

IN BRIEF  
RAINEY COLLINS  
LAWYERS  
GENERAL ISSUES

Autumn 2008

## WELCOME

to the Autumn edition of Rainey Collins In Brief newsletter.

In this edition we focus on preparing for buying and selling property, wills, retirement, employment law, business ventures and blended families.

These articles and others are available on our "new-look" website [www.raineycollins.co.nz](http://www.raineycollins.co.nz). You can download them or send them to others.

To enter our competition to win a free bottle of French champagne, please visit our website.

I trust that you find the information of interest and use.



JAMES JOHNSTON

## CONTENTS

- 1 Be Prepared For Perhaps The Biggest Transaction Of Your Life - Buying Or Selling A Property!
- 2 Make Sure You Put It In Your Will!
- 2 The Retirement "Boom"
- 2 Expensive Failure To Follow A Commonsense Employment Process
- 3 Write It Down Before It Hits You Where It Hurts
- 3 Did You Know? Auctions
- 3 Did You Also Know? Property
- 4 Wills and Blended Families: A Balancing Act

## Be Prepared For Perhaps The Biggest Transaction Of Your Life - Buying Or Selling A Property!

Harry and Sally found the home of their dreams. They knew there were others wanting to buy the property, so they hastily signed an unconditional offer, which was accepted. Once their initial excitement died down they realised they had not done any research into the property. They didn't even have finance organised! They later discovered that there had been unauthorised extensions completed on the house, but because they had not been carried out by the present Vendor there was little they could do about it under the contract. If they had called us first, they would at least have been alerted to the potential issue.

Buying or selling a property is likely to be perhaps one of the biggest transactions you ever make and potentially one of the most nerve wracking! We have compiled a list of 5 tips to hopefully make the process a whole lot easier and less stressful for you:

### 1. Make sure your agreement is in writing

With more and more private sales occurring, particularly through means such as TradeMe, you need to be aware that a verbal agreement to purchase a property is not enough.

### 2. Talk to us before you sign anything!

We will be able to talk you through the conditions you may want to put in your Agreement for Sale and Purchase. The conditions you put in your contract are very important as they allow you to make sure all bases are covered before you commit to anything. We can discuss with you the conditions that you may want or need in your agreement before you sign the agreement and lock yourself in.

### 3. Finance – can you afford this place?

If your purchase is dependent on you being able to obtain finance, it pays to talk to your bank or mortgage broker in advance. Check your eligibility for mortgage finance and whether you can afford the repayments. You don't want to be forced to buy a house you really can't afford!

### 4. Do your homework

Find out as much information as you can about the property. If you don't obtain a LIM (Land Information Memorandum) report (and we highly recommend that you do) you can look at the Council records for the property. Many Councils also have online databases which can be very useful. Ask neighbours about the property and the area. Ask the agent as much as possible. They may have valuable insights and knowledge.

### 5. Check everything is working

Before you sign the contract, test all of the appliances on the property and the condition of the chattels that come with the property. Make sure the oven is working, the lights are working and the toilet flushes. This might seem unusual, but it is not uncommon for issues to arise on settlement about broken appliances. If you didn't check that they were working at the time you signed the contract, then you can't come back after you have taken possession to say they are not working.



FINTAN DEVINE

# Make Sure You Put It In Your Will!

Mary told her good friend and caregiver of many years that she wanted her to have all her jewellery when she died. She repeatedly said this.

Mary died, leaving a Will which made no mention of the jewellery going to her friend. Although the friend received a gift of money under the Will, this did not compare to the sentimental value that attached to the jewellery. Not to mention the fact that she knew Mary's wish was for her to receive the jewellery. Unfortunately, because the jewellery was not specifically referred to in the Will, it fell into that part of Mary's estate that was to be divided among Mary's family.

In situations like this, the Will is the only binding document. Even something handwritten and signed by the deceased before they died may not be sufficient, as there are strict witnessing requirements surrounding the signing of Wills.

The law allows the friend to make a claim against the Estate as the deceased promised to give her something for work carried out in her lifetime. But such a promise can be difficult to prove, may result in conflict with those entitled under the Will to the deceased's property, and sometimes even results in court proceedings.

If you have a specific wish regarding any of your property after your death, make sure you put it in your Will! It may avert disputes between family and friends that could occur over your estate.

If you do not have a Will, the results are even worse! In that situation, who gets your property is decided by the Government. Not having a valid Will, or having a Will that does not accurately reflect your intentions, can produce unintended, and emotionally painful results for your family and loved ones.

If you don't have a Will, now is the time to remedy that. If you have a Will, it is a good idea to review it to make sure that it still reflects your intentions.



CLAIRE COE

## The Retirement "Boom"

A rapidly aging population, spurred on by the baby boomers' steady approach to retirement age means that the demand for retirement villages is also on the rise. New retirement villages are cropping up everywhere, prompting many of us to consider them as an option for ourselves, parents or grandparents. The benefits of this type of lifestyle, together with New Zealand's changing demographics, will continue to make retirement villages an increasingly attractive option.

However, entry into a retirement home involves a huge personal and financial commitment. Changes to the law which recently came into effect protect your interests as a resident or potential resident as much as possible, so that this commitment proves to be a blessing rather than a burden.

Key features of this protection are:

- Intending residents must receive appropriate independent legal advice before signing an Agreement to live in the Village. In addition, their signature must be witnessed by a lawyer who must certify that he or she explained the implications of the Agreement to the intending resident. If all this is not done properly, the resident may be able to get out of their Agreement.
- After an Agreement is signed, there is a "cooling off" period of 15 days during which the intending resident may cancel without providing any reason.
- Residents have the right to be informed of any matter likely to affect the terms or conditions of their residency, and the right to be consulted by the operator about any proposed changes that may significantly impact their occupancy.
- The operator of the Retirement Village must make available to residents both a complaints facility and a Disputes Panel to deal with residents' complaints fairly and consistently.

The changes recognise that the decision to live in a Retirement Village is an important one that affects most areas of a person's life, and that legal advice is therefore crucial. It is important that you understand the requirements of the Act so that it does what it was designed to do – provide you with confidence in your position and the ability to maintain your independence.



RACHEL VOKES

## Expensive Failure To Follow A Commonsense Employment Process ...

A recent case again shows the financial and other costs of not following the correct process when dealing with employees. A manager was appointed on what the employer intended to be a casual basis, but the casual nature was not spelled out to him.

The manager believed he was a permanent full-time employee, so when he was dismissed and treated as a casual worker he took a claim for wrongful dismissal, seeking lost wages, compensation and a penalty.

The Employment Relations Authority (ERA) and Employment Court have held that he was permanent and full-time, and entitled to \$14,000 loss of wages plus \$10,000 compensation.

The employer would also be liable for costs in the ERA and Court and a \$1,000 penalty was imposed on them as well.

This could have been avoided by following a simple commonsense process when hiring the employee so that no misunderstanding arose. In addition it is a legal requirement that all employment contracts are provided in writing. For our free checklist on hiring call Jenny Graham on 0800 733 424. You can also obtain our free Employer's Guides to Handling Disciplinary and Performance Issues and many other matters from our website [www.raineycollins.co.nz](http://www.raineycollins.co.nz).



JENNY GRAHAM

Be In To WIN!

Visit our website

[www.raineycollins.co.nz](http://www.raineycollins.co.nz)

fill out the form online and  
be in to win a bottle of

# FRENCH CHAMPAGNE!



ALAN KNOWSLEY

## Write It Down Before It Hits You Where It Hurts

Had an idea for a business venture but need the help of a friend, longstanding colleague or business partner to get your dream business or project going?

If you do, be warned! The initial, "honeymoon period" may resolve issues that arise early in the developmental stages of the project. If not, there is a very good chance obligations will be imposed on you without your agreement if you end up in Court.

That is because, even if you have not entered into a formal contractual arrangement with your joint-venturer, you can be held to certain obligations that are considered to be almost inherent to a joint-venture relationship.

Take the following actual situation: "David" and "Sam" were associated in a project to develop a commercial property at a viable central city site. Both men worked on the project but David took principal responsibility for progressing it during the initial stages (as he had done on a previous similar project with Sam).

David entered into an agreement for the purchase of the site, conditional on attracting a major retail tenant. He did so through a company in which his family trust was a major shareholder. When a tenant was secured the plan became feasible and the agreement was finalised. At that point David tried to exclude Sam, intending to complete the development alone. There was no written agreement between them to pursue the project to its end together.

The Courts became involved when "Sam" attempted to hold "David" to his word. The Courts agreed with "Sam" and awarded substantial compensation of \$850,000 for the lost opportunity. The alarming aspect is that the outcome was totally outside the control of both people simply because they began their project on a handshake.

While you may prefer casual arrangements early in a business relationship, particularly when you are uncertain whether the project will even proceed, you must be careful.

You will be in a much better position if things "turn to custard" if you made formal contractual arrangements from the outset. Then obligations cannot be imposed on you that you would never have agreed to.

The law has recently been clarified and it is now clear that joint-venturers owe each other what are called "fiduciary obligations", even during the initial stages of a project, and even in situations where the relationship is "loose".

"Fiduciary obligations" are similar to duties of loyalty and good faith. The Courts infer the obligations based on an implicit understanding between joint-venturers that they are depending on each other to make progress towards the common objective. That is, they infer an expectation of loyalty to the joint cause. The extent and nature of the expectation is determined by the Courts where there is no clear indication between the parties, for instance by way of a written agreement.

So it makes good sense to think ahead, and to negotiate the scope of that expectation with your joint-venturer before it is imposed on you. The Courts are now unlikely to allow a person to take sole control of the business opportunity, even where that person does all the initial spadework, without some clear indication of a prior understanding between the business partners.

This is not to say that, once started, a project is impossible to withdraw from. But the Courts also expect that the joint-venturers will act fairly toward each other in bringing the affairs of the joint venture to a fair conclusion. Again, what is fair will be determined by the Courts unless there is a contractual arrangement.

A degree of uncertainty is inherent in creativity and an inevitable aspect of a new business venture. Uncertainty about the outcome is avoidable by taking very simple steps at the start of the project, particularly by putting some expectations down on paper in an agreement. Do not leave it until you are standing in Court to learn the extent and scope of your obligations to your joint-venture partner and are ordered to pay a very large sum of money.



KIRSTEN FERGUSON

### DID YOU KNOW? – AUCTIONS

We were recently asked for advice regarding a vehicle purchased from a TradeMe auction. Shortly after the purchase, the vehicle experienced problems costing in excess of \$6,000. Unfortunately there was no recourse for the purchaser under consumer laws, because the Consumer Guarantees Act does not apply to auctions. Where possible, consider visiting a trader's dealership and purchase from them directly, as your consumer protections then apply.

### DID YOU ALSO KNOW? – PROPERTY

Regardless of where you live, we can assist you with legal advice about buying, selling or refinancing your home or apartment. This is because we operate up-to-date, state-of-the-art systems including being "e-dealing capable" with LINZ (Land Information New Zealand) and have secure desk banking facilities.

# Wills And Blended Families: A Balancing Act

“The family home has passed to my stepbrother! Dad wouldn’t have wanted this!” “Why was I left out?”

The death of a family member can bring out the best in a family... or the worst. Adding into the mix the situation of a “blended family” and tensions can rise sky-high – no matter how close you may have been. A Will that accurately reflects your wishes is always crucial, but for a blended family it can often become a case of “it’s all too hard”. Arranging your affairs so that you provide fairly for everyone when you die may seem a complicated task. However, particularly in the case of a blended family, you can’t afford not to.

## The Risk: A Recent Example

Suspensions are running high and family relationships that have taken years to build are in ruins after the recent reading of a Will. When “Jack” and “Carol” were married, Carol already had two children from a previous marriage. A couple of years later Jack and Carol had a child together as well. They had mirror Wills: they each left all their property to the other, and if the other had already died the property was to be split between all of the children. Carol passed away first and Jack passed away some years later. Upon the reading of his Will, the (now adult) children discovered that he had changed his Will and had left the family home and everything in it to his one child with Carol.

Of course Jack was entitled to change his Will at any time, and there are innumerable reasons why he may have done so. Carol’s two children from her previous marriage may be able to challenge the Will, but who knows what the outcome would be?

Something as important as providing for your family after your death should not be left to chance. There are plenty of options available in the planning of your estate and you owe it to your whole family to make the best arrangements possible.

## Just Do It – Taking The First Step

A relationship where each partner has their own children, and sometimes children together as well, can be a complex scenario. It can be difficult to reach an arrangement that provides fairly for everyone involved. The key is to take that first step of contacting your lawyer to discuss your situation. You may well be surprised how everything can fall into place with expert advice.

Lawyers have a “toolkit” of options to reach into when it comes to structuring family property arrangements. Your lawyer will be able to listen to your concerns, discuss the options available to you and recommend something that best suits your family’s particular circumstances.

## The Blended Family “Toolkit”

Every family is unique and will need a solution which is tailor-made to their particular circumstances. Before your lawyer can recommend the right “tool” for the job you will need to discuss things like:

- Is there a mix of young and adult children involved?
- Do you and your partner own a house? What about other assets?
- Does either partner own any separate property?
- Are there any Trusts involved?

Some of the options that may be available to you include:

- Setting up a Family Trust;
- Splitting ownership of Life Insurance policies between your partner and a child;
- Granting rights to occupy properties for a period of time;
- Giving a “life interest” in your assets to your partner with a “gift over” to your children once your partner passes on;
- Making outright gifts to specific children.

## Revisiting the arrangements

Any arrangements put in place should be reviewed regularly and updated when there is a significant change in circumstance. We can meet with you to discuss your individual circumstances and help you to put in place measures that best suit your situation. This will allow you to rest easy in the knowledge that your wishes are clearly set out and your family is taken care of.



HOLLY DRUMMOND

## RAINEY COLLINS LAWYERS

Tel (04) 473 6850    Level 23 Vodafone on the Quay  
Fax (04) 473 9304    157 Lambton Quay,  
DX SP20010    PO Box 689  
www.raineycollins.co.nz    Wellington 6140

## Receive future editions of In Brief

If you are not on our mailing list and would like to receive future editions of In Brief, phone Maureen on 04 473 6850 or email [mharris@raineycollins.co.nz](mailto:mharris@raineycollins.co.nz)  
You can unsubscribe in the same way if you do not want to receive future copies.

