

Welcome

...to the first of our bi-monthly commercial property section newsletters for 2010. However you say it, 2010 is an exciting year for Gordon Brown Associates. On 22 February 2010 our commercial property team moves from its Chester le Street "home" to join with our commercial litigation and employment teams in their new Newcastle home at our recently-acquired premises in Hadrian House, Newcastle. Personally, it brings my career full circle in a geographic sense, having started in the Law with a training contract in Jesmond way back in the 1970s. Unfortunately the last three years have been redolent of the economic and political times in those days.

However, we are encouraged by signs of more activity in the commercial property and business sectors since October 2009 and, if the banks start to lend more readily, more people will be able to take advantage of the good deals which are increasingly "out there". This, and the move to be physically nearer the financial hub of the region and many of our business clients, sets us challenges to which we will rise.

The addition to our property team of Richard Brown gives us great, new strength in offering legal services to property developers. He was a contemporary of mine at the Royal Grammar School in Newcastle, did his training in London and held partnerships in major commercial firms in both London and Newcastle. Richard acts for several regional and national developers, particularly in the leisure industry.

Below, my colleagues James McEwen and Martin Donnelly highlight a couple areas that have proved to be problematic for clients recently, and if we can help you with similar issues, or commercial legal matters generally just give us a ring, drop us an email, or call in and see our new premises, which we're very happy with - and, no: we don't need to put our prices up to pay for them. Like most of our business clients, we operate within the constraints of a market place and we aim to give great value for money in all times, good, bad or indifferent.

All the best for 2010

Gordon Brown

Partner - Head of Commercial Property

Bank Guarantee

A secondary agreement in which one person (the guarantor) will become liable for the debt of the principal debtor if the principal debtor defaults. A guarantee is not enforceable unless it is in writing or there is a memorandum or note of the agreement signed by the guarantor or at its direction'. Statute of Frauds 1677 s.4.

"In Barclays Bank Ltd v O'Brien [1994], the House of Lords established the principle that in certain circumstances a bank would be fixed with constructive notice of presumed undue influence and consequently would be unable to enforce its security, unless before taking the security it had taken steps to ensure that the security had not been given as a result of undue influence".

The decision set down by the House of Lords in the Royal Bank of Scotland v Etridge case further clarified the law in this area to the extent that specific guidance was given to both banks and solicitors for dealing with taking a guarantee from a person, where the relationship between the guarantor and the principal debtor is non-commercial. Whilst the detail of that advice is too long to set out in full, the advice of Lord Nicholls was to 'urge the client to take independent legal advice'. The advice proffered to solicitors was that they were required to advise on the core minimum requirements, which include the nature and practical consequences of entering into the guarantee; the seriousness of the risk in the event that the client was called upon to repay the debt and the fact that the client had a choice as to whether to sign at all.

Institutional lenders also commonly require additional security when funding commercial transactions over and above the usual debenture or legal charge. If the borrowing is to a limited company, directors may be asked to provide a director's personal guarantee. But what are the implications of entering into such a deed?

1. Guarantee's are unlimited as to time - whilst the guarantee may have been entered into many years ago until you are formally released, it remains in place.
2. A guarantee can be an 'all moneys' guarantee - the purpose of the guarantee covers all of the borrowers existing and future liabilities. However, it is becoming increasingly common to see a cap on the limit of the indebtedness covered by the guarantee, usually to the value of the borrowing.
3. Payable on demand - the guarantee may not be used as a back up or last resort. This means that where the lender has a first charge over a property, it need not wait for that property to be sold before calling in the guarantee. The guarantor may not be given time to realise the money and there has been a case where the lender gave two hours before defaulting.
4. Court action - In the event that you cannot pay you can be taken to Court and the lender could take action to seize and sell your assets. If you cannot pay you could be made bankrupt.
5. Cross default risk - many commercial agreements include a clause that stipulates that immediate repayment is required should a borrower default upon the terms of any guarantee.

If you require any assistance on this area, please contact:-

Tenant Administration

In these challenging times, commercial landlords will be more anxious than ever to ensure that the rent due to them is paid on time. Despite the apparent complexity of some leases, the remedies available to a landlord in respect of a defaulting tenant are usually clear. Since a landlord and tenant relationship is a simple matter of contract, if the tenant does pay on time the landlord can, ultimately, pursue a debt action against the tenant or can choose to forfeit the lease.

However, what is the position if a company that property has been let to becomes insolvent? Often, the first indication that a landlord will receive of its tenant's difficulties will arrive in the form of a formal notice served by the insolvency practitioners appointed either by the company itself or by its creditors.

Whilst the consequences of insolvency can take many forms, the one most commonly encountered is administration; this is a process made available under the provisions of the Insolvency Act 1986 (as amended by the Enterprise Act 2002) by which a company may be reorganised or its assets realised. In order to achieve these objectives, a "statutory moratorium" comes into effect immediately upon an administration order being made in respect of a company. The main effect of this is that no legal process (including suing a tenant for debt or forfeiting its lease) may be started or continued against the company or property of the company except with the consent of the administrator or with the permission of the court.

Whilst the administrators will have been appointed on the basis that they incur no personal liability for the company's debts, it is likely that they will agree to pay the rent for as long as they continue to use the premises (provided that sufficient money is available). However, if the premises are not viable, it is likely the administrators will simply cease trading and ask the landlord if it will accept a surrender of the lease (although the landlord cannot be compelled to accept a surrender). Arrears may accrue once more making it necessary consider whether rent recovery can be achieved by other means.

In the first instance, an analysis of the leasehold documentation should be made to establish whether the arrears can be enforced against any former tenants or guarantors. In connection with leases entered into on or after 1st January 1996, the landlord must first serve a "Section 17 Notice" pursuant to the Landlord and Tenant (Covenants) Act 1995 within six months of the arrears falling due. Alternatively, the landlord may be able to defray the debt due to it by withdrawing money from a rent deposit or by recovering the rent due under an underlease directly from the undertenant.

Given the complexity of the law in this area and the consequences for a landlord who pursues the wrong option, specialist legal advice should be obtained at the earliest opportunity.

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