S J SCANNELL & CO

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If you have any questions about the newsletter items, please contact me, I am here to help.

For traders – what are your obligations when selling goods online?

Online auction websites (like TradeMe) can be an easy stepping-stone towards starting or growing a business. The systems are already in place and there are relatively few barriers to entry. As with any business it is important to be aware of your rights and obligations. Typically, running a business in an online auction environment is no different to running any other business. Outlined below are some issues to keep in mind.

Income Tax Act 1997 (ITA)

Any amount you derive from a business is income, and can attract tax. The ITA provides that 'business' includes any profession, trade, or undertaking carried on for profit. If you intend to make a profit, the presumption is that you are operating a business.

There is no minimum threshold for income tax. Even small, part-time, hobby or after-school businesses must pay tax on income earned. If annual turnover exceeds $60,000 you will also be required to register and account for GST.

If you sell something because you no longer want or need it, you will not typically have an obligation to pay income tax. This is because your primary motivation was not to make a profit, so you are not operating a business for the purposes of the ITA.

Fair Trading Act 1986 (FTA)

The FTA applies to online selling only when a seller is 'in trade'. The definition of 'trade' is wider than the definition of 'business' under the ITA. 'Trade' includes "any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land." With such a wide definition, it may

not always be easy to determine whether or not you are 'in trade'. If in doubt, seek legal advice.

Those in trade have wide obligations under the FTA, which details that you must:

- make it clear to potential buyers you are 'in trade',
- have a reasonable basis for claims that you make about your products or services,
- not make representations that mislead or deceive consumers about the product or their rights,
- not bury qualifications, limitations and other important terms in fine print or on a link-through web-page,
- not offer to sell goods or services that you do not reasonably believe you can supply. If you source goods from a supplier only once the product has been sold, you must ensure any representations you have made about availability and delivery times are accurate.

Consumer Guarantees Act 1993 (CGA)
The CGA applies to goods and services you sell while 'in trade'. The CGA implies a warranty that the goods sold match their description, are fit for their purpose, are of acceptable quality and will last for a reasonable time having regard to the price. If you breach one of these implied warranties, you may be required to repair or replace the product within a reasonable time, or provide a full refund.

Many people fall into the trap of thinking these rules won't apply, because their business is small, part time or just a hobby. If you have any doubts about whether you are in trade or running a business, or if you are unsure of your obligations, you can seek legal advice.

Property sales – disclosure

The principle of 'caveat emptor', or "let the buyer beware", applies to buying property. Purchasers are always advised to complete their own thorough due diligence investigation before they buy.

It is important however to remember that despite caveat emptor, the people involved in selling a property (i.e. the vendor and in particular, the real estate agent) have significant obligations to disclose information to the purchaser. These requirements are in place to protect the purchaser.

A real estate agent, as a licensee under the Real Estate Agent's Act (Professional Conduct and Client Care) Rules 2012 (the Act), cannot rely on caveat emptor when involved in the sale of a property. The obligations on a licensee under the Act require, at a minimum, that an agent discloses known defects to a customer. Clearly, where an agent has knowledge of an issue with a property, the only appropriate course of action is to advise prospective purchasers.

In some situations, the Act requires an agent to go further than simply disclosing known defects. Rule 10.7 of the Act states that where it would appear likely to a reasonably competent licensee that land may be subject to a hidden or underlying defect, the licensee must obtain confirmation from their vendor client and expert evidence that the land is not subject to the defect, or ensure the purchaser is informed so that they can commission expert advice should they choose to do so.

An example where rule 10.7 would apply, is where a house was built in a particular time period using particular materials, the combination of which are commonly associated with a risk of weathertightness issues. Regardless of whether a client vendor discusses this issue or not, an agent is expected to take appropriate action as described above to investigate (and possibly disclose) this risk as part of their obligations.

If a situation arose where a vendor directs an agent to withhold information in respect of defects, an agent must stop acting for that vendor as required by rule 10.8 of the Act. Such an obligation should provide some comfort to purchasers that an agent cannot simply stay silent on any issue, even if that is what their vendor client wants.

The provisions of the Act only apply to licensees, so obligations on the vendor in a private sale with no vendor's agent are not as well defined. However, most sales of real estate use as a template the ADLS / REINZ Agreement for Sale and Purchase form. This form includes a comprehensive list of vendor's warranties, for example the vendor warrants that building works at the property completed by that vendor have been properly consented.

While purchasers must complete their own investigations on a property, they can take some comfort in the obligations around disclosure on the people involved in selling property. A combination of upfront clear questions about a property and an understanding of these disclosure obligations is the best recipe for uncovering any issues and avoiding problems down the line.

The Family Court reforms – one year on

A year has now passed since the introduction of significant changes to the way the Family Court deals with parenting disputes.

The thinking behind the reforms is that family disputes are better resolved between the parties themselves. Now parties seeking Family Court assistance must first participate in a Parenting Through Separation course and then compulsory mediation called Family Dispute Resolution (FDR). It is only after agreement cannot be reached at FDR that the matter may proceed to court.

As well as these preliminary requirements, legal aid is no longer available at the application stage, unless the application is urgent, because there are restrictions on when lawyers may represent a party in court (usually not until the matter reaches the hearing stage).

Where domestic violence or other risk factors are at play, the process has not changed. Parties in these situations may proceed directly to court if the circumstances justify the making of urgent orders.

Unsurprisingly, the Government considers their reforms have been broadly successful. They point to cost savings, and believe the Family Court is now freed up to focus on the difficult cases that really require judicial intervention. Likewise, FDR providers also believe that they assist parties to reach a resolution that is sustainable, and in a faster and less stressful way than the court process.

The legal profession has not viewed the reforms in the same light. While only anecdotal evidence exists given the short period since implementation, family lawyers have a number of concerns.

The changes have resulted in a rise in unrepresented parties. These parties have to make their own applications to the court, sometimes with legal advice but often without it. They may have no understanding of the law, court processes and how best to state their case, which can slow down the court process. It is of greater concern that unfair outcomes may result as parties agree to outcomes they do not truly understand, and that may be counter to the best interests of the children. It is difficult to see how this results in reduced stress on families.

There has been a significant rise in applications made on a without notice basis, which strictly speaking do not meet the criteria. The increase in these kinds of applications results in greater pressure on court staff and the judiciary to process these promptly. The new application forms that were introduced, ostensibly to assist unrepresented parties, have instead frustrated court users and proved difficult to follow. Documents that were previously two to three pages long now stretch to ten. Thus any cost savings that Government points to may simply increase in other areas as they are forced to direct more resources into court processes. The changes come on top of an existing scarcity of court registry and judicial resources, meaning lengthy delays in obtaining court time and processing of documentation. It is hard to see how this frees up judicial resources for difficult cases. In addition, any cost savings the Government points to are likely to be 'back ended' into different areas of the family justice system.

It is true that it is better if family disputes can be resolved between the parties themselves. Many parents already resolve parenting disputes without assistance from the court, but this will not always be possible. These latest Family Court reforms arguably block access to justice to those who really need it and at a time they really need it.

Speak no evil – non-disparagement provisions in employment settlement agreements

The Media love reporting on salacious details of employment disputes before the Employment Relations Authority (ERA) and Employment Court, by trumpeting headlines like "Sacked worker who took worthless magazine gets $9,000". Many employers and employees, however, choose to avoid the glare of publicity by resolving employment disputes with settlement agreements.

Settlement agreements are confidential, keeping matters from the glare of publicity. Settlement agreements also often have a term preventing either party from speaking badly of each other, known as a non-disparagement provision. Several recent ERA decisions have examined the issue of breaches of these non-disparagement provisions in settlement agreements.

In Kea Petroleum Holdings Limited v McLeod [2014] NZERA Wellington 113, a settlement agreement between the parties included a term that Ms McLeod would not "disparage or speak ill of the company…or its officers." However, Ms McLeod posted articles on Facebook, including allegations that Kea's Managing

Director had made "false statements" and "disrespected shareholders by lying to them." Kea sought a financial penalty against Ms McLeod for breaching the settlement agreement. The ERA found that Ms McLeod's statements regarding the Managing Director were disparaging. The ERA also observed that Kea paid a "substantial sum of money" to Ms McLeod to resolve an employment relationship problem. In return she agreed not to pursue her personal grievance and not to disparage or speak ill of the company. The ERA found Ms McLeod breached the settlement agreement, and ordered her to pay a penalty of $2,000.

In Jacks Hardware and Timber Limited v Beentjes [2015] NZERA Christchurch 29, the parties signed a settlement agreement with a non-disparagement provision. Mr Beentjes then sent text messages to a current employee calling the Director of Jacks Hardware a "sociopath", alleging the current employee was lying, calling another staff member a "sycophantic sociopath" and accused Jacks Hardware of hushing up his allegations. The ERA found the text messages breached the non-disparagement provision and were flagrant, deliberate and ongoing. The ERA imposed a penalty of $2,500 against Mr Beentjes.

In Simpro Software New Zealand Limited v Nuttall [2015] NZERA Auckland 64, the parties entered into a settlement agreement requiring Mr Nuttall to desist from publishing "any statement which would be construed as being degrading, defamatory, negative or disparaging against Simpro and its agents, officers, directors or personnel." Mr Nuttall published a comment on a Xero blog site that referred to Simpro software as "a pile of crap" and "a waste of space". Simpro sought an order from the ERA that Mr Nuttall comply with the non-disparagement provision. The ERA found Mr Nuttall in breach of the provision, and ordered he immediately comply. While Simpro did not seek a financial penalty, the ERA noted that Simpro could have asked for a penalty, indicating the ERA would likely have ordered a penalty.

These cases are a clear warning to employees to take settlement agreements seriously, including the requirement not to speak ill of their former employers, and gives hope to employers wanting to enforce settlement agreements when their former employees do not comply.

Bain's latest battle: the quest for compensation

David Bain's name has been well-known to New Zealanders for nearly 21 years, when his entire family were found murdered at their Dunedin home in June 1994, followed by his conviction for their murders in 1995 and subsequent acquittal in 2009.

The latest episode in the long running saga is Mr Bain's application for compensation for wrongful conviction and imprisonment.

Compensation is a matter entirely for the Cabinet and is discretionary. The Cabinet guidelines set out the circumstances in which a person may be eligible for compensation. Mr Bain is not eligible under the guidelines because, when it quashed his convictions, the Privy Council ordered a re-trial. Defendants who are sent back for retrial are considered to be more likely to be guilty, than those cases where the appellate Court is confident to acquit.

However, in extraordinary circumstances, the Cabinet has a residual discretion to pay compensation to a person who is not eligible where it is in the interests of justice. In assessing eligibility under this residual discretion, the principles of the guidelines are generally applied. Claimants must show that they are innocent on the balance of probabilities and that there are extraordinary circumstances to justify compensation.

In criminal proceedings, the burden is on the prosecution to prove all elements of the offence beyond reasonable doubt. In applying for compensation, the burden shifts onto Mr Bain to demonstrate that he is innocent on the balance of probabilities. "Balance of probabilities" simply means that it is more likely than not that he is innocent. It is a less stringent test to satisfy and is the standard of proof required in civil proceedings. The classic example of the two standards of proof is the case of OJ Simpson, who was found not guilty in criminal proceedings for murder, but liable for wrongful death in civil proceedings.

Once Mr Bain has established that he is innocent on the balance of probabilities, it is a matter for the Cabinet to decide whether there are extraordinary circumstances that justify an award of compensation. Factors relevant to the exercise of the extraordinary circumstance discretion have been described as "inherently open-ended".

The Cabinet generally instructs a New Zealand QC to review claims for compensation. The scope of the review is very wide and is not restricted to the usual rules of evidence in criminal proceedings. In Mr Bain's case, the Cabinet appointed a retired judge from Canada (Justice Binnie). Justice Binnie's report was peer reviewed by Robert Fisher QC who considered it would be unsafe for Cabinet to rely upon. The current Minister of Justice, Hon. Amy

Adams, has now appointed retired Australian judge Ian Callinan to undertake a fresh inquiry into Mr Bain's innocence.

Interestingly, the terms of reference for the report also ask Justice Callinan to consider whether Mr Bain is innocent beyond reasonable doubt. If the report considers Mr Bain is innocent beyond reasonable doubt, this will be a factor relevant to the exercise of the extraordinary circumstance discretion. The report is expected within six months, but it remains to be seen whether it ends the debate about Mr Bain's innocence that has so polarised New Zealanders.

Snippets

Building Amendment Act 2013 update

From 1 January 2015 the Building Amendment Act 2013 (the Act) changed the rules around residential building works. These include the following:

- Works worth more than $30,000 now require a written contract including the building timeframe, the process for varying the contract and the dispute resolution process.
- For works worth more than $30,000, or if requested, a prescribed checklist must be provided together with information about the legal status of the builder, their dispute history, their skills, qualifications and licensing status.
- Work done to a household unit may automatically include a one year defect liability period in which the builder can be required to remedy defects.

The Act also provides implied warranties in all works, that:

- the work will be completed within a stated or reasonable time and will be in accordance with the plans, the building consent, all laws and legal requirements and with all reasonable care and skill in a proper and competent manner, and
- supplied materials will be new (unless otherwise agreed) and suitable for the purpose for which they will be used.

Should you pay a deposit?

Payment of deposits has become a normal part of everyday business, being commonplace in transactions from house purchases to building work.

However, what is best practice? There is always risk involved when paying money and receiving nothing tangible in return. What happens, for example, if a company or natural person becomes insolvent before completing the work you paid the deposit for? What if a property vendor has spent your deposit but cannot complete settlement on the day, because they owe their bank too much? Typically, you may then find yourself an unsecured creditor and it is quite possible that you will not recover all of your money.

While loss of a deposit happens rarely, you should always consider the risk when paying a deposit. For example, is the other party solvent? Always seek to pay the smallest amount possible and consider requiring security to be granted in return. In property transactions you should consider requiring a deposit to be held in trust as stakeholder until risks have been assessed and minimised.