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Welcome to the first issue of the decade for *Commercial eSpeaking*. We hope you find the articles of interest. If you would like to talk further about any of the issues covered in this newsletter, please be in contact with us.

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The next issue of Commercial eSpeaking will be published in June 2010.

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Director's Duties

Knowing your duties and obligations

There are more than 100 provisions in the Companies Act 1993 of which a breach can constitute a criminal offence and, in almost all of these sections, criminal liability is imposed on the directors personally. If you are a director of a company, or are considering becoming a director, you must know and understand your duties and legal obligations and be prepared to actively perform your duties.

Directors primarily owe duties and obligations to the company, but duties can also be owed to shareholders and to others dealing with the company including the company's creditors.

With the current economic climate putting increased financial pressure on companies, there is a noticeable rise in the number of aggrieved creditors and shareholders seeking to recover losses from directors personally, and succeeding in doing so. This trend is growing overseas and now also in New Zealand. Therefore, it is increasingly important for directors to understand and comply with their duties and obligations. Some key duties are outlined below.

Duty to act in good faith and in the best interests of the company

Directors must act in good faith and in what they subjectively believe to be in the best interest of the company. Directors should act in an honest, transparent manner and should not act in a way that could harm the company or bring it into disrepute.

Duty to exercise powers for a proper purpose

Directors must exercise their powers for a proper purpose and not stray beyond the limitations imposed on them by the company's constitution. The legal test applied is what would a 'reasonable' director do in the particular situation?

Duty to comply with the law

While it may be obvious that a director must comply with the company's constitution and the Companies Act 1993, directors should also be aware of their obligations under other legislation including the Privacy Act 1993, Health & Safety in Employment Act 1992 and the Personal Property Securities Act 1999. Failing to comply with any legislation could also be viewed by the courts as acting for an improper purpose.

Reckless trading

A director must not agree to, cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors. To do so may jeopardise the company's solvency.

Duty in relation to obligations

A director must not agree to a company incurring an obligation unless the director believes, on reasonable grounds, that the company will be able to perform the obligation when required to do so. For example, this duty will apply where a company borrows money or gives a guarantee.

Duty of care

Directors must exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances, taking into account such things as the nature of the company, the decision of the director and the nature of the responsibility undertaken by them.

Conflict of interest

Directors must avoid acts which promote their own interests at the expense of the company's interests. If directors are likely to derive a material financial benefit from a transaction entered into by the company they must disclose their personal interest in the transaction as soon as they become aware of it.

Compliance with your legal obligations as a director is critical to the success of your company; failure to do so could have serious implications for you personally. If you have any doubt about the wisdom of a prospective business decision, or you would like further information about your duties as a director and how you can protect yourself and your assets from a potential claim, please contact us.

Review of the Credit Contracts & Consumer Finance Act 2003

Making disclosure and credit provisions clearer for consumers

The Credit Contracts & Consumer Finance Act 2003 (CCCFA) was introduced in April 2005, but has not proved an unqualified success. As a result last year the Ministry of Consumer Affairs undertook a review of the legislation. The fundamentals of the review are set out in bullet points below.

The CCCFA was designed to improve the information disclosure requirements for consumer credit transactions and to regulate methods of interest charging, fees and payments, it also regulates consumer leases. Hardship provisions were introduced for oppressive credit contracts, and penalties were established for breaching the Act.

Disclosure

The purpose of disclosure is to ensure informed decision-making by consumers. However, does the CCCFA go far enough to ensure consumers understand the true cost of borrowing? In particular, many credit card users are not aware of the true cost of interest accruing when they make the minimum required payments.

- » It is proposed that credit card issuers be required to disclose interest accrued with monthly statements and
- » To extend disclosure to cover credit-related insurance and the costs of repaying their loan.

There is an anomaly between the five day disclosure period and the borrower's right to cancel. Currently creditors have five working days to make full disclosure to borrowers but this creates difficulty where there are two contracts, one relating to purchase and the other relating to purchase finance with, for example, motor vehicle finance. In these circumstances only the latter is subject to a right of cancellation.

- » It is proposed to require immediate disclosure where purchasers of vehicles access credit at purchase.

Credit fees

Under the Act a credit fee must not be unreasonable, but clarity is lacking.

- » A possible solution is to include the provision of guidelines as to what constitutes 'unreasonable'.
- An alternative solution is to incorporate greater prescription as to what can be included in fees.

The Act currently provides for front-loading of fees that would otherwise accrue over time. Concerns have arisen that this results in the borrower paying a greater amount because the front-load fee is added to the initial loan and interest accrues from the outset. The review suggests these costs should only be recovered at the time they fall due and that fees for services should only be charged when the service has been performed.

Hardship provisions

Currently a consumer can seek relief for the terms of a credit contract if unforeseen hardship occurs when personal circumstances change, for example, illness or loss of employment. Although the Act permits reasonable variation of the credit contract, the following changes are recommended:

- » Extension of the existing hardship provisions to allow borrowers to apply to vary a credit contract even when in default for less than two months
- » Creation of timeframes in which a creditor must respond to a hardship application
- » Prohibition of fees for hardship applications, and
- » Mandatory disclosure in relation to hardship applications.

Unsolicited credit

Extending credit card limits without the express agreement of the consumer is a form of unsolicited credit. Credit cards can provide easy access to additional credit prompting some to take on excessive debt. At present, credit card issuers may offer a credit extension in which the consumer must opt out if they do not want the extended limit. However, in practice consumers rarely opt out.

- » The review suggests consumers must opt in to greater credit limits, rather than having to opt out.

In conclusion, the review signals legislative change to tighten and clarify a number of provisions and to encourage a more responsible attitude towards credit.

Business Briefs

Search and Surveillance Bill

A new bill proposes widespread changes to government search powers. A wide range of new provisions are proposed including allowing a larger number of government agencies to use covert surveillance, install tracking devices and request assistance from others (such as internet service providers) to access information – even remotely – and potentially without a search warrant.

As drafted, the bill empowers ‘enforcing officers’ (which includes officers of bodies such as the Civil Aviation Authority to use ‘reasonable force’ to enter premises, including private premises, obtain information remotely (and without notice) and to detain people at search sights. Further, enforcing officers who obtain search warrants can apply for ‘residual warrants’, allowing them to deploy covert surveillance techniques.

Enforcement officers entitled to be on any premises can also record what they see or hear, without a search warrant. While sounding relatively innocuous, this means an enforcement officer could record what is said at a meeting, without the participants’ knowledge.

The Human Rights Commission and the Privacy Commissioner have warned about the potentially ‘chilling’ implications of extending search powers to a broad range of government agencies, currently only permitted by the Serious Fraud Office and the police.

Application of the Consumer Guarantees Act 1993 to boat brokers – recent case

You may recall the saga of the yacht “Blaze” (*Keybank National Association v the ship “Blaze”*), which concerned competing security interests in a United States-registered vessel. The High Court found in favour of the US mortgagee and against the New Zealand purchaser of the vessel. In round two, in a recent landmark High Court decision², Taylor Marine Limited (boat brokers) were held liable for losses incurred (of \$312,654) by the purchaser of a yacht to release a previous mortgage owed to the Ohio-based bank.

The sale and purchase agreement included a warranty that the boat would pass to the purchaser ‘free of all encumbrances’.

The purchaser argued that the brokers were ‘suppliers’ under the Consumer Guarantees Act 1993 (CGA) and liable for a breach of the warranty that the goods were not encumbered.

The judge noted the CGA’s consumer protection focus and held that people who intentionally set themselves up in the trade of selling goods as agents came within the definition of ‘supplier’. The court refused, however, to extend such liability to employees/agents of the broker.

Those advising clients in the business of selling as agents should encourage their clients to closely review the warranties clauses contained in their standard sale and purchase agreements. It is expected that Taylor Marine will appeal the High Court’s decision.

Section 92A of the Copyright Act 1994 revisited: a new internet copyright repeat infringer regime

After widespread opposition last February, the government delayed the introduction of s92A of the Copyright Act. The section contained a regime to pursue and prevent online copyright infringement by providing that Internet Service Providers (ISPs) must terminate the accounts of users who repeatedly download material in breach of copyright using peer-to-peer (P2P) file sharing technology. (Read more about it in *Commercial eSpeaking/21*, February 2009, together with an *eFlash* published a week later.)

Cabinet reviewed the regime and released a proposal to replace the current s92A with a system where rights holders as well as ISPs must deal with copyright infringers. The paper recommends that a right holder should be able to issue a notice to a P2P copyright infringer through the infringer’s ISP. If there are three or more infringements, the right holder will then be able to take a complaint to the Copyright Tribunal which may penalise the infringer. The court will also be able to make orders suspending the copyright infringer’s internet account.

A bill is expected to be available for submissions to a select committee in late February 2010 with a target date for the law to come into force mid-2010, followed by a six month transitional period.

¹ [2007] 2 NZLR 271

² 8 September 2009, HC Auckland, Asher J, CIV-2006-404-2772