DeVARGA COMMENTARY – DECEMBER 2012

I Agree Ian – There Are Reasons To Be Cheerful

I have decided to send this out on the 12th of the 12th of the 12th. It has a certain hopeful/promising ring about it.

Recently I was instructed by a client to give them advice as to the literal interpretation of a rent review clause. I was fortunate in that prior to receiving this instruction I had read two very interesting articles. The first was prepared by Fenwick Elliott, an eminent specialist construction law firm. Their article was entitled "Contract Interpretation: Commercial Intent Takes Centre Stage". The second article was prepared by Lesley Webber. Lesley has a sharp legal brain. She works as a consultant for Field Fisher Waterhouse. Her article was entitled 'Rent Review – A Lawyer's Perspective'. I was fascinated by both. I trust the authors will not be offended when I say that so intellectually stimulating were the articles, that to me they were the equivalent of having an educational orgasm.

As Lesley pointed out, rent reviews came into their own in the 1970s. The purpose was to allow for inflation. The success of a rent review depends on two factors: the market evidence and the strict interpretation of the Lease terms. My view is that the latter carries more teeth. So we often find ourselves stimulating our intellectual cells in trying to interpret what was meant by certain words in the Contract. In other words, we have to get into the minds of the parties and ask ourselves a fundamental question, - "What was the intention of the parties when this Contract was formed?" Once you have asked that question and applied some robust common sense more often than not you will find the solution.

The problem is that many of these tricky intellectual questions create a difference between the parties. Most Leases permit the appointment of an Arbitrator in the event of difference. However, as a famous Judge once said, *"parties to a dispute cannot even agree the time of the day let alone a joint appointment of a specialist to give a view".* Given the difference in time zones, where do you go when the Lease says all differences must be determined by an Arbitrator and it is clear that person must have the necessary legal expertise and who, for want of a better description, can read and understand the "legal fine print" in the Lease.

Well for start off you need to look at Section 1 of the Arbitration Act 1996. That sets out in plain English the primary principles of the Act amongst which it states ... *"parties should be free to agree how their disputes are to be resolved".* So how about each party putting two names in a hat and drawing lots, as it were. Now that is real party autonomy. And it is fair. Just what the Arbitration Act intended.

However, it does not stop there. It is the primary duty of every Arbitrator to recognise the dispute is that of the parties. They must do all they can to encourage settlement. An eminent Arbitrator, Mr Arthur Marriott, states *"let me nail my colours to the mast. I believe it is the primary duty of every Arbitrator to encourage the parties to settle. They should do so on any one or more number of ways from simple enquiry to active participation as mediator"*. Find someone like that and you are half way to a settlement.

We are fast approaching that wonderful festive season of Christmas. I have decided to recharge the batteries and get some sun on my face. We close the office at midday on 24th December and re-opening for normal business on Monday, 7th January 2013. In that intervening period I will be available on my mobile, 0044(0)7889 179 306. It only remains to thank all of you for your support of DeVarga in 2012. 2013 looks like it is going to be an interesting year but in the immortal words of Ian Dury & the Blockheads, I can see 'reasons to be cheerful'.

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