



## **Recent Developments For Business**

### ***Breach of Contract for Late Payments - A Repudiatory Breach?***

In a recent case concerning dentists, the Court of Appeal decided that, on the facts, a refusal to pay sums due under a contract at the times stipulated did not give rise to a right to terminate.

The arrangement between the parties was that a dentist (J) would allow his Associate (V) to use his premises and in return V would pay J half his monthly earnings. The majority of V's earnings were from the PCT, which paid him monthly instalments on the basis of a projected target for the year. At year end, if V had failed to meet his target the PCT would seek re-imbursement from V of any overpayment, and V would in turn be reimbursed by J.

V was concerned that he would not fulfill his target by the year end, and would then have problems being reimbursed by J. He therefore decided that rather than pay J 50% of the monies received from the PCT each month, he would pay him for the actual work he carried out, thus negating the need for an adjustment at the year end.

J however deciding that this was a repudiatory breach of their contract, terminated the contract and excluded V from the premises. As a result V lost his NHS contract.

The Court of Appeal decided that as V was delaying payment rather than withholding it, J was not entitled to terminate the contract. Their decision was based on the fact that time is not of usually of the essence in commercial contracts unless expressly stated. Therefore the obligation to make the monthly payments by V was not a condition which if breached would amount to a repudiatory breach.

**Contracting parties should take care and as a safeguard, the defaulting party should always be given an ultimatum which, in the case of delays, expressly makes time of the essence.**

### ***Commercial Agents: Indemnity or Compensation - the right to choose***

The Commercial Agents (Council Directive) Regulations 1993 allow for either compensation or an indemnity to be paid to a commercial agent on termination, the latter being capped at one year's commission based on the average commission over the last five years. Whilst parties to such an agreement have an absolute right to choose whether the contract provides for an indemnity or compensation to be paid to the agent at termination, the courts do not appear keen to allow the principal the right to choose at the point of termination itself.

In the recent case of *Charles Shearman v Hunter Boot Limited*, the agreement provided that an indemnity would be paid unless the level of compensation paid was such that it would be less than the indemnity. In this case the compensation payable would have been over £1.25 million more than the indemnity.

The court decided that purpose of such a clause was to provide the principal with the cheapest option and therefore the clause went against the directive. The effect of removing the clause from the agreement meant that the default position then applied which meant that the agent would be entitled to be paid compensation of £1,454,500.

**Agents and principals should be careful when negotiating their agreements and ensure that they are properly drafted setting out their intentions.**



**Marsons Solicitors LLP**  
Waterford House  
4 Newman Road  
Bromley Kent BR1 1RJ



### **Break Clauses and Rent Payable Under Leases**

In a recent case the High Court held that a tenant who had only paid rent up to the termination date set out in the break notice had failed to comply with the break clause in the lease.

Where a break clause is included in a fixed-term lease which allows either party to terminate the lease early, any conditions attached to the right to break must always be complied with.

In this case the tenant (T) had the right to terminate his lease early by serving a six months' notice. This was conditional on T giving vacant possession and paying the rent up to the termination date. As is usual in commercial leases, the lease provided that rent was to be paid, in advance on the usual quarter days.

T served a break notice as provided for by the lease. Rather than pay the usual quarter's rent, T paid the rent to the termination date and followed this up with an email asking the landlord (L) to confirm that this was correct.

In the resulting dispute the Court decided that as T had failed to pay the rent up to the termination date: the conditions relating to the exercise of the break option had not been complied with and therefore T had failed to terminate the lease. The court determined that L had discharged his duty by serving its usual Rent Demand for the September quarter and that there was no further duty to point out T's error.

**Care should therefore always be taken when exercising a break option. If there is any doubt whether the full rent should be paid, a cautious tenant should err on the side of caution and pay the full rent together with any other sums that may arguably be due under the terms of the lease. The tenant can of course subsequently make a claim that any overpayment that should be reimbursed, however this right would be dependent on the express provisions of the break clause.**

### **About Us**

We advise on contracts, property, employment, professional negligence claims and other disputes for businesses and individuals.

Marsons Solicitors have been described as "a cracking team" who provide a "professional and good value service" and "excellent at picking up the finer detail without failing to see the bigger picture" by the Chambers Guide to the Legal Profession.

Find out more about us and our services at [www.marsons.co.uk](http://www.marsons.co.uk)



@Marsonsllp



Marsons Solicitors LLP



+Marsons Solicitors LLP



Marsons Solicitors LLP

**Tel: 020 8313 1300**

Jennifer White  
[jennifer.white@marsons.co.uk](mailto:jennifer.white@marsons.co.uk)



Meena Gupta  
[meena.gupta@marsons.co.uk](mailto:meena.gupta@marsons.co.uk)



Greg Bush  
[greg.bush@marsons.co.uk](mailto:greg.bush@marsons.co.uk)

The information contained in this newsletter is intended for general guidance only. It provides useful information but it is not a substitute for obtaining legal advice as the articles do not take into account specific circumstances. If you need assistance with any of the issues raised, please do contact us for further advice.



**Marsons Solicitors LLP**  
Waterford House  
4 Newman Road  
Bromley Kent BR1 1RJ