



Christmas office hours

Evans Bailey will close for Christmas at 4pm on Thursday 21 December 2006 and re-open at 8.30am Monday 8 January 2007

Wishing you all a Merry Christmas and safe and happy holidays

Would you like to have Legalease emailed to you?

If so, please e-mail us at: lawyers@evansbailey.co.nz and we will e-mail *Legalease* to you at the reply address when each edition is published

Buying a business

You have had enough of working as an employee, and wish to take advantage of the benefits of owning your own business. You are about to make an offer to the vendor of a business and to instruct your lawyer to deal with the matter on your behalf. What happens next? Some of the issues that need to be considered are discussed below:

Share purchase or asset purchase?

There are two ways of buying a business. The first is to buy the shares in the company which owns the business. The second is to buy the assets of the business. These include the plant, equipment and the goodwill.

As buying shares in a company can also mean acquiring that company's debts and liabilities, the second method is the most commonly used in the purchase of a business. By acquiring the assets, you have the freedom to incorporate your own company to become the owner of the business, thereby enabling you to start with a "clean slate".

Due Diligence

"Due Diligence" describes the process of investigating the business and ascertaining whether it is in fact as the vendor has represented it. The vendor should provide access to the company's books and accounting records. You should then undertake an investigation (preferably with your accountant) to satisfy yourself that the company is profitable and that any projections as to earnings which may have been provided by the vendor are realistic and achievable.

The due diligence process can be carried out either before or after an agreement for sale and purchase is signed. Where it is to be carried out after an agreement has been signed, the agreement will need to include a "due diligence" clause which provides, amongst other things, that if the outcome of your investigation is unsatisfactory, for whatever reason, then you can cancel the agreement.

Warranties

"Warranties" are representations made by the vendor about the business. The sale and purchase agreement will include standard warranties but if the vendor has made specific representations about the business that have played a major part in your decision to buy it, then the agreement should specifically record these. It is vital to communicate such matters to your lawyer who can then ensure any such representations are included in the agreement.

Lease

If the business is being operated on leased premises, then the lease will need to be transferred to you or your company. This is known as an "assignment of lease". As part of your due diligence investigation, you should check the terms of the lease carefully to ensure they are acceptable. In particular, beware of a lease that only has a short term to run and has no right of renewal. You may find the landlord has other plans for the building and you will be unexpectedly faced with expensive relocation costs.

The above is an outline only of some of the issues that arise when purchasing a business. You should seek legal advice in relation to those issues which are particularly relevant to your transaction.

Building Consents – what to look for

When purchasing a property, it pays to investigate the history of the buildings on the land. If there are no records of building consents having been issued by the council, then at best the buildings may have been constructed without council approval and may not comply with the building code. At worst, they may be dangerous for use and occupation.



Background to the building consent process

The Building Act 2004 ("the Act") governs all building works in New Zealand. It states that such work must comply with the building code. The code is made up of regulations which prescribe the functional requirements for buildings and the performance criteria they must comply with for their intended use.

Before undertaking building work, the owner of the property needs to obtain approval from a building consent authority. In most cases, the building consent authority is the local council. Council approval for building work is known as a "building consent".

Once construction is complete, the council will inspect the work to ensure compliance with the conditions of the building consent and the building code. If the council approves the work, then it issues a code compliance certificate.

Under the Act, it is an offence to carry out any work that is not in accordance with the terms of the building consent. Also, until such time as a code compliance certificate has been issued, it is an offence to occupy the building.

What happens when building work has been done without a building consent?

Building consents cannot be issued retrospectively. However, if the work has been completed and a building consent was required but not obtained, then an application to the council for a "certificate of acceptance" may be made. This involves the council inspecting the work to determine if it complies with the building code. If it does, then it may issue a certificate of acceptance. However, such a certificate cannot be issued if the building work was carried out prior to 1992 as the building code was not in existence prior to that date.

It is not uncommon to come across properties where the buildings on the land have been constructed with a building permit or consent but the work has either never been completed, or if it has, the council has not approved it. If the work was carried out prior to 1 January 1993 and provided that the building is not "dangerous" or "unsanitary" as defined in the Act, then the council cannot take any action to require the owner to complete the work in accordance with the original building permit.

LIM reports

The best way to check that there are no unauthorised buildings on a property is to obtain a Land Information Memorandum (known as a "LIM report") before you buy it. This includes a summary of all records held by the council in relation to the property including details of building permits, consents, code compliance certificates and certificates of acceptance.

It is worth remembering that although the absence of permits or consents may not pose a problem while you live in the property, it may well become a problem once you decide to sell it. For that reason, a LIM report is money well spent. It could save you a great deal more at a later date. ●

Enduring Powers of Attorney and the Family Court

In the last newsletter we focused on the benefits of enduring Powers of Attorney. In doing so we emphasized the need for the Donor to have complete trust in the person being appointed Attorney.

In 2001 the Law Commission produced a report entitled "Misuse of Powers of Attorney". The Commission suggested a law change may be required given the lack of accountability for Attorneys appointed under

the legislation. The report notes that although the Family Court has power to intervene, there is often an understandable reluctance to instigate a process which will result in the attorney being brought before the Court, particularly as that person is more often than not a family member.

Whilst the current legislation prevails, it is important to publicise the Family Court's role.

Powers of the Family Court

An Attorney can apply to the Court for directions. Alternatively, other persons including the Donor, who are disaffected by the Attorney's decision, may apply to have a decision reviewed.

Usually it is a member of the Donor's family, other than the Attorney, who makes the application. Although such applications are not common, when they do occur they often raise issues as to whether the Donor had capacity when signing the documentation or alternatively whether a decision has been made in the best interests of the Donor. This occurs usually where other family members believe the Attorney is not an appropriate person to take on the role or has made an inappropriate decision, often to benefit themselves rather than the Donor.

Such applications will usually pitch family members against family members. The end result, understandably, is an inclination by the Court to revoke the Power of Attorney and replace the Attorney with a professional Trust company.

This legal procedure can be costly, difficult and emotionally charged for all involved. Most Donors would not wish to intentionally place their family in such a situation. It is therefore all the more important to give careful consideration to the person you appoint as your Attorney. ●

Dealing with a deceased person's estate

People are often unsure of the process to be followed when dealing with a deceased's estate. Where a deceased has not left a will, the administration of an estate can be complex and costly. However, this article provides a brief guideline of the process where the deceased has left a will.

1. The will

The original will should be held by the firm of solicitors who prepared it. The first step is to contact the solicitor concerned and advise him or her of the death. The will can then be checked to ascertain who has been appointed as the executor of the will and the identity of those named as beneficiaries. The will may contain special directions as to funeral arrangements.

2. Apply for probate

The executor must appoint a solicitor to act for the estate who will then make an application to the High Court for probate. Probate is the process whereby the Court determines the authenticity of the will and confirms the authority of the executor named in the will to administer the estate. Generally, it is not necessary to apply for probate where the assets of the estate are less than \$10,000.

The application for probate must be supported by an affidavit sworn by the executor who must swear that he or she is the person named as executor in the will. He or she must also provide evidence of the death of the deceased (such as producing a copy of the death certificate) and confirm their belief as to the validity of the will. In addition, the executor must undertake that he or she will carry out the instructions contained in the will in accordance with the law.

LEGAL *lease*

3. Administration of the deceased's estate.

Once probate has been granted, the executor can proceed to administer the estate. The executor's duties include:

- Making arrangements for the burial or cremation of the deceased;
- Preparing an inventory of the deceased's assets;
- Paying the funeral expenses and any other debts owed by the deceased from the assets of the estate;
- Paying any gifts or legacies to beneficiaries named in the will;
- Distributing the remainder of the estate to the beneficiaries; and
- Keeping a set of accounts recording all financial transactions in relation to the estate.

The terms of every will differ. For example, there may be provision for a life interest in a particular asset to be granted to a person during that person's lifetime. This means that the executor will retain ownership of the asset until the person who has the benefit of the life interest has died. At that point the asset then becomes part of the "residuary estate" and can be distributed to the remaining beneficiaries.

Conclusion

The administration of an estate may take some months depending on the number and the nature of the assets involved. The solicitor who has been instructed to administer the estate will be able to provide a more specific timeframe. ●

Shareholders' agreement

A shareholders' agreement is one made between the shareholders of a company which deals with issues arising out of ownership and management of the company. The absence of such an agreement can lead to serious problems and may result in the company's failure.

Strictly speaking, a company's written constitution regulates the relationship between the shareholders and between the shareholders and the company. However, a constitution is a document which is available for public inspection, whereas a shareholders' agreement is normally confidential.

Consideration should be given to having a shareholders' agreement in the case of any company where there is more than one shareholder. This is especially so where the shareholders are family members and the potential for disagreement can sometimes be greater. The purpose of the agreement is to ensure that decisions are taken by consensus and discussion.

Issues covered in a Shareholders' Agreement

The most important benefit of the agreement is that it provides a mechanism for resolving disputes between shareholders, whether by mediation, arbitration or some other dispute resolution processes.

Matters covered in a shareholders' agreement may also include the following:

- Dividend payment policy.
- Management and control of the company.
- Allocation of key roles and responsibility between the shareholders.
- Nature and amount of initial financial contributions to the company.
- A procedure for dealing with the breakdown of the relationship between the shareholders.
- The circumstances in which shareholders can exit the company.

Shareholder "deadlocks"

A shareholders' agreement is particularly useful when dealing with a "deadlock" situation with shareholders. Where the shares are owned in equal proportions by the shareholders, a disagreement will create

a "deadlock" which means the company is effectively prevented from making decisions. A shareholders' agreement can include a mechanism to ensure this situation does not occur.

A shareholders' agreement can also deal with the situation when a shareholder dies or become mentally or physically incapacitated. This may mean the remaining shareholders will have to work with a family member of that shareholder and who may have little or no knowledge of the company and its business. A shareholders' agreement can deal with this by allowing the shares to be sold at a fair price to the remaining shareholders by the family member so that the company can continue to trade without disruption.

Summary

If you do not carefully consider and provide for situations which may arise between the shareholders, then you could be risking serious disruption and even the ultimate demise of the company. A shareholders' agreement can avoid this and your solicitor will be able to advise you on the terms of one which best suits your particular requirements. ●

Update on Personal Property Securities Act 1999

The Personal Property Securities Act 1999 ("PPSA") came into force on 1 May 2002.

What is the PPSA?

The PPSA is legislation that reformed the law relating to security interests. A "security interest" means an interest created in personal property by a lending or leasing transaction.

In the Act, personal property is defined as all property other than land. All security interests taken in personal property are subject to the PPSA. Generally, security interests need to be registered to ensure that they have priority over other security interests on a particular piece of personal property. While registration is not compulsory under the PPSA, it does ensure priority over subsequently registered security interests.

Law Changes under the PPSA

The PPSA replaced the Chattels Transfer Act 1924, the Companies (Registration of Charges) Act 1993 and the Motor Vehicles Securities Act 1989. Some security interests that were not able to be registered under the previous law are now subject to the PPSA. Examples include hire purchase agreements, retention of title clauses in supply agreements, and finance and operating leases for a term of more than one year.

Personal Property Securities Register

At the heart of the legislation is a register called the Personal Property Securities Register (PPSR) which commenced operation on 1 May 2002. The PPSR is a form of electronic notice board recording specific details of security interests held in respect of personal property. Anyone can access the register online at www.ppsr.govt.nz. It is accessible 24 hours a day, 7 days a week.

A security interest is registered with the PPSR by means of a standard financing statement. The term "financing statement" refers to the data which is to be entered on the register. Registering a financing statement with the PPSR enables a security interest to be "perfected" which is

LEGAL *lease*

critical to protecting the priority of security interests. The general rule under the PPSA is that the first to register a financing statement has priority.

Searching the PPSR

The register allows anyone to check if an individual or company has debts by entering the name and date of birth or address of the relevant person, or by specific collateral details such as vehicle registration, VIN and chassis numbers. However, it is illegal to carry out searches of the register without good reason. Any person attempting to search it out of interest only could breach the Privacy Act. A degree of protection is provided by the requirement for people wishing to search the register being required to first register their details with the Companies Office in order to obtain a user ID and password.

Renewals

A security interest will lapse after five years. Consequently, as the fifth anniversary of the PPSR looms on 1 May 2007, approximately 250,000 security interests will be due for renewal. There will be no reminders sent regarding these. Registrations can be renewed for a further five year (or lesser specified) period for a fee of \$5.00 (GST included). The renewal will need to be completed before the original registration expires. The date from which the new registration period begins is the date of renewal, not the original expiry date.

If a secured party fails to renew a security interest before the registration period expires, the registration lapses and priority on the collateral may have been lost. If you are the holder of a security interest which was registered around the time the Act came into force, then now is a good time to check whether it will need to be renewed. ●

Legal definitions

Letters and documents prepared by your lawyer may contain words which are generally only used by the legal profession.

These words are often referred to as "legalese". In this issue, we explain some of the legal terms which you will find in an agreement for the sale and purchase of land, and legal terms that relate to Wills and Estates.

Fee simple

This term is used interchangeably with the word "freehold". A fee simple estate in land continues until such time as the owner dies without leaving heirs in which case the land reverts to the Crown. In practice this happens very rarely as most properties will pass either by will, or if the owner dies without leaving a will, then under the terms of the Administration Act 1969.

Leasehold

A leasehold interest in land is created under the terms of a lease. When the lease comes to an end, then the land reverts to the owner of the freehold and the leasehold state is "merged" with the freehold.

Crosslease title

This refers to a "composite title" which combines freehold and leasehold interests. It is made up of an undefined share in the freehold of the land and a defined leasehold interest in respect of the buildings on the land.

Unit title

Unit titles (or Stratum titles), were created by the Unit Titles Act 1972 to enable individual ownership of units within a larger building complex.

Land covenants

These refer to restrictions regarding the use of land. They are particularly

common for new residential subdivisions where the developer wishes to ensure a high quality of development and will include such matters as specifications for the materials to be used in the construction of buildings on the land.

Wills and Estates:

Codicil

A document (or additional clause), which alters an already executed will. A codicil is executed in the same way as a will.

Testator/testatrix

The name given to the person who makes a will.

Executor

The person appointed in the will by the testator to administer the testator's estate.

Trustee

A person or trustee company who is directed to hold the assets of the estate in trust for beneficiaries or specific purposes under the will (usually the executor).

Intestate: Where a person dies without leaving a will.

Probate

A High Court decree stating that a will has been proved and that the executor(s) appointed have the authority to act in the administration of the estate.

Letters of administration

A High Court decree which authorises an administrator to administer a deceased person's estate where the deceased did not leave a will. ●



7th Floor, NZI Building, Garden Place, Hamilton

PO Box 19-149, Hamilton

Telephone 07 838 2459

Fax 07 838 2454

Email: lawyers@evansbailey.co.nz

Partners: Ron Evans and Andrew Fletcher

Consultants: Gerald Bailey and John McLeay

Associate: Catherine Starr

Registered Legal Executive: Donna Parrish

All information in this newsletter is to the best of the author's knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter.

It is recommended that clients should consult a senior representative of the firm before acting upon this information.