



SILVER SHEMMINGS SOLICITORS

Business Information Update

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Welcome....

Welcome to the second edition Update of 2009.

It has been a challenging and exciting few months into 2009. In January we opened our new Cardiff office specialising in equine law and rural/commercial matters.

Congratulations also to Robert Shawyer, Partner based at our Cardiff office, who has been voted as Chairman of the Institute of Arbitrators for Wales. Robert has also recently been awarded his diploma by the International Bar Association in International Joint Venture Law.

If you have any topics you would like to see reviewed please email us at office@shemmingsllp.co.uk and we will try to include these in later editions.

Construction Law - Construction Act Bill Update

On 2 March 2009 the Construction Act was discussed at committee stage in the House of Lords. The part that is relevant to the construction industry was reached on the 8th day in the committee stage. Discussions took place as to the adjudication clauses and Tolent clauses. Lord Bratt stated that:

"Whatever we introduce must work in a fairly broad range of commercial relationships. Therefore it will have to command the respect of a wide part of the industry. Following extensive consultation, we have introduced provisions elsewhere to deal with the key issues that have come to light in the decade also since the operation of the 1996 Act – the application of the Act to all and partly oral contracts being precisely such point. Given that I continue to believe that the flexible approach is the right approach; it strikes a sensible balance and is the approach most able to cope with a broad range of commercial relationships.... The Bill directly addresses the interest of a broad range of SMEs in the construction supply chain..."

In all the proposed amendments suggested by their Lordships were rejected by the Government Minister and, it looks as though very few changes is any will occur to the Bill as currently drafted.



It is envisaged that the Bill will become law later this year and as such is not retrospective and therefore will only apply to construction contracts entered into after the date it becomes law.

Disputes - are they worth it?

The words "credit crunch" seem to be ever more frequent and many in the construction industry are feeling the pinch with it being reported that there is a steady rise in the number of companies going into liquidation or

administration.

Faced with this many companies are looking very closely at their own financial security and seeking to get out of financially disastrous contracts or attempting to recover payments more quickly to help their own cash flow.

First port of call must be in any situation the contract. There are clauses that may be used to ones advantage dependant on whether one is an employer or contractor and whether there has been any delay or default which allows the contract to be brought to an end. Unfortunately the Courts have scuppered what would appear to have been a good excuse by stating that the recession cannot be considered to either frustrate a contract or, come under the heading of "force majeure". The Courts have found that where companies take a commercial risk they take the good with the bad. Equally this was found in a recent court decision when a husband tried to get his wife's divorce settlement reduced on the basis that the value of his shares had fallen and he would be in financial difficulties if he had to carry on making that payment. Unfortunately that argument did not wash with the divorce Court either!

If you are owed money and the debtor fails to pay then provided the debt is over £750.00, the issue of a Statutory Demand can be used. Statutory Demands are a formal demand for payment but can only be used where there us no dispute over the amount owed. If payment is not made in accordance with that Demand then you can issue a Winding Up Petition.

If disputes arise over the value that is being claimed then it may be worth considering Adjudication or even a form of dispute resolution to try and get the matter resolved quickly and cheaply. The last resort is the issue of Court proceedings and litigation.

If you would like to discuss the issues raised in this article please do contact either Sarah Shemmings at sas@shemmingsllp.co.uk or Richard Silver at rns@shemmingsllp.co.uk

Litigation - Changes to the Civil Procedure Rules (CPR)



The 6 April 2009 was not only the start of the tax year but also the date when many new regulations came into force.

This is true of CPR where the Government have introduced many changes two of which are relevant to commercial claims.

The Courts divide claims into three financial categories namely: small claims, fast track and multi track.

The limit of a small claim still remains at £5,000.00 for debt claims but the fast track limited has been raised from £15,000.00 to £25,000.00. This will increase the number of smaller claims within this band thus allowing, hopefully, a more rapid conclusion to such claims. All claims over £25,000.00 will automatically be considered multi track claims.

The second change is to introduce a new practice direction with regard to the use of pre-action protocol. Basically, even if there is no specific protocol relevant to the type of claim, each party must now act as though there were a protocol in place. This means that prior to issuing any form of claim in the Court, it is now necessary for Claimants to write setting out details of their claim to the proposed Defendant. The Defendant is expected to give a full written response within a reasonable period of time.

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What is meant as a "reasonable period of time" will depend upon each matter. However the practice direction states that as a general guide, the Defendant should send a letter of acknowledgment within 14 days and where the matter is straight forward e.g. an undisputed debt, then that response should be provided within the same 14 day period. If however the matter requires involvement of an insurer or another third party then a full response should normally be provided within 30 days. However if the matter is quite technical and specialist then that period of time can be extended.

There is a sting in the tail in that where a company wishes to pursue a debt claim i.e. the usual 7 day letter, this is now no longer possible where the Claimant is a business and the Defendant is an individual. In this instance it is necessary to give details of how the money can be paid e.g. method of payment and the address to which it should be sent, advise that the Defendant can contact the Claimant to discuss repayment options and again provide relevant contact details and finally, inform the Defendant that free and independent advice or assistance can be obtained from various organisations details of which have to be given. However if a Defendant requires extra time in which to seek debt advice then the Claimant has to allow a reasonable period of up to 14 days for that advice to be obtained.

The current recession means it is unlikely that any creditor will gain sympathy from the Court for failing to comply with these time limits. This does put a greater burden on businesses and their own credit control departments.

Equine Law - How good is your fencing?



This is a question you may well wish to pose to yourself. If you are wondering why then consider the case of *Mirvahedy v Henley*. This case involved Mr Hossein Mirvahedy, Dr and Mrs Henley and one of the Henley's horses.

Dr and Mrs Henley kept three horses in a field. Despite the field having an electric fence, a wooden fence plus a strip of tall bracken and vegetation between them and the A380, which was over one mile away, the three horses broke out and reached this road.

When they reached the A308 one of the horses collided with the car driven by Mr Hossein Mirvahedy causing him to suffer serious personal injuries.

Mr Mirvahedy brought an action against the keepers, Dr and Mrs Henley on the basis that they were negligent in not adequately fencing the field the horses were kept in.

This matter was heard before Judge O'Malley in Exeter County Court and was unsuccessful. Mr Mirvahedy however also claimed under section 2 of the Animals Act 1971 on the basis that if the Henley's were not at fault then in any event they remained liable for any damage caused by their horse since under the Animals Act 1971 they had strict liability. For Mr Mirvahedy this route of pursuing his claim also found no favour and was dismissed by the judge.

However Mr Mirvahedy did not let matters rest there and took the matter to the Court of Appeal where the hearing came in front of Dame Elizabeth Butler-Sloss P AND Hale and Keane LJ. His appeal was successful; this did not end matters though.

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Dr and Mrs Henley decided to take the matter all the way and it then ended in the House of Lords. The outcome did not give a clear interpretation but it has set a precedent when interpreting strict liability for a horse owner irrespective of fault.

The question in effect was: **Is the keeper of an animal such as a horse strictly liable for damage caused by the animal when the animal's behaviour in the circumstances was in no way abnormal for an animal of the species in those circumstances?**

Importantly in this case the horses had appeared to escape as a result of them taking flight, which is not abnormal behaviour for horses.

Indeed in the Lords of Appeal for Judgement in the Cause reference is made to section 2(2)(b) in particular where it states:-

"(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-

"(b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and.."(Emphasis added)

The result was that Lord Nicholls, Lord Walker and Lord Hobhouse dismissed the appeal and Lord Slynn and Lord Scott allowed the appeal thereby on a three to two majority the appeal was dismissed.

Thus this case has set the precedent that horse owners may be strictly liable for damage caused by their horse even if they were not negligent.

So, as I said at the start of this sorry tale, check your fences before you go to bed tonight, oh and just hope your horses don't break out anyway.

If your horses or farm animals have caused damage or you have suffered damage due to the actions of someone else's horse or farm animals contact Robert Shawyer at rjs@shemmingsllp.co.uk

Contact Us

For more information on any of the issues raised in this business information update please visit our website or email at

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