlord’s consent would not, therefore, be required. This was challenged in the *Clarence House Limited* case.

The case

Nat West arranged for a separate entity called New Liberty to be entitled to receive rent directly

was distinct from a question of “occupation” as Nat West had previously sub-let the whole of the property to a sub-tenant.

Crucially, the Court of Appeal decided that Nat West remained entitled to receipt of rents from the sub-tenant on the basis of its legal right to exclude people other than the sub-tenant from the premises and, although the entitlement to receive rents had been assigned to New Liberty, New Liberty’s entitlement to the rents was purely contractual and as agent to Nat West.

The decision clarifies that virtual assignments are contractual agency arrangements and are not caught by the requirement for consent provided for in the usual drafting found in commercial leases.

Issue for landlords and impact on lease terms

Landlords may be concerned by this decision. Their commercial position may be affected by a virtual assignment because where a tenant is not

receiving rents from its sub-tenants and /or it is paying rent to a third party rather than directly to the landlord this could affect its financial strength and be a problem if the landlord wants to enforce directly against the tenant. The landlord will have no means of enforcing against the virtual assignee of the tenant.

Landlords could consider drafting in their leases to prevent virtual assignments alongside the other usual restrictions on dealings with the property although this could impact on rent reviews.

Virtual assignments are still rare, their application is limited and there are VAT complications in using these arrangements. However, both landlords and tenants should be aware of them as they need to be considered in agreeing terms of commercial leases.

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Maintenance Hotline

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Efficient and effective maintenance of existing stock has never been more important to providers of social housing than during the economic downturn that Britain has recently experienced. A prudent and progressive maintenance strategy will not only provide cost benefits and assist with staff efficiencies, but is also a key driver in improving resident satisfaction. Greater emphasis on asset management is one of the quickest routes to increasing approval ratings amongst social housing tenants at large, and with this being an important goal of any social housing provider, the relevance of pro-active and pro-resident maintenance strategies could not be starker.

At Devonshires we have seen more and more of our clients turn their attention to their maintenance strategies and contractual requirements in the last twelve months.

Should you be considering doing the same, then our Construction Department are able to assist in any way and lend the weight of our considerable experience in this area. We are more than happy to offer a free of charge initial phone call consultation to discuss with you your best way forward.

Please feel free to call:

Andrew Thompson, Partner	020 7065 1829
Mark London, Partner	020 7880 4271
Tom Phillips, Solicitor	020 7880 4328
Stephen Morris, Solicitor	020 7065 1849

Enterprise Management Incentives: The Share Option Scheme Aimed at SMEs

Employee share incentive schemes are one of the most successful ways of recruiting, retaining and incentivising employees. By giving employees the opportunity to own, or potentially own, a stake in the business no matter how big or small, a company can align the interests of its employees, particularly senior executives, with that of its shareholders. Share schemes can also be structured to incentivise employees to achieve specific corporate performance targets.

However, in small and medium-sized enterprises (SMEs), where control is often held by a small number of people, it may not be desirable for employees to actually hold shares in the company (e.g. because the owners may fear a dilution in voting control).

An effective means of getting around this problem is to either provide share options to employees or provide them with non-voting shares. A share option gives an employee a right to buy shares in the future at a set price - known as an "exercise price" - provided that certain conditions are met.

- on exercise of the option, again no income tax or (employee or employer) NIC are payable. However, the company should be able to obtain a corporation tax deduction equal to the difference between the market value of the shares at the date of exercise less the exercise price;
- on the sale of shares following the exercise of an EMI option, the employee will incur liability for capital gains tax (currently at 18%) on the difference between the sale proceeds less the exercise price. (Note that entrepreneurs' relief may be available for employees owning more than five percent of the ordinary share capital of the company).

Minority interests - until an option is exercised no shares are held by the employee. As a consequence until the option is exercised and the underlying shares acquired, there is no dilution of shareholder rights (i.e. voting and dividend entitlements). Exercise generally takes place on a

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"A share option gives an employee a right to buy shares in the future at a set price - known as an "exercise price"."

The most tax-efficient manner of granting share options is through the use of HM Revenue and Customs (HMRC) tax favoured share option schemes known as "Approved Schemes". Where the qualifying conditions are satisfied, the approved share option scheme most appropriate for SMEs is an Enterprise Management Incentive (EMI) scheme.

Key advantages of EMI schemes

Tax efficiency - EMI schemes are tax efficient for both the company and the employee. Under HMRC rules the tax treatment for options granted with a market value exercise price on date of grant is highly favourable:

- on grant of the option, there will be no liability for income tax or (employee or employer) national insurance contributions (NIC);

liquidity event such as a sale of the company so the employee does not have to pay "up front" for the shares.

Flexibility – the company has discretion to select which employees can participate in the EMI scheme and determine how and when options will be exercisable. It is also possible to state different conditions for different employees.

Ease of implementation - an EMI scheme does not require formal approval from HMRC before options can be granted, neither does an EMI share option plan need to be adopted, but this can be done if desired. It is therefore relatively quick and cost efficient to implement an EMI scheme compared to other HMRC "approved" tax favoured schemes.

Generous - EMI plans are generous compared to other tax favoured share option schemes. An employee can hold unexercised EMI options over shares worth up to £120,000. The total value of

a company's shares that may be subject to EMI options is £3 million. However, the value of the shares in both cases is measured at the date of grant.

No holding period - unlike all other HMRC tax favoured share option schemes, employees are not required to hold the EMI options for a minimum of 3 years before they can be exercised in a tax efficient manner.

Eligibility Requirements

A company must satisfy certain eligibility criteria before it can implement an EMI scheme or grant EMI options. For example:

- it must not have assets worth more than £30 million;
- it must have fewer than the equivalent of 250 full-time employees;
- the company must be independent - it must not be controlled by another company;

Other restrictions and exclusions that apply to the employee include the following:

- employees who own more than 30% of the share capital of the company before EMI options are granted are excluded from participating in the EMI scheme;
- employees must work for the company at least 25 hours a week or, if less, 75% of their working time (**working time requirement**). There is no continuous employment period before an individual can be granted EMI options; and
- the favourable tax treatment of EMI options may be lost if there is a "disqualifying event", unless the options are exercised within 40 days of that event. Disqualifying events include the company coming under the control of another company, the employee ceasing to work for the company or not meeting the working time requirement and the making of certain

"EMI plans are generous compared to other tax favoured share option schemes. An employee can hold unexercised EMI options over shares worth up to £120,000."

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- the company's business must be carried on wholly or mainly in the UK (although the Government has proposed to remove this requirement from 6 April 2010) and must be conducted on a commercial basis with a view to profit; and
- the company's business must not consist of (wholly or substantially) an "excluded activity". Excluded activities include (amongst other things) dealing in land, leasing, property development and financial activities.

Companies may seek advance HMRC clearance to ensure that they meet the requirements of the EMI legislation.

variations to the EMI option or to the share capital of the company.

There are a number of hurdles to get over to satisfy all the conditions and HMRC does have a dedicated office to deal with queries. If you want to implement an EMI scheme it is advisable to take appropriate professional advice and assistance.

**For further information please contact:
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Corporate Social Responsibility - An Educational Opportunity

Does your organisation want to help improve the futures of young people and contribute to building strong, sustainable communities? Do you want to help shape the communities in which you work and to raise the aspirations of people within these communities? If that sounds of interest all you need to do to make it happen is to become the sponsor of an Academy. Before the mention of the word “sponsor” makes readers turn to the next page, we should make clear that in this instance, sponsorship does not mean you have to part with any cash.

The Government’s Academy scheme is one of the most successful government initiatives of the last ten years. Academies are independently run state funded schools. Usually an Academy is an existing school which is failing. The conversion to Academy status allows the school access to Government funding to either rebuild or refurbish the school.

Each Academy has an organisation which acts as its sponsor. By becoming a sponsor of an Academy, the organisation has the opportunity to provide strategic direction for the school and raise aspirations. The sponsor will control how the school will be rebuilt or

So what, you may ask, is the benefit to our organisation; why we would we want to become a sponsor? We believe the benefits are tangible and real and can be split into two basic types; commercial and social.

An organisation that is an Academy sponsor has demonstrated that it has the ability and people to work with stakeholders to deliver an infrastructure project in the heart of a community. For organisations bidding for local authority housing projects (or grant), it would be difficult to think of a way to add more value to the bid than to demonstrate that not only will you be delivering new housing, you will also be regenerating the school at the heart of the housing.

Sponsoring an Academy also gives an organisation an opportunity to demonstrate its corporate social responsibility. This is a chance to contribute to the creation of stronger, more sustainable communities. For those already working with and within communities, imagine having a sparkling new facility from which to run courses and training sessions. Imagine having leisure facilities that could be opened to young people and the wider community in the

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“By becoming a sponsor of an Academy, the organisation has the opportunity to provide strategic direction for the school and raise aspirations.”

refurbished, how the school budget is to be spent, it will appoint the head teacher, shape the curriculum for the school and mould the culture and ethos of the school.

Each Academy is a charitable company which is legally separate from its sponsor. The sponsor exercises control over the Academy by having the right to appoint the majority of the Governors to the Board of the charitable company.

Until last Autumn, each sponsor was required to commit to pay £2 million which was to be used for the benefit of the Academy. In September last year, this requirement was removed. The test will now be based on an organisation’s skills and leadership and their commitment to working with local parents, teachers and pupils. Under the new Academy sponsorship rules, sponsor applicants will have to pass a robust but light touch selection process to demonstrate the leadership and drive to turn schools around.

evenings and at the weekends. Being the sponsor of an Academy means you have control of the school assets. Perhaps one way to tackle anti social behaviour amongst young people might be to channel their energies into sport by opening up the five-a-side football pitches in the evenings at your new school.

And we have saved one of the best bits until last. You will of course need advisors to assist you in applying to become a sponsor and in the establishment of your Academy (including lawyers – why else would we be writing this). The good news is that you do not pay for these advisors, the Government does. The Government will even pay for a consultant to act as your project manager. All you are likely to need to commit is one member of staff for up to two and a half days a week during the bid process.

Academies are part of the education policies of both the current Government and the Conservative Party and so the future for them looks very bright.

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A Short Sharp Shock!

Using Statutory Demands to Enforce Payment of Debts

These are difficult times. Despite what we are now hearing in the news, that the recession is over, that is far from the reality. The effects of the recession are still being felt, and it is important to stay ahead commercially.

If you are owed money by an individual or a company, and despite demands for payment, the debt still remains unpaid- what can you do about it?

Presuming that the debt is not disputed, this article examines one way of recovering debt- by serving a Statutory demand for payment which is usually followed by either a bankruptcy petition in the case of an individual or a winding-up petition in the case of a company. If you decide to adopt this method of debt enforcement, there are strict procedures which must be followed, although your solicitor can advise as to these procedures. There is also case law which says that if directors of a company serve a statutory demand if they know the debt to be disputed, they can be held personally liable

Once the statutory demand has been prepared, if you are pursuing an individual, the creditor is under an obligation to do all that is necessary to bring the demand to the attention of the debtor. An effective and cheap way to do this is either to hand it personally to the debtor, or if you think that the debtor may be trying to avoid you, arrange for it to be served through a service agent.

In a situation where you cannot serve the debtor personally, permission is usually sought from the Court to serve the demand by posting it through the debtors' letterbox.

In the case of serving a company, service at the registered office is usually sufficient.

What rights does the debtor/company have?

Once the demand has been served, the individual/company has 18 days within which to make an application to set it aside setting out their dispute. If there is no genuine dispute then any such application will fail.

"If you are owed money by an individual or a company, and despite demands for payment, the debt still remains unpaid - what can you do about it?"

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for costs on an indemnity basis. It is therefore important to ensure that there is no dispute before you adopt this method of enforcing a debt.

Requirements to serve a demand:

- Minimum debt of £750
- The debt is undisputed

Information to be given in Statutory Demand

A statutory demand is not a Court document and as such can be prepared quite easily and cheaply. The following information must be given in the demand:

- a) The purpose of the Demand;
- b) The time within which the Demand must be complied with;
- c) Methods of Compliance which are open to the Debtor; and
- d) His/her right to apply to the Court for the Statutory Demand to be set aside.

If no such application is made and the demand was correctly served, then leave can be sought from the Court to issue a bankruptcy/winding-up petition. Petitions are outside the scope of this present article, but further information is given below as to the consequences and practical considerations of serving a statutory demand.

I have served a demand – now what can I do?

The consequences of not complying with a demand are that this constitutes good evidence from the creditor's point of view that the individual/company is unable to pay its debts as they fall due. That entitles you to present a bankruptcy/winding-up petition which if successful will result in either a bankruptcy or winding up order being made. If that happens the assets of the individual/company will be passed to a trustee in bankruptcy or a liquidator who will then sell off the individual's/company's assets and control is no longer in their hands. They can lose everything.

That is the worst case scenario. Often, in my experience, the service of a demand usually results in full payment of the debt, as the individual/company will be concerned to avoid the above scenario.

The threat implied by serving a demand is that you mean business, and unless payment is forthcoming that will result in severe and in some cases draconian consequences for the individual or company concerned. This method is at the same time, a relatively quick and cheap procedure. In many cases, the short, sharp shock of receiving a demand is just the tonic that a creditor needs in seeking payment of an unpaid, undisputed debt.

Protection?

There is no getting away from the fact that no matter what you do, any enforcement action will cost money and time. However, putting in place a rigorous protection mechanism will at least enable you to off set the majority of the cost. For example:

1. The first thing to do is consider the financial viability of the company/individual with whom you wish to trade. Although it is not conclusive, an examination of the last filed accounts and trading history of the company can be a useful pointer.
2. Secondly, in some cases, for example in constructions matters, an insurance policy should be considered which includes insolvency cover.
3. Consider recourse to a third party in the event of insolvency, either a parent company or a bondsman
4. Where possible, try and secure funds 'up front' – this will particularly apply in the sphere of professional services

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12 Directors' Conflicts under the Companies Act 2006

Whilst the principle of directors avoiding conflicts of interest has been the subject of much case law, the Companies Act 2006 introduced new statutory duties that company directors owe to a company.

When making decisions, directors need to be methodical and consider a number of issues to ensure that they do not fall foul of their statutory duties regarding conflicts.

Duty to avoid conflicts of interest – Situational Conflicts

Section 175 of the Companies Act 2006 which came into force on 1st October 2008 imposes an absolute duty on each director to avoid situations in which he has or could have a direct or indirect conflict with the interests of the company. This is known as a "situational conflict".

Situational conflicts can be ongoing, for example when a director is also an advisor, shareholder, competitor or customer of the company or, being a director of a subsidiary is also a director of the subsidiary's holding company. Those conflicts can also relate to a particular instance for example when a director is involved with a competitor of the company and wishes to take up an opportunity that the company has declined.

Further examples of potential conflict situations include:

Joint venture companies – the directors of the joint venture company may also be the directors of one of the joint venture partners.

Listed and AIM companies – non-executive directors are likely to hold a number of other directorships.

Private equity and venture capital backed companies – the director representing the investor is likely to hold a number of other directorships including directly with the investor.

Prior to 1st October 2008, directors would normally seek to mitigate any conflict of interest by declaring their interest and abstaining from voting on the matter or seeking shareholder approval in relation to the conflict.

The position now, under section 175, imposes a duty on a director to avoid or prevent these conflicts from arising in the first instance.

A director, however, will not be deemed to be in breach if “the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the directors” (section 175(4)).

In other words, it is still open to the other (independent) directors to approve conflicts in

company's but who comply with the provisions of the Articles.

The terms of approval will vary according to the circumstances and may, for example, provide that the interested director be excluded from the receipt of documents and information and/or participation in discussions (whether at meetings of the directors or otherwise) related to the conflict, or whether he shall or not participate in any future directors' vote in relation to the conflict. This is particularly relevant where directors are appointed by and are representatives of a parent company on the board of different members within a group of companies, or where directors represent the interests of the shareholders who appointed them (or a class of shareholders).

It is important to note that this board approval has to be made by the independent directors without the interested director counting in the quorum or his vote counting towards the resolution.

“Amending the Articles to include a general authorisation will provide a safe harbour to directors whose interests conflict or may conflict with the company's but who comply with the provisions of the Articles.”

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order that the conflicted director can remain in the meeting and vote on the resolution at hand. The way in which this approval can be given differs depending on whether the company is a private or public company and whether it was incorporated before, on or after 1st October 2008.

In the case of private companies incorporated before 1st October 2008, shareholders can provide, by ordinary resolution, that the board is authorised to approve situational conflicts. In the case of private companies incorporated on or after 1st October 2008, the board is deemed authorised to approve a conflict unless the Articles provide otherwise. In the case of public companies, the board can only approve a conflict if the Articles expressly permit it.

Amending the Articles to include a general authorisation will provide a safe harbour to directors whose interests conflict or may conflict with the

The new duty under Section 175 does not apply to conflicts of interest arising in relation to a transaction or arrangement with the company – these are dealt under Sections 177 and 182 of the Companies Act 2006.

Duty to Avoid Conflicts of Interest – Transactional Conflicts

Under Section 177, directors have a duty to declare any interest in a proposed transaction or arrangement with the company. Under section 182, directors must also declare any interest in any existing transaction or arrangement with the company.

This is known as a “transactional conflict” and was previously dealt with under Section 317 Companies Act 1985. An example of a transactional conflict would be if a director sold or purchased a property or other assets to or from the company. Another example would be an intra-group loan agreement

where the directors of the lending or guarantor company are also directors of the borrower. This would trigger a declaration under Section 177 in respect of the specific loan/guarantee transaction or arrangement.

In relation to a proposed or existing arrangement or contract with the company, which has to be declared under Section 177 or Section 182, a company's Articles of Association usually provide that a director can vote and be counted as part of the quorum in respect of issues arising from that arrangement/contract. We generally recommend keeping the existing provisions.

It is worth noting that a situational conflict caught under Section 175 may also develop into a transactional conflict which instead falls within Section 177. An example of this would be a situation where a director of a company is also a director or shareholder of a company on that company's list of preferred suppliers: the general

would apply if the corresponding common law rule or equitable principle applied. The duties in those sections are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors. It should be noted however that a breach of Section 182 carries criminal penalties.

The remedies for breach of fiduciary duty vary in accordance with the severity of the breach. Possible remedies include injunction, setting aside of the transaction, restitution and account of profits, damages and disciplinary proceedings.

Directors' benefit or remuneration

Finally, depending on their individual circumstances, companies may consider provisions in the Articles whereby directors who receive any benefit or remuneration as a result of any approved transaction/arrangement or interest are not accountable to the company for these benefits and are not in breach of any duty.

“Companies should note that the definition of ‘connected persons’ has also been substantially widened under the Companies Act 2006.”

relationship may fall within Section 175. However, if the company enters into a contract with the director, this would fall within Section 177.

Directors should disclose all direct or indirect interests in transactions (either existing or proposed), together with those interests of 'connected persons'. Companies should note that the definition of 'connected persons' has also been substantially widened under the Companies Act 2006. Connected Persons now include a director's spouse or civil partner, children and step-children, any person with whom the director lives as partner in an enduring family relationship, children and step-children of such a person and the director's parents.

Consequences of breach

The consequences of breach (or threatened breach) of Sections 175 to 177 are the same as

Action points

- We would recommend that our clients:
- Identify existing actual or potential conflict situations (situational and transactional).
- Consider amendments to current Articles to include specific conflict provisions or an ordinary resolution of the members empowering the directors to authorise conflicts.
- Ensure that the relevant quorum for each approval is present to enable resolutions to be circulated and approved.

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Payments Provisions Revisited - Key Changes as a Result of the Local Democracy, Economic Development and Construction Act 2009

This briefing focuses on the impact the LDEDCA has on regulating payments under construction contracts.

The Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act") governs the current position as to payment and disputes for construction contracts. However, due to continuing concerns about the consequences of unreasonable delays in payment under the Construction Act, the LDEDCA received royal assent on 12 November 2009.

The changes in respect of payment are intended to bring more transparency to the amount the payer intends to pay at the outset of the payment cycle. No date has been set to bring into force the LDEDCA. However, there is a possibility that the reforms will be overtaken by the general election

Proposed Changes to the Payment Provisions

Under the Construction Act, every construction contract is required to provide (i) an adequate mechanism for determining when and what

attached to a failure to serve a Section 110 payment notice. The LDEDCA seeks to address this by providing that if the payer (or specified person) fails to serve a notice, then the payee may provide a payment notice. The "notified sum" is the amount specified in the payee's "default notice" and the client is obliged to pay this unless a withholding notice has been served. Unless the payee gives a notice:

- i) it cannot validly suspend performance of "any or all of" its obligations under the construction contract for non-payment; and
- ii) the payer is not obliged to pay the payee

If the payee has to give a payment notice in default of the payer's notice, it should do so straight away, as the final date for payment will be postponed by the number of days after the due date that any such notice is served.

Under the existing regime, employers sometimes try to contractually delay the "due date" for

"The changes in respect of payment are intended to bring more transparency to the amount the payer intends to pay at the outset of the payment cycle."

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payments are due under the contract; and (ii) a final date for payment of any sum which becomes due. There are also detailed requirements in relation to issuing payment notices and a prescribed procedure is to be followed if a party intends to withhold payment.

The LDEDCA will still require an adequate mechanism for payment. However, the provisions governing payment notices will change significantly after the LDEDCA comes into force. These include the following:

New Payment Notices

A construction contract would have to require the "payer" or the "payee" to issue a new form of payment notice. This would have to specify: (i) the sum the payer or payee considers is due, or was due, at the payment due date; and (ii) the basis on which that sum was calculated.

A problem for contractors and consultants with the Construction Act is that there is no sanction

payment to avoid their obligations under the Construction Act. They do this by providing that the due date will not commence until they have given a payment notice to the payee. The LDEDCA outlaws any payment procedure where the payer (or third party) decides when payment is due. However, a construction contract may still require the person who will be paid to give a notice.

Replacement of Withholding Notices

The regime has not changed much in that it is still necessary to serve a withholding notice a prescribed number of days before the final payment date. The new section would require the payer to identify the amount being withheld and the basis on which that sum is calculated, even if the sum was zero. So if for example, monthly payments are to be paid under a construction contract with provision for a final release of retention when defects have been made good, the payer would still have to give a notice every

month until the final release of the retention is paid.

Pay-when-certified clauses banned

The Construction Act prohibits “pay-when-paid” provisions except in certain circumstances where a third party, on payment where the contract is conditional, is insolvent. The LDEDCA goes one step further and extends this to pay-when-certified provisions.

The LDEDCA prohibits provisions that determine what payments are due and when by reference to the performance of obligations under another contract (or a decision by any person as to whether obligations under another contract have been performed). The theory is that this will reduce the time it takes for sub-contractors to be paid. However, some sceptics argue that it will instead lead to employers agreeing longer final dates for payment.

Conclusion

According to the Government's impact assessment, amendments to the “payment notice” requirements should save the construction industry approximately £5.8 million in administration costs per annum. The Government also estimated that improvements to the payment framework, to ensure contracts create clear and timely entitlements to interim payments, will save 1% to 1.5% on the average project. Reflected across the construction sector in England and Wales, this represents £1 to £1.5 billion.

However, if and when the LDEDCA does come into effect, the construction industry will need to familiarise itself with the new provisions, and ensure that their template contracts are revised accordingly. JCT propose to produce a Revision 3 of their standard form of contracts once the LDEDCA comes into force.

Despite the potential savings outlined above, the changes mean this area will become increasingly

“However, if and when the LDEDCA does come into effect, the construction industry will need to familiarise itself with the new provisions, and ensure that their template contracts are revised accordingly.”

Suspension of performance for non-payment

Under the Construction Act, a party to a construction contract may suspend the performance of all of their obligations under the contract if they are not paid.

The LDEDCA will allow a party to suspend all or part of its obligations on a project. This could lead to an increase in contractors' and consultants' spending. Rather than suspending all obligations, they may suspend a particular obligation (for example, attending site meetings) until they are paid. However such right may be academic in the event that the payer has become insolvent. In addition, the suspending party will be allowed an extension of time for the suspension.

The LDEDCA will also require a payer, who has not paid, to pay a reasonable amount to the payee for the reasonable costs and expenses suffered by the payee, if it suspends its performance for non-payment.

complicated. Therefore, any potential savings will require an initial investment of time to update the relevant contracts and to understand and comply with the provisions.

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Fire Safety – A Burning Issue

It is now more than three years since the Regulatory Reform (Fire Safety) Order 2005 (“FSO”) came into force. The Regulations brought together over 70 independent pieces of legislation, including repealing the Fire Precautions Act 1971, revoking the Fire Precautions (Workplace) Regulations 1997 and extended extensive duties upon thousands of bodies across England and Wales. Any corporate body must be aware of the duties that the FSO creates so that it can deliver a compliant fire safety strategy.

Where does it apply?

Subject to minor esoteric exceptions, the FSO applies to **all premises** that are not single occupancy domestic dwellings. Houses in Multiple Occupation are within the scope of the FSO, as are care homes, halls of residence, hostels and workplaces. The duties therefore weigh heavily on RSLs that are responsible for communal areas across numerous developments in different localities.

Article 24 in respect of ‘Relevant Persons’.

Relevant Persons include anyone who is lawfully on the premises or any person in the immediate vicinity who is at risk from a fire occurring on the premises.

These duties require the RP to:

- Undertake regular risk assessments;
- Use principles of fire prevention;
- Make fire safety arrangements with respect to size and nature of undertaking – for planning organisation control monitoring and review of the preventative protective measures;
- Eliminate or reduce risks from dangerous substances;
- Consider fire-fighting and detection mechanisms;
- Consider emergency routes and exits;
- Introduce procedures for serious and imminent danger and for danger areas;

“Subject to minor esoteric exceptions, the FSO applies to all premises that are not single occupancy domestic dwellings.”

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Who must comply?

The duty to achieve compliance falls upon a Responsible Person (“RP”). Where the premises are a workplace, the employer will be the RP to the extent that the premises are under its control. In relation to all other premises, it is the **person** who has control of that premises, or where that person does not have control in relation to the trade or business, then it is the **owner** of the premises.

There can therefore be more than one potential RP and care should be taken, particularly in mixed-use developments or where an RSL employs a managing agent to look after premises, to ensure that the responsibilities under the FSO are addressed.

What are the duties?

The RP must comply with the duties imposed by Articles 8 – 22 or made by regulation under

- Consider additional emergency measures in respect of dangerous substances;
- Undertake regular maintenance;
- Appoint competent persons to assist with safety;
- Provide information to employees and employers and the self-employed from outside undertakings;
- Provide fire training;
- Institute procedures for co-operation and co-ordination.

There is also a duty to take ‘general fire precautions’ which may include precautions not explicitly listed above. In this respect, the RP must take such actions as are reasonably practicable. The onus is on the RP to show they could not have reasonably been expected to do or provide more for the safety of the Relevant Persons.

The FSO does not provide satisfactory guidance on what may be deemed reasonable, and we must therefore look elsewhere for guidance. Where there is a significant body of expert opinion, or indeed British Standards (BSI) giving guidance over particular aspects of design and operation, this is likely to provide cover for an RP. However, it is a matter of scale and degree and the RP must take care to recognise the higher perceived risk of some premises over others.

How can I best discharge these duties?

An RP may choose to appoint an employee who has been appropriately trained, or alternatively by bringing in a Competent Persons (someone with sufficient training and experience or knowledge and other qualities) to undertake compliance procedures. This may mean contracting out the provision of Fire Risk Assessments, the drafting of a Fire Safety Policy, or the provision of staff training. While this delegation of duty does not absolve the RP from their position of responsibility,

up to £400,000.00 have already been imposed by the courts.

It is a defence under the FSO that the RP “took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.” While this is of some comfort, corporate bodies must realise that the onus of proof remains on the RP to show that such precautions were in fact exercised.

For full advice on how to achieve compliance with the FSO, deal with a fire inspector enquiry or for a full audit of your fire safety compliance strategy, do get in touch.

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“It is an offence for an RP to fail to comply with the requirements of the FSO, or to give evidence that you know to be untrue or recklessly give any information which is false in an inquiry instituted by an inspector.”

it does provide a reasonable defence to any subsequent prosecution for breach of the FSO.

There are of course perceived benefits to the appointment of an external contractor. They are experts in their field who are trained and experienced in bringing your business into compliance with the FSO. However, without day-to-day attendance on your business, external contractors lack the ability to monitor your continued compliance with the FSO. For instance, fire safety policies must be subject to review in the event of any substantive changes to premises that may affect spread or means of escape.

Offences

It is an offence for an RP to fail to comply with the requirements of the FSO, or to give evidence that you know to be untrue or recklessly give any information which is false in an inquiry instituted by an inspector. Failure to comply can result in a fine and / or up to two years' imprisonment – fines of



Information Commissioner to Get New Powers

From 6 April this year the Information Commissioner (ICO) will have two important new powers.

The first is the new power to audit data protection compliance by public sector bodies. The ICO will be able to serve 'assessment notices' on public sector bodies and then send in the ICO audit team to investigate compliance with the DPA including interviews with staff.

The Government can designate the public bodies the audit power but has not done so yet. It could be that the Government includes Registered Providers but we don't know yet. The power to serve assessment notices appears in the Coroners and Justice Act 2009 (Part 8) which introduces a new section 41A into the Data Protection Act 1998. We won't know much more until the ICO issues its Code of Practice on using assessment notices nearer the April commencement date. There is a concern that if RPs are included in this that they will subsequently be added into the Freedom of Information Act as named public authorities.

The second new power will enable the ICO to fine data controllers and others who deliberately or recklessly breach the DPA 1998. This provision comes in under the Criminal Justice and Immigration Act 2008 (s144). The ICO will be able to fine organisations by up to £500K for serious breaches of the DPA. The power applies to all organisations, public and private.

There is a third change due to come in in April which will require the ICO to produce guidance about sharing of personal data. The ICO has already issued a code of good practice on data sharing and it is anticipated this will form the basis of the new statutory guidance. The ICO will consult on the new Code and issue it sometime later this year. The new duty is inserted into the DPA at new section 52A by the Coroners and Justice Act 2009 (s 174).

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Devonshires goes Platinum in Green Awards

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Building on our successful win of a gold award in 2008, Devonshires has been awarded Platinum in this year's City of London awards for our achievements in waste management, waste minimisation, reuse and recycling.

There are over 1650 business sites participating in the Clean City Awards Scheme and Platinum Awards are presented to the top ten performing sites in each category - Small, Medium and Large.

Devonshires have continued to recycle via The Corporation of London, New Leaf, and International Technology Products and worked hard to ensure external suppliers have solid and effective recycling policies in place. Items such as paper, card, glass, toner cartridges, mobiles, computer equipment and furniture have all been recycled and certification provided. Deliveries of goods have been kept to a minimum and the firm have recently moved into new offices that are considerably more energy efficient than their

previous space. For example, the lighting in the majority of the new offices is on PIR timers (Passive Infrared) set at 30 minutes.

Following a rebrand in 2009 all of the firm's letter headed paper and marketing material is now printed on environmentally friendly paper. Pencils used in the firm's meeting rooms are recycled from old newspapers and drinking water used in our conference rooms is filtered and bottled on site, significantly reducing waste.

Despite receiving the Gold Award in 2008 and the Platinum Award in 2009 the Environmental Policy is still being reviewed with plans to make improvements and modifications wherever possible throughout 2010.

Upcoming Seminars

The following seminars are being held over the coming months:

26 May - Discrimination and the Equality Bill: What You Need to Know - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

9 June - The New Care Standards: The Health and Social Care Act 2008 - What Every HR Professional Should Know - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

30 June - Purchase/Development Contracts - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

7 July - Pensions: The Legal, Financial and Wider Implications - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

13 July - Dealing with Disrepair: A Practical Guide for Social Landlords - IoD Hub, New Broad Street House, 35 New Broad Street, London EC2M 1NH.

15 July - Handling Judicial Review Claims - Devonshires Solicitors, 30 Finsbury Circus, London EC2M 7DT.

Further information can be obtained from our Marketing Department on 020 7628 7576 or email info@devonshires.co.uk or from the events section of our website at www.devonshires.com.

The DBRIEF is a quarterly newsletter from Devonshires Solicitors on legal developments.

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Range of legal services offered by Devonshires and partner contacts.

Banking Andrew Cowan
Building Contracts, Maintenance and Gas Contracts

Paul Buckland

Charities Andrew Crawford

Commercial Litigation and Fraud

Philip Barden,
Daniel Clifford and
James Dunn

Commercial Property

Susan Hall and
Allan Hudson

Constitutional Advice

Gareth Hall and
Andrew Cowan

Construction

Philip Barden and
Mark London (contentious),
Paul Buckland and
Andrew Thompson
(non-contentious)

Corporate and Commercial

Jonathan Ebsworth,
Gareth Hall and
Andrew Crawford

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Amanda Harvey and
Nicola Philp

EU Procurement

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Julie Bradley

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Allan Hudson and
Julie Bradley

Property Litigation and Planning

Nick Billingham

Regeneration

Julie Bradley

Securitisation

Sharon Kirkham

Stock Transfers

Julie Bradley