Horrocks Hampton
LAWYERS

NEWSLETTER

Issue 4
Nov 2007 – Jan 2008

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Internet Banking Fraud – Are You Protected?

Code of Banking Practice

If you do your banking on the Internet, then you should be aware that the risk associated with Internet banking increased as of July 2007. The New Zealand Bankers Association (of which all the main trading banks are members) has introduced a new Code of Banking Practice, which includes a section on Internet banking.

If an Internet banking user becomes the victim of fraud and has contributed to the Internet fraud by either:

a) having a computer or device that does not have appropriate protective software and operating systems installed and up to date; or
b) failing to take reasonable steps to ensure that the protective systems such as virus scan, firewall, anti-spyware, operating system and anti-spam software on the computer are up to date; or
c) failing to follow reasonable security warnings about the appropriate processes and safeguards to follow when using Internet banking;

then the bank is not liable for any loss.

The code provides for the bank to have the right to request access to the user's computer in order to verify all reasonable steps to protect the computer had been taken. If access is denied then the user may be held liable.

The effect of the new code is that the onus to safeguard a computer has been shifted to the user although the banks retain the responsibility to inform the user of the best way to do so. The Code has been criticised for not being specific enough as to what constitutes adequate protection. However, as matters now stand, users are obliged to update their computer

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security systems in accordance with their bank's recommendations. Failure to do so means that the Internet user will be liable for losses up to their overdraft limit.

The Bank is responsible for fraudulent transactions that are not caused by the user if they are promptly advised of the fraud or advised that the customer ID, password or other security information is, or may be, known to another person or that there has been unauthorised access to the banks site for Internet banking information or accounts.

Remedies
If you become involved in a dispute with your bank over liability for Internet fraud, then you should initially attempt to resolve the matter through the bank's internal complaints procedure.

If this is unsuccessful, a complaint may be made to the Banking Ombudsman, provided the amount at issue is less than $200,000. The Banking Ombudsman in turn can refer complaints to another party such as the Insurance and Savings Ombudsman, the Privacy Commissioner or the Human Rights Commissioner. Banks are bound by recommendations made by the Banking Ombudsman.

If a claim is unsuccessful with the Banking Ombudsman, or it is for an amount exceeding $200,000, then an application will have to be made to the Court. Either way, it would be advisable to consult your lawyer at the outset.

Greater Security Surrounding Finance Companies

In the wake of the collapse of a number of finance companies, cabinet made swift changes to the Securities Regulations 1983. The Securities Amendment Regulations 2007 ("the regulations") came into effect on 21 September 2007.

The regulations affect finance companies that continuously offer debt securities to the public and either lend money or provide financial services. The changes do not affect finance companies that are building societies, credit unions or co-operate companies.

The regulations add clauses that are deemed to be included in both existing and future trust deeds of finance companies. Under the new clauses, finance companies have more stringent obligations in terms of reporting their financial position to trustees, regular certification of compliance with trust deeds requirements, and keeping the trustee informed of matters relevant to the trustee's duties.

The new clauses will also give the trustee the power to appoint an independent auditor to audit the financial statements of a borrowing group and the power to appoint an expert to assist the trustee in determining the true financial position of an issuer.

Conditional Agreements – Home Buyers' $300,000 Mistake

Background
Mr and Mrs Fleming owned a house at Beachlands, South-East of Auckland. They signed a conditional contract to buy a lifestyle block near Whangarei, owned by the trustees of the Mana Trust. One of the conditions of the contract provided that the Flemings had 90 days within which to enter into an unconditional agreement for the sale of their Beachlands property.

The Flemings failed to secure a contract for their house within the 90 day period. They therefore considered the contract with the Mana Trust to be at an end. The trustees disagreed.

In due course, the trustees found an alternative purchaser for their block. However, the purchase price was less than the amount the Flemings had agreed to pay.

The trustees successfully sued the Flemings for the difference between the contract price and the eventual sale price (approximately $100,000) together with interest (approximately $225,000) and costs. The interest exceeded the damages, due to the length of time before the original settlement date of the agreement and the date of judgment some two and a half years later. Furthermore, interest was calculated at the rate specified in the agreement of 14%.

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The law

The agreement for sale and purchase between the trustees and the Flemings included a provision requiring the Flemings to “do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment”.

The question for the Court was whether the Flemings had tried hard enough to sell their Beachlands home. Had they done “all things which may reasonably be necessary”? Unfortunately for the Flemings, the Court found that they had not and were therefore in breach of contract.

The requirement to take reasonable steps to fulfil any condition e.g. to obtain finance or sell your house etc, is generally implied by the courts. The Court of Appeal described the clause in the Flemings' contract as making explicit what had previously been implicit.

This means that in most conditional contracts to buy and sell property there is an express or implied obligation to take all reasonable steps necessary to satisfy any conditions. Without such a requirement, a party could use a condition to avoid their contractual obligations simply by taking no steps to satisfy the condition and allowing the contract to lapse. This would effectively undermine the certainty of the contract for the other party.

The problem

The Court found that the Flemings had behaved unreasonably when they adopted an unconventional approach to marketing their house by using covert strategies. This involved minimal marketing and, although there were discussions with real estate agents, there was no formal listing.

The main reason the Flemings adopted the low profile marketing approach was concern about the effect the sale of their house might have on their local lawn mowing business.

However, when the Judge weighed up the importance of protecting the lawn mowing business against the obligation to attempt to sell their house, he concluded that there was an obligation on the Flemings to take a much more proactive approach to achieving a sale of their house.

Conclusion

If you sign a conditional contract to buy a residential property, you need to be aware that you must be proactive and do all things reasonably necessary to ensure the conditions are fulfilled within the permitted time frame.

There is no set formula as to what is reasonable. It will depend on the circumstances of each contract. However, to avoid the problems faced by the Flemings, you should discuss the steps you are proposing to take to satisfy the conditions with your lawyer at an early stage.

Don't Get Caught Napping
– Changes to the Personal Insolvency Regime

For the past 40 years personal insolvency has been governed by the Insolvency Act 1967. That is about to change. A new Insolvency Act has been passed and is likely to come into force by January 2008 (at the time of writing no date has been set by the government).

According to the Insolvency and Trustee Service (the government agency which administers insolvent estates) there has been a change in the nature of people going bankrupt since the 1967 Act was passed. Now, unlike then, almost two thirds of bankruptcy estates involve debtors with few, if any, assets that can be sold for the benefit of creditors. Similarly, these debtors seldom have sufficient income to make any meaningful contribution to the creditors during the three years of bankruptcy.

One of the changes to the personal insolvency regime aimed at addressing this problem is the “no asset procedure” (NAP). This is a new addition to insolvency law in this country.

NAP

If a person satisfies the five criteria set out in section 363 of the new Act, they may apply to the Official Assignee to be accepted for the NAP. To qualify, the debtor must have:

- no realisable assets (excluding certain necessities of life);
- not previously been admitted to the NAP;
- not previously been adjudicated bankrupt;
- total debts (excluding any student loan balance) of not less then $1,000 and not more than $40,000; and

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- no means of repaying any amount towards the debts.

Once a person is accepted into the NAP, they are protected from creditors for 12 months, during which time creditors may not begin or continue any recovery or enforcement action against them.

The debtor is automatically discharged after 12 months. At that time, the debtor's debts are cancelled and the debtor is not liable to pay any part of the debts. However, some important exceptions to note are: fines, maintenance obligations, child support and student loans. These remain payable.

During the 12 months it operates, the NAP may be terminated for a number of reasons. These include the debtor misleading the Official Assignee or concealing assets, or a change in circumstances which enables them to repay part or all of the debt. Upon termination, all of the debtor's debts become enforceable.

Summary Instalment Order (SIO)
At present, there is a limited right for a debtor to apply for an order that they pay their debts over time. If an SIO is made, it prevents creditors from taking action to recover their debts, provided the debtor makes regular payments.

Under the existing legislation, SIOs are made by a District Court, generally operate over a three year period, and are only available if the debtor's total debts are $12,000 or less.

Under the new Act, the application will be made to the Official Assignee and the debtor's total debts may be up to $40,000 (excluding any student loan balance). The time frame for repayment may be extended for up to five years. The Official Assignee will have discretion to determine whether the debtor must repay all, of just a part, of their debts.

There will be a public register of NAP and SIO debtors.

Conclusion
In general, if the debtor is in a position to pay money towards their debt, then the SIO procedure is available as an alternative to bankruptcy. If the debtor is not in a position to make any payments to creditors, then the NAP may be more appropriate.

Anti Spam Law

The computer age has introduced many new words into the English language and the word "spam" is a good example. It describes the unsolicited emails that appear with monotonous regularity on our computer screens promoting an endless range of products and services.

The Unsolicited Electronic Messages Act 2007, which came into effect on 5 September 2007, seeks to put a stop to spam.

The matters covered by the Act include the following:

- The Act applies to all commercial emails that have a New Zealand link.
- The sending of unsolicited emails is prohibited unless the sender is clearly identified and can be readily contacted.
- The information contained in the email must be "reasonably likely" to be valid for not less than 30 days after the message is sent.
- The sender must genuinely believe the recipient has consented to receiving the email and the onus of proving that is on the sender.
- The email must include an "unsubscribe" facility.

Failure to comply with these requirements can result in a fine of up to $200,000 in respect of an individual and $500,000 in respect of an organisation.

The Act does distinguish between express, inferred or deemed consent. Express consent is self explanatory. An inferred consent is one that can reasonably be inferred from the conduct and the business or other relationships of the persons concerned. Deemed consent is where the recipient has conspicuously published their email address in a business or official capacity and the publication of the address is not accompanied by a statement which says it does not wish to receive unsolicited emails. Furthermore, the message sent is relevant to the business of the recipient.

The Act only applies to emails sent within New Zealand or which have a New Zealand link so it remains to be seen how much impact it will have on the volume of unsolicited emails received from overseas.

If you have any questions about the newsletter items, please contact us, we're here to help

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