COVID 19 - INSIGHTS FROM TWO WEEKS IN THE TRENCHES

The spread of Coronavirus, and our and regional Government responses to it, has forced us and our clients to think and act differently, and to call on all of our combined experience. As we write this the firm has turned 10 years old – starting in the GFC and now turning 10 in another, but very different, crisis.
Follows a quick update of issues and insights we have seen and advised on over the last two weeks of the Covid 19 crisis.

All the best from us.

IN THIS UPDATE WE LOOK AT THE FOLLOWING:

COMMERCIAL LEASING:

A recurring theme last week amongst our clients has been in the property – commercial tenancy space with many tenants, looking to landlords for rent relief given that they are legally prevented from accessing their premises to operate their business. The current form of the market standard ADLS lease (6th Ed 2012) has a "no access in emergency" provision providing a contractual mechanism to respond to the present pandemic which is preventing tenants in non-essential businesses who have been ordered to shut down operations during Alert Level 4 from accessing their premises.

The ADLS lease provides that there shall be a "fair abatement" in the rent and operating expenses for the tenancy during the period where access to operate is prevented. What is fair will depend on the individual circumstances of the tenancy business. For example, professional services firms may well be able to with (relative ease) relocate to working remotely, whilst in the case of retail and industrial and manufacturing premises, the closure of the physical premises in compliance with the Government directive causes an almost total loss of ability to operate.

Other forms of lease may either, as is the case with the Property Council New Zealand (BOMA) form of lease provide very little or no contractual coverage for the present situation. Under the PCNZ form of lease, the ability of the tenant to obtain a rental abatement is limited to the landlord's ability to recover loss of rent insurance. Pandemics are likely excluded from insurance coverage, rendering this provision of little assistance. In the case of older editions of the ADLS lease and other landlord/ institutional forms, the lease may be entirely silent on what happens to the rent and outgoings where the tenant cannot operate from the premises, where the premises have not been physically destroyed or damaged.

However, while for many tenancies there may be no contractual basis for requesting rent relief in the present situation, where, as is the case here, there is a nationwide lockdown and state of emergency, many tenant businesses are taking the view that the practicalities of the situation require support from their landlords in order to remain viable through this period and able to restart on the other side. We have been advising tenant and landlord clients on options for charting a pragmatic path through this given the current circumstances.

Each tenancy situation will depend on its own particular circumstances, including the terms of the lease. Please get in touch with a member of the Heimsath Alexander team if you would like to discuss the impact of the present situation on your tenancy arrangements.

CONSTRUCTION CONTRACTS:

The following article discusses some key aspects regarding how the commonly used construction contract NZS3910 responds to New Zealand's move from Wednesday midnight 25 march 2020 to Covid-19 Alert Level 4 imposing a national lockdown and state of emergency **(Level 4)**. As is the case with other areas of the law, what we are finding with construction contracts is that the position and response very much depends on the particular circumstances of each situation, namely the project and the relevant contract documents as to how in legal terms risk has been allocated between the parties:

1. **Contract:** It is common for the standard 3910 Extension of Time **(EOT)** and variation provisions to be modified to suit the needs of each project;
2. **Project and Timing:** The contract terms need to be allied to the practicalities and impact of the situation. Where the Project is at when the national lockdown arrived and the impact on delivery and critical path of the stoppage in work etc.

It will be necessary to have regard to these in order to develop a tailored response. One size will not fit all.

At the outset, we note that the following is not legal advice regarding any specific contracts, special conditions or factual circumstances:

1. **Change of Law?:** While there remains debate as to whether a 'change in laws' has occurred due to Covid-19, the general consensus is that the move to Level 4 which was accompanied by the enactment of supporting legislation determines that a change of law under 3910 has occurred. The event driving the change will increase the cost of performance of the works and therefore invoke the variation and EOT regimes.

2. **Suspension of Works?:** The Government directives and restriction imposing the Level 4 lockdown using its prerogative powers trump the Contract. Many contractors have been requesting Engineers to the Contract to issue suspension notices in response. We consider that this is not strictly necessary unless a Client has expressly instructed the Engineer to do so. Given the rapidly evolving and uncertain nature of the situation, we have advised Engineer clients to steer clear of providing notices of this nature.

   However if the situation with Level 4 gets extended beyond the present 4 weeks, or alternatively re-engaged (one or multiple times) down the track in response to future spikes in cases, then at some point the common law and 3910 contractual concept of 'frustration' (under clause 14) and with it termination comes into play. Frustration has very high hurdle to overcome before it can be engaged however.

3. **Variations:** There are a range of ways that a variation could be triggered by Level 4:

   a. The late issue by Client or Engineer of instructions or documents.
   b. Interruptions to the materials supply chain.
   c. If the Engineer (or other advisors) are unable to carry out their duties – e.g. incapacitated due to contracting Covid-19.
   d. The Contractor fails to get nominated subcontractors to enter into contracts, or these are repudiated.
   e. Change of law.

4. **Extension of Time:** The EOT regime under clause 10.3 in 3910 has a number of gaps. There is no general condition in 10.3 which specifically responds to a pandemic or similar event. However general condition 10.3.1(f) requires the Engineer to grant an EOT if the Contractor is *"fairly entitled"* to one by reason of any circumstances *"not reasonably foreseeable by an experienced Contractor at the time of tendering"* and *"not due to the fault of the Contractor"*. Whether the Pandemic with Covid-19 was reasonably foreseeable by the Contractor at the relevant time will depend on the factual circumstances and lifecycle of the particular Project and the works. In general terms, since there was no acknowledgement in New Zealand of the emerging risk of a virus or outbreak until the end of January, the starting point is that the delay from Covid-19 was not reasonably foreseeable to a Contractor who submitted a tender before then and accordingly clause 10.3(f) is engaged.

5. **Impact of Delay:** If the first hurdle with an EOT is satisfied, then the contracting parties working with the Engineer will need to assess whether the claimed delay has been caused by the event, i.e. impact on the critical path of the works and what steps have been taken to mitigate, to extent that that is feasible in the circumstances of a national lockdown.

6. **Prolongation Costs:** If an EOT engaged through 10.3.1(f) (circumstances not reasonably foreseeable), then clause 10.3.7 states the Contractor is entitled to time but not time cost compensation. However if as discussed earlier, a variation is triggered, then 10.3.1(a) engages the EOT and both time and cost apply.

There is a strong incentive for the contracting parties to work together collaboratively to determine a pragmatic course of action for projects to navigate these unchartered waters. Commonly this includes negotiating agreement on the commercial terms of a variation to specifically address the impact of Level 4 (and beyond) which will apply, including sharing of the cost and resource burden between the contracting parties.

If you would like to discuss any specific issues or matters arising out of this article that you are facing with your construction projects, please contact a member of the Heimsath Alexander team.

EMPLOYMENT UPDATE – WAGE SUBSIDY SCHEME:

On 17 March 2020, as part of the economic response package to the rapidly developing COVID-19 pandemic, the government put in place a wage subsidy scheme and a leave payment scheme to support businesses to retain employees when they otherwise may not be able to as a result of the COVID-19 pandemic. This is an evolving situation, and on 27 March 2020 the wage subsidy was modified and the leave payment scheme ended.

Who can apply for the wage subsidy?

The wage subsidy scheme is available to employers, self-employed, sole traders, contractors, registered charities, NGOs, incorporated societies and post-settlement governance entities.

Do you qualify for the wage subsidy?

To qualify for the wage subsidy:

- businesses must be registered and operating in New Zealand;
- active steps must have been taken to mitigate the impact of COVID-19;
- there must have been at least a 30% decline in actual or predicted monthly revenue when compared to last year, or reasonable equivalent for a business operating less than a year;
- employers are expected to use their best endeavours to pay employees 80% of their ordinary income as at 26 March 2020. If this is not possible, employers must pay employees at least the level of the subsidy, currently $585.80 per week for a full time employee and $350 per week for part time (less than 20 hours) for 12 weeks, or the employee's ordinary wages if those are less than the wage subsidy before the impact of COVID-19. In the latter situation, the balance of the subsidy is to be put towards achieving 80% of other employees' income.

What you need to declare

When applying for the subsidy, employers must declare that they will, among other things:

- retain their employees for the 12 week period they receive the subsidy;
- not change any obligations under an employment agreement, including remuneration, hours of work, and leave entitlements without the employee's written agreement;*
- not compel employees to use their leave entitlements during the period of the subsidy, except as lawfully permitted to, including as provided for in an employee's employment agreement;
- continue to comply with their obligations under the Employment Relations Act 2000;
- repay any part of the subsidy in certain circumstances including if they stop being eligible, or fail to meet their obligations of how to use the subsidy, or receive insurance for costs covered by the subsidy;
- acknowledge that they may be subject to civil proceedings for recovery of any amount they were not entitled to, and/or prosecution for offences under the Crimes Act if they provide false information, fail to meet their obligations regarding use of the subsidy, or receive any subsidy to which they were not entitled to.

** There are uncertainties and inconsistencies in the scheme, and tricky legal issues which need to be considered. We recommend seeking legal advice if you are in doubt about your eligibility.*

Where to apply:

The application process is relatively straightforward, the subsidy appears to be paid out very promptly, and government encourages businesses that qualify to apply. Applications can be made here: https://www.workandincome.govt.nz/products/a-z-benefits/covid-19-support.html#null

Fundamentally, the wage subsidy scheme relies on the honesty and integrity of New Zealanders to provide accurate information and deal with their employees in good faith. Trust is key in supporting the longevity of New Zealand businesses.

This article is written on 31 March 2020. The government continues to develop the details of the wage subsidy and other information relating to impact of COVID-19.

TIME TO UPDATE YOUR WILL?

In times like these people often think "when was the last time I updated my Will?" As the old adage goes, time flies, and some of you might find it has been years since you've last updated your Will. In that time, some major life events may have occurred, such as the birth of children, a new partner or a general change in family dynamic. Or perhaps you've never had the time to actually enter into a Will in the first place.

If you have been thinking along these lines, we are available to help prepare your Will and assist in signing of the same.

The Wills Act 2007 currently provides that two witnesses must be physically present when a will maker signs his or her Will. Those witnesses must be independent of the Will-maker (i.e. not a beneficiary under the estate) and over 20 years of age.

Under the current lockdown situation, it is unlikely that these requirements can be met, as most people will not have two independent witnesses living within their "bubble".

However we can do the next best thing, by arranging for you to sign your Will remotely over video calling with two members of our team. This video calling session will be recorded and the Will can be circulated by email for the witnessing sections to be completed by our team members. Once we are out of lockdown, you can then pop into our office to re-sign your Will in person.

In the unlikely event a Will signed via video calling needs to be acted on, there is provision under the Wills Act 2007 for that document to be formally validated and acted upon. We believe that the majority of Wills signed in this manner would be approved by Court (unless there are exceptional circumstances that would deter the Court from doing so).

Please contact Vikki Templeman by email for further assistance.

TAKEOVERS PANEL TO GRANT CLASS EXEMPTION RELIEF TO ADDRESS COVID-19 IMPACT

The Takeovers Panel has approved the granting of a suite of temporary class exemptions from the Takeovers Code (the Code) that are aimed at assisting Code companies in raising capital. The Panel's focus is on making it quicker and easier for shareholders to provide additional capital to Code companies urgently should the need arise.

These temporary class exemptions will apply to capital raisings conducted on or before 31 October 2020. This mirrors the timing of the NZX class waiver in relation to equity capital raising requirements. The exemptions, while approved, will come into force only once an exemption notice has been finalised in accordance with the Takeovers Act 1993.

The Panel has indicated that the temporary class exemptions will allow shareholders to make "creeping" increases as a result of allotments (including between the 20% and 50% control zone) provided that the increase is subject to a 10% cap. In addition, shareholders will be allowed to underwrite pro-rata rights issues provided that any additional voting rights acquired above the 10% cap are not exercised and are sold within a 24-month period, or the increase is subsequently approved by shareholders. Amendments to current class exemptions will extend sell-down periods for shareholders and professional underwriters to 24 months.

Further details will be provided on the Panel's website once the exemptions come into force.