Liability for forestry consultants – some suggested responses

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This article has been prepared as a general guide only and covers in general form a wide range of complex and technical legal matters. It is not intended to provide exhaustive or complete legal advice. Specific and comprehensive legal advice should be sought for a particular fact situation. Registered Forestry Consultants should also refer to the NZIF Professional Handbook and might wish to review the long and short form Terms of Engagement that the Institute has prepared.

Introduction

Although New Zealand has some way to go before it matches the enthusiasm for litigation in jurisdictions such as the United States it seems clear that we are becoming an increasingly litigious society. This should be a matter of concern for forestry consultants who would be well advised to consider their business risks and put in place structures, processes and procedures to manage that risk. The purpose of this article is to briefly consider some of the processes and mechanisms by which a prudent forestry consultant might seek to manage business risk over and above providing their services in a manner that meets the standard expected of a Registered Forestry Consultant.

Which Business Structure?

Whilst some business structures, such as a partnership in terms of the Partnership Act 1908, may seem to provide an inexpensive and tax effective business structure to operate under, the ease with which personal liability can be sheeted home to individual partners means that prudent forestry consultants would use a limited liability company under the Companies Act 1993 as their business vehicle.

The concept of the limited liability company enables individuals to reduce the risk of being involved in a business venture by the creation of a separate legal personality. Some argue that the creation of the concept of the limited liability company is one of the defining moments of business history[1]. In essence, the company rather than the individual, is responsible for any debts or liabilities that might occur in the course of trading. However, the flow-on effects of the split between a company with direct responsibility for its debts and liabilities and the actions of the individuals actually driving the company (for example directors) has been hotly debated over the decades.

Thus, in New Zealand, the "corporate veil" has been pushed aside by legislation such as the Resource Management Act 1991[2]. Further, changes to the Companies Act have increased the possibility of directors becoming personally accountable to shareholders and other parties. Nevertheless, the use of a limited liability company remains a relatively simple and inexpensive way of providing a useful degree of risk management. Having established a business using a limited liability company the next layer of risk management involves a systematic and disciplined approach to the process of documenting the instruction process or contract formation.

Contractual Formation

In formal legal terms the existence of a legally enforceable contract depends upon an analysis of the intention of the parties; for example whether there has been an offer versus an invitation to treat, acceptance of the offer and certainty as to the terms of the contract.

Although most contracts can be made wholly or partly orally, a major difficulty with oral contracts is evidentiary. Memories do fade over time! Thus, a practical piece of advice for a forestry consultant is to confirm instructions in writing and, in doing so, identify the salient points such as delivery date, payment and so forth. In the absence of conflicting correspondence from the client, the presence of such a confirming letter would be highly persuasive as to the main terms of the contract should a dispute arise. At the same time, every new client should be supplied a set of carefully drafted standard terms and conditions or terms of engagement. The confirming letter would attach those terms or, where the client has already received the consultants set of terms of engagement, a note to the effect that the forestry consultant's standard terms of engagement will apply.

A prudent forestry consultant will require the client to sign and return a copy of the

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[1] *"The Company: A Short History of a Revolutionary Idea." J Micklethwait & A Wooldridge – Weidenfield & Nicolson 2003*

[2] *Section 340(3) RMA 1991*

confirmation letter prior to the consultant commencing the supply of its services. Where a forestry consultant with an established client base wishes to introduce a set of standard terms and conditions, or is updating them, one approach might be to write to each client on their client list advising that, in light of the changing business and legal environment, the company has decided to review and/or put in place new terms of engagement to clearly set out the manner in which the business relationship between the parties will be conducted. The letter should attach a copy of those terms and should state the particular date from which the terms will apply.

Contractual Terms

The next step is to consider the detail of your standard terms of engagement and its use in terms of risk management. From a forestry consultant's perspective, the exact quantum of damages that may flow from a breach of contract (for example, as a result of incorrect advice) will depend upon a variety of factors and may encompass both the direct loss as well as consequential losses (such as loss of a business opportunity). Thus the loss flowing from poor advice in relation to tree stocks that is only picked up a year or two down the track will have a net present value based on future loss of revenue which may be well in excess of merely putting the matter right by, say, replanting.

Whilst it may seem fair that a forestry consultant be held to account for a breach of a contractual term, nevertheless it is the client's choice to engage in a particular venture and a consultant will not want to act as an "underwriter" to a client's business venture/ proposition.

The outcome of such debate can be seen in sweeping contractual terms that attempt to **exclude** all liability by the service provider as to the consequences of a breach for a contractual term. However, over the years, such clauses have been viewed with varying degrees of favour by the courts. Thus, for example, a court will often make the person seeking the protection of such a clause show that the words clearly cover the situation in question. Any ambiguity or other doubt may be resolved in a way less favourable to the party claiming the protection of the clause. As a result of this approach by the courts, legal drafters often **limit** the maximum liability of the service provider to a sum or formula. For example, the amount paid to the service provider.

This is on the basis that, overall, the courts are prepared to construe limitation provisions less strictly than clauses of total exclusion. The policy reasons for this include the apportionment of risk (versus exclusion) and the courts preference to recognise agreements reached by commercial parties dealing at arms length.

Accordingly, a prudent forestry consultant would, in their standard terms and conditions, give careful consideration to the risks and limit (in a clear and unambiguous manner) their liability accordingly. The writer recommends this approach.

Another contentious area is where the client "on supplies" the consultant's advice to a third party. That third party then relies on that advice to their detriment and sues the forestry consultant under the law of tort (negligence). For such a duty to arise to a third party not connected by contract, a forestry consultant must be aware that his or her advice will be transmitted to the third party, that it is transmitted for a specific purpose or transaction and that the third party may rely on it. It must also be reasonable for the third party to rely on the forestry consultant's advice rather than seeking their own independent professional advice.[3]

As can be expected, the application of this legal principal (with potentially harsh consequences) is not even and the result depends upon the factual context. Clearly, one way to avoid liability for negligence to third parties is to supply your services to the client in a manner that exhibits the degree of skill normally expected of a competent and experienced forestry consultant. In addition, the use of disclaimers should also be considered.

Disclaimers are commonly used by professionals to mitigate against liabilities to third parties arising in the manner outlined above. Thus, a prudent forestry consultant might include in a valuation report a disclaimer to the effect that "the valuation opinion has been prepared at the request of the client and accordingly neither the forestry consultant nor any of their employees accept any responsibility on any ground whatsoever, including that arising from negligence, to any other person".

Whilst the use of disclaimers has become increasingly problematic with the advent of legislation such as the Fair Trading Act and the Consumers Guarantee Act, an express disclaimer is a useful addition to any terms of engagement.

Legislation

In the January 1999 Guidance Note (NZIF Professional Handbook) on 'Issues of Liability for Forestry Consultants' I gave an overview of the Consumer Guarantees Act 1993 and the Fair Trading Act 1986. The commentary in that article

[3] *Hedley Bryne & Co Limited v Hellier & Partner [1963] 2 AER 575*

in relation to these two pieces of legislation is, by and large, still very appropriate. However, recent changes to the provisions of the Consumer Guarantees Act[4] ("CGA") mean that a forestry consultant in contracting out of the CGA on the grounds that they are supplying services to a business consumer should also consider the situation where the product of the services may be on-supplied by the client. In these situations, it might be useful to contain a provision in your terms of engagement to require the client to, in turn, contract out of the CGA in terms of the on-supply.

Conclusion

Against this background my view is that operating a consultancy business using a limited liability company is a "no brainer". However, more careful use of the grey matter is required in contractual formation in order to manage ongoing business risk.

[4] *Consumer Guarantees Amendment Act 2003*

Registration Board provides standard terms of engagement guidelines for consultants

Rob Miller*

The NZIF Registration Board will shortly release, for NZIF's Registered Forestry Consultants (RFCs), two Standard Terms of Engagement (TOE) for use in contracts for professional forestry consulting services. The two samples are:

- A **long form** Standard Terms of Engagement.
- A **short form** Standard Terms of Engagement.

The Board engaged Simpson Grierson to prepare the TOE forms as a guide for RFCs. The short form TOE is an abbreviated version of the long form document for use in smaller contracts under approximately $10,000.

The Board recognises that while most of the larger consulting companies routinely use their own TOE in contracts, many of the smaller firms or sole practitioners do not. We are living in increasingly litigious times. Professional liability claims have been made, some successfully, against forestry consultants involving large sums. The Board recommends that all RFCs routinely adopt terms of engagement procedures in their work to minimise their professional risk when providing professional services.

Terms of Engagement set out the terms and conditions by which a RFC undertakes to provide professional services to a client. The NZIF standards include sample clauses on:

- Specific services to be provided
- Quality of services
- Payment terms
- Liability
- Intellectual property
- Confidentiality
- Supply of information
- Disclaimers
- Dispute resolution
- Other general matters

Issues of liability including limitations on liability are particularly important in contracts. The NZIF models provide for professional liability arising out of a RFC's performance or non-performance to be limited to either a fixed sum or some multiple of the level of fees paid by the client for the services provided.

The Board believes the introduction of the standard TOE will benefit RFCs because it will:

- Establish a clear and unambiguous understanding between the consultant and his or her client as to the nature of services provided and the conditions upon which they are provided.
- Limit the consultant's professional liability.
- Improve the perceived professionalism within the industry.
- Reduce future professional indemnity insurance costs.

The Standard TOE developed by the Board is meant to be a guide only. Consulting engagements vary and RFCs need to assess the suitability of the samples on a case by case basis and use a lawyer to review them before use. The NZIF accepts no responsibility or liability that may arise from the use of the sample TOE.

The NZIF Standard TOE will be forwarded to all RFCs and will otherwise be available on the NZIF website.

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