

Happy New Year, we hope that 2011 is a good one for you. This issue of *Commercial eSpeaking* has many articles that will be of interest to you. If you would like to talk further about any of these, please contact us.

In this issue:

Website Disclaimers

Do you have one?

Almost every business has a website these days, but does your site have an appropriate disclaimer? These disclaimers are intended to protect businesses and organisations from liability arising out of misleading or negligent statements on their website... CONTINUE READING

Business Briefs

Major employment law changes ahead – Copyright (Infringing File Sharing) Amendment Bill: an update... CONTINUE READING

Limitation Act 2010

What effect will this new legislation have on business?

Limitation laws prevent certain legal claims being brought against a person or company after a defined period of time. They provide a defence against old claims and give certainty in relation to legal liability for past events. This has important ramifications for businesses, particularly in relation to how long records should be kept for past clients and customers... CONTINUE READING

Company Directors

Can you rely on expert advice?

It appears from the recent case Ministry of Economic Development v Feeney and Ors that directors can, when preparing financial statements, rely on expert advice provided they act in good faith, make proper enquiry (where the need is indicated by the circumstances) and have no knowledge that such reliance is unwarranted... CONTINUE READING

If you do not want to receive this newsletter, please [unsubscribe](#).

The next issue of Commercial eSpeaking will be published in May 2011.

DISCLAIMER: All the information published in *Commercial eSpeaking* is true and accurate to the best of the author's knowledge. It should not be a substitute for legal advice. No liability is assumed by the authors or publisher for losses suffered by any person or organisation relying directly or indirectly on this newsletter. Views expressed are the views of the authors individually and do not necessarily reflect the view of this firm. Articles appearing in *Commercial eSpeaking* may be reproduced with prior approval from the editor and credit being given to the source.

Copyright, NZ LAW Limited, 2011. Editor: Adrienne Olsen. E-mail: adrienne@adroite.co.nz. Ph: 04-496 5513.

Website Disclaimers

Do you have one?

Almost every business has a website these days, but does your site have an appropriate disclaimer? These disclaimers are intended to protect businesses and organisations from liability arising out of misleading or negligent statements on their website.

Why have a disclaimer?

In *Patchett v SPATA*¹ the UK Court of Appeal was unanimous in finding that a duty of care can arise from statements made on a website. The court also confirmed that a clear and well written disclaimer can protect a business or organisation from liability for negligent or misleading statements on their website.

The case involved the Swimming Pool & Allied Trades Association website which had a 'member finder' function linking users to swimming pool installers in their area. Mr & Mrs Patchett employed Crown Pools Limited to build their pool but the company became insolvent before the job was completed and after the Patchetts had paid in full for their pool.

It transpired that Crown Pools was only an affiliate member of the association and therefore it had not been financially vetted and was not eligible for the SPATA warranty. The website had failed to mention that there was more than one type of member. The Patchetts were led to believe that all members were 'full' association members. They sued alleging that SPATA owed a duty of care to those who relied on the representations made on its site. However, SPATA escaped liability because the website had a disclaimer (of sorts) urging users to make further inquiries and, in particular, to request an information pack which included more detail about SPATA and its warranties, something the Patchetts did not do.

In light of this case, which is likely to influence any similar future New Zealand cases, all website operators should ensure that their site has an appropriately worded disclaimer as protection against various liabilities that can arise through a website.

The disclaimer need not be lengthy or complex, but it should tell users not to rely solely on the information displayed on the website and to make their own independent inquiries before acting on any information. It should emphasise that the information provided is only of a general nature and should not be taken as specific or complete advice. The disclaimer should also be prominently displayed on all relevant pages of the website.

External links: association websites

It is very common for websites to provide links to other sites so users can access information in a timely and cost-effective manner. However, many businesses do not realise that in providing these links, they are exposing themselves to further liability. For example, a business may find itself liable for copyright infringement through contributory negligence if the associated or linked website contains infringing material. In this case website disclaimers are essential to avoid responsibility for the contents or reliability of other websites.

Do not mislead

Tools such as website disclaimers may not protect a business for every eventuality and, accordingly, it is important that your website does not include any misleading material. A disclaimer will be of limited effect under the Fair Trading Act 1986 if misleading conduct occurs in trade through your website. Essentially, most problems can be avoided if your website is not misleading.

Conclusion

A website disclaimer can protect your business from liability. It should be carefully worded to emphasise that information should not be relied upon without independent advice. It should also be prominently displayed and express acceptance is advisable where terms are onerous or where a sale of goods is concerned. It is also crucial that any business pays regular attention to its website; it should be reviewed regularly to make sure it is up-to-date. A record of all the variations to the terms of trade should be kept. We encourage you to contact us if you would like assistance with your website disclaimer and terms of trade.

Business Briefs

Major employment law changes ahead

The Employment Relations Amendment Act 2010 and the Holidays Amendment Act 2010 were passed in late November 2010. This legislation will have a significant impact on employers and employees alike. Nearly all changes will take effect from 1 April 2011; the exceptions are a minor change to the Holidays Act that took effect prior to Christmas, and a provision regarding employment agreements that will take effect on 1 July 2011.

The Employment Relations Amendment Act 2010 amends the Employment Relations Act 2000 in a number of areas, the most significant of which we list below.

- » Extends the current 90-day trial period to all employers
- » Requires employers to retain a copy of an employee's individual employment agreement, making them subject to penalties if they do not, and clarifying the status of unsigned employment agreements (this change comes into effect on 1 July 2011)
- » Implements a code of employment practice around disciplinary and dismissal procedures
- » Broadens the test for justification in personal grievance cases from what a reasonable employer would have done to what a reasonable employer could have done
- » Prescribes minimum requirements of a fair and reasonable process for the court or Employment Relations Authority (ERA) to consider
- » Allows the ERA to dismiss claims deemed to be vexatious or frivolous, and to penalise parties for obstruction or delay
- » Promotes mediation by providing mediation services for early problem resolution without representation, requiring that priority be given in the ERA to mediated cases, and prescribing provisions for mediators to make a recommendation for dispute resolution
- » Removes reinstatement as a primary remedy in personal grievances, and
- » Provides that union access to workplaces is conditional on the consent of the employer (which is not to be unreasonably withheld), and allows employers to communicate directly with employees in good faith during collective bargaining.

The Holidays Amendment Act 2010 has changed the Holidays Act 2003 as follows:

- » Allows the 'cashing in' of an employee's fourth week of annual leave
- » Allows the observance of public holidays on another working day by agreement
- » Allows payment for a public holiday, alternative holiday, sick leave or bereavement leave during a close-down period if it 'would otherwise have been a working day' (this change came into effect before Christmas 2010)
- » Changes the relevant daily pay calculation and defining 'discretionary payments', and
- » Allows an employer to request a medical certificate earlier than the current three consecutive days, provided the employer pays for it.

Both Acts double the maximum threshold for penalties to \$10,000 for an individual and to \$20,000 for a company or body corporate.

The Employment Relations (Film Production) Employment Relations Act 2000 (known as the 'Hobbit Act') was passed in late October 2010. It allows workers involved with film production work to be independent contractors rather than employees, unless they choose to be employees by entering into an agreement that provides that they are employees.

Copyright (Infringing File Sharing) Amendment Bill: an update

The Commerce Select Committee has reported back with changes to the controversial Copyright (Infringing File Sharing) Amendment Bill. The Bill has implications for all New Zealanders, particularly those involved in sharing/downloading music or movies without a copyright owner's authorisation.

The Bill repeals section 92A of the Copyright Act and implements a three strike notice regime to deter illegal file sharing. Under the proposed regime ISPs will send warning notices to customers advising them they have infringed copyright, and the jurisdiction of the Copyright Tribunal is extended. The Tribunal will be able to award damages of up to \$15,000 and aims to provide a 'fast track, low cost process' to hear illegal file sharing claims. Many observers remain sceptical as to whether this will be the case given the size of the Tribunal relative to the anticipated workload. ... CONTINUED ON PAGE 4

Limitation Act 2010

What effect will this new legislation have on business?

Limitation laws prevent certain legal claims being brought against a person or company after a defined period of time. They provide a defence against old claims and give certainty in relation to legal liability for past events. This has important ramifications for businesses, particularly in relation to how long records should be kept for past clients and customers.

On 1 January 2011, the Limitation Act 2010 came into force, repealing the Limitation Act 1950. Attorney-General Christopher Finlayson considers the 2010 Act to be "clearer and easier to apply" than the old statute. The 2010 Act only applies to claims for acts or omissions after 31 December 2010. Despite being repealed, the 1950 legislation will continue to govern a claim before that date, provided the claim is brought against the relevant person or company by the later of either 15 years from the date of the act or omission, or five years after the new Act comes into force.

Major features of the new legislation are:

- » It provides for a limitation period of six years after the act or omission for most 'money claims', which is a claim for monetary relief.
- » The concept of 'late knowledge' is introduced. If you do not discover your claim before the end of the relevant limitation period, you have three years from when you discover the claim to issue proceedings. There is however, a 15 year absolute 'longstop' by which all claims must be brought whether or not the person knows they have a claim.
- » It permits parties to contract out of, or modify, the terms of the Act. This means that businesses and individuals should be cautious when negotiating and signing agreements as to how long a potential claim in relation to the contract could persist, and for how long they should retain records of the events.

Company Directors

Can you rely on expert advice?

It appears from the recent case *Ministry of Economic Development v Feeney and Ors*¹ that directors can, when preparing financial statements, rely on expert advice provided they act in good faith, make proper enquiry (where the need is indicated by the circumstances) and have no knowledge that such reliance is unwarranted.

Five directors of Feltex Corporation Limited faced charges under s36A of the Financial Reporting Act 1993 (FRA), which requires financial statements to comply with applicable reporting standards. The charges related to Feltex's 31 December 2005 interim financial statements, which did not record Feltex's breaches of various covenants under a bank facility and did not classify the amounts owing under that facility as a current liability. At the time the statements were prepared, Feltex was transitioning to the new International Financial Reporting Standards (IFRS).

The directors relied on the defence under s40 of the FRA, claiming they took all reasonable and proper steps to ensure they had complied with the FRA requirements. They had employed a qualified and well-resourced financial management team, sought declarations from Feltex's CFO and CEO and established a comprehensive transition process. They had also engaged a reputable accounting firm to review the statements and ensure they complied with IFRS.

In determining whether the directors had breached s36A, the court relied on s183 of the Companies Act 1993 which allows directors to rely on expert advice, provided they act in good faith, make proper inquiry (if the need for inquiry is indicated by the circumstances) and have no knowledge that such reliance is unwarranted.

The court held that by taking the steps the directors took, and by relying on expert advice, they had taken all reasonable and proper steps to ensure the interim statements complied with applicable reporting standards.

... CONTINUED FROM PAGE 3

The Bill had originally included the power for a District Court to suspend an internet account for up to six months, in appropriate circumstances. The Select Committee has now recommended that this power be included in the Copyright Act but that it not be brought into force unless the notice process and the remedies in the Copyright Tribunal are 'ineffective'.

Proponents of the internet suspension are disappointed in the delay but remain optimistic that the legislation, when ultimately enacted, will discourage illegal file sharing and provide more effective measures to help rights holders enforce their copyright. It is expected the issue of internet suspension will be reviewed in two years time, in conjunction with the five year review of the digital copyright amendments that were passed in 2008.