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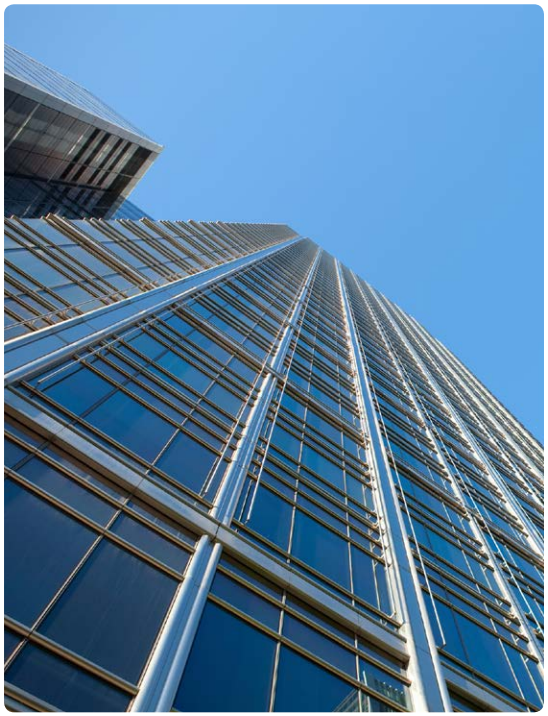
MACTODD
LAWYERS

MACTODD 11-17 Church Street, Queenstown 9300, PO Box 653, Queenstown 9348
Ph: 03 441 0125 | queenstown@mactodd.co.nz | www.mactodd.co.nz
Also in Wanaka and Cromwell

Welcome to the first edition of *Commercial eSpeaking* for 2019.

We hope you enjoy reading all these articles, and find them both interesting and useful.

To talk further with us on any of the topics in this e-newsletter, or on any other legal matter, please be in touch. Our contact details are above.



Construction industry and its retentions scheme

High Court provides useful guidance for subcontractors

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Monday, 6 May 2019 is D-day

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The retentions regime

The retentions regime was created under the Construction Contracts Act 2002. It requires all principals/head contractors to hold moneys they retain on trust. The regime aims to protect retention funds if the principal/head contractor becomes insolvent. While Ebert was not legally required to establish a separate bank account to hold the retention money, it did so.

In July 2018, the Ebert Construction Limited receivers applied to the High Court for directions around Ebert's retentions scheme. The receivers wanted guidance on:

- Whether they could manage and distribute the funds held in a retention account
- Which subcontractors had a right to receive those funds, and
- How those funds were to be distributed.

Useful guidance from the court

The High Court case[1] provides useful guidance to all stakeholders in the construction industry, including subcontractors.

Can receivers manage and distribute the retention fund?

Yes, if the receivers have been appointed by the court. While a receiver has legal title to the retention funds, subcontractors also have an entitlement as beneficiaries under the regime. The Ebert receivers could distribute the company's retention fund to entitled subcontractors, but not to Ebert's creditors.

Which subcontractors have a claim?

The court confirmed the Act does not *create* the trust. The principal/head contractor must do this. There must be an intention to create a trust, and the trust must have a subject matter and an object (or beneficiaries). The Act also requires that retention money is actually *withheld*.

The Ebert subcontractors' retentions were categorised as follows:

- Retentions invoiced, calculated *and* actually transferred to the retention fund
- Retentions invoiced, calculated but *not* transferred to the retention fund, and
- Retentions not invoiced, calculated or transferred to the retention fund.

The court held that *only* Ebert subcontractors with retentions invoiced, calculated and actually transferred to the retention fund had a claim. In these cases, there was an intention to create a trust because money was withheld and deposited into the retention fund. The subcontractors were the beneficiaries and the subject matter was clear (retention money). Ebert had also complied with the regime because the retention money was actually *withheld*.

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1 *Bennett v Ebert Construction Ltd* (in rec and liq) [2018] NZHC 2934

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Last year saw many changes in the employment law sphere, with the Labour-led government delivering on promises of reform in this area. Of particular significance are the changes incorporated into the Employment Relations Amendment Act 2018 that was passed late last year. These changes will affect both employers and employees. We summarise some of these below.

No 90-day trial periods for 'large employers'

From 6 May 2019, employers who have 20 or more employees ('large employers') will no longer be able to include 90-day trial periods in their employment agreements.

The number of employees will be judged at the date employment agreements are entered into, not on the day the employee starts work. If you are an employer with close to 20 employees and wish to include trial periods within your employment agreement, it will be important to carefully consider whether any such trial period would be enforceable. Casual employees are likely to be 'counted' as employees when judging whether your organisation is a large employer.

Probation periods can be used

Even though large employers will not be able to use trial periods, probationary periods are allowable. Probationary periods are an agreed period at the start of an employee's employment where the employee's ongoing employment is conditional on their employer being satisfied with their performance and suitability for the role at the end of the probationary period. Probationary periods are more flexible than trial periods and the requirements to have a valid probationary period are not as strict as for trial periods.

However, employers must still follow a fair process if they wish to dismiss their employee on the basis of a probationary period; and it's wise to note that your employee is not prohibited from bringing a personal grievance. The employment relations institutions (such as the Employment Court) do, however, acknowledge that the requirements for fair process and the substantive justification for termination of employment based on a probationary period are somewhat less stringent than in cases of termination outside a probationary period.

Employers should note that employment agreements cannot include both a trial period and a probationary period clause.

If you wish to include a probationary period clause in your employment agreement, or need advice as to your obligations as an employer if you want to terminate an employee in reliance on a probationary period, please see us for advice first.

Rest and meal breaks

Another significant change on 6 May is that the legislation will provide minimum allowances for rest and meal breaks, and default provisions for the timing of those breaks if an employment agreement does not specify otherwise. The requirements are summarised here.

Work period	Entitlement
2–4 hours	1 x 10 minute paid break
4–6 hours	1 x 10 minute paid break 1 x 30 minute unpaid break
6–8 hours	2 x 10 minute paid breaks 1 x 30 minute paid break
For periods of more than eight hours, the breaks set out above effectively repeat.	

Employers and employees are free to agree between them on when these breaks will be taken. If they don't agree, and record that in the employment agreement, the breaks must be evenly spaced throughout the work period to the extent that is reasonable and practicable.

Given many employers in customer service industries will not want all their employees taking their lunch break at the same time, for example, employers should carefully consider the timing of breaks and record those in employment agreements.

There are some narrow exceptions from these changes where the employment relationship involves national security or

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Business briefs

Directors have personal liability for company debt in liquidation

A recent decision in the Court of Appeal[2] has made a director liable for almost $500,000 of company debt due to the company's failure to keep adequate accounting records. The decision highlights the importance for directors to understand their duties under the Companies Act 1993. The Act requires directors to ensure that the company keeps proper financial records.

If you are a director and fail to keep adequate accounting records, and the company is unable to pay its debts in liquidation, then the court can make you personally liable if the failure has resulted in:

- Uncertainty of the company's assets and liabilities
- The liquidator being impeded in the company's liquidation, and/or
- The company's insolvency has been caused by the failure.

The duty to keep proper accounting records is one of a number of duties that all directors have under the Act.

If you have any questions about what your duties might be, or what you need to do to fulfil those duties, please get in touch with us.

Electronic signatures – uses and risks

With the rise of technology, it is usually easier and faster for an agreement or terms to be accepted electronically, as opposed to the traditional signing of a physical document. However, how reliable is that electronic signature/acceptance if a dispute arises between the parties?

An 'electronic signature' can take many forms including a scanned image of the signature, a mouse mark on a screen, a signature signed by way of a stylus, or by a person agreeing to the terms and conditions by ticking a box on a web form which expressly provides that the person ticking the box agrees to be bound by all the relevant terms. For an agreement to be binding, the person agreeing to the terms must be able to read the terms before accepting them.

Electronic signatures are, arguably, less secure than a traditional signature because of the possibility of a third party intercepting the electronic document and extracting and using that signature. There is also no verification of who actually signed it.

The electronic transaction provisions of the Contract and Commercial Law Act 2017 provide that an electronic signature needs to be 'as reliable as is appropriate'. This is assessed by whether:

- The means of creating the electronic signature is linked to the signatory and to no other person
- The means of creating the electronic signature was under the control of the signatory and of no other person
- Any alteration to the electronic signature made after the time of signing is detectable, and
- Where the purpose of the signature is to provide assurance of the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

Whether an electronic signature 'is as reliable as appropriate' depends on the circumstances. Where the sums involved are large and you have concerns about the enforceability of an agreement,

it's likely you would want to reduce the risks attached to electronic signatures. In this case, a 'digital signature' which incorporates increased security measures, is likely to be more appropriate.

A digital signature is a form of electronic signature which is more secure (less likely to be copied and the document less likely to be changed when emailed) than the above-mentioned forms of electronic signatures. A digital signature is produced using identity verification and is bound to the document with encryption.

2 *Bishop Warden Property Holdings Ltd v Autumn Tree Ltd* [2018] NZCA 285

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Construction industry and its retentions scheme

This decision, however, highlights a disparity in the regime in that many of Ebert's subcontractors only missed out due to the company's failure to comply with its legal obligation to withhold retention money. These subcontractors have no recourse against Ebert; this is a risk to subcontractors that needs to be managed.

How are retention funds to be distributed?

The court held that the retention fund can only be used to repay a debt owed to eligible subcontractors. It also confirmed the Ebert receivers could deduct their fees from the retention fund.

Managing your risk

If you are a sub-contractor in the construction industry, there are some steps you can take to better protect your hard-earned money:

- Try and avoid giving retentions as your ability to recover those funds depends solely on the principal/head contractor having complied with the Act. Receivers are also entitled to have their fees paid from the retention fund, which dilutes the amount available to subcontractors. You could consider offering a performance bond as an alternative.
- Seek evidence that the principal/head contractor is holding retention money on trust. The Act requires principals/head contractors to maintain accounting records of retentions and, as a subcontractor, you have a right to inspect them; you should exercise this right regularly.
- Require retention money to be held in a separate bank account. This ensures the money is not mingled with other principal/head contractor funds and used as working capital. You should be aware that the law does not require principals/contractors to open a separate bank account. You would need to negotiate this point.

While the court has provided further guidance on the regime created under the Act, there are still risks for subcontractors that you must manage either through the construction contract or by taking other protective measures.

Navigating your way through the process can be tricky; if you need advice on the regime and how to protect your retention money, please don't hesitate to contact us.

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Potpourri of employment law changes ahead

essential services, but these exceptions will not apply to most employers.

Further points of note

- The exemption for small-medium sized employers (with 19 or fewer employees) from the 'restructuring' provisions in Part 6A of the Act, so far as they relate to 'vulnerable employees', will be removed from 6 May. This means that where there is a restructuring as defined in the Act (for example, a business sale) vulnerable employees will be entitled to transfer to the new employment structure (including a new employer) on the same terms and conditions – if they wish to do so. Vulnerable employees are those working in certain industries, such as catering and cleaning.
- Reinstatement has been restored as the 'primary remedy' for grievances claiming unjustified dismissal. If an employee succeeds and asks to be reinstated, that must be ordered if it is practical and reasonable to do so.
- There are significant changes for employers who use collective agreements. Please contact us if you need advice on this.
- Lastly, aside from the changes in the new legislation, health and safety prosecutions continue and the sentences being delivered are consistently more severe than under the previous regime. These court decisions are frequent reminders to all employers on the importance of having, and following, appropriate health and safety policies.

As always, please contact us if you have any queries about any of the above matters, or indeed any employment matter.

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Business briefs

The Tax Working Group: recommendations coming soon

The Tax Working Group (TWG), established by the government to consider the future of tax in New Zealand, intends publishing its recommendations very soon.

This report will follow the TWG's September 2018 interim report that considered the possible introduction of a capital gains tax (CGT) in New Zealand. The details of how a CGT would work are yet to be clarified, as there are a number of different options that could be taken on implementation and the design detail of such a tax. It is hoped that the TWG's report will provide further details.

It is anticipated that, even if the recommendations proposed by the TWG are accepted by the government, the introduction of a CGT is not likely to come into force until after the general election in 2020.

Further information on the Tax Working Group can be found here.

If you would like to talk more about any implications of the TWG's recommendations, please don't hesitate to contact us.