

Sleeping with the enemy?



The economy is on the upturn, green shoots are everywhere and the recession looks like it is over. Bring out the Pimms, it would appear that with this new found confidence coming from... somewhere... that we are all going to live happily ever after, even surviving the pandemic of swine flu.

Sadly when one slightly scratches under the surface it may appear to be not entirely true. From my own experience the banks are still not playing ball, mortgage lending is up slightly over the last few months but that hides the issue of what terms have been offered to the borrowers.

Certainly on the corporate side of matters, things are very slow and the "big ticket" work is very few and far between - what does all this mean? It means simply that cash is stuck in the system and not moving as it once did due to an extremely sensitive and paranoid approach to lending by our tax-funded banks. People are stretching their credit lines and holding onto their cash, overdrafts are frozen at best or reduced with, in cases, punitive terms. The trading known yesteryear is gone and times are tough.

If I had a £100 for every time I have heard the expression "cash is king" I would not be writing this article but would be sat watching the Ashes and drinking the above-mentioned Pimms. It is crucial in these times to have a considered approach to contracts. Their terms could prove the difference between survival and otherwise.

Taking one step back from the contract, a sensible purchaser/distributor of goods and/or services will firstly consider who they are contracting with. If the company is a limited company, a quick companies search at Companies House or one of the other agencies to acquire the accounts will tell you roughly the financial state of the company, when it was set up and who the directors are, etc. A little more probing and you will find out things like credit ratings and a cursory look at the balance sheet will enable you to consider broadly the financial health of the company. What you do not want to be doing is engaging with a business that is a limited company of short pedigree with a poor credit rating and a lousy balance sheet. Such companies are liable to soak up your cash, provide you with defective goods/services and when the proverbial hits the fan, they go into liquidation and you end up holding the baby.

The savvy businessman however may be quite happy to deal with a limited company of the above ilk – but only with a personal guarantee from the directors of the company. If the directors are not happy to enter into personal guarantees, which place them personally responsible for any debts, one must wonder whether it would be prudent to get in bed with the company and its directors in the first place. A note of interest – banks use them if they can 9 times out of 10.

Another traditional form of a business is a partnership/sole trader. These "firms" do not need to have their accounts filed and as such their credit worthiness or otherwise is harder to ascertain. However, the partners or

sole trader are personally liable in the event that you need to sue them – the corporate veil, as it is called, does not protect them, as they have no limited liability status. The old trick of having all assets in the wife's name can be discreetly investigated by a simple check at the Land Registry to see whether or not the proprietor/partners have their houses in their own name or their spouses. Obviously it is not fool-proof as the house may actually be in the correct name but at least it is better than nothing and certainly in this day and age, taking risks with corporate identity may well leave an unpleasant taste when things go wrong.

There is then also the question of insurance – depending on what form of business you are engaged in, it is not unreasonable to enquire whether or not the business is insured and enquire as to what they are insured for and to what levels. Obviously the greater due diligence equates to the greater amount of money involved in any contract.

Having established that you are dealing with a bona fide company that is acting in good faith with a decent history and recognised goods, a cursory look at their terms and conditions will reveal a great deal. What are the payment terms? How is a dispute resolved? You will find this typically at the very end of the contractual terms which will be in the small print on the back of a purchase order in the main. Beware of companies that are registered abroad or that contain an arbitration clause calling for international arbitration – it is more common than you would imagine.

What are the limits of liability? Do they outlaw profit and loss claims or indeed cap their maximum exposure in the event of any claim to, for example, the value of the goods/services purchased or provided? What are the indemnities and are there any warranty provisions? How can the contract be terminated and is there a penalty clause, for example, for late delivery? These may sound technical and obtuse things to consider. However what is absolutely clear is that if you do not consider them prior to entering into a contract and things go wrong you will spend an incredible amount of time looking at them later with your lawyers. Your lawyers will issue the immortal "I wish you had come to see me before you signed this and I would have advised you not to sign it".

The old adage "act in haste, repent at leisure" will spring to mind and I would whole heartedly recommend that for the sake of a few hundred pounds or so, just discuss the business generally of who you are dealing with and what the terms and conditions say or indeed sharpen up your own. It would be money extremely well spent in this climate when a lot of people out there are looking for an angle and an easy ride at your expense on your precious overdraft.

If you have any queries regarding the above or simply want to discuss matters generally of a commercial nature please do not hesitate to contact Giles D Ward, joint managing partner of Milners.

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