

COMMERCIAL e.SPEAKING

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Welcome to our Midwinter issue of Commercial e.Speaking. We hope you find the articles both useful and of interest to you. If you have any specific business or commercial topics that you would like to see covered in future issues, please get in touch with us.

Company Directorships

Board functions and responsibilities.

Cash is Still King

Electronic payments.

The Building Act 2004

Huge changes for the construction industry.

Business Briefs

Real estate investment – Practical business tips for SMEs – Kiwi executive success.

If you require any further information on any of the topics covered in Commercial e.Speaking, then don't hesitate to contact us. If you do not want to receive this newsletter, please [unsubscribe](#).



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Company Directorships

- Board functions and responsibilities

In the final of our three articles on company directorships, we identify and briefly discuss the core functions and responsibilities of the board.

Mission, vision and values

As the Cheshire cat said to Alice, “If you don’t know where you are going, any way will take you there”. The board of directors must develop and instill a clear set of values and a vision as to what ‘success’ will look like to the organisation when it is achieved. Regardless of the size of the organisation, the vision and values must be developed and instilled at the highest level.

Planning

To use another well thrashed quotation, “Few people plan to fail, but many fail to plan”. Although the strategic and operating plans, and budget are usually developed by management, the board retains the right to approve these plans, and provide its own input to them. These plans represent the blue-print for the organisation to follow in order to achieve its stated objectives - financial and otherwise.

Value of a good CEO

An effective CEO is critical to the success of an organisation; he or she is the interface between the board and the rest of the organisation. The CEO is the means by which the board’s mission, vision and values is communicated to the organisation. The CEO is also the conduit through which the organisation reports to the board against agreed key performance indicators (KPIs). Even if an organisation is fundamentally sound, and there is good governance through the board, a poorly performing CEO can cause significant damage to the organisation and loss of shareholder value. If the board of directors gets nothing else right, it must get it right when appointing, mentoring and evaluating the CEO.

Ensuring legislative compliance

As many experienced company directors can confirm, their role has become increasingly onerous, not the least of the reasons being the significant increase in legislative requirements imposed on companies generally, and boards of directors in particular. Failure to comply with these legislative requirements can leave the company and, in some cases the directors personally, exposed to criminal and civil sanctions.

Adequate resources

There is little point in a board approving strategic and operating plans, and a budget when these are demonstrably incapable of being achieved through inadequate resources, whether it is people or dollars. It is the board’s responsibility to ensure that management and staff have the tools and the resources with which to achieve the agreed objectives.

Communicate with stakeholders

Although this is particularly true, company stakeholders want to be kept informed – particularly when things are not going according to plan. Stakeholders include not only shareholders, but also staff, suppliers and customers. Whilst it would not normally be the function of the board to communicate directly with stakeholders (except in a crisis), it is the board’s function to ensure that management fulfils that task effectively.

Evaluate Performance

Boards have a responsibility to undertake effective self evaluation, both of individual directors and the board as a whole. This process will normally be driven by the chairman to ensure that the board is constantly adding value to the organisation, and assisting the other elements of the organisation to grow shareholder wealth.

Cash is Still King - Electronic payments

The means by which commercial transactions are handled have changed over time with new technologies and changing banking procedures. It is now common for many trade payments to be made electronically. This article gives an overview on a recent case.

When operating outside normal contract parameters (for example, the person making the payment is in contract default) and the stakes are high, contract law will often find a requirement to pay in 'legal tender' (cash, bank cheque or other cleared funds) rather than by 'personal' payment such as a cheque (which must be cleared by the banking system over a period of days before being confirmed and honoured). The decision in *Otago Estates v Parker* demonstrates the difference.

The transaction involved Otago Station Estates purchasing 455 hectares of rural land in North Otago from the Parkers. The purchase was unconditional and a deposit of \$355,000 was payable. The Parkers' lawyers gave written notice under the current standard form property contract requiring a deposit within three working days, failing which the contract could be cancelled. The notice specified the trust account number of the Parkers' lawyers to which payment was required but did not specify the mode of payment (personal or bank cheque).

Personal cheque paid

Otago Estates' lawyer made the payment by direct crediting Otago Estates' personal cheque to the nominated trust account one hour before the three working day notice expired, and then faxed copies of the deposit slip and the cheque to the Parkers' lawyers.

The next day the Parkers' lawyers responded by fax that the personal cheque was not legal tender, did not comply with the standard form agreement and, as the default in paying the deposit had not been remedied within the stipulated three working days, the contract was cancelled.

In the High Court, the Court of Appeal and (in April 2005) the Supreme Court, the judges distinguished between payment of an initial deposit in the usual course of events when a contract becomes unconditional and a payment made to remedy a default in response to a formal notice. There is a need for much greater certainty in the latter situation (remedying a default) because of the fact that failure to remedy the default gave rise to an immediate right of cancellation. Although the judges noted common custom that contract deposits are made by a personal cheque, they did not accept that custom applied in relation to payments required to remedy a default for which formal notice had been given.

Here the failure of the Parkers to specify the mode of payment required (bank cheque) did not matter. An academic had criticised the first decision as giving the impression that the Parkers had exploited a technicality and questioned why the High Court went along with this. The Court of Appeal responded, "The default notice required strict (or technical, if that term is preferred) compliance, failing which the vendors were entitled to cancel the contract. We can see no reason to read down the vendors' right to cancel because the purchaser "almost" complied. The same would apply if the purchaser had tendered a bank cheque just after the notice period had expired."

Conclusion

If the commercial stakes are high and formal notices have been given, the prudent person will pay by bank cheque - or ascertain beforehand that no objection will be taken to the tender of a personal cheque.

The Building Act 2004

- Huge changes for the construction industry

Many provisions in the Building Act 2004 are now in force signifying the beginning of major changes in the construction sector. The Act will have a major impact on the construction, alteration, demolition and maintenance of new and existing buildings.

On 30 November 2004 the implementation of the Building Act 2004 began. It replaced the Building Act 1991 and aims to improve control and encourage better practices in building design and construction

Code Compliance Certificate

It is now an offence to use any part of a building intended for public use for which no building consent or Code Compliance Certificate (CCC) has been granted. The fine for breach of this provision is \$200,000 with a further fine of \$20,000/day for continuing breaches. This has serious implications for, say, a tenant if building work (that requires a building consent) commences during the lease term; the tenant may not be able to continue to trade from the premises until the CCC is issued.

Section 364 is of particular importance to residential property developers. It is an offence to sell a household unit or hand over possession of that unit without a CCC. The fine is similar to that above, and there is limited scope to contract out of this provision.

Warranties

The legislation states that a builder cannot contract out of consumer warranties. In short, duties of skill and care; the use of suitable materials; timeliness; and consistency with plans and the particular purpose as stated in the contract are imposed on the builder.

The warranties are enforceable by an 'owner', including a subsequent owner and also a mortgagee in possession of the land. A blanket 'full and final settlement of all issues arising now or in the future' will not be effective.

Interim Code of Compliance abolished

The second stage of the Building Act came into force on 31 March 2005. The most important change is that the interim code of compliance certificate has been abolished. The consent process may prevent the settlement of staged developments under the one consent unless there is careful planning to ensure compliance. An entire development (not just unit by unit) may now have to be finished before a CCC is issued. This, together with the prohibition to sell or allow possession without a CCC, will create a point of difference between financiers of developments and the consumer. It is already becoming increasingly difficult for purchasers to obtain bank funding without a CCC.

There are limited contracting out provisions in the Act and an amendment made in April 2005 allows for public use of premises prior to CCC in some circumstances. The amendment provides that a territorial authority may issue a certificate for public use for the premises or part, only if satisfied on reasonable grounds that members of the public can use the premises safely.

Other changes

The Act will eventually introduce a licensing regime for building practitioners. Registration will be voluntary until November 2009. Once licensing is compulsory it will be an offence to perform 'restricted building work' unless holding a license.

The Act will introduce a new building product certification scheme later this year. This is intended to give the industry and consumers confirmation that building products, methods and systems comply with the building code.

The legislation provides for directors and managers to be liable for their agents and contractors. This imposes personal liability on directors or builders for their sub-contractors.

The new Building Act is designed to give comfort to consumers. However, all those involved in the building trade must be aware of the implications of the legislation and adopt contractual arrangements that effectively meet the new requirements.



BUSINESS BRIEFS

Real Estate Investment

Recently reviewed by the New Zealand Herald and by KPI Commercial, *Commercial Real Estate Investor's Guide* by Peter Aranyi sets out some practical rules for successful real estate investment.

“Rule 1

Be unhurried when buying

Rule 2

Know how to value

Rule 3

Know market rents well

Rule 4

Understand leases

Rule 5

Beware of the economic cycles

Rule 6

Have a focus

Rule 7

Build relationships with agents

Rule 8

Build your network and your team”

Some of these are going to require input from accountants, and lawyers, and valuers. Another simple rule when looking at investment is that you buy with your head, not with your heart.

Commercial Real Estate Investor's Guide is available from www.empowerededucation.com.

Practical Business Tips for SMEs

Enjoining the practical again was an interesting story in the Institute of Director's *Board Room* published in June 2005. The advice is directed particularly to SMEs. Some of the practical things that a small business can do are:

- 1 Involve employees in business decisions that affect them and will improve their work environment.
- 2 Be open to job sharing, flexi-time, and other forms of work – life balance and family-friendly policies.
- 3 Provide a gym or sports facilities, or offer subsidised membership of the same.
- 4 Make some of the business' products or services available free, or at cost, to charitable and community projects.
- 5 Look for opportunities to make surplus products and redundant equipment available to local schools, charities, and community organisations.
- 6 Collaborate with local teachers to make the activities of your business the subject of a school project.

These points can add to the enjoyment of staff, the overall enjoyment and sense of purpose that the business has, and are a great exercise in promoting a positive community-focused reputation.

Kiwi Executive Success

Ralph Norris has been given the top job at the Commonwealth Bank of Australia, following on from his position with Air New Zealand. It is another example of those who succeed in New Zealand business have the credibility to succeed on the international stage.

CBA is Australia's biggest bank by market capitalisation, with a value of A\$50b, compared with Telecom which has a capitalisation of A\$11.7b. CBA's profit for the half year to 31 December 2004 was A\$1.86m.

For those interested in looking for top jobs, Norris' base salary of A\$1.9m, cash incentive of A\$1.9m, and an initial allocation of A\$3.8m in bank shares.