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Welcome to the Winter edition of *Commercial eSpeaking*.

We hope the articles inside are both interesting and useful to you. If you would like to talk further about any of the topics covered here, or on any business law matter, please be in touch with us – our contact details are above.

INSIDE:

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The next issue of Commercial eSpeaking *will be published in early Spring.*

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Terms of Trade

Ensure your Terms are robust

Despite a post-quake construction boom in Christchurch, an unprecedented number of building firms are going bust. Reports surfaced earlier this year of almost 100 rebuild-related companies having been placed into liquidation since the February 2011 earthquake, owing tens of millions of dollars. Some relatively high profile companies have fallen victim in recent times, emphasising that even large, well-established businesses are not immune to poor management and the vagaries of the rebuild market.

When a company is placed into liquidation, there's often little, or no chance, of anything being recovered. However, there are steps that you and your business can take, starting with having robust Terms of Trade in place, that will help prevent a sad ending for your business.

The purpose of Terms of Trade is to set out the essential terms and conditions on which parties will do business. Terms of Trade are primarily designed to protect the rights of the business selling goods or providing services, however, there are other advantages. Of particular relevance to the Christchurch situation is that Terms of Trade can be used to limit potential liabilities of the business and provide a degree of security for the recovery of debt following the supply of goods or services.

The first aspect to be aware of when adopting Terms of Trade, is that many of the 'one size fits all approach' templates available online are unlikely to give you the protection you and your business need. The more the Terms of Trade are tailored to your business, the more effective and useful they will be.

There are, however, certain essential matters that should be addressed in any Terms of Trade irrespective of the size of your business, and the nature of the goods and/or services being provided. These include:

1. Definitions: All key terms should be defined, including the parties to the terms of trade.
2. Quotes, Orders and Acceptance: Clauses dealing with how orders are placed, how quotes are dealt with and confirming that placement of an order constitutes a binding contract and acceptance of the Terms of Trade.
3. Price and Payment: Clear, unambiguous statements about when and how payment is to be made and any arrangements regarding prompt payment discounts and the charging of interest on late payments. The latter is particularly useful and acts as another incentive for clients to pay you on time. The Terms should also reserve the right to recover debt collection costs from your customers.
4. Ownership: The point at which ownership passes to the customer. It is in your interest to ensure that ownership in the goods is retained until such time as payment in full is made for the goods, particularly where the cost of the goods is significant. You could go a step further and take a registered charge over the goods until payment is made. Specific legislation applies to the creation of these charges and the Terms will need to be drafted with legislative requirements in mind.
5. Guarantees: If your customer is a company, you should consider obtaining guarantees from the directors and/or shareholders. Small, recently formed companies are unlikely to hold significant assets and the risks of non-payment are increased. Under the guarantee, the directors will be personally liable for the debts incurred by the company. This would allow you to pursue the directors for payment as it would be more difficult for them to hide behind their company.

These are just some of the key features to effective Terms of Trade. This is, however, only the first phase in managing risks in doing business with an individual or business of whom you may have no real or prior knowledge. Once you have established effective Terms, you should ensure they are incorporated into all of your business transactions. Conversely, you also need to consider any Terms of Trade that you are offered and be sure that they don't have the propensity to compromise your position in the future nor limit the action that you are able to take. ■

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Budget 2015: Introduction of the 'Bright Line' Test for Property Investors

This year's Budget, delivered on 21 May, contained few surprises and, generally speaking, little of significance for business. The Budget did, however, confirm that the government will increase measures to ensure people buying and selling residential property for profit, including overseas buyers, pay their fair share of tax.

The introduction of the 'bright line' test is a measure of which all property buyers and sellers should be aware.

The test has been introduced as an addition to the Inland Revenue's 'intentions' test for taxing property sales. The new legislation will aim to target speculators who buy and sell residential property for gains purposes. Put simply, if a property is purchased and sold by the same owner within two years any gains will be subject to tax unless it is an exempt transaction. Exempt transactions include situations where the property is:

» The seller's main home

» Inherited from a deceased estate, or

» Transferred as part of a relationship property settlement.

Land Information New Zealand will collect taxation information for the IRD from property buyers and sellers through its existing survey and title system, Landonline.

If you are looking to sell property and you are unsure of whether the transaction meets the test, talk with us early on so we can organise an historical title search before you enter into a sale and purchase agreement. If you plan to sell property in the near future ensure that settlement and registration are completed before 1 October 2015, when the new legislation comes into force.

It's important to be aware that if your transaction meets the 'bright line' test it's possible you will be red-flagged by the IRD. The IRD may then choose to audit your previous property transactions to ascertain whether you have adequately declared your income.

Other measures introduced with the Budget 2015 include mandatory IRD numbers for all non-residents and New Zealanders who are buying and selling property. In order to obtain a New Zealand IRD number non-residents must supply proof of a New Zealand bank account. Non-resident buyers and sellers will also be required to provide their tax identification number from their home country.

If you would like to read more detail on the Budget 2015 click here. ■

Business Briefs

New avenue for capital raising – small offers exclusion

The recently introduced Financial Markets Conduct Act 2013 has completely overhauled New Zealand's capital markets and financial services laws. One key change is the introduction of new avenues for companies seeking to raise capital by issuing shares to existing shareholders or proposed new investors. The most notable of these is the new exclusion for 'small offers'.

The small offers exclusion allows companies to raise up to $2 million from up to 20 investors in any 12-month period, without needing to provide the investors with lengthy and expensive disclosure documents. In calculating the thresholds, investors who fall within other exclusions provided in the Act are excluded. This allows the small offers exclusion to be usefully adopted alongside companies' other targeted capital raising offers, for example, alongside offers to *eligible investors*.

In order to qualify, the offer must also constitute a 'personal offer'. This generally means that the person must be likely to be interested in the offer, having regard to their previous contact or connections with the company (including, for example, their participation in an angel network).

Where the small offers exclusion is available, companies must include a warning statement on every document provided to investors which contains the key terms of the offer. The company must also notify the Financial Markets Authority of their reliance on the exclusion. In comparison to the usual disclosure requirements, these minor requirements significantly lower compliance costs for companies, meaning that the new small offers exclusion adds significant flexibility to companies conducting early-stage capital raising. ■

Cooking up a storm: the zero hours contracts debate

April saw a number of protests across the country concerning the use of zero hours contracts. A significant number of the protests occurred outside fast food outlets – the fast food industry having been identified as a key sector in which zero hours contracts are used.

What is a zero hours contract and why is it controversial? A zero hours contract is a contract for working under which an employer doesn't guarantee to provide their employee with any work and pays that employee only for work actually carried out. However, broadly speaking, their employee is expected to be available for work when or if called on by the employer.

The nature of a zero hours contract means that an employee isn't guaranteed a level of income from one week to the next. An employee could feasibly work 40 hours one week and 10 hours the following week. This can leave employees in a difficult situation when it comes to financial planning/budgeting.

The future: A number of employees have been left with a sweet taste in their mouths following Restaurant Brands' decision to end zero hours contracts by July 2015. Restaurant Brands owns a number of businesses including Burger King, Pizza Hut and KFC and it has decided to move away from zero hours contracts to fixed hours contracts.

It remains to be seen what will be the response of other employers. As well, the government has confirmed that this matter is on its radar. It will be interesting to see how far the government is willing to go. Will the government outlaw zero hours contracts completely or perhaps just ban the harshest terms of zero hours contracts (including clauses that allow employers to cancel shifts at short notice or clauses that require an employee to work exclusively for one employer)? For now all we can do is watch this space. ■

Parent company liable for debt of subsidiary company in liquidation

If you are a director of a company in a corporate group, a recent High Court decision[1] should serve as a timely reminder of the need to preserve each company's separate legal identity within the group.

It's an important principle of New Zealand company law that a company is a legal entity in its own right which is separate from its shareholders.

In this case, however, the High Court ordered Steel & Tube Holdings Ltd to pay all or part of a claim against a wholly owned subsidiary in liquidation in relation to a lease of property from Lewis Holdings Ltd. The decision was based on the seldom applied section 271(1)(a) of the Companies Act, which provides an exception to the general principle of separate legal personality, by allowing the court to order a related company to pay the whole or part of the claims against a company in liquidation where it is just and equitable to do so.

While the decision was based on the specific facts, adopting sensible commercial practices is prudent, including making sure:

- Each group company's business is run as a separate commercial and legal entity from its parent, rather than being run as a division of the parent
- Each group company's board gives separate consideration to the interests and position of that company when making decisions, as distinct from the interests of the parent company or other group companies (even where a subsidiary's constitution expressly allows the board to have regard to such interests)
- Separate records (board minutes, resolutions, etc) are kept for the parent and each group company
- Arrangements for financial and management support from the parent company to a subsidiary are formally documented, and
- Invoices are addressed to, and paid by, the relevant group company.

If you don't maintain a clear distinction between parent, subsidiary or other related companies, you may find the parent, or a related company, is ordered to pay certain debts of the subsidiary if the subsidiary is put into liquidation. ■

1 *Lewis Holdings Ltd vs Steel & Tube Holdings Ltd* [2014] NZHC 3311