IN BRIEF
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Welcome

to the Spring edition of Rainey Collins Commerical Issues newsletter. In this edition we look at a number of relevant issues for you and your business, including lessons from the TradeMe sale, buying and selling, leasing and strengthening governance and management. We also provide some useful tips for improving HR, getting debtors to pay promptly and in full, and safeguarding IT.

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

I trust that you find the information of interest and value to you in your business.

James Johnston
Chairman of Partners

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TradeMe - What's in it for Our Own Businesses?

The spectacular sale of popular online auction site TradeMe to Fairfax Holdings created quite a stir. For many it was a success story of an idea, and of a small group of people committed to following through on that idea. The success and wealth created was no doubt discussed in many boardrooms, cafes and staffrooms throughout the country.

But what lessons can be learnt from TradeMe's ongoing success? And more particularly, what can your business learn from it?

What has TradeMe done? They:

- Had a great idea.
- Developed and perfected that idea.
- Continued (and are continuing) to expand the applications of that idea.
- Concentrated on providing what their customers wanted.
- Innovated and used modern technology.
- Marketed effectively, e.g. enormous exposure gained from the streaker 'bikini sale' and the Tana Umaga handbag episode without any advertising cost at all.
- Offered reasonable commission/fees.
- Listened to their customers and kept up with trends.
- Continually tried to improve.

While most of us will not hit the TradeMe jackpot, we can probably all improve our performance. In particular, we should always be asking ourselves: "How can we do this better?", "What do our customers want?" and "What else can we do for them?"

In the final analysis, what TradeMe did - and continues to do - probably wasn't rocket science, but they hit on a really good idea and then didn't they do it well! And as much as anything, it's probably the doing it well that counts. We can all copy that.

James Johnston

Can't Open for Business? You May Still Have to Pay Your Staff

Gas outages in Wellington. Heavy snowfalls in the South Island. Power cuts in Auckland. They all meant that many employers could not open for business.

Where the interruption is short, many employers will choose to continue to pay employees to preserve goodwill.

Whether you must continue to pay staff during a temporary closure caused by outside circumstances depends on the terms of the employment agreement you have entered into.

If you want to be able to not pay workers if the business has to shut temporarily then this needs to be specifically covered in the agreement with employees.

Without such a provision, if you unilaterally cut wages, you could face claims for unpaid wages plus penalties.

Employees cannot be forced into any unnegotiated changes to their employment agreement. Of course such changes may be bargained over the next time you negotiate your agreements, preserving goodwill.

Could your business afford to keep paying the wages if a power or gas cut meant you were closed for days or weeks?

To give you options for negotiations we can provide you with suitable clauses to cover situations like these.

Catherine Harold

Business: Buying & Selling... How to Avoid a Lemon

Buying or selling a business can be an exciting time … and a terrifying time. Jane Stevenson suggests questions to consider when buying or selling.

Sarah had agreed to buy a hairdressing salon without requiring that the seller not open up a similar business nearby. This is called a restraint of trade clause. The seller opened up a competing salon just around the corner and attracted most of their prior clients from Sarah's new business. Sadly for Sarah, without this clause, her business ended up being a lemon!

Todd also had problems when he came to sell his business. Whilst the business seemed on the outside to be thriving, the books were not well kept. This affected the value of the business by tens of thousands of dollars and put off a number of prospective purchasers. The important message for Todd was what does the business look like to potential purchasers? Processes and procedures, including the books, must be kept in order.

Ask these questions before signing up.

Buying

1. What are you actually buying? Is it the assets and goodwill of an existing business? Or is it a franchise or a complete takeover of a trading entity?
2. How will you run the business? e.g. as a company, a sole trader, a partnership or through a trading trust?
3. What is the cash flow for the business? You need to look at a minimum of two years of annual accounts as part of the due diligence process.
4. How are you going to finance the purchase? Will you be raising the money over assets of the business itself or over other assets you already own, such as a private home?
5. If financing arrangements include personal guarantees, do you need to protect your personal assets? e.g. transferring them into a family trust or, if you do not have a trust, forming one.
6. Where does the business operate from? If it is leased premises, what are the terms of the lease, when is the next rent review, and how many rights of renewal are attached to the lease? You will also need to provide information so that the landlord can consent to an assignment of the lease to you.
7. Will you be an employer? If so, are there existing employees who will be protected under the Employment Relations Act? If there are, what are the terms of their current employment arrangements?
8. How is the goodwill in the business represented? Are there trademarks or patent issues to consider? Does any agreement need to include a restraint of trade preventing the seller from setting up in competition with you within a certain distance or time period?
9. Do you need any special consent to operate the business or licences/ contracts? e.g. liquor licence, resource consent, accreditation, or council sign offs.

Selling

1. What is the value of the business? You may need a special valuation i.e. how is the value to be broken down between plant, equipment and goodwill?
2. Do any special provisions in the agreements give rights to any party which need to be discharged prior to a sale e.g. shareholder agreements?
3. Are the books in order? They must be disclosed to incoming purchasers in the process of due diligence.
4. Are there any outstanding tax liabilities or tax losses that need to be disposed of prior to sale?
5. Does the sale include the transfer of an existing entity? For example if a company is being transferred, then as well as resigning as director and transferring the shares, check if you need the additional release of any other liabilities such as bank guarantees.
6. Are the lease documents in order? If the business is run from leased premises then the consent of the landlord will usually be required.
7. Have any staff been consulted as part of the sale process?
8. Are there any special consents, licences or contractual arrangements that go with the business and need to be transferred?
9. Are only the assets being sold? The partnership or company should be wound up following the sale.

This article picks up on only some key issues. You should obtain specialist professional advice to help you successfully negotiate the process of buying or selling a business.

Jane Stevenson

Contemplating a Move? How to Get it Right

Leasing can be a major undertaking. Despite this, once entered into, leases can be quickly forgotten – that is until the letter arrives from the landlord's lawyer reminding you of the upcoming termination date.

Bob's case is a classic example of what not to do, but is unfortunately too common. For some time Bob had wanted to relocate his business to new premises, but was "too busy" to sort it out. Then the termination date was upon him.

Without time Bob could only relocate temporarily to unsuitable space until he could find something more appropriate. This process took 12 months and meant additional costs, the hassle of two moves, and losing a lot of customers.

Bob and his business could easily have avoided the problem with good business planning, which includes factoring in lease expiry dates and/or renewals.

It is crucial for all business owners to know the important terms of their existing lease, including the expiry date. This enables you to make sound decisions about whether you will move or stay put, well in advance of the end date. We recommend a minimum of six months and preferably nine months as a lead-in period. What does this allow you to do?

- Test the market to see what is available and at what cost. Is the grass truly greener somewhere else?
- Assess whether your existing space is adequate for both current and future needs. This is important especially if you have expansion plans.
- Quantify any "make good" lease obligations. What is the cost to put things back to how they were?
- Weigh up the actual costs of moving.
- Assess costs of any refit to existing premises or outfitting new premises. Include the timeframe for any consents needed.
- Properly assess the "hassle factor" of moving e.g. changed phone numbers or equipment.

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Failure to Follow Disciplinary Process Costs $30k

An employer recently faced an order for $17,000 compensation and $13,000 lost wages after failing to follow proper processes at a disciplinary meeting. The employer had failed to tell the employee they were entitled to a support person at the disciplinary meeting, failed to tell them their employment was at risk, failed to tell the employee what their concerns were and failed to listen to the employee's responses. The Employment Relationship Authority held that the procedure was so blatantly lacking in natural justice that any issues of the contribution by the employee (failure to follow instructions and procedures) would not reduce the remedies.

In all HR matters it is necessary to follow a fair process. In the case of a disciplinary investigation, this includes following any process agreed in the employment agreement, and giving the employee:

1. Sufficient detail for them to be able to properly respond.
2. A copy of the letter of complaint/ allegations.
3. An opportunity to take advice before they respond.
4. A chance to give a response. This is usually face-to-face, but may also be in writing.
5. Advice of their right to a support person when attending any meeting.
6. Information about the possible consequences. What is the most serious thing that could happen? Is it a warning or dismissal?

You should then:

1. Consider all matters raised by the employee and investigate those matters. Do not make on the spot decisions. These show that you have not taken time to consider what the employee had to say.
2. Once you have decided what happened, you must then decide what to do about it. Again give the employee a chance to give their input into any outcome.
3. Do not have a termination letter or final pay made up before the meeting – this would show you have made up your mind and are not prepared to listen to employee input.
4. Be consistent – do not expect standards you do not insist on from others of a similar level. Outcomes should also be consistent for similar conduct.

Even if you are completely justified in the actions you eventually decide to take, you will be tripped-up if you do not follow a fair process to get there.

Employment disciplinary hearings of sub-standard work are legal mine fields. We can assist in guiding you through the process, and some clients have us run the process for them so that there are no missed steps.

The information in this article is necessarily brief. Full guides to handling disciplinary investigations, including our free guide to the disciplinary process, are available on our website www.raineycollins.co.nz or by calling Alan on 0800 733 424.

Alan Knowsley

Debtors - How to Get Paid in Full and On Time

A recent case highlights the need to, (a) get contractual details confirmed in writing and (b) arrange security to cover what you are owed. A supplier of industrial equipment received an order worth over $300k. They proceeded with the supply and installation without having any written contract with the purchasing company or any personal guarantee to protect them should the company turn out to not have sufficient funds or assets to meet the debt.

During the installation process it was discovered that not only had the purchaser made no payments for the machinery, but that other creditors were chasing the company for payment as well. The supplier was understandably concerned that they would lose $300k and sought our help.

1. The best way to deal with bad debts is not to have any at all. This requires having the right systems in place, including regular book keeping and stringent credit checking. Policies of payment in advance or payment of deposits should be strictly enforced. Proper agreements, including, where appropriate, personal guarantees as security for payment should be obtained from the outset.
2. In reality, every firm some times has bad debtors. Create a clear process for dealing with bad debts. They must be identified and dealt with promptly. Early attention to debt recovery is vital to its success.
3. It is crucial to follow through with the process and have dedicated persons dealing with the situation urgently.
4. In the event that internal steps do not work, have an arrangement with debt collection professionals who can then follow through all appropriate steps promptly.
5. Lastly, ensure that you have clear processes for identification of bad debtors to avoid doing further work or providing further services for them in the future.

When approached to assist the above supplier we were able to obtain acknowledgements of debt and personal guarantees to provide security for payment. We were then able to recover payment in full plus costs for the client - much to their relief.

Tracy Robinson

Contemplating a Move? How to Get it Right *(Continued from Page 2)*

- Recheck your location (to market, suppliers and staff).
- Negotiate with the landlord in a timely and appropriate manner.
- Focus on what needs to be done.
- Make a considered decision about staying or going.

Letting your landlord know you are looking can also assist with the negotiations, particularly if the market softens.

Having the time to follow through on these matters will ensure that when the time comes, you will be prepared, and can make good decisions about the future of your business.

Jane Stevenson

Review With James Johnston - Strengthening Governance and Management

The importance of regular strengthening or up-skilling both in governance and management is an integral part of running a successful business.

It is clear from the feature article on page 1 that a business which is well governed and well managed improves its chances of success and dramatically reduces the chances of failure. Such businesses enhance the prospect of a subsequent sale and appear more attractive to potential investors or joint venture partners.

Whilst there are a multitude of governance and management "gurus" offering their wares, the key is to first identify the areas requiring strengthening, and then target the appropriate expertise to those areas. This is where self-evaluation can be of assistance, particularly for those who are candid in acknowledging areas that are potential weaknesses and require "beefing up".

It is also worthwhile, before engaging assistance in this area, to check the track records of those providing the services. This includes speaking with those who have used their services before to verify the value or perceived value that the client received from the expert services.

External help does come at a cost, but a properly targeted investment is well worth it, particularly in terms of added value, good processes, clear leadership, strategy and appropriate policies and procedures.

James Johnston

Our Server Has Crashed... What Do We Do?

You have been working on an important document all day. It must be dispatched by 5pm. Then at 4pm the server crashes and your work disappears. Do you know what to do?

In today's world, businesses, big or small, are relying more on technology for smooth transactions and efficient dealings. All too often however when the server crashes, there is a crisis as valuable data and financial transactions are affected. The short point is to have a clear plan or strategy prepared in advance, which kicks into action at the time of a crash. This can prevent you or your business from losing valuable profits, missing out on commercial opportunities, or even being held liable for missed deadlines.

The strategy should include the following:

1. Simple steps to follow to ensure that it is not a user error, including: ensuring the system is plugged in, rebooting the server.
2. A clear process for contacting the tech team.
3. Moving to the backup plan (i.e. the backup server in the interim).
4. Assigning priorities, advising management and staff of the situation, including regular updates.
5. Advising clients, customers and other stakeholders where appropriate.
6. Finally, regular testing of your strategy will also ensure that should a crash occur your actual down time is kept to an absolute minimum and the situation can be handled in a calm, controlled fashion.

Claire Coe

Computer Tips: Did You Know...?

Tracked Changes – Be Aware!

Take care when tracking changes in your important documents. If you forward it to an outside party, the recipient may be able to view any changes that you have made through the tool 'Track Changes'. This could potentially be disastrous for you if the document is a sensitive one. To avoid this happening, we recommend that you turn your document into a PDF file (through Acrobat) before sending it on.

Emails – Are They Really Instant?

Businesses today rely heavily on email correspondence being instantaneous. However technical difficulties with computers can result in significant delays in your message being delivered to the recipient, or possibly not being delivered at all.

If your email is important or urgent we recommend that you follow it up with a phone call or fax to ensure that it has been received.

Sam Mainprize

Business Seminars on Succession, Asset Protection and Buying and Selling a Business are held regularly. See our website www.raineycollins.co.nz or call us on 0800-733-424 for full details.

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