



WHEN IS AN OVERDUE FEE EXORBITANT?

For all of us, entering into contracts is something we do as part of our everyday lives. Some are in writing, some are not. Some involve credit, some do not. But when we sign up for a Farmers' Card, a Placemakers' Card, or even a video store rental card, we are entering a contract on the supplier's terms. How often do we carefully read the terms of these contracts? Unfortunately, the answer to that question is usually only when something goes wrong.

At a barbeque the other week, I was approached by a friend who was having some difficulties with a video store (not your store, Grant).

His wife had gone to the local video hire store to hire a "feel good" movie (not of the Shane Jones type) to watch while her husband was out of town. As these movies often are, it was an overnight hire. And then, as sometimes happens to all of us, she did not return the video on time. In fact, the video wasn't returned until the husband found it down the side of the seat of his wife's car while he was cleaning the car (isn't he a good husband). By then, the video was 10 days overdue.

And so it came to pass that the next time he went to hire a video, the husband was told that there was an \$84 overdue fee owing on his account! On questioning the size of the fee, he was told that the fee was automatically calculated at the video's overnight rental rate: since it had not been returned on time, it was not able to be rented out. I am sure that all of us have been in this position some time or other.

My friend admits he was somewhat tardy in paying the overdue fee. Even so, he was surprised when he received a letter of demand from a debt recovery company. The letter informed him that was liable not only for the overdue fee, but also for a debt recovery fee.

What should he do? First of all, the video store can only charge overdue fees like this if they have been agreed as part of the contract. The contract should set out when the hirer is liable for overdue fees, including how amounts are

calculated. And if the video store also wants to be able to charge recovery fees, the contract must also specifically provide for them.

So a good starting point would be to ask the video store for a copy of the contract it is relying on. He will want to check that he actually agreed to the terms, and that the video store's claim is pursuant to the contract.

But even if the contract provides for overdue fees, they may still not be enforceable. Overdue fees, like these, are called liquidated damages. They are an amount that the parties agree one party will pay if it breaches the contract, without having to go to the significant hassle of having to prove its loss. But a Court will only enforce liquidated damages if the amount reflects a genuine estimate of what the video store has lost because the video was returned late. Liquidated damages are compensation for loss not a penalty for breach of contract.

So it may be difficult for a video store to enforce an overdue fee on the assumption that the overdue video would have been hired out every night it was overdue, especially if there were numerous copies available for hire at the store when "your" copy was lying down the side of the seat in your wife's car.

What is the moral of this story? You should read contracts before you sign them, even in the most mundane of circumstances. You never know when may come back to bite you. And, you should also make sure you return videos on time ...



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