

Welcome to the Spring edition of *Commercial eSpeaking*.

We hope that 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.

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The next issue of Commercial eSpeaking will be published in late January 2015.

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Construction Contracts Act 2002

Making sure you get paid, and on time

Making sure you get paid, and on time, is critical if you're running any business. If you're involved in commercial or residential builds, the Construction Contracts Act 2002 outlines a process for progress payment arrangements. The legislation also provides an adjudication process for the quick and efficient resolution of disputes.

What's covered by the legislation?

Every contract for construction work is covered by the Construction Contracts Act 2002. 'Construction work' is broadly defined and includes the construction, repair and demolition of buildings or other structures. Also covered is painting and decorating; installation of roadways, water mains and electricity; and landscaping, site preparation and cleaning work carried out as part of the construction work. Parties to a construction contract cannot contract out of the Act.

Work not covered includes the drilling for, and extracting of, oil or natural gas; the supply of materials; and any work carried out by designers and quantity surveyors.

The legislation applies to both commercial and residential construction contracts. Certain provisions, however, don't apply to residential construction contracts such as provisions relating to charging orders and the right to suspend construction in particular circumstances.

Progress payments and progress claims

Parties to a construction contract are free to agree between themselves as to the number and frequency of progress payments under the contract, the amount of each of those payments and the date at which they become due. If either party can't agree on the terms of the progress payments, then the default provisions in the Act apply.

For each progress payment, a payee can serve a 'payment claim' on the payer. Payment claims must be in writing, identify the construction contract and construction work to which the progress payment relates, indicate a claimed amount and the due date for payment, indicate how the payee calculated the specified amount and state that the claim is made under the Act. Payment claims served on residential occupiers must also be accompanied by an outline of the process for responding to the demand and an explanation of the consequences for failing to do so.

Once a payment claim is served, the payer can either pay the claimed amount by the due date (by default this is 20 working days after service of the payment claim) or provide a 'payment schedule' to the payee. A payment schedule is the payer's opportunity to contest the amount as set out in the payment claim.

A payment schedule must be in writing, indicate the payment claim to which it relates and indicate a scheduled amount. If the scheduled amount is less than the claimed amount, the payment schedule must indicate the manner in which the payer calculated the scheduled amount, the payer's reasons for the difference and their reason for withholding payment. The due date for payment remains the same regardless of whether a payment schedule has been issued.

If the payer doesn't pay any part of the claimed amount or provides a payment schedule before the due date the payee may recover the debt in court.

Remedies

If a payment schedule is issued by the payer within the time limit disputing the amount of money to be paid, the matter can be referred to adjudication for resolution. This involves the claimant serving a notice of adjudication and an adjudicator being appointed. The claimant then has five working days to serve an adjudication claim and the respondent has five working days to respond. The adjudicator must then issue a decision within 30 working days, which is enforceable by the courts.

The future

The Act is currently being amended. If passed (and we expect this to be sometime next year) the amendments will remove most of the differences between how the legislation applies to residential and commercial construction contracts. Other proposed changes include making the adjudication and enforcement processes more efficient and extending the Act to include design, quantity surveying and engineering work contracts.

Keep yourself updated so that you're ready to implement any changes into your business when they come into force. As you cannot contract out of the Act, it's vital that you are aware of your obligations under the new legislation. ■

Buying Into an Existing Business

Getting value for money

Buying an existing business is sometimes preferable to establishing one from scratch. This article gives some pointers (but not an exhaustive list) to prospective purchasers to help ensure you get value for money.

There are many positive aspects in purchasing a small business, provided that you don't pay too much for it. The most important aspect of the Agreement is the price which you are paying, and it's important to ensure that this price is backed up by the profitability of the business. We strongly recommend that you have an accountant review the figures before you sign on the dotted line.

Be sure that the business which you are taking over on the settlement date is the business which you have purchased. Talk to us at this initial stage – we have seen a lot and may be able to help you spot trouble before you commit. Taking the time to visit the business premises can also give you a feel for the real atmosphere and dynamics within an organisation that accounts and balance sheets don't provide.

Most small businesses rely heavily on key personnel and you need to know who those key people are and, if necessary, incorporate a provision in the Agreement to cover their continued employment situation. Enthusiastic and experienced employees can make or break a business. If staff members leave soon after you purchase the business, ensure that you factor into your purchase price recruitment and training costs required to get new staff members up to speed. Getting employment clauses right in a business sale and purchase agreement will also help you avoid difficult problems if there are any employees involved. Come and see us if this might apply to the business you are purchasing.

Buying the company v buying the business

You should consider establishing a new entity to run the business to minimise the risk of inheriting company debts, contracts and liabilities that may not have been disclosed to you. This also separates out your business venture from any existing companies that you own. The cost of incorporating a company is relatively small and enables you to tailor the constitution and ownership to your own needs. If the company name is the business name you want to retain, you should negotiate for the vendor to change their company name and free up that name for your use.

Restraint of trade clauses will bind the vendor company but not the vendor's directors, shareholders or employees unless they enter into a separate deed. As with key personnel, make sure that you are tying in the commitment of those who can help you set up the business for success.

Shareholders' agreements

A well-drafted shareholders' agreement can save you many headaches in unforeseen or unwanted scenarios if you are going into business with a partner. This will set out what will happen if one of you wants to get out of the business, dies suddenly or is unable to continue working. Having such an agreement can help avoid being left in business with someone who inherits from your business partner. It can ease the tension, give certainty and provide a clear process if one party wants to depart the business.

Premises

Buying a successful business is only part of the equation – in most cases you need a place to do business. If you lease premises, this is often the biggest cost and the longest commitment involved in the business. Make sure that you are comfortable with the terms and length of the lease, the outgoings and all the fine print. Be aware that it may be possible to negotiate a variation of lease or further rights of renewal as a condition of the purchase. Depending on the nature of your business, this can be the best investment that you make. If location is important, check that you have sufficient rights of renewal.

The Sale and Purchase Agreement

The wording of the Agreement is important for your protection. Minor errors in an Agreement can lead to huge financial cost – this is not the place to cut corners! Working with us in the negotiation stage (before you sign!) can help avoid unnecessary conflict or unrealistic timeframes. After the Agreement is signed, map out a timeline of all the matters to attend to before settlement and allow yourself some extra time to double check at each step rather than lock yourself into a timeline that is inflexible or creates unnecessary pressure.

If you're thinking about buying an existing business, invest some time and talk with us early on – it will add value to your purchase. ■

Business Briefs

Unfair contract terms

New rules regarding 'unfair contract terms' will come into effect on 17 March 2015. The rules will apply to 'standard form consumer contracts' – that is contracts between a supplier and a consumer (a person who acquires personal, domestic or household goods or services) that haven't been negotiated between the parties such as standard terms of trade (usually written in 6 point font on the back of invoices).

Under the new rules, a term will be unfair when it:

- » Would cause significant imbalance in the parties' rights and obligations,
- » Is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and
- » Would cause detriment to a party if it were applied.

If you're a supplier, you should start reviewing your standard form consumer contracts now to ensure they don't include any unfair terms by the time the new rules come into effect next year. ■

Three fundamentals for a successful joint venture

So you've been looking at doing with a joint venture with a business partner you know you can trust. Before going ahead, there are three key areas you need to nail down.

- » **Economics:** Fundamentally, both parties need to agree on and be comfortable with what they're each contributing to the venture at the outset and on an ongoing basis. This includes cash funding, expertise, intellectual property, and so on.
- » **Control:** You need to carefully consider and agree how the venture will be controlled, both strategically and at an operational level. If control is in your hands then make sure you have enough freedom to get on and do your job. If you don't have control, you need to make sure that you have a say on major changes to the venture and any major transactions, as well as sufficient information access/audit rights. Also, you need to ensure you have appropriate dispute resolution processes.
- » **Exit arrangements:** When and how should the parties be able to terminate the venture? Is a fixed term appropriate? Should there be an exit process that applies if there's a deadlock in a decision about a major matter or a breakdown in the relationship? Also, you'll want to be able to tightly control what the other party can do with their interest in the venture in such circumstances.

Trust and compatibility at the outset of a joint venture are of utmost importance, but they're not enough. People change, business dynamics change. Clear agreement on the fundamentals will go a long way towards ensuring a successful outcome. ■

Health and safety reform – increased obligations for directors and managers

The Health and Safety Reform Bill 2014 (which will replace the Health and Safety in Employment Act 1992 and is expected to come into force sometime in 2015) will place significant obligations on company directors and managers to manage risks and keep workers safe. These obligations are to be backed with increased fines, and even prison, for people who fail to comply.

In its present form the Bill imposes a positive 'due diligence duty' on 'officers' of a 'PCBU' (being a 'person conducting a business or undertaking'). 'Officers' will include people who:

- » Occupy the position of a director of the company (by whatever name called), and
- » Make decisions that affect the whole, or a substantial part, of the business of a PCBU.

If you are an 'officer' of a PCBU, practically speaking, at a minimum this positive duty will mean that you must have access to, and read, information about your organisation's health and safety systems and processes, health and safety committees and audit reports, to ensure those health and safety systems, processes and resources remain appropriate and relevant.

Now is a good time for you to prepare yourself for these upcoming reforms and ensure as far as possible you take steps to mitigate your personal risk. ■