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LAWYERS

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Welcome to the Winter edition of *Commercial eSpeaking*.

Unsurprisingly, our lead story is a commentary on the government's Budget delivered by the Minister of Finance on 30 May. Although it is clear the economic outlook is somewhat gloomy, the minister said that savings across government have resulted in responsibly-funded tax relief.

We cover a recent case that has implications for the property and construction sector and, on page 4, we have the *Business briefs* section.

To talk further with us on any of these topics, or indeed any other legal matter, please don't hesitate to contact us. Our details are on the top right.



## The Budget 2024

### A no-frills outlook

The Minister of Finance, Nicola Willis, delivered her first Budget on 30 May.

The promised tax cuts have been delivered by adjusting the tax brackets.

The minister admitted the Budget is "tight, but realistic" and she intends to stick closely to the allocated spending.

Treasury expects the economy to pick up later this year, with a drop in inflation and a fall in interest rates. All things being equal, the government expects the country's operating balance to head into surplus in the 2027–28 financial year.

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## Can losses be recovered from a faulty building?

### Design professionals can rely on limited liability clauses

The High Court recently found that the construction and insurance sectors can rely on limited liability clauses when defending claims for negligence or breach of contract in commercial projects.

The Tauranga City Council brought a case against its engineers asserting defective design.

Until recently, this had not been considered by the New Zealand courts.

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## Business briefs

### Five companies sentenced over Whakaari/White Island eruption

We report on the sentencing of five companies and GNS Science.

### Navigating financial distress

Some advice if your business is in rough financial waters.

### Commerce Commission win over Viagogo

The High Court has provided useful guidance on misleading and deceptive conduct, and unfair contract terms under the Fair Trading Act 1986.

### CCCFA update

The government recently announced changes to the Credit Contracts and Consumer Finance Act 2003.

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# The Budget 2024

## A no-frills outlook

Although it is clear the economic outlook is somewhat gloomy, in delivering the 2024 Budget, the Minister of Finance, Nicola Willis, said that savings across government have resulted in responsibly-funded tax relief. "Spending is targeted, effective and affordable."

The government has promised targeted investments in public services, including healthcare, education, and law and order. Front-line services will be increased.

Having said that, the minister has admitted the Budget is "tight but realistic" and she intends to stick closely to these allocations.

## Tax relief

The much-promised tax cuts have been delivered.

As previously signalled, the Budget will help what the government calls 'the New Zealand squeezed middle income earner'. For the first time since 2010, personal tax brackets have been adjusted for New Zealanders earning up to \$180,000 pa. Overall, average income households will have up to an extra \$102 in their back pockets each fortnight.

Additional FamilyBoost payments will help around 100,000 families manage the costs of early childhood education with up to \$150/fortnight.

These tax changes take effect from 31 July this year (a month later than promised) in order for payrolls to accommodate the resettlings. Changes to FamilyBoost will apply from 1 July.

The government has reiterated the restoration of tax deductibility for interest on residential investment properties, as well as the adjustment to the bright-line test from 10 years back to two years from 1 July this year.

## Health

Frontline health services have received a boost. Emergency departments, primary care, medicines and public health will get \$8.15 billion additional operating and capital funding over the next four years:

- + \$3.44 billion has been allocated for hospital and specialty services (including \$31 million to increase security in emergency departments)
- + An additional \$2.12 billion will be available for primary care, community and public health providers including GPs, Māori health services, mental health services and aged care services
- + Free breast screening will be gradually extended for 70–74-year old women (currently only available up to 69 year olds); an extra \$31.2 million
- + Pharmac will receive additional funding of \$1.77 billion over four years, which is said to just cover ongoing costs for additional medicines, and
- + The mental health initiative, Gumboot Friday, has \$24 million to deliver services to young New Zealanders.

On the other side of the coin:

- + Free prescriptions have gone for most New Zealanders. However, free prescriptions will remain for those under 14 years old, people aged 65 and over and for Community Services Card holders, and

+ Promised additional funding for cancer drugs has not materialised. Since the Minister delivered the Budget, she has stated that the government aims to make an announcement on cancer drug funding this year.

## Education

There will be increased spending on schools and early childhood education equating to \$2.93 billion in extra operating and capital funding, including \$440.8 million of reprioritisation. The government is allocating:

- + \$1.48 billion to build new schools and classrooms and to maintain and upgrade existing school properties. This includes funding for kōhanga reo, play centres, kindergartens, kura kaupapa Māori, special schools, and intermediate, secondary and charter schools.
- + \$516.4 million to support schools and early childhood education providers, plus \$153.3 million to establish charter schools
- + \$477.6 million to continue the Healthy School Lunches programme for the next two years
- + \$67 million to support schools to use the new structured literacy approach when teaching reading, and
- + Funding is switched to allow a fees-free final year of tertiary study, rather than free fees in the first year.

## Law and order

The government has reiterated its pledge to crack down on crime and keep communities safe. This includes:

- + Funding of \$1.94 billion for more frontline Corrections officers, increased support for offenders to turn away from crime and increased prison capacity, and

+ \$651 million allocated to support frontline policing (including increased pay) and for an additional 500 police officers and additional operational support staff.

## Public services

\$140 million is budgeted for an additional 1,500 social housing places, delivered by community housing providers.

\$1.1 billion is allocated to ensure disabled people can access the essential services, equipment or support they need.

Hawke's Bay and Auckland communities will receive \$1 billion-plus for the rebuild and recovery from Cyclone Gabrielle and the Anniversary Day floods. \$939.3 million of this is allocated for road repairs.

## Infrastructure

The government, as it has previously signalled, is investing heavily in roading – \$4.1 billion to accelerate priority roading projects including Roads of National Significance.

\$200 million will be invested to support KiwiRail carry out maintenance and renewals on the national rail network.

## Climate change

The government wants to support the country's transition to a low-emissions economy and climate-resilient future. The minister said that around \$2.6 billion of climate initiatives funded from the previous government's Climate Emergency Response Fund will continue.

# Can losses be recovered from a faulty building?

## Design professionals can rely on limited liability clauses

The High Court recently found that the construction and insurance sectors can rely upon limited liability clauses when defending claims for negligence or breach of contract in commercial projects.

## Background

In 2018, the Tauranga City Council (TCC) decided to build a nine-storey car parking building with 550 car parks on land it owned in central Tauranga. However, it ended up selling the land with a partially completed car parking building two years later for \$1.

The TCC used a consulting engineering firm to design the car parking building; it engaged a second firm of engineers to check the design. Construction of the building began in June 2018.

## The failed construction process

In March 2019, when the building was 20 metres high, a steel beam twisted while concrete was being poured. A third firm of engineers reviewed the building's structural design. The firm's initial conclusion was that the foundations, including the basement walls, were inadequate and that 300 tonnes of reinforcing steel and 140 truckloads of concrete were needed to strengthen them.

Construction was paused while a detailed design was prepared for the required remedial work. In June 2020, the TCC abandoned the project after receiving

advice that it would cost: \$26.5 million to demolish the building, \$55.4 million to strengthen it and \$64.4 million to rebuild it completely.

## The court case

The TCC subsequently sold the land and building for \$1 and filed legal proceedings in the High Court against the two engineering firms involved in the original design of the building. The TCC sought to recover losses of more than \$20 million.

## Limitation clauses

The TCC's contracts with both engineering firms contained limited liability clauses seeking to cap the engineers' liability to the TCC for any faulty design work at a set figure. A key issue in the case was whether the contractual limitation clauses were legally effective. This precise issue had not been previously considered by the New Zealand courts.

There is no general legal rule that prevents parties from agreeing to limit or exclude liability for a breach of contract. However, the court needed to consider the impact of section 17 of the Building Act 2004. Section 17 states that all building work must comply with the Building Code regardless of whether a building consent is required.

The TCC's lawyers argued that the clauses limiting the engineers' liability amounted to an attempt by the engineers to contract out of the duty to do all building work so that it complied with the Building Code.



'Building work' includes the design work done by engineers. They claimed this meant that the clauses were unlawful and unenforceable.

The court held, however, that the clauses did not attempt to avoid the duty to comply with the Building Code; they merely limited the consequences of failing to do so.<sup>1</sup> This means that it is possible for anyone involved in the building industry to contractually limit their liability, but not exclude it entirely.

## Fair Trading Act claim

The TCC also brought a claim against the engineers under the Fair Trading Act 1986 (FTA). The TCC argued that the engineers'

incorrect design advice amounted to misleading or deceptive conduct, breaching the FTA. This type of claim could only be brought against those who provide advice, not those who do physical building work.

Claims under the FTA can be a powerful tool for parties that have suffered losses, as the general rule is that parties cannot contract out of liability under this legislation. However, the court may uphold a clause that seeks to limit or exclude liability for a breach of the FTA between commercial parties under section 5D if it considers that the clause is fair and reasonable.

<sup>1</sup> *Tauranga City Council v. Harrison Grierson Holdings Ltd* [2024] NZHC 714.

## Business briefs



### Five companies sentenced over Whakaari/White Island eruption

In our Summer 2024 edition published in early February, we wrote on the Whakaari/White Island prosecutions brought by WorkSafe; in this Winter issue we report on the court's late February sentencing.

Almost five years after the Whakaari/White Island eruption that left 22 people dead and 25 others severely injured, the District Court delivered its sentence for safety failings under the Health and Safety at Work Act 2015.<sup>2</sup>

Five companies were collectively fined \$2 million for failing to assess and mitigate risk, and three of the five have been ordered to pay a collective total of \$10.21 million in reparations to victims and their families. GNS Science was also fined \$54,000 for failing to adequately communicate risk to contractors.<sup>3</sup>

Whakaari Management Limited (WML), one of the five companies sentenced and responsible for managing access to the land, was held liable for a significant portion of the penalties. WML has claimed

it is unable to pay the penalties as it has no assets or bank account, even though evidence at trial indicated WML received about \$1 million annually from island tours. The judge acknowledged he cannot make orders against WML's shareholders, but appealed to their 'inescapable' moral duty to advance the necessary funds – even if this means reaching into their own pockets.

These penalties are a strong reminder for businesses to take seriously their health and safety obligations or risk hefty penalties.

### Navigating financial distress

What should you do if your business is in rough financial waters? If you feel financial strain creeping into your business, it is important to take action early to address the situation rather than hoping it improves on its own. Below we suggest some options to help you navigate financial distress.

- + **Engage with lenders:** Communicate transparently with your lenders early on. This will maximise available options and strengthen your relationship. Most lenders are willing to agree to an approach where borrowers are transparent and can demonstrate a plan
- + **Reach out to suppliers and customers:** Have open conversations, where appropriate. Clarity around payment timeframes, late payment fees and other expectations will provide certainty for all parties involved

- + **Review business contracts:** Understand the terms of your business contracts, what obligations are owed and the implications if you default
- + **Keep directors' duties in mind:** Ensure you are complying with your director duties, including avoiding trading recklessly or incurring obligations the company is not able to perform. You can be found personally liable if you breach your director duties. Maybe you have to make the difficult decision of winding up your business to avoid breaching your duties, and
- + **Seek professional advice:** Speak to your accountant or financial advisor to assess the financial position and solvency of your business. We can also advise on your options at any stage.

### Commerce Commission win over Viagogo

In a recent judgment, the High Court provided useful guidance on misleading and deceptive conduct, and unfair contract terms under the Fair Trading Act 1986 (FTA). The decision followed a six-year legal battle between Viagogo and the Commerce Commission.<sup>4</sup>

The Commission commenced proceedings against Viagogo in 2018 after receiving thousands of complaints by consumers who had purchased event tickets from Viagogo, only to be refused entry at the events because their tickets were not authentic.

<sup>2</sup> *WorkSafe New Zealand v Whakaari Management Limited, White Island Tours Limited, Volcanic Air Safaris Limited, Aeries Limited, Kahu (NZ) Limited* [2024] NZDC 4119.

<sup>3</sup> *WorkSafe New Zealand v Institution of Geological Nuclear Sciences Limited* [2024] NZDC 4149.

<sup>4</sup> *Commerce Commission v Viagogo AG* [2024] NZHC 713.

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## The Budget 2024

Later this year the government will consult on plans to deliver emissions reductions over the second emissions budget period. The minister confirmed that the Emissions Trading Scheme will play a vital role in reducing emissions.

### In summary

While the Budget could not be considered an austerity plan, it is certainly a 'no frills' programme indicating the government will be running a tight financial ship over the next few years.

Treasury expects the economy to pick up later this year, including inflation returning to its target band of 1–3% and a fall in interest rates.

All things being equal, the government expects the country's operating balance (before gains and losses) to head into surplus in the 2027–28 financial year.

In the meantime, however, we will all need to hold on to our hats and buckle our belts a little tighter over the next few years.

To read more detail about the Budget, click [here](#) for the Budget documents. +

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## Can losses be recovered from a faulty building?

The court will consider matters such as the contract's value and the parties' respective bargaining powers when deciding whether a particular term is fair and reasonable.

In this particular case, the court decided that the clauses in the contracts with the TCC seeking to limit the engineers' liability were fair and reasonable, and thus enforceable.

Section 5D only applies to contracts between commercial parties. This means that it will not usually be possible for a designer to contract out of liability under the FTA for residential building work.

### What to do?

Design professionals can limit their liability for defective design work if commissioned for commercial construction work. Your organisation cannot rely on recovering any losses caused by faulty design. This means that you need to be careful to choose a reputable design professional. It also means that it may be worthwhile having design work peer-reviewed for substantial projects. +

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## Business briefs

The High Court found that Viagogo had misled consumers in breach of the FTA by:

- + Failing to adequately disclose its status as a resale platform
- + Guaranteeing customers' tickets to events, when in practice it often refunded invalid tickets after a customer had already missed the event
- + Creating a false sense of urgency for prospective purchasers seeking tickets
- + Disclosing additional ticket fees at a late stage of the purchase process, and
- + Stating it was an official or authorised source of tickets when it was not.

A clause in Viagogo's terms and conditions requiring customer disputes to be resolved in Switzerland was also found to be unfair and unenforceable.

Viagogo was ordered to correct the misleading information on its website and update its terms and conditions.

This judgment emphasises the importance of using honest and fair trading practices, and ensuring your terms and conditions comply with the FTA.

Viagogo has appealed the judgment.

## CCCFA update

The government recently announced changes to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) as part of a larger, two-phase financial reforms package to address concerns about the accessibility of credit and burdensome obligations on lenders.

**Phase 1:** Already underway, this phase includes the removal of overly prescriptive requirements around loan affordability assessments, and exemptions for local authorities and providers of non-financial goods and services (such as certain car dealers).

**Phase 2:** As this phase is rolled out, it is expected the CCCFA will be updated to further streamline the lending process and continue to support more accessible lending practices.

The Ministry of Business, Innovation and Employment will publicly consult on revisions to the Responsible Lending Code and possible amendments to the CCCFA as they become available. +