

In brief from
RAINEY COLLINS
LAWYERS
BUSINESS ISSUES

Autumn 2011

WELCOME

... to the Autumn 2011 edition of Rainey Collins Business In Brief newsletter.

In this edition we provide tips for buying a business and the need to be careful of apparent bargains, and information relating to the rights of retailers when customers return goods, various types of Employment Agreements for your business, and Terms of Trade. We also remind you about the LAQC changes.

I trust you find the information of interest and value.



JAMES JOHNSTON

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Buying a business? Be careful of apparent bargains...

There are some great bargains in this market if you are looking to buy an existing business but purchasers need to be sure that "good buying" really is good buying. With distressed vendors or businesses that have only just survived the recession and an interesting commercial lease market, due diligence is even more important.

In this market we are finding that there are sometimes hidden factors that are turning apparent great bargains into merely fair value deals, or occasionally, into nightmares.

Some recent examples we've seen include:

- A business vendor sold his business, but couldn't hold off creditors until settlement, the company went into liquidation, the agreement was terminated, the viability of the business was threatened and the purchaser was left to negotiate with the liquidator;
- Rent on premises was reviewed before the Recession hit. Unfortunately, what was good rent then seems overpriced now and there is no opportunity to review it or find alternative premises. So whilst a business price may seem good, it isn't quite so attractive if the ongoing rent is over-priced;
- A business owner was struggling to pay the bills so offered the business for sale at a good price to the existing manager of the business. The manager had cash to pay two-thirds of the purchase price and the owner agreed to finance the balance over four months. It seemed like a good deal until the manager realised that the two-third cash contribution was not sufficient to release debts over the business assets.

It was too risky for the manager to purchase assets without the old debts being cleared, so the deal struck was never going to work and is currently being re-negotiated. The manager will probably not be able to meet the requirements of the new agreement so sale, if possible, on the open market is a likely outcome;

- Landlords with buildings that are not fully tenanted may have deferred maintenance which may affect customers' perceptions of the business. The business being offered for a bargain may actually be a reflection of a recent change in customer attitudes to a business being located in an otherwise empty or shabby premises;
- Some lease documents have demolition or relocation provisions in them that require landlords to re-house a tenant in other premises whilst work is being undertaken. Proceed with caution if you look to purchase a business that has such a clause in its lease. The Wellington City Council is requiring many commercial buildings in Wellington to upgrade for earthquake strengthening. Consider the effect on the business if a demolition or relocation clause is invoked during the term of what will become your lease... especially if location is particularly important to you.

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RONETTE DRUSKOVICH

Is the customer really always right?

Retailers' rights when customers want to return goods

It seems that there is plenty of information around about consumer rights. But what about your rights as a retail business owner? If a customer wants to return goods, what redress do you have? Do you get a "Fair Go"?

The Basics

In an increasingly competitive marketplace, it is becoming standard for retailers to allow customers to return goods simply because they have changed their minds. However, did you know that you do not legally have to do so (unless you have a "no questions asked" refund policy)? Legally it is only if the goods are faulty that the Consumer Guarantees Act 1993 ("the Act") requires you, as the retailer, to resolve the problem.

Faulty Goods – the 3 Rs

In the event that faulty goods are returned, a retailer can choose one of the three Rs in response: Repair, Replace, or Refund.

In the case of repair, if you cannot or do not fix the problem within a reasonable amount of time, the customer is entitled to have the goods fixed elsewhere and recover the costs from you.

If the goods cannot be fixed or the fault is substantial, the customer can demand that you take the goods back and provide a refund or replacement. Alternatively, under the Act, the customer may claim compensation for the loss of value of the goods. While uncommon, this means that you may have to pay compensation to an amount equal to the worth of the goods with the fault, compared to what the customer paid for them. You and the customer will have to agree on reasonable compensation – if you cannot agree, you may have to go to the Disputes Tribunal or Court.

Finally, the customer can also claim damages from you for any loss or damage suffered by them resulting from the failure. To claim such damages, it must be reasonably foreseeable that the loss or damage would result from that failure. For example, if a freezer stops working and causes \$200 worth of frozen food to spoil, you may have to pay \$200 to the customer, in addition to resolving the problem.

What if the product is under a manufacturer's warranty – shouldn't the customer go straight to the manufacturer?

Even if there is a manufacturer's warranty with the goods, the customer has separate rights under the Act. This means that the consumer can still choose to bring the product back to you to be fixed, even if it is also covered by a manufacturer's warranty. (Luckily though you can seek redress from the manufacturer, which is explained further below.)

What if the manufacturer's warranty has expired?

You may still have to fix the problem even if the manufacturer's warranty has expired. This is because a manufacturer's warranty only lasts for a specific period of time, while the rights under the Act last as long as a "reasonable" person would expect the goods in question to last. So, for example, it is reasonable to expect that a fridge would last longer than two years, even though it came with a two year manufacturer's warranty.

What redress do I have in relation to my supplier or manufacturer?

The Consumer Guarantees Act does not apply to goods purchased for business purposes. Therefore, the relationship between you and your supplier and/or manufacturer is determined by your supply contract (if you have one), and the Sale of Goods Act 1908. Under the latter, goods must be fit for the purpose for which they are sold, so if they are faulty or break you have recourse. However, if you have a supply contract check it carefully because there are certain provisions that your supplier can contract out of under the Sale of Goods Act 1908. If you can, negotiate the right to require them to fix issues or compensate you for having to.

As a retailer you have some onerous obligations when supplying goods, but remember that you have rights too! You do not always have to provide a refund, and you may have some recourse against your supplier and/or manufacturer if they supply you with faulty goods. We recommend you talk to your legal advisor if you are unsure about your rights and obligations.



KIRSTEN FERGUSON

Buying a business? Be careful of apparent bargains...

Continued from first page...

These lessons serve as timely reminders that purchasers should not jump into apparent good deals without first:

1. Receiving good professional advice;
2. Completing thorough investigations; and
3. If in doubt, have the business valued before you commit to a price.

Business Consultations

We offer initial business consultations to give you peace of mind for your business for a fixed investment of \$285 + GST.

To make your most important business decision today call now...0800 733 444 to make the appointment.



RONETTE DRUSKOVICH

An Employment Agreement to suit

There are different types of Employment Agreements available that are suitable for different employment structures. Here are some of the key types as well as information about trial periods.

Fixed Term Agreements

A Fixed Term Agreement is appropriate where employment will come to an end on a specific date for a specific reason or on the happening of a specific event. Fixed Term Agreements are good in terms of project work, or for providing cover while another employee is on leave. However, a key point to remember is that a Fixed Term Agreement cannot be used as a way of assessing whether the employee is suitable for the job. There has to be a genuine reason for the fixed term, such as covering for an employee on maternity leave and these types of Agreements also cannot be used when the job should be a permanent one. Fixed Term Agreements can become permanent if they are repeatedly rolled over and/or there is no longer a genuine reason for the fixed term.

Casual Agreements

The law requires Casual Agreements to be linked to casual work arrangements. This means there is no obligation on the employer to provide work, nor is there an obligation on the employee to accept work offered. This type of arrangement can get tricky if the employment becomes continual and can then be deemed to be a Permanent Agreement. One example is where an employee was given rostered shifts on an ongoing basis. This was not 'as and when required' and cost the employer over \$7,200 payable to the employee. Holiday pay can, if it is too difficult to do otherwise, be paid on an as-you-go basis but it must be separately identified in each pay.

Permanent Full or Part Time Agreements

As the name suggests these are appropriate for permanent employees on a full time or part time basis. They are the most common Employment Agreements. Most will contain a notice period stating that the employer can terminate the employment on so much notice. Do not be fooled by such a clause as an employer cannot terminate without good cause and having followed a proper process regarding performance or discipline. See our Guides to Discipline and Performance on our website or call me for copies. In contrast, an employee can give the required notice at any time without reason.

90 Day Trial Period

This is not a separate Agreement type but is a clause inserted into some Employment Agreements. The employee can be dismissed within the trial period without the ability to bring a personal grievance for dismissal. They can still claim other remedies such as discrimination on racial or religious grounds or for non payment of wages if these apply.



ALAN KNOWSLEY

Trial Period

Again this is not a type of Agreement but some Agreements specify a trial period. They can be used for a workforce of any number of employees. The employee cannot be dismissed at the end of the period unless their performance is below acceptable standards and they have been given reasonable opportunities to improve.

Independent Contractor Agreement

This is not an Employment Agreement and independent contractors do not receive all the rights that employees do under employment legislation. However, this type of scenario allows a contractor to control how and when the work is done, he or she makes a profit or loss directly and usually supplies his or her own equipment and materials. The contractor is responsible for payment of their own taxes, ACC and insurances. Independent Contractor Agreements must be carefully worded to avoid being held by the Courts to be Employment Agreements in disguise. The Courts will look at the degree of control the "employer" has over the "employee" such as a requirement to be at work between specific hours, perform specific duties and receive an hourly wage.

Special rules apply to film industry workers where the contract stipulation that the person is an independent contractor is determinative of the issue.

If you would like a specific Employment Agreement or Independent Contractor Agreement tailor-made to suit the requirements of your business, give us a call on our free phone 0800 733 424 for a free initial relaxed chat about how we can help you.

FREE LEGAL BUSINESS HEALTH CHECKLIST

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from our website at...

www.raineycollins.co.nz



PETER JOHNSTON

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Terms of Trade – There's more than meets the eye!

We heard about Susie, a graphic designer, who used terms of trade she found on the internet. She was engaged by Jim and provided a design to him. Susie then billed Jim at the end of the month in accordance with her terms.

Jim loved the design and started reproducing it on t-shirts and tea towels that he sold. He failed to pay Susie, who was naturally very unhappy as she had not anticipated that the design would be used on products that Jim was selling while she remained unpaid.

When your customers fail to pay their credit accounts by the due date, having quality terms of trade can prove invaluable. Terms of trade allow you to pass the costs of recovery on to your customer and allow for interest to run on the outstanding balance to the date of payment. However, there is more to terms of trade than recovering unpaid debts!

Below we consider some helpful clauses for terms of trade ("terms").

Set Fee vs Estimate

If you provide estimates of costs to your customers, your terms should explicitly state that the estimate is only your anticipated costs, and the price may change depending on the circumstances of the job. This is different to a set fee or quote, which is the total cost which you will charge to your client to carry out the agreed services. It is important to make sure it is clear if you are providing an estimate or a set fee or quote to avoid disputes in the future!

Personal Guarantee

If you contract with companies or trusts, you should consider including a clause in your terms stating that directors and trustees are personally liable for paying your invoices if the company or trust does not. If you do include such a clause, ensure that the director or trustee who signs the terms

understands that he/she is giving a personal guarantee, and that he/she has the opportunity to obtain legal advice.

Privacy

You may hold private information about your customers, which means you have certain legal obligations concerning how you collect and hold such information. Your terms should set out that you are authorised to collect personal information about your customer and use that information for certain purposes. For example, do you collect information about your customers' creditworthiness? Do you intend to use your customers' information for marketing purposes? These kinds of things should be set out in your terms, or you might find that your business is inadvertently breaching privacy laws.

For the purposes of legal compliance, your terms should also make it clear that your customers are entitled to access information you hold about them and that they can request that it be corrected.

Disputes

It pays to think about what will happen if a dispute arises between you and your customer. Some businesses include a detailed process in their terms so that both parties know what to expect if a dispute arises. For example, it is common to require both parties to attempt to resolve the issue, before taking legal action.

Lessons

Don't wait until something goes wrong to finalise your terms as it is difficult to enforce something that hasn't previously been agreed to. Talk to your legal advisor for assistance with drafting terms for your business or undertaking a review of your current terms. Finally, ensure that your terms of trade are relevant to you and not copied from another business.



OLIVIA PORTER

REMINDER: LAQC CHANGES

Late in December, a law was passed to significantly change Loss Attributing Qualifying Companies ("LAQCs") and Qualifying Companies ("QCs"), effective from 1 April this year. As such, shareholders of LAQCs and QCs will need to reconsider their company ownership vehicles. There will be real advantages in seeking good advice as soon as possible.

What Should You Do?

Contact your accountant to obtain the appropriate advice. Contact us if:

- You need assistance finding appropriate accounting advice; or
- After advice, you need assistance setting up suitable trusts, or transferring assets and finance.



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