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Made In The Midlands

The firm has recently shown its support for manufacturing in the region by becoming a Founder Member of the Made in the Midlands campaign.

Designed to support the region's manufacturing community and launched by Lord Digby Jones last year, the *Made In The Midlands* campaign aims to protect and assist local manufacturing companies not only during these tough economic times but also to be ready for when the

upturn arrives. Wall James Chappell is proud to be able to help local businesses work together and keep essential skills in the region.

If you would like to become involved in or find out more about this initiative please contact Philip Chapman (p.chapman@wjclaw.co.uk)



Commercial agents: Tread carefully

Commercial agency disputes appear to be on the increase judging from the growing number of enquiries from clients. This may be a response to the current economic climate which has forced businesses to rationalise or restructure their agency and supplier relationships. As the economy begins to recover this pattern may well continue as businesses begin to grow again and will therefore require new commercial agents.

Commercial agency agreements are regulated by the Commercial Agents (Council Directive) Regulations 1993 (1993 Regulations). A commercial agent has continuing authority to negotiate the sale or purchase of goods on behalf of another person or company, and negotiate and conclude the sale or purchase of goods on behalf of, and in the name of, that principal.

Companies needing to rationalise costs may consider terminating their commercial agent contracts, however, they must be aware that this may prove an expensive exercise as agents are protected by the 1993 Regulations. A business may decide to undertake its agents' roles itself or it may decide to stop supplying certain territories or regions. Businesses and commercial agents alike need to be aware that **"a commercial agent is entitled to a compensation or indemnity payment"** on the termination of its contract for any reason other than a default of that

agent. Importantly, this entitlement also applies even if the principal terminates by notice under the contract.

Two recent cases demonstrate the uncertainties of the 1993 Regulations when terminating agency contracts. In *Accentuate Ltd v Asigra Inc*, a Canadian arbitration and choice of law clause relating to a commercial agency arrangement was unenforceable because it did not give effect to mandatory provisions of the 1993 Regulations. As a result, the arbitration award could not be enforced.

The second case is *Claramoda Limited v Zoomphase Limited (t/a Jenny Packham)*, in this case it was unclear when the agency agreement had been terminated as there was no written termination notice or contractual provision. The limitation period for bringing compensation claims under Regulation 17 is one year from termination of the agency contract. The court found that the agency contract does not necessarily end when the agent ceases to negotiate sales if they are still carrying out some commercial activity for the principal. As a result, the agent was able to bring a claim as the claim limitation period was deemed to not have run out.



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Tenant break clauses: making them work for you

In the current climate many tenants are looking for ways to escape from their lease obligations and a break clause may seem an ideal way out. However, many landlords are looking for ways to challenge the validity of the notice in order to keep the tenant on the hook and at the premises.

Tenants need to ensure that the break clause is operated effectively because it is in its nature an option and as such the Courts will construe its terms strictly. It is essential that both any preconditions to the exercise of the break and its procedural aspects are strictly adhered to.

“The notice needs to be correctly served by the correct entity on the correct entity at the right time. If notice is served late, by even one day, it would be invalid.”

If the required method of service is mandatory, for example, if the Lease stipulates it is to be served at the landlord’s Registered Office, it is essential that it is followed by the letter and served in plenty of time. As a practical measure ask for acknowledgement of receipt. Ensuring service and if in doubt serving it again may incur a bit of time, expense and effort now but is likely to be far cheaper than paying rent and other outgoings for unwanted space until the end of the term or until the next break date.

Often the exercise of the break is dependent on there being no breach of the tenant’s covenants, on all rents being paid in full up to the termination date and on vacant possession being given.

A precondition that all rents are to be paid to the termination date can, depending on the drafting of the Lease, include insurance rent and service charge. In order to avoid any disputes it is advisable to request from the landlord a statement of outstanding monies due.

Delivery of vacant possession at the break date should be straight forward; the tenant needs to ensure that all keys are handed back to the landlord and that all its belongings are removed from the premises.

A Lease containing a provision that the break clause is dependent on the tenant complying with all its covenants is likely to be construed strictly making a break ineffective, for example, if a tenant has painted with two coats of paint rather than the stipulated three. A tenant should try to resist such a break clause at the outset. Sometimes landlords may agree on a compromise referring to material compliance. Courts have held that a breach will only be material if it would be fair and reasonable to refuse the tenant the right to break having regard to all of the circumstances.

A tenant exercising a break should agree with the landlord what needs to be done in order to comply with its covenants, in particular, relating to its repairing obligations. The tenant should at the same time deal with reinstatement of any alterations. These works should be done in plenty of time so that the landlord can inspect well in advance of the break date. If there is any likelihood of a dispute the tenant should instruct a Surveyor to prepare a report evidencing compliance.



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Agreeing monthly payment terms

This is a question that many tenants, particularly in the retail sector, are now asking their landlords. A recent report has shown that one in eight shops now stand empty in our average High Street and in some areas, including Wolverhampton, almost a quarter of shops lie empty. Preventing the closure of more shops is in the interest of both landlords and retailers.

Traditionally, commercial leases require the rent to be paid quarterly in advance; retailers, especially small independents, are being hit hard having to find three months rent up front.

The British Retail Consortium, which represents the in-

terest of retailers, has for the last few years been campaigning for rent to be paid monthly rather than quarterly. Its latest Rent Survey has found that **“since January 2008 two thirds of new leases, in the retail sector, are on monthly payment terms.”** However, only a small minority of landlords are allowing retailers to switch to pay rent on a monthly basis.

The time has come for tenants to ask if monthly payment terms can be agreed. It is better for the landlord to have a tenant paying monthly rather than no tenant at all or having a tenant being unable to comply with the terms of its

...monthly payment terms continued

Lease. It is not in the landlord's interest to have empty premises; not only will it be more difficult for a landlord to let an empty parade of shops, but if a retail premises is empty for more than three months, the landlord will be liable to pay 100% business rates.

If you are looking to agree a concession with your landlord certain issues need to be considered.

Often landlords want something in return, for example, insisting payment by direct debit. Others try to agree a slight increase in the rent to compensate for having to collect twelve times a year although this should be resisted as it may result in additional Stamp Duty Land Tax being payable. Some landlords may want

the agreement being terminable if the tenant is in breach of any of the provisions of its Lease.

Is the agreement to relate to rent only or is it to cover insurance rent and service charge? Will it be for a fixed period say for one or two years or will it be indefinite? Will it be personal to the current tenant or will the Lease be varied permanently?

It is in the interest of both landlords and tenants to seek legal advice to ensure what is agreed does take effect.

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Planning for the unexpected

Business continuity planning is a familiar concept to most small and large businesses however many fail to consider the impact of sudden ill-health to a key person or persons.

Nobody knows what the future holds and what situations may arise, such as failing health or unexpected incapacity where you are no longer able to take care of your own business affairs. If nothing formal is in place, your business could go into limbo as no one may be authorised to deal with the decision making or day to day running of your business which could create difficulties where there are decisions to be made or simply cheques to suppliers need to be paid. This is why we recommend that business owners protect themselves and their business by having a Lasting Power of Attorney ("LPA"). **"Not only will it save time, it'll help ensure that everything runs smoothly in your absence."**

An LPA is a legal document that enables you to appoint one or more persons of your choice to handle either your personal or business financial affairs or property, either now or in the future. Anyone who is over 18 years old can be appointed as an Attorney. It needs to be someone you trust implicitly and who will put your business needs first. In certain circumstances it can be helpful to appoint your solicitors or accountants

More than one Attorney may be appointed to act either

"jointly" or "jointly and severally". Attorneys appointed "jointly" need to act unanimously (for example all signing cheques); Attorneys appointed "jointly and severally" can act separately or together. You can also stipulate that your Attorneys must act "jointly" in relation to certain decisions and "jointly and severally" in relation to others.

Powers of Attorney can be restricted to specific acts such as simply paying routine business invoices. Alternatively, you may give them wider powers to do anything which you would have been able to do yourself. You can also include guidance on how they should manage and look after your business affairs.

Be aware that your appointed Attorney(s) cannot act upon your behalf until the LPA has been registered at the Office of the Public Guardian. If an LPA is not in place your family would have to apply to the Court of Protection for the appointment of a Deputy to look after your affairs. This is a long and costly exercise which often causes inconvenience to your business compared with the ease of thinking ahead and preparing an LPA.



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Are you claiming all of your interest entitlement?

In these recessionary times you need to look after cash-flow. This is of course affected by how quickly you (1) get paid and (2) pay your own suppliers.

Do not overlook the Late Payment of Commercial Debts (Interest) Act 1998 for contracts between businesses. (The Act does not apply to contracts with private individuals; or to provide a mortgage, pledge, security or credit).

“When payment is late there is automatic entitlement to (1) interest (unless the supplier’s conduct would make this unfair) and (2) compensation.” “Late” is 31 days after the supplier has fulfilled its obligations and notified the customer of the amount due, or after any final hire payment is due.

Interest on the sum outstanding from time to time is at a simple 8% over the official base rate on 31 December

(applied January to July) and 30 June (July to December). Compensation is £40 for each debt under £1,000; £70 for £1,000 to £9,999.99; or £100 if more.

The Act does not apply if the contract already allows interest or some other “substantial” remedy for late payment, after taking into account (a) the benefits of commercial certainty; (b) the strength of the bargaining positions of the parties; (c) whether the term was imposed by one party to the detriment of the other (by the use of standard terms or otherwise); and (d) any inducement for the supplier to agree to the term. However, the due date itself cannot be delayed by contract. We can advise on these points where the situation may not be clear cut and you are not certain as to your position.



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The recession may have prompted a positive change for charities

Over the past year we have seen a number of charity clients become more vigilant of issues such as restructuring and governance.

Many charities are recognising the need for change and the importance of embracing business practices with the objective of being better placed to survive in a very competitive market once the economy recovers.

Some charities have chosen to become incorporated and have thereby benefited from limited liability status; others have looked at the commerciality of their current practices, such as their terms & conditions of business and the accountability of their governing bodies.

Several charity clients have recently focused on merging

with other charities that have similar cultures and objectives. This may be for reasons of necessity or the need for increased efficiency and size. Charities are also ensuring that they have the right skills mix and commercial experience to make sure the right commercial decisions are made.

When combined with the increased regulation of this sector, it may well be that we come out of these difficult economic times with a stronger, healthier charity sector than ever before.

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This update is intended only to provide a summary of the law and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. If you would like specific advice please contact a member of the team.