in brief from

RAINEY COLLINS LAWYERS

BUSINESS ISSUES

WINTER 2009

WELCOME

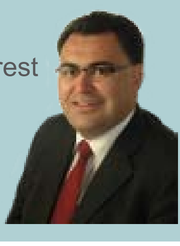
To the Winter edition of Rainey Collins In Brief Business Issues newsletter.

In this edition we focus on leases, business tips, getting paid promptly by debtors, business seminars, health and safety, family trusts and succession planning for your business.

These articles and others are available on our website **www.raineycollins.co.nz.** You can download them or send them to others.

I trust you find the information of interest and use.

James Johnston
Chairman



JAMES JOHNSTON

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Business Owners, Don't Let Your Lease Catch You Out

The lease of a popular Wellington café recently ran out after eighteen years. There were no current rights to renew in the lease.

Try as they might, the café owners could not persuade the owner to give them a new lease and were devastated, as under the lease, they only had one month to pack up after many years.

All terms of a lease are important, however we suggest that before entering into a lease agreement, there are several important terms that business owners need to double check, to avoid being caught out. Some include:

1. The term of the lease. Is the length of the lease (including renewals) sufficient for the business?
2. Exactly how any renewal options must be exercised … it's tricky and technical and easy to get wrong. We know of a number of cases where a tenant has failed to properly exercise a renewal and then had to apply to the High Court to make the landlord grant the renewal. The Court has a discretion as to whether the renewal should be granted and there are usually costs awarded against the tenant even if the renewal is granted.
3. How the rent will be paid and how often it will be reviewed. If you are taking over an existing lease, note carefully the date of the last rent review and the date the next one is to be done. If you are buying a business based on returns, you need to factor in potential rent increases.
4. When and how the lease can be renewed. If you are counting on being able to extend the lease, you need to ensure that there are renewals in the lease that enable you to do that. Remember, there is no obligation on you as the tenant to take up renewals if your business plan changes.
5. What your "make good" obligations are. These are your obligations to return the premises to its original state at the end of your lease and can cause issues and significant cost if you don't think about them in advance.

   After eighteen years (as in the example given) will you and the landlord even remember what the premises looked like when the lease began? This can be a challenge after 3 or 6 years. It's a good idea to know what your obligations are from the outset to avoid difficulties over who owns what and whether you need to remove certain objects such as partitions, or in the case of a café, fixed seating booths. It is also important to clearly establish ownership of the fit out at the start of the lease and to record that as part of the lease.
6. Whether you are getting your money's worth. A big trap is people paying for far more space than they really need. If a space suits you but there is too much of it, talk to the landlord about reducing the leased space or subletting. In leases where the rent is calculated on the net useable area ... have it measured by your own expert … it could save you a lot of rent over many years.

We would always recommend that before entering a lease or agreement to lease you seek legal advice.

FINTAN DEVINE

Business Tips

In the current climate, we thought it useful to spell out some practical tips for businesses:

Tip 1 – Collecting Outstanding Debts

People are taking longer to pay or simply not paying at all. In our experience, the best way to chase a problem debtor is to identify and deal with them promptly. In the event that you need assistance, our dedicated debt recovery team are experts at getting payment and still preserving the professional customer relationship. [See article on this page]

Tip 2 – Should I Sell My Business Or Wait For An Upturn?

Every decision to sell depends upon the circumstances and knowing what your objectives are. The current climate has created a number of opportunities and the tip is to discuss the position with your key advisors as you may be able to take up those opportunities.

Tip 3 – Retaining Title To Your Goods

Make sure your business Terms of Trade are up-to-date and comply with the current law. Simply having a retention of title clause in your Terms without registering a security interest is no longer enough to guarantee that you will retain title to your unpaid goods. Registration gives priority over other unregistered or later registered creditors.

Get Paid Promptly – Key Tips For Recovering Debt Quickly In A Recession

As a business owner in these economic times, can you really afford to write-off unpaid debts to your business? Unfortunately, we have seen many small business owners write-off thousands of dollars of unpaid debt. Even worse, much of the time, these write offs occur unnecessarily. Don't let this happen to you! Use these six key tips for recovering debt quickly in a recession.

1. Write your expectations down up front

Having terms of a trade in writing at the outset, and making sure your customer has a copy, can help avoid having to chase a debtor at all. When parties are aware of their obligations, and the likely action to be taken if they are not fulfilled, they will often make sure they act accordingly.

2. Choose your clients

Be aware that it is worthwhile "screening" new clients to make sure they can pay. Do not be a victim of those unreliable, late paying, customers that often shop around for an easy target in hard times. A client who argues about price or payment requirements at the start of a job (or following a prior job) should put you on alert that payment could become an issue. Particular care should be taken with these clients. In some cases, taking the client on could cost your business in the long term.

3. Invoice and follow up promptly

When a transaction is finished, render an invoice immediately, which clearly states when payment is required. When the debt becomes outstanding, put the telephone to good use to follow up outstanding debts early on. In our experience, letters and other written reminders are not as effective as the telephone.

4. Regular follow-up – Persistence can pay off

Once a debt goes one business day past your payment terms - do something about it. Call the customer immediately and, if appropriate, follow your call with a letter of demand detailing the amount owing and indicating a response timeframe. Keep the timeframe short and again, if appropriate, indicate you are serious by stating that after the lapse of the timeframe you will begin legal action to recover the debt.

5. Put the client on stop credit … make transactions C.O.D.

Consider whether or not you should put the client on stop credit, especially if you cannot make contact with them regarding payment of their account or if you believe the customer is deliberately being evasive. While most of your clients will pay you promptly and without issue, you are sure to get your share of ratbags who drag out payment for months, or worse, disappear without paying you at all.

6. Engage a professional

If there is still no response, place the matter in the hands of your debt collection professionals. We recently wrote to a debtor company for a client who had a debt that was six months outstanding. Within only four days we had secured full payment. It shows that while early action is usually best it's never too late to chase that money.

Maintaining a healthy cash flow during these hard times could be the key to ensuring your business makes it through. This is not a time to be lacklustre about debtors. Collecting old debts may be the key to getting you kick-started again. If confrontation is something you usually avoid, now is the time to get some help. It may be the best investment decision you ever make for your business.

ALAN KNOWSLEY

Business Seminars

Free business seminars on Buying and Selling a Business, Asset Protection, Business Succession and Contracting are held regularly. See www.raineycollins.co.nz for details and to register.

Health And Safety Breaches Fines Sky Rocketing … Employer Fined $200,000!

The Courts are taking a new hard-line approach against employers who breach health and safety laws. In several recent cases the Courts have increased by 200 percent the amount of fines and reparation ordered against employers who breach the Act.

In a recent case a company has been ordered to pay nearly $200,000 in fines and reparation for workplace safety breaches that resulted in an employee losing his legs. The punishment compares to a similar accident that occurred in 2006, where the Courts only ordered $40,000 in fines and reparation against a different employer.

The increase is in line with other recent cases such as the fine imposed on a construction company which increased from $5,000 to $50,000 following an accident in which an employee of the contractor was injured by falling off some wooden scaffolding at a building site.

A food manufacturer also had a fine increased from $15,000 to $40,000 in relation to an accident in which an employee's arm became caught in the mechanism of a conveyor belt.

Maximum fines were increased substantially back in 2003, however in practice the Courts did not impose any significant increase in fines, until recently.

The maximum fine for serious harm, where it was known that serious harm was reasonably likely to occur, is $50,000 and the maximum fine for some other offences can be as high as $250,000.

If you are an employer or an employee and would like to discuss your obligations and rights under the Health and Safety in Employment Act, please call on our free phone 0800 733 424 for a relaxed and confidential initial chat.

FIONA MCGEORGE

A Family Trust And Your Business

Contrary to popular belief, Trusts have been around for centuries and a Family Trust is still one of the best ways of protecting your hard earned assets. If you are in business, there are times when you run the risk of losing all of your assets. It does not matter whether you have a small service business, practise a profession, or trade or sell products. Money, property and investments belonging to a Family Trust are held separately from those for whom the Trust has been established (the beneficiaries).

A key benefit is of course protection from creditors if you are exposed to financial risk because of the nature of your business.

Family Trusts also have the benefits of giving additional protection including:

- Relationship Breakdowns – Trust assets are not "relationship property" available for equal division between spouses or de facto partners if they separate. While there can be exceptions to this, a Trust is still a very powerful tool for protecting property from the consequences of a relationship breakdown.
- Protecting Children – Assets that you place into a Trust for children are absolutely protected from claims by a child's partner, whether de facto or married. As well, a Trust can protect spendthrift children from themselves by preventing them from getting their hands onto capital that they might otherwise waste.
- Challenges To A Will – Assets put into a Trust where the value has been fully disposed of by a gifting regime are no longer the personal property of the testator of a Will. As a result, these assets are as a rule protected both from family protection claims and from changes to the testator's wishes being implemented after their death.
- Rest Home Care – If assets have been held in a Trust for a sufficient amount of time, they are unlikely to have to be used for rest home care and so remain available for the family.

If you think you might need the protection offered by a Trust, or wish to investigate establishing one, you should talk to a lawyer who is experienced in Trust law.

CLAIRE COE

Succession Planning … Your Gateway To Success!

Hands up those who want to think about ill health, financial trouble or having to end their involvement with the business that they love! If you think succession planning is all about these gloomy things, you're unfortunately right! But there is a silver lining behind the grey cloud. Succession planning is empowering. When done correctly it will provide you with the means to reap the rewards of all your hard work.

Succession – You've probably heard of it before and have possibly been told by your accountant or other professional advisor about planning for it, but have you actually done it? For many busy business people the answer is usually "NO".

The Meaning

There's no hiding the word "success" in "succession". Why is this significant? Put simply, succession is "the successful exit from your business". What does "success" mean in this context? We think of it in terms of being able to exit on your own terms. This is incredibly important after you've expended huge amounts of time and energy, and no doubt money, on the development of your business.

The Reluctance

It is an exit strategy, and so it is the next logical step after successfully navigating a business through the various stages of its life-cycle including start-up, development and growth. However despite planning for all of the front-end business steps, more often than not, business owners do not consider succession. This is probably for a number of reasons:

- A natural reluctance to think about planning for retirement, death, etc;
- An inbuilt reluctance to let go of something you have built up and nurtured by handing it over to someone else;
- A failure to recognise the true value locked up in the business and how to realise that value, focusing instead on annual cash flow;
- Insufficient time to look at what succession really means and how to go about planning for it.

Despite these reasons, it is inevitable that there will come a time when you will want or need to leave your business for good. Circumstances can change quickly and something might force you to exit the business, for example burn-out, financial difficulties, ill-health, or even death.

Planning succession early allows even a forced exit to be on your own terms.

The Plan

There is no perfect template or model for a succession plan, because each plan will vary. Having said this, there are three basic steps to creating a succession plan:

- Step 1: evaluate the business assets;
- Step 2: evaluate the management of the business; and
- Step 3: collate the information from Steps 1 and 2 into a written plan.

The Review

A crucial part of ensuring the "success" of your succession plan is to subject it to constant review. This is so you can update it, if necessary, to reflect both the currency of the forecast assumptions and also changes in the wider market.

Your plan should also be reviewed if something unexpected happens, such as relationship upheaval (personal or business) or the loss of a key customer or supplier, or if your own succession objectives change.

The End

Succession is generally all about ending your involvement in your business. As a result it is very focused on what you are going to end up with. It makes sense then to think, as early as possible in the life of your business, about what you want out of your business.

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