



Commercial eSpeaking

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Welcome to the first issue of *Commercial eSpeaking* for 2012.
We hope you find the articles both useful and interesting.

If you would like to talk further about any of the topics covered in *Commercial eSpeaking*, or indeed any business law matter, please be in touch with us.

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Family Businesses

Planning ahead for success

Family businesses have long been part of New Zealand's commercial landscape. It's estimated that family businesses represent 75% of all businesses in New Zealand. However, despite their prevalence, many family businesses don't survive beyond the second or third generation. This article gives some guidance to those who are either already involved in a family business, or are contemplating setting up a family firm.

The high failure rate of family businesses can often be attributed to family conflicts and a lack of formal planning. Often familiarity is to blame for family businesses failing to carry out essential tasks, such as creating clear role descriptions, planning for the ongoing success of the business through the various generations, and documenting dispute resolution procedures and rules addressing governance and decision-making.

Independent directors/managers

As family members are very familiar with each other, it's easy to lose a degree of objectivity and impartiality. Accordingly, family businesses can greatly benefit from engaging an independent (and appropriately qualified) person as a director or manager. This person can provide impartial advice and guidance. They can help define roles and responsibilities, and carry out the performance and remuneration reviews of family members and other employees to help avoid contention in these areas.

Conflict resolution

Most families experience conflict, but the challenges arising from conflict can be multiplied when the family members are also in business together. We recommend that all family businesses should have a well documented dispute resolution strategy to ensure family disputes are resolved quickly. The strategy will usually include mediation. Engaging an independent mediator will help family members focus on the issue at hand, and prevent personal family issues clouding their ability to remain objective for the sake of the business.

Succession planning

Family members need to start thinking about the future of the business and plan ahead. Potential successors need to be identified early. Possible successors could be the current owner's children or existing employees. Alternatively, the family business may need to consider appointing a professional manager or selling to a third party. It's particularly important for parents and children to clearly communicate their expectations and intentions in regard to the future of the business. Parents often presume at least one of their children will take over the business only to find those children have other ideas.

Shareholder/partnership agreement

Business owners often presume that because they have a family business, they don't need to address and record essential rules governing their relationship as business partners and the operation of the business. However, a shareholders' or partnership agreement is just as important in a family businesses as in any other commercial enterprise. A good agreement will address key issues which, if not dealt with, will affect the success and survival of the business. Those key issues include:

- » What happens if a business owners' marriage or personal partnership dissolves?
- » What will happen to the business if a principal member of the business dies or becomes permanently disabled, or wants to retire?
- » How will disputes be resolved?
- » Whose consent is required for different decisions within the business such as hiring and firing employees, setting employee remuneration, raising capital and entering into significant contracts?

If you have a family firm, start treating it like any other business and put in place the necessary rules, documents and plans to ensure its future growth and success through the generations.

Insolvent Transactions and Clawbacks

The Companies Act carries a sting in its tail

Section 292 of the Companies Act 1993 gives liquidators the power to recover payments made by a troubled business in the two years prior to its liquidation, and at a time when it was unable to pay its debts. The purpose of s292 is to ensure all unsecured creditors are treated equally and prevents one creditor receiving more from a troubled business than it would otherwise receive in a liquidation.

There is a true story of a business that was owed \$60,000 by its customer. The customer agreed to repay the debt by regular instalments, and these were made. Eighteen months later, however, the customer went into liquidation. The liquidator attempted to recover every instalment. This didn't go down well; nobody wants to 'give back' \$60,000!

Defence

There is a defence available to creditors under the Companies Act, but it requires them to prove that when they received the payments, they had acted in good faith, they provided value for the payment, and that a reasonable person in their position, would not have suspected, and did not have reasonable grounds to suspect, the customer was or would become insolvent.

This defence is demanding due to the difficulty in satisfying the 'good faith' and 'reasonable person' elements. The good faith element requires the creditor to show it honestly believed the payments would not put them in a better position than other creditors. They will fail if they knew the customer was experiencing financial difficulties, and if there were signs they were paid before other creditors. The reasonable person element is difficult because it doesn't consider the creditor's actual belief at the time payments were received. Rather, the focus is whether another person in the position of the creditor would, having regard to all the circumstances, have an actual fear that the customer was insolvent. Relevant factors include the age of the debt, whether cheques had been dishonoured or enforcement action taken, and whether a creditor had knowledge about the businesses' poor cash flow.

Courses of action

The better course of action is to try and avoid the sting of s292 in the first place. This is difficult, as many businesses accept payment plans from time to time, and need to continue doing so to obtain payment in order to maintain acceptable cash flow. The following courses of action can help if your business finds itself in this situation:

- » Always be aware that payments received for an outstanding debt could be vulnerable to attack
- » Make sure you have registered your security interest on the Personal Property Securities Register (www.ppsr.govt.nz)
- » If possible, obtain a personal guarantee from the directors/shareholders of the customer, and
- » Try to get payments up front, or implement a debt collection policy that encourages fast payments, and stick to it.

Finally, always keep watch for signs indicating a business is in trouble and if concerns do arise, talk with us immediately for guidance on how to manage the situation.

Clearing up Confusion About Criminalising Cartels

Proposed amendments to the Commerce Act are intended to assist businesses by deterring hard-core cartel conduct. Such conduct raises prices above the competitive level and, in turn, affects the competitiveness of those selling into domestic and international markets. The amendments also clarify the law in relation to cartels to ensure that genuine, pro-competitive arrangements are not deterred.

The article *Criminalising Cartels*, which appeared in the October issue, suggested that the reforms would capture a large number of commercial arrangements, put commercial players involved in genuine commercial arrangements through the criminal courts, and make commercial decisions more costly due to the increase need for legal advice and compliance. It was based on an early exposure draft of the *Commerce (Cartels and Other Matters) Bill*, not the Bill introduced to Parliament in October 2011. The Bill is currently awaiting its first reading and referral to the Commerce Select Committee for further consideration. More information about the reforms can be found [here](#) or at www.med.govt.nz/cartels.

Business Briefs

90-day trial periods

A recent Employment Court decision *Blackmore v Honick Properties Limited*¹ has provided some clarity for employers on the requirements for 90-day trial periods. The court found:

- » Mr Blackmore's trial period was invalid. Mr Blackmore was already an employee as he was employed by Honick Properties when he accepted its employment offer around five weeks before he started work, or alternatively, the court found he was employed when he started work at 7am on his first day of work (he was presented with the employment agreement to sign at 8am), and
- » Honick Properties unfairly bargained for the trial period as Mr Blackmore wasn't advised, and didn't have the opportunity, to get independent legal advice.

Employers looking to use trial periods should note the following:

- » If you make an offer of employment to an employee, then the proposed employment agreement containing the trial period should be given to the employee as part of the employment offer. Best practice is to make the offer conditional upon your new employee signing the proposed employment agreement with the trial period.
- » You must give prospective employees a reasonable opportunity to seek independent legal advice about the terms of the employment offer (including the trial period) before signing the employment agreement.
- » Employees must sign the employment agreement containing a compliant trial provision *before starting work*.

Spam

The Unsolicited Electronic Messages Act 2007 (known colloquially as the Spam Act) prohibits an individual or company from sending unsolicited commercial electronic messages, also known as 'spam', to, from or within New Zealand. The Act covers email, instant messaging, SMS, multimedia message services and other mobile phone messaging. Since 20 October 2011, the Act was extended to include commercial faxes. This means that an individual or company may no longer send a commercial fax, with a New Zealand link, to a recipient that has not consented to receive the message. Internet pop-ups and voice telemarketing continue to be excluded from the Act.

Companies and Limited Partnerships Amendment Bill

This Bill was introduced into Parliament on 13 October 2011. The Bill proposes a number of changes to the Companies Act 1993 and the Limited Partnerships Act 2008 including:

- » A requirement for all companies and limited partnerships to have a New Zealand resident agent where the company does not have a director, or the limited partnership does not have a general partner, that is resident in New Zealand or in an approved jurisdiction
- » Expanding the Registrar's investigatory and removal powers, along with the power to warn the public about suspect entities by placing a note of warning in the register
- » Restricting the ability of code companies to circumvent the Takeovers Code provisions by implementing changes to the company through arrangements, amalgamations or compromises effected under the Companies Act, and
- » Criminalising breaches of certain directors' duties, in circumstances where a director has actual knowledge that his or her act or omission would have serious consequences for the company or its creditors. Those directors convicted of such offences can be imprisoned for up to five years or fined up to \$200,000.

We will keep you up-to-date with the Bill's progress throughout the House. The timing will, however, depend on the priorities of the new government.

¹ [2011] NZEmpC 152, 24 November 2011