

New rules for loans and consumer credit

The Credit Contracts and Consumer Finance Act 2003 ("Act") came into effect on 1 April 2005. It replaces the Credit Contracts Act 1981 ("CCA") and is designed to simplify and update the laws relating to the provision of credit.

Why change?

The provisions of the CCA were quite complicated and some of the concepts were not well understood. As a result, the purpose of the CCA, (to simplify the disclosure of financial terms such as the finance rate, interest rate and other charges to debtors), was often not achieved. Furthermore, the CCA did not provide any real means of redress for debtors with the result that its provisions tended to be disregarded by creditors.

The purpose of the new Act is to ensure that the interests of debtors who are entering into credit contracts are protected by ensuring that proper information is given to them as to the calculation of costs, fees, charges and interest charges in relation to the credit contract. Furthermore, it is designed to prevent oppressive terms or conduct by creditors.

Which contracts does the act apply to?

The Act is mainly concerned with "consumer credit contracts". The key requirements for a consumer credit contract are:

- The debtor must be a natural person and must enter into the contract primarily for "personal, domestic household purposes"; **and**
- Interest and/or credit fees are payable, and/or a security interest is being taken by the creditor; **and**
- The creditor must be in the business of providing credit or makes a practice of doing so in the course of another business.

The Act does not apply to companies, incorporated societies or family trusts.

The requirement for a loan to be primarily for personal, domestic or household purposes should make it relatively easy to determine whether or not the Act applies. A good example is a loan for the purchase of a home. Clearly that would be for personal, domestic or household purposes in which case the loan is a consumer credit contract. However, if the loan is for the purchase of a rental property, it is not a consumer credit contract, as the debtors are not intending to occupy the house themselves.

In cases of doubt, the Act does provide that a declaration by the debtor that the credit is for use primarily for business or investment purposes (or both) rather than personal use, will generally be sufficient to ensure the contract falls outside the Act.

What are the advantages?

- The creditor must disclose in a format whereby the financial terms of the transaction can be easily understood (including the method of calculating interest, any penalty charges for early repayment of a loan and default interest charges).
- The debtor has the right to cancel the credit contract at any time before initial disclosure has been made and within three working days after that has occurred. In order to cancel a consumer credit contract, the debtor must give written notice and refund any money or return any property they have received under the contract.
- Creditors are now required to charge reasonable fees for credit (but this does not apply to the interest rates).
- The Court now has the right to "reopen" a credit contract if it considers the contract is oppressive or that a power contained in the contract has been or will be exercised in an oppressive manner or if a person has been induced to enter into a contract by oppressive means.
- The Court's powers to reopen a consumer credit contract include situations where the debtor suffers unforeseen hardship and it was not foreseeable at the time the debtor entered into the contract that they would not be able to meet their obligations (for example illness, injury or loss of employment).
- A failure by a creditor to comply with the Act's disclosure requirements means that the contract cannot be enforced.

In summary, the changes introduced by the Act should be of general benefit to all parties in that the process for disclosure of financial terms has been simplified.

However, time will tell whether the new Act proves effective in practice. ●

Independent contractors versus employees – the debate continues

In New Zealand, workers are divided into two categories – independent contractors and employees. Is the distinction between the two important?

“Employees”

The *Employment Relations Act 2000* defines an “employee” as any person ‘employed by an employer to do any work for hire or rewards under a contract of service.’

This definition includes home-workers or persons intending to work. It excludes volunteers who do not expect to be rewarded and do not receive rewards for work done voluntarily.

“Independent contractors”

In contrast, “independent contractors” work for “principals” under contracts for service and are typically seen as autonomous commercial operators.

Independent contractors are responsible for paying their own taxes.

Statutory protections

Employees enjoy statutory protections contained in the *Employment Relations Act 2000*. Independent contractors do not and their relationship with a principal is governed by contract law. There is limited statutory protection for independent contractors contained in the *Health and Safety and Employment Act 1992* and in the *Human Rights Act 1993*. The underlying philosophy behind this is that the bargaining position of an independent contractor with a principal is considered to be equal and it is assumed that independent contractors have the ability to take care of themselves in the market environment.

How to tell the difference

On occasion the Court must determine which category an individual belongs to. In doing so, it must consider all relevant matters – including

those that are indicative of the parties’ intentions. The Court cannot treat any statements made by persons that describe the nature of the relationship as determinative. Essentially, this means that a written contract that labels a party an “independent contractor” will not on its own determine the matter and the Court will look to other relevant matters to make a final determination.

Recent case law

In *Three Foot Six Limited versus Bryson*, the Court of Appeal had to decide the relationship between the parties. In mid-2000, Mr Bryson was seconded from Weta Workshop to Three Foot Six Ltd and was engaged to work as an Onset Model Technician. Mr Bryson’s conditions of employment were written and the written document took the form of a tax invoice. The conditions of Mr Bryson’s employment described him as an independent contractor. Over a year later, Mr Bryson was informed that his services were no longer required as Three Foot Six Ltd had made the decision to downsize its miniatures unit. Mr Bryson argued that he was unjustifiably dismissed but he had to first establish that he was an “employee” and therefore entitled to bring a claim under the *Employment Relations Act 2000*.

In analysing one of the tests commonly applied by the Courts, the Court of Appeal noted that while Mr Bryson may appear to be an “employee” (as found by the Employment Court) insufficient weight had been given to other relevant factors – specifically, the form of the contract and film industry practice. The Court of Appeal held he was an independent contractor.

Mr Bryson has appealed to the Supreme Court which has reserved its decision. The Supreme Court’s decision should provide clarity and certainty in respect of the distinction between employees and independent contractors. In the interim, the debate continues. ●

Wills

From time to time we remind people to review their Wills. This is because circumstances change and over time the provisions in your Will may become outdated or inappropriate. People who you appointed to act as trustees may no longer be able to act in that role. You may wish to change your beneficiaries. As a first step, we suggest you review your copy of your Will. If you do not have one, contact us for help. It may be that no changes are required. If however, you wish to change the Will or at least discuss it, please contact us. You should formally or informally review your Will at least once every five years. ●

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Economic disparity – what does this mean for you?

Section 15 of the Property Relationships Act 1976 was introduced to address issues of inequality between partners following a breakdown of their relationship. The section empowers the Court, following a division of relationship property, to compensate a spouse/partner if his or her living standards and income will be significantly less than the other party because of the division of functions in the relationship.

Why?

The intention behind the section is to recognise that one partner may be economically disadvantaged as a result of a relationship ending because of the division of functions during the relationship. That disadvantage will not be overcome by an equal division of relationship property.

Reported decisions on the section are now accumulating and the limits of the section are being tested.

When will it apply?

The section will apply where there is a real and significant difference between the respective income and living standards of each partner. The disparity must arise from the division of functions in the relationship and not, for example, from a difference in earning capacities which existed before the relationship began.

The most typical circumstance will be where one party compromises a career to look after children and/or to assist a high flying partner to increase his or her earning capacity.

Finally for an award to be made, there must be circumstances which convince the Judge that it is just to compensate the disadvantaged party. In considering whether it is just to make an award, a Judge will usually consider factors such as:

- The length of the relationship;
- The length of the career break;
- The length of time required to rectify the break in career path;
- The position of the children now and in the future;

- The career possibilities available to the disadvantaged person; and
- The amount of property available for division.

While this section has not and will not produce a flood of claims, it is important that the circumstances of each possible claimant are considered at the point of separation.

A departing partner who treats the other partner of lesser means with consideration and kindness following the separation may well be limiting the chance of a successful claim being made against him or her. Ongoing support following a separation through assistance with housing or voluntary maintenance payments, will certainly influence the Court in the exercise of its discretion. In reality, the partner providing the assistance is already recognising the economic disadvantages which have flowed from the separation.

Be aware

A successful award of compensation can result in a significant payment. One recent court decision, in recognising the economic disparity, made an adjustment to the division of assets of \$75,000.00. ●

Closing the gaps – Holidays Amendment Act 2004

Are you required to work on a public holiday? Thinking of calling in sick, being paid time-and-a-half, and getting an additional holiday? Recent amendments to the *Holidays Act 2003* ("Act") will foil any such plan.

The Act came into force on 1 April 2004. Following the introduction of the Act, a number of unintended consequences soon came to light. Controversy surrounding these consequences quickly led to the drafting of the *Holidays Amendment Act 2004* that took effect on 25 October 2004, just in time for Labour Day.

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The situation

There are 11 statutorily recognised public holidays. Employees are entitled to be paid for public holidays if the holiday falls on a day that would otherwise be a working day for the employee. Many people are not actually required to work on public holidays and for them the Act works well.

The problem

If an employee does not work on a public holiday but would otherwise be required to work, the employee is still entitled to be paid at his or her "relevant daily pay rate". The Act defines how relevant daily pay is calculated. The calculation can be complicated as it may include productivity or incentive based payments (including commission); overtime payments; and the cash value of any board or lodgings provided by an employer.

Where an employee is required to work on the public holiday (where it falls on a day that is otherwise a working day and the employee's employment agreement expressly requires it) the employee must be paid at time-and-a-half for the time actually worked on the public holiday, and is also entitled to an alternative holiday.

But what if the employee is sick on that public holiday? The Act provides that after six months continuous employment, an employee is entitled to five days sick leave in a 12 month period. The employee must be paid an amount equivalent to his or her "relevant daily pay" for each day of sick leave. One interpretation was that in this situation the employee was entitled to pay at time-and-a-half for the sick day plus an alternative holiday – hence the bonanza! The Act was unclear as to whether or not this was the correct position.

The solution

The amending Act clarifies this situation by stipulating that the day's leave is to be treated as an unworked public holiday (not as sick or bereavement leave) and states that an employee is not to be paid at time-and-a-half and is not entitled to an alternative holiday.

Although the amendment aims to address a number of controversial and unintended consequences of the Act, there are outstanding issues in the finer details of the Act and the amendment that have the potential of involving ongoing challenges and significant cost to employers. Albeit, plans to call in sick when required to work will no longer provide a windfall for an employee. ●

News in brief

Penalty interest on leases

Commercial tenants would do well to carefully consider the penalty interest provisions in their lease agreements. Some agreements specify a percentage rate while others refer to a percentage (say 5%) above the interest rate charged by the Landlord's bank. When the bank rate is high, some tenants can be paying 18% or more in penalty interest. And be warned – just because the landlord is not taking action at the tenant's failure to pay rent, does not mean that penalty interest is not accruing and the landlord may eventually come knocking for the whole amount owed.

Court fees update

Last year Court filing fees were increased substantially by the Government. The primary reason given was to ensure that the cost of justice was met by those utilising the system. The New Zealand Law Society and New Zealand Bar Association both opposed the increase and have continued to voice concerns. The good news is that those concerns have been heard and the Regulations Review Committee is reconsidering the increases because they are seen to be impeding access to justice. ●



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