



Evans Bailey
L A W Y E R S



C L I E N T N E W S L E T T E R



Christmas office hours

Evans Bailey will close for Christmas on Thursday 23 December 2004 and re-open Monday 10 January 2005

Wishing you all a Merry Christmas and safe and happy holidays



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Buying at auction

There is an increasing trend today for properties to be bought and sold at auction. If you are considering buying at auction for the first time, be aware that there are some matters which differ from the usual 'offer on paper' approach and which require your attention beforehand.

Register your interest

Firstly, you would do well to advise the real estate agent of your interest. Then, if the vendors are considering a pre-auction offer, the agent will be able to contact you and, if necessary, help you to submit your own offer. Reference to a sale by auction does not prevent the vendors from selling prior to the auction date.

Unconditional offer

Secondly, all offers at auction must be unconditional. If you require a mortgage to purchase the property you must arrange finance beforehand. Generally you will be required to pay a deposit of 10% of the purchase price on the day of the auction.

Because you cannot make the agreement conditional on any matters, it is advisable to ask your lawyer to read and approve the auction contract before the auction. The contract contains the terms and conditions of the sale, legal description of the property and list of chattels. If you wish to change any of the details, e.g. the amount of the deposit or the settlement date, you will need approval from the vendors prior to the auction.

If you want to undertake any further investigations of the property you must arrange for those to be completed beforehand. Obtain a LIM report or a building inspection before the day of the auction.

Know the value and the process

Make sure you have a realistic idea of the value of the property and the amount you are prepared to pay for it. You may need to look at other properties of similar value, or if in any doubt, obtain a valuation from a valuer.

Talk to the real estate agent so that you know what the auction process involves and, if necessary, enlist his or her assistance on the day. You may like to attend other auctions beforehand to familiarise yourself with the process.

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Vendor bidding

Finally, be aware that if the property has a reserve price, the vendors may reserve the right to bid themselves. That right is generally assigned to the auctioneer and must be disclosed at the start of the auction.

The High Court last year considered a case where the auctioneer appeared to be taking bids from different parts of the room when in fact he was bidding himself on behalf of the vendor. On receiving a complaint, the Commerce Commission alleged that the auctioneer had engaged in conduct that was deceptive or misleading.

Although there was insufficient evidence in that case to uphold the claim, the Court of Appeal held that the auction must be conducted in a manner which does not mislead or deceive. It would be misleading of an auctioneer to create the illusion of real competition where there is none, and it must be made clear when vendor bids are being made.

So, if you have done your homework and consulted the relevant professionals beforehand, good luck with your bidding! ●

Terms of trade – are yours up to scratch?

If you are in business and have occasion to extend credit to your customers, are your terms of trade adequate to ensure the effective and efficient collection of unpaid accounts?

Your terms of trade need to be effective and work for you. Too often terms of trade are ambiguous and do not adequately provide for personal guarantees, collection costs and security over items sold. If you are wondering whether or not your terms of trade are adequate, here are a few questions for you to consider.

Compliance with the PPSR

The enactment of the Personal Property Securities Act 1999 ("Act") changed the provisions for taking security over personal property as a form of securing payment. Do your terms of trade reflect those changes to comply with the Act? Are you aware that retention of title clauses are no longer effective?

Interest on unpaid amounts

Can you charge interest on unpaid accounts? This must be provided for in your terms of trade. Otherwise you are limited to the statutory rate imposed by the Court, which can only be charged after you have obtained a judgment against your customer.

Personal guarantees

Do you have provision for a personal guarantee? Personal guarantees must be in writing, be clear and unambiguous and executed in a way that ensures that the person signing realises that they are to be held personally liable to pay you if the customer or borrower does not. If the guarantee is not clear or not properly executed it may not be enforceable, and you may lose the last opportunity you have to get paid, especially if your customer is a company that has gone into liquidation or has otherwise ceased trading.

Recovering costs

Can you recover your actual costs (including lawyer's fees) of pursuing someone that does not pay? Again you can, but only if you provide for it in your terms of trade. Otherwise you are limited to the amounts set by statute for "costs" in Court proceedings. Those "costs" are low and do not reflect the actual costs incurred in instructing a lawyer to assist in pursuing a reluctant payer.

Its worth the effort of getting them right

Of course, terms of trade cannot guarantee that you will in fact get paid. However, the better they are the more likely you are to be able to effectively obtain payment of not only the amount owing to you, but the costs of doing so, as well as interest on the amount outstanding. You may also improve your chances of getting paid if the guarantee provision in your terms of trade is effective and enforceable, as a customer may think twice about not paying.

Your lawyer is the best person to advise you on what should be in your terms of trade and how to best ensure that the terms you trade on are yours, and not your customers – but that's another story! ●

Home-made wills – a cheap option?

In a recent High Court case in Hamilton the difficulties and pitfalls of drafting and executing your own Will were highlighted when the Court heard of a person that created and signed two Wills on the same day.

Home Made Wills

Mr Madsen had obtained a 'home made will kit' and used it to record his testamentary intentions. The problem arose after he died, in March 2001, when it was discovered that he had executed two documents both of which purported to be his last Will and Testament.

The two documents were dated "8th December 2000" and "8th 2000" respectively. Both documents were signed by the same witnesses, and the evidence presented to the Court established that the Wills were signed on the same day, but no one could remember which one had been signed first. There was no question that Mr Madsen had testamentary capacity to sign both documents.

The difficulty arose when the trustees tried to obtain probate for the Wills. It required a formal application to the High Court and required all people affected by the Wills, and who might have some claim to the estate, being served with the proceedings and being required to instruct solicitors to represent them.

Fortunately, it was accepted by all concerned that both documents should be granted probate as the Wills were essentially of the same effect, with one Will being slightly more detailed version of the other. In those circumstances, where there was essentially no dispute over the Wills, the Court was able to make orders that suited all parties.

If there had have been a dispute, or if the contents of the Wills were significantly different to each other the case would not have been so straight forward.

In any event the matter was not resolved until it went to Court in November 2003, some 18 months after Mr Madsen's death.

The Court awarded costs of \$3,337.50 to each of the two groups of beneficiaries, both of whom were represented by solicitors. Those costs, as well as those of the solicitors for the estate, and the disbursements incurred in the proceedings, were all paid from the estate. The costs awarded were undoubtedly used up in legal fees.

Potential Problems

A home made will kit may be cheaper to prepare than a will prepared by your lawyer, but this case clearly demonstrates that mistakes may cost a lot more than the savings made. In addition there are dangers in preparing your own Will. If it is incorrectly signed or witnessed, it will not be valid, and in preparing your own Will you run the risk that it will not adequately deal with the distribution of your assets, and the beneficiaries will need to resort to costly legal proceedings.

The law relating to Wills and their administration is very specific, and strictly adhered to, and the Court is very conservative when dealing with estate matters as its only guidance is the written wishes of the person who has now died.

If those wishes are ambiguous, or there is a problem with the execution of the will, the beneficiaries will suffer due to costs and delays as a result. ●

Why is due diligence important when buying a business?

"Due diligence" is a phrase used to describe a process of business investigations. A purchaser will often insert a due diligence clause as a condition to be satisfied in an agreement to purchase a business or shares in a company which operates that business.

Why do we have due diligence?

The main objective of due diligence is to extract information about the important areas of the business to be purchased. Through the process due diligence provides the purchaser with greater certainty as to the likely future performance and earnings of the target business.

Engaging the appropriate experts (i.e. lawyers, accountants, financiers and others) an investigation is undertaken into the contracts, financial statements, supply arrangements and other information related to that business.

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What will you find?

Due diligence can identify a purchaser's exposure to third parties in the event of non-compliance by the vendor under various regulations and legislation affecting the business. It can identify those areas of the business which are vulnerable in terms of contractual arrangements with either suppliers or customers.

Due diligence may result in:

- the purchase price being affirmed or re-negotiated;
- additional conditions or covenants being added to the agreement;
- better allocation of the purchase price, for example, minimising the value of the personal goodwill in the business and increasing the value of plant, equipment and stock in trade in order to maximise future taxation benefits.

In some cases, due diligence may result in the cancellation of the contract.

Risk Avoidance

No matter how thorough the due diligence process, risks still exist in purchasing a business, and enforceable warranties and indemnities

from the vendor need to be included in the agreement for sale and purchase to protect the purchaser. However, these warranties and indemnities have to be enforced for the purchaser to receive the benefit of them.

A vendor seldom rolls over and pays up on a failed warranty. A purchaser may also find the vendor has disappeared, or spent the proceeds of the sale by the time the purchaser realises the warranties are needed.

The purchaser also has to bear the time and cost burden of that enforcement. Hence the need to obtain as much information as possible through the due diligence process before proceeding with the purchase.

Our thoughts

If you intend to purchase a business in the future, you should ensure that, as a minimum, your lawyer and accountant are involved in the due diligence process. Ideally, both these professional advisers should be involved as early as possible so that a clear and coordinated approach to the due diligence can be adopted. ●



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