Dispute Resolution Briefing is a newsletter produced by Trethowans to provide helpful and informative guidance aimed primarily at business clients affected by litigation and dispute resolution issues.

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We are delighted to announce our exciting expansion plans; on 8 December 2014, our Southampton Office will relocate to Botleigh Grange Business Park at Hedge End.
Whilst commercial premises are let, a landlord is assured that its tenant will be paying the business rates, since it is usual for a tenant to be obligated under a lease to pay all outgoings, including rates.

**Facts**
In the case of Schroeder Exempt Property Unit Trust and another -v- Birmingham City Council, the position was:
(a) the lease had been disclaimed by the liquidator, following the tenant’s insolvency; and
(b) the tenant’s guarantor was paying the rent to the landlord; and
(c) the premises were unoccupied, since the landlord had chosen not to take physical occupation, in order to maintain its entitlement for the rent against the guarantor; and
(d) the Local Authority looked to the landlord to pay the business rates, triggering a dispute which turned on the identity of the “owner” of the premises.

**Question**
Resultantly, the question for the Court was, “is the landlord the “owner” within the meaning of sections 45(1)(b) and 65(1) of the Local Government Finance Act 1988?” (Question). Under these sections, “the ratepayer is the owner of the whole of the hereditament”, and “the “owner” is the person entitled to immediate possession”.

The landlord submitted that it was not entitled to immediate possession such that “[the landlord] is only entitled to immediate possession as and when it exercises its right to physical possession”. In summary, the landlord argued that it was not entitled to possession as the lease may have ended in respect of the liabilities of the insolvent tenant but the effect of the disclaimer was not to end the lease for all purposes.

The Court was not persuaded by the landlord’s arguments having regard to the case of Hindcastle Limited -v- Barbara Attenborough Limited, which confirms that a disclaimer operates to terminate a lease but introduces a statutory deeming provision, whereby a guarantor is not released from its contractual liabilities to make good the defaults of a former tenant.

The Court was therefore able to separate the property rights from the contractual rights and consequently, the fact that the landlord chose not to physically recover of the premises, so as to preserve the obligations of the guarantor to pay the rent, made no difference to the effect of the disclaimer which had given the landlord the right to immediate possession as the owner.

**Answer**
This case confirms that the answer to the Question is “Yes” because the landlord, once it had the right to immediate possession of the premises (whether or
not it went into occupation) became the “owner” within the meaning of Sections 45(1)(b) and 65(1) Local Government Finance Act 1988 and is therefore liable for the business rates.

Outcome
The case has highlighted not only the importance of Authorised Guarantee Agreements and the possibility that the landlord may in turn recover the business rates from a former tenant’s guarantor but the need for landlords to factor in a liability for business rates when faced with an insolvent tenant.

FURTHER PLANS TO ADDRESS DISHONESTY IN CLAIMS PROPOSED

The Criminal Justice and Courts Bill, which is currently being considered by Parliament, is expected to be passed into law by early next year (probably April 2015). The current Clause 49 concerns personal injury claims where a finding of fundamental dishonesty has been made. It is important to note that this Clause only applies to personal injury claims and not other civil claims.

In particular Clause 49(1)(b) sets out that a court should dismiss the entire claim if there is a finding that the Claimant has been fundamentally dishonest in relation to any part of either the primary claim or a related claim.

The only time the Court is able to not dismiss the claim, in such circumstances, is where it believes that the Claimant would suffer “substantial injustice” if the claim was dismissed in such a manner.

The result of this Clause will be that where there is any finding that a Claimant has been “fundamentally dishonest”, for example by exaggerating his or her symptoms, the entire claim (even genuine injuries and losses) would be dismissed.

Unfortunately neither “fundamental dishonesty” nor “substantial injustice” are defined within the Bill and it must therefore be a concern that, assuming the Bill does pass Parliament, this will give rise to increased satellite litigation and a degree of uncertainty on such issues.

It is important to note that the Clause also extends to counter claims.

The Clause applies to any cases issued from the day the section comes into force (regardless of when the claim arose).

This Clause raises the interesting issue that a claim, where liability has been admitted, could still be lost completely at a quantum hearing. For example a claim for a person injured when travelling as a passenger, a seemingly innocent party to the issue of liability, could lose completely, even when it is established that he or she probably suffered injury as a result of the incident. Further there is likely to be an increase in complications arising from interim payments, as, in principle the Defendant may be able to obtain an order that the Claimant repays such interim payments (which may have already been spent on things such as treatment), if he receives nothing due to a finding of “fundamental dishonesty”.

Outcome
The case has highlighted not only the importance of Authorised Guarantee Agreements and the possibility that the landlord may in turn recover the business rates from a former tenant’s guarantor but the need for landlords to factor in a liability for business rates when faced with an insolvent tenant.
NEW PROCEDURE FOR RECOVERING DEBTS AND WHAT THIS MEANS FOR YOUR BUSINESS

Until now the procedure for commencing debt recovery has been fairly quick and straightforward. The norm is for a standard letter before action to be sent requesting payment within 7 or 14 days and if payment is not received court proceedings are issued.

The Civil Procedure Rules Committee has released a draft pre-action protocol for debt. The aim of the protocol is to provide debtors with more information to enable them to seek advice before court proceedings are issued. The overall objective is to encourage the use of Alternative Dispute Resolution and to only issue court proceedings when parties have exhausted all possible solutions to resolve the matter.

The protocol applies to any business, including a sole trader, claiming payment of a debt from an individual. It does not apply to business to business debts unless both parties are sole traders. The proposal states that the debtor needs to be provided with the following information:

- A letter before action containing a standard notice prescribed by the protocol, highlighting the importance of obtaining legal advice;
- Specific details of the debt and the agreement it arises out of, including a copy of the contract or agreement;
- A copy of the protocol;
- A full statement of account including all interest and charges and payments already made by the debtor; and
- A reply form for the debtor, together with a self-addressed envelope.

The creditor will be required to allow the debtor sufficient time to seek independent debt advice and in any event wait at least 28 days. If the debtor requires more time to obtain specialist advice they must notify the creditor who must allow them reasonable additional time to obtain that advice. If any aspect of the debt is disputed, the protocol encourages parties to exchange sufficient information and disclose documents to enable them to understand each other’s position.

In addition to the above, the protocol requires parties to take stock before the creditor issues court proceedings and try to agree what remains in dispute that the court will be asked to decide. Following this, the creditor should give the debtor 14 days notice of their intention to issue court proceedings.

While there is no specific sanction for non-compliance of a pre-action protocol and inevitably there will be debtors who are unwilling to cooperate, the Court will take into account the extent of parties’ compliance with the protocol when giving directions for the management of claims and when deciding who should pay costs. In some cases, the Court may suspend court proceedings and order a party to take steps which they think ought to have been taken under the protocol.

The new proposals are highly onerous for creditors and will only be effective with cooperation from debtors. The procedure will ultimately slow down the process of recovering their debts and may cause business’ cash flow problems. Once the protocol has been implemented our advice to businesses will be to tighten their credit control procedures and send...
IN WHAT CIRCUMSTANCES CAN COMPANY DIRECTORS BE LIABLE FOR THE COSTS OF THEIR COMPANY’S LITIGATION?

Company directors invariably litigate in the belief that if they lose the company will pick up the costs and they cannot be personally liable because the debt is owed by a limited liability company. However, there has been an increasing trend on the part of successful litigants to seek costs orders against directors personally and for the court to grant those applications. So directors need to be aware of the risks before embarking on litigation.

The criteria the courts use in deciding whether to make non-party costs orders against directors are:

1. Where a person has some management of the action, e.g. a director of an insolvent company, who causes the company improperly to prosecute or defend proceedings, or substantially controls the litigation or stands to benefit from it.
2. Where a person has maintained or financed the action.
3. Where the person has caused the action.

In most cases it is the personal funding of litigation by directors that most obviously exposes them to the liability. This need not necessarily take the form of paying the costs personally. Litigation could equally be funded by way of directors not drawing dividends from the company or otherwise financially supporting it in some way.

The degree to which the director controls the litigation is also relevant, so if he is the only person giving instructions and/or the company is effectively his alter ego then he is at more risk. Likewise if he is the one debts to their solicitors without delay, providing as much information as possible to allow a letter before action to be sent that complies with the pre-action protocol.

A copy of the consultation can be found here: https://www.gov.uk/government/consultations/consultation-on-the-pre-action-protocol-for-debt

The closing date for responses to the consultation was 30 September 2014 and we are therefore waiting for an update.
who stands to gain the most from the successful outcome of the litigation.

The merits of the claim being advanced are also a relevant factor. The more hopeless or speculative the claim the more likely the court is to find that the director should be personally responsible.

Trethowans has recently been involved in a case where it successfully obtained a costs order against the principal director and shareholder of a company who had brought a highly speculative claim. It was dismissed with an order that the company pay indemnity costs, only for the company then to be placed into administration.

The court found that although the director had only personally funded a small proportion of the overall costs, nevertheless the director was the person who in reality controlled the company and that he was the one who had also caused the litigation because of the views that he held about the safety of his product (the litigation concerned the fitness for purpose of a product that had been adapted for use in the oilfield industry but which had been rejected on the grounds of safety) He had alleged that those who had come up with an alternative product to alleviate those safety concerns had been motivated by reasons that were spurious and in fact had acted in bad faith. If the claim had succeeded then the director was the one who stood to benefit since the money would have flowed through to him by way of salary or dividend. Therefore in all the circumstances it was just and proper to make the costs order sought.

One of the issues that the court had to consider was whether prior notice needed to be given to the director during the course of the litigation warning him of the intention to seek a non-party costs order. Recent authority, including the case that Trethowans were involved in, confirms that this is not a prerequisite. Therefore directors can get to the end of litigation, lose and find themselves being faced with an order that they pay the costs personally. They may not have been warned about this possibility by their legal advisors.

Generally a director is far more at risk of a personal costs order being made against him when he brings a claim which fails rather than defending a claim and the weaker the claim the greater the risk. The courts tend to consider it far more legitimate for a director to invest personally in trying to resist litigation, especially if there is a reasonable basis for that defence (obviously if spurious then the personal risk increases).

The cloak of protection that limited liability provides is not by any means foolproof.