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Enjoy reading this spring edition of *Commercial eSpeaking*. We hope the articles are both interesting and useful for you.

To talk further about any of these topics, or of course, any legal matter, please contact us – our details are above.

Important changes in construction law now in force

The Construction Contracts Act 2002 (CCA) sets out a number of duties and obligations on both those commissioning building work, and those undertaking it. It's designed to ensure prompt payment of invoices from contractors, and that disputes are identified and resolved quickly and cost-effectively. If you provide or commission building work, it's important you are familiar with this legislation.

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Important changes in construction law now in force

The Construction Contracts Act 2002 (CCA) sets out a number of duties and obligations on both those commissioning building work, and those undertaking it. It's designed to ensure prompt payment of invoices from contractors, and that disputes are identified and resolved quickly and cost-effectively. If you provide or commission building work, it's essential to be familiar with this legislation.

Important changes to the CCA came into force on 1 December 2015. These included:

- Requiring 'payment claims' on commercial construction contracts to include certain specified information, (this was only necessary on residential contracts before 1 December 2015), and
- Enabling adjudication decisions on 'rights and obligations' under construction contracts to be enforced in court. (Previously only decisions on payments could be enforced in this way.)

From 1 September onwards

On 1 September 2016 further important changes came into force: engineering, design and quantity surveying services (referred to as 'related services') will be covered by the CCA.

This means that providers of related services can take advantage of the payment, enforcement and dispute mechanism provisions in the legislation.

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However, it will also mean that they are subject to the obligations under the CCA. Similarly, those commissioning such work can use the dispute resolution options. They must, however, be aware of their obligations when faced with a payment claim.

The definition of 'construction work' under the CCA has been broadened to capture design and engineering work, and quantity surveying work, carried out in New Zealand. The definition of 'construction site' has also been broadened to include, in relation to related services, the site or premises that are the subject of the contract, as those services will not always be provided 'on' the construction site.

Concerns over adjudication provisions

The changes were driven by consumer-protection issues. However, they are not free from controversy. In particular, there's concern over how the adjudication provisions of the Act will work when a claim is made in relation to related services.

The tight timeframes involved (the default position is five days for responding to a claim) are likely to cause problems as, generally speaking, claims in relation to related services are likely to be based on negligence and will therefore be more complex (both legally and factually) than a determination of rights under a building contract. A claim may also be made well after the work in question has been completed, and accessing documents and witnesses may prove problematic.

Claims will also almost inevitably involve insurers, and parties risk losing any insurance cover if they take any steps on the claim which prejudices their insurer's position. It's also possible that standard cover will not extend to such claims.

When you only have five days in which to respond to a claim, the pressure is on. It may not be possible to formulate a response, liaise with insurers and get acceptance of cover within that time frame. This makes it crucial to act promptly, communicate often and early with your insurer or broker, and to be familiar with the process.

Implications for businesses

If you provide related services you should become familiar with the Act's obligations and how it works. This includes reviewing your agreements and terms of trade to ensure they are compliant, and ensuring any invoices are structured as payment claims (including prescribed information) to ensure you can rely on the Act's prompt-payment mechanisms. You should speak to your professional-indemnity insurer to check that your policy covers any claims under the Act and to check on any special procedures they may have in place to deal with such claims.

If you are commissioning related services (as with any other construction work) you should ensure you are aware of how to respond to a payment claim (by paying it or disputing it) within the legislation's strict timeframes. If there is a dispute, you will have the option of using the adjudication process that is a less expensive 'rough and ready' way of resolving disputes as opposed to resorting to court proceedings.

Further changes next year

Another significant change to the CCA will take effect from 31 March 2017 when retention monies on commercial contracts will automatically be held on trust. We will provide you with more detail on these changes closer to the time.

If you are building, thinking of building, or involved in the construction industry, these changes could affect you. We have experts available who can talk through the changes in more detail with you.

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Directors' duties – how far is far enough?

The Court of Appeal recently revisited the all-important question of how far must directors go to 'take all reasonable and proper steps' when making decisions on behalf of a company. In this case[1], the court looked at the decisions and inactions of the directors of Apple Fields Limited when relying on professional accounting advice in meeting their obligation to file financial returns.

Apple Fields had come under scrutiny from the Financial Markets Authority for not filing financial returns for the 2011, 2012 and 2013 financial years. Apple Fields claimed that they had relied on professional accounting advice in that the Generally Accepted Accounting Principles required that any of its financial returns would need to be consolidated with those of Noble Investments Limited, a company which it partnered with as part of a joint venture. The sole director of Noble, however, had refused to allow access to its financial information, which prevented Apple Fields from filing its financial returns.

Apple Fields' directors claimed that in relying on accounting advice provided to them, they had taken all steps available and they had no other options to procure financial information from Noble. The directors believed that although they could not meet obligations to file financial returns, because they had relied on professional advice they had met their duties under the Financial Reporting Act 1993 and, similarly, under the Companies Act 1993.

The principles for all company directors to take on board are, using the Apple Fields example, whether the directors had honestly believed that there was nothing more they could achieve on the basis of accounting advice they had received, or whether they had taken the advice and merely accepted it.

What else could the directors have done?

The court made the point clear that it was not for it to question directors' decisions but rather to provide guidance and clarification as to what steps should be taken by directors in this situation.

Company directors should be fully aware of their obligations and responsibilities to their company and its shareholders, and a director must therefore shed light on a situation where there's doubt. In doing so, directors need to take all practicable steps to ensure their organisation complies with appropriate legislation. If not, the outcome can be harmful not only in terms of the company's profitability, but also in its reputation and that of the directors themselves.

In the Apple Fields situation, the court said that the directors could not have taken all reasonable and proper steps if the steps already taken had not ensured compliance with legislative requirements. It noted that there were a range of options available to the directors of Apple Fields, in particular taking further practical steps such as seeking legal advice to explore whether there were options available to require Noble to provide its financial records, or to obtain a second accounting opinion to ascertain whether the outcome would be different.

Directors need to be aware that the Financial Markets Authority has the power to fine up to $100,000 for non-compliance; Apple Fields' directors were fined $30,000. The decision is being appealed.

Where to from here?

Undoubtedly situations arise daily for directors where they have to make a decision on whether advice, professional or not, is sufficient and accurate.

Nevertheless, in this particular decision, the court has highlighted that as a director you must keep asking yourself whether you need to seek further assurances, in particular a second opinion of legal or accounting advice in areas of expertise which you are not familiar with. This comes to the core of a director's duty in that you must carry out decisions for the benefit of the company, even in situations where you may not hold expert knowledge.

From a practical viewpoint, when it comes to legislative compliance, directors need to consider whether additional professional advice is required in order to meet these requirements or whether there are any other legal avenues which can be taken to ensure compliance.

1 *Prain v Financial Markets Authority* [2016] NZCA 298

Business Briefs

Alert: Put a start date on your employment contracts

In late August the Employment Relations Authority (ERA) released four decisions relating to the employment contracts of four early childhood teachers and the 90-day trial clause.

This is a timely reminder that you need to dot your Is and cross your Ts if you want to dismiss an employee on the basis of a 90-day trial clause.

In these cases[2], the 90-day trial clause did not expressly state the date on which the trial period began (although elsewhere the agreement did specify a start date for the employment). In the absence of express agreement as to a trial period start date, the ERA said it was not reasonable to assume that it started on the day the employment relationship started. The ERA considered it was open to the parties to agree to a later start date and, for example, it could have begun after completion of an initial training or induction period. The ERA held the clause invalid.

While there is some doubt in the legal community as to the correctness of the ERA's decision, we recommend you make sure your employment agreements state that the trial period clause commences on the agreement's commencement date, and that the commencement date is expressly stated somewhere else in the agreement (it's often in a schedule).

There are other requirements relating to trial periods that you will need to comply with as well – we are happy to assist with any queries you may have.

Employee share scheme tax update

Employee share schemes are globally recognised as an effective way for companies to recruit, retain and incentivise their staff. The legal requirements necessary to establish such schemes in New Zealand have recently been clarified under a new securities exemption in the Financial Markets Conduct Act 2013. Inland Revenue has now turned its attention to whether income tax is being properly collected on employee share scheme benefits, with new legislation passed and in the pipeline.

It has previously been up to employees to self-report and pay tax on any income arising under share schemes in their annual tax returns. However, from 1 April 2017:

- Employers *must* report employees' share scheme benefits to Inland Revenue, and
- Employers *may* elect whether or not to withhold tax on any resulting income, using PAYE.

If you have an employee share scheme, you should be aware of the new reporting requirements, and should consider whether you will withhold tax. You can read more about the changes **here**.

Wider policy changes are currently under consultation: these are likely to affect the fundamental taxation of employee share schemes. If you have an employee share scheme, we recommend you seek specialist tax advice.

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2 *Clark v Lighthouse ECE Limited* [2016] NZERA Auckland 281; *Du Plooy v Lighthouse ECE Limited* [2016] *NZERA Auckland 282; Baxter v Lighthouse ECE Limited* [2016] *NZERA Auckland 283; Honey v Lighthouse ECE Limited* [2016] NZERA Auckland 284.

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An unsettling agreement

A recent Employment Relations Authority decision is a reminder that an employee can bring a claim for breach of minimum entitlements even after signing a settlement agreement.

In this case[3], on termination of her employment, the employee (KC) signed a settlement agreement under s149 of the Employment Relations Act 2000 (ERA). A s149 agreement usually provides certainty of settlement since its terms are final and binding (except for enforcement purposes). The agreement had a full and final settlement clause and, in accordance with the ERA, stated that the parties had not forgone minimum employment entitlements.

Some years later, KC brought a minimum entitlement claim against her previous employer (Selwyn House School) having become aware of case law favourable to her. KC argued that she should have received the minimum wage when she carried out sleepovers for the school.

The school applied to strike out the claim on the basis that it was already settled.

The authority disagreed. The agreement did not attract the certainty afforded under s149 because it (arguably) settled minimum entitlements. Therefore, the school argued that the agreement, though not compliant with s149, was still binding. However for that to occur, the sleepover/minimum wages claim must have been in KC's thoughts when she signed the settlement agreement. It wasn't and therefore the full and final settlement clause didn't exclude KC from pursuing her claim.

When you're dealing with minimum employment entitlements, be careful and identify all claims your employee may have. As well, before agreement to any settlement, do talk with us first.

When does a director 'live in New Zealand'?

Since 1 May 2015, the Companies Act 1993 has required that at least one director of each New Zealand registered company 'live in New Zealand' or 'live in an enforcement country and be a director of a company that is registered ... in that enforcement country'. The aim is to ensure there is someone who can be questioned about, and held to account for, a company's activities. The Registrar of Companies, drawing on tax legislation, has interpreted 'live in New Zealand' to mean living in New Zealand for at least 183 days a year.

This interpretation was recently challenged in the High Court[4]. The court found that a broader test is to be applied and that the 183-day threshold only provides 'a criterion through which directors can automatically meet the statutory test'. If a director does not meet the threshold, the test can be satisfied by other means. While the court did not set any definitive criteria for assessing whether a director 'lives in New Zealand', it noted that the following considerations will be relevant:

- The amount of time the person spends in New Zealand
- Their connection to New Zealand
- The ties they have to New Zealand, and
- The manner of their living when in New Zealand.

When incorporating a company, bear in mind this New Zealand resident director requirement and how it is to be interpreted.

3 *Cleverley v Selwyn House School Trust Board* [2016] NZERA Christchurch 43

4 *Re John Malcolm Carr* [2016] NZHC 1536