

In brief from
RAINEY COLLINS
LAWYERS
BUSINESS ISSUES

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WELCOME

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

In this edition we focus on providing you with useful tips in the areas of cashflow, intellectual property, investment and information for all property investors.

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



JAMES JOHNSTON

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Get In Quick Or Pay Up

Cashflow ... New Court Rules

John had been operating his business successfully for many years, but had recently experienced some cash flow problems. This was a flow on effect from his debtors suffering from the current economic climate. He had attempted to give them some leeway, but his own creditors were not as accommodating. One of his creditors began debt recovery processes against John in the District Court. Unfortunately for John, being unaware of the new District Court Rules, he failed to provide a response to the creditor's claim on time and a Court judgment was obtained against him. This meant unnecessary Court costs were incurred and his credit rating was affected. Court judgments once sealed are published in the Mercantile Gazette and are also recorded against the individual's credit file by Veda Advantage (formerly Baycorp).

To avoid being caught out like John, you need to read this ...

New processes for debt recovery have been implemented in the District Court. They are designed to speed up the Court process and make getting Judgment easier where no defence is put forward. This includes situations where the required steps are not taken on time.

The following procedures are now applicable:

1. A Notice of Claim is filed and served on the Defendant.
2. The Defendant then has 30 working days to file and serve a response.
3. If no response is received from the Defendant within 30 working days then Judgment by default can be obtained.
4. If a response is received from the Defendant then the Plaintiff has 30 working days to file and serve an "information capsule". This is the term used to refer to all documentation relevant to the claim.
5. The Defendant then has 30 working days to file and serve their information capsule.
6. If the Defendant fails to provide an information capsule then Judgment by default can be awarded.

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We are currently providing initial consultations for people in business at the special rate of \$285 plus GST.*

Contact us on 0800 733 444 or by email at gscanlon@raineycollins.co.nz to make your appointment today.

* Terms and conditions apply. Please see insert for details



RONETTE DRUSKOVICH

7. If the Defendant files and serves an information capsule then the Plaintiff has 30 working days to file and serve a Notice of Pursuit of Claim.
8. At this stage the Court can either direct the parties to attend a Short Trial or Judicial Settlement Conference. The latter is a conference held between the parties and the Judge. It is closed to the public and is confidential to the parties involved. It is intended to provide the parties with an alternative method of resolving the dispute in a fair and timely manner under the guidance of a Judge. All issues between the parties will be explored and the Judge will attempt to assist the parties to reach a settlement of the dispute.
9. If no settlement is reached between the parties at the Judicial Settlement Conference the Judge will then allocate a hearing. This may be a Short Trial, Simplified Trial, Summary Judgment or a Full Trial which involve increasing degrees of complexity for more serious matters.

What should you do if you find yourself pursued?

If Court proceedings are issued against you, act quickly. If you are unsure about how to proceed, obtain professional advice. Whatever you do, do not wait and get caught out like John.



TRACY ROBINSON

Intellectual Property: Did You Get Everything You Paid For?

So you have just purchased a new business? Are you sure you purchased it all? You almost certainly purchased the stock and you no doubt arranged for the lease to the building to be transferred. But did you take steps to ensure that you also purchased the intangible parts of the business that you paid for?

Often the intangible assets are what make a business purchase a safer bet than starting your own business from scratch. Imagine then if you paid top dollar for a well-known retail store only to be required soon after the purchase to change the name of the store. You may well ask how this could happen? Well, sometimes even the heavy hitters get it wrong

Take for instance, Volkswagen. They pulled off somewhat of a coup by outbidding BMW for the acquisition of Rolls Royce but because they didn't deal with IP at the time of the purchase they were out-manuevered. They hadn't undertaken the necessary checks, so they didn't know that BMW were already owners of the Rolls Royce trademarks (having purchased them some years earlier). So what happened?

At the time of the sale of Rolls Royce to Volkswagen, BMW were thought to have "missed out," but their ownership of the Rolls Royce trademarks meant that they could prevent Volkswagen from producing a car called a "Rolls Royce". Consequently Volkswagen

are now producing Bentleys in the old Rolls Royce factory, while BMW are producing vehicles with all the trademark Rolls Royce features under the Rolls Royce brand.

3 Key Tips

1. Check who owns IP and whether it is being transferred to you.
2. Ensure you understand your rights to IP and whether or not those rights are exclusive.
3. Understand where the value in the purchase price comes from and that you receive what you pay for.

How can you avoid this type of mistake from happening to you? The following are three key tips for purchasers when buying a business.

Tip 1: Transfer IP ownership

Never assume that the trading name or other Intellectual Property (IP) is "part of the deal." Make sure your vendor can sell you what they are purporting to sell. Check, or have your professional adviser check, that they are the owners of all relevant trademarks and other IP. Remember to then take the next step – arrange for the legal transfer of ownership of the IP.

Tip 2: Get exclusive IP ownership

Make sure you understand what Intellectual Property is in the context of the business you are buying. Then, make sure you understand what aspects you are paying for and whether you are purchasing exclusive ownership rights. For example, you might be paying for a client list that the vendor intends to also retain for themselves.

Tip 3: Only pay for what you get

Only pay for what you are getting. Double dipping for instance by a vendor should be prevented where possible. Alternatively, if you are happy to share IP such as a client list with a vendor, do not pay top dollar for it.

How can you make sure you don't make a mistake like Volkswagen?

Often you will be working with professional advisors during the purchase process. However not all professionals are specialists in Intellectual Property. If possible, work with professionals who can facilitate your purchase and cover off all the IP aspects involved. Making sure you have your bases covered at the start could prevent some nasty surprises later.



KIRSTEN FERGUSON

Need Investors?...

Know the Rules When Asking for Capital

CW Widgets Ltd had a great product and a good small business but in the current economic environment it was unable to get bank funding to grow and reach its full potential. The shareholders and directors were not willing to let a recessive economy hold back what they knew to be a great business so they set out looking for other options. They heard through a friend about a guy who had recently sold a business and some properties and was cashed up looking for a new opportunity. They arranged to meet him. One thing led to another and they had the cash injection the business needed, a new shareholder and CW Widgets Ltd was set to be the new market leader.....or was it?

Obtaining non-bank funding

Bank funding for business is harder in the current economy than it has been for a number of years. But there are still businesses doing extremely well, and there are still individuals with money who are looking for good opportunities. What is important to remember is that there are strict rules and CW Widgets Ltd did not follow them.

“generally speaking, businesses offering shares to individuals other than their family and close friends need to develop a full prospectus ...”

Raising capital in New Zealand through the offer of equity securities to the public is governed by the Securities Act 1978 and its regulations. There are procedures and processes that must be strictly adhered to when a company offers shares to the public. These rules are there to protect both the investor and the business seeking investment. In short, generally speaking businesses offering shares to individuals other than their family and close friends need to develop a full prospectus and register this with the Companies Office.

If this does not happen and the shareholder later becomes disgruntled, they can complain to the Securities Commission

that adequate disclosure was never made prior to their investment. For companies who have issued securities in breach of the Act, like CW Widgets Ltd, they run the risk of the company having to repay all the invested funds and significant financial penalties under the Act for the company and its directors.

What sort of things might lead to an investor-shareholder complaining? The personal relationship between the company founders and the new investor shareholder might become strained and unworkable. The company may not turn into the new market leader as expected or, even worse, the company may not handle its growth and may start making less money than when it was small.

The cost of compliance – other options

For most small businesses the cost and time of preparing a prospectus and associated documents can be prohibitive. However, without injections of cash businesses also struggle to grow and make the best use of their products, ideas or resources.

Just because bank funding is difficult and compliance under the Securities Act is significant doesn't mean there aren't options for the small business owner.

If you have a business and possible investor funds, let us consider the options available to you. For instance there are some categories of investor who do not require full disclosure under the Securities Act and there are means to obtain Securities Act exemptions. There are also other ways of putting together that deal including joint ventures, creating new companies or limited partnerships.

The consequences of non-compliance are obviously not worth the penalties and consequences of having to return investors funds. The key is to obtain advice early to ensure the growth of your business is not stifled and to allow it to realise its full potential.



RONETTE DRUSKOVICH

Your Business Success... Free Business Information

- Free seminars are held regularly on employment, asset protection, contracting, intellectual property and buying and selling a business.

Upcoming seminars include: “Taking the mystery out of Intellectual Property” and “Buying and Selling a Business”.

- Our free business legal health checklist is now available for you to download directly from our website. Many more free articles are also available for your use on our website.
- For more information on seminars and to view articles see www.raineycollins.co.nz in the ‘Your Resources’ section or call us on 0800 733 424 for details.

If you would like to receive this newsletter as an electronic version please contact Maureen Harris by telephone on 04 473 6850 or email mharris@raineycollins.co.nz and provide relevant details.

If you or your Trust own property, you need to read this...

Grant, a self employed marketing consultant, set up a family trust many years ago. As is common, he was the settlor and one of the trustees of that trust. His Trust owned his family home and late last year bought a holiday home.

He was also a property investor and had a company which held other investment properties. Grant's investment property strategy was to buy dated houses, renovate and then sell them at a profit.

Unfortunately Grant's marketing consultancy lost a big contract and all of a sudden cashflow was tight. So when the Family Trust received a good offer and sold the holiday home his accountant informed him that the transaction may be subject to new tax laws. He had thought that because it was owned by the Family Trust, the beach house was protected from tax on any profits. Grant was wrong.

Late last year there were very significant changes made to the Income Tax Act 2007. Those changes amended the definition of an "associated person" with the intention of catching those persons who previously avoided tax by using multiple entities to own property. Under the changes more property investors could now be liable for extra tax for being "associated" with other entities or structures owning their property.

How it was ...

New Zealand does not have any capital gains tax and in the past a person in Grant's situation would not incur a tax liability on the sale of their holiday home or investment property. This was unless:

- The person bought a property with the intention of on-selling it for a profit;
- The person was a builder, developer or trader;
- The person undertakes a development or subdivision of the land; or
- The value of the land has increased because of a zoning change or a granting of a resource consent (eg for a particular activity to occur on the land.)

"... the changes widen the range of persons who can be classified as associated and means that many more transactions will be subject to income tax."

And now ...

Under the changes, examples of those who can now be "associated" are:

- The settlor of a trust and the trustees of that trust;
- Two trusts with the same settlor;
- Two companies where more than one shareholder is associated and between them hold 50% or more of the shares in the company;
- The settlor of a trust and the beneficiary of that trust;
- A trust and the person with the power to appoint and remove trustees.

The new legislation also creates a new three way test whereby if person A is associated with person B, who is in turn associated with person C, then person A is seen as being associated to person C. Spouses and de facto partners can also now be seen as associated, depending on the circumstances. In the example above Grant was associated with his company and his Trust so when the Trust sold the beach house Grant was personally targeted and taxed on the profit from the sale.

Generally speaking the changes widen the range of persons who can be classified as associated and means that many more transactions will be subject to income tax. The intention is to indirectly close up perceived "loopholes" in the associated persons definition. What was previously a tax free capital gain has now become taxable income.

One slight relief for investors is that the changes are not retrospective. The rules in relation to land came into force on the date of enactment in October 2009.

If you have structures in place for ownership of your property which worked for you under the old regime, now is a good time to talk to your lawyer and accountant about whether you need to reassess your structures. Your current structure may not protect you under the new regime in the way it previously did.



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