IN BRIEF

RAINEY COLLINS

COMMERCIAL ISSUES

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Welcome…

to the Winter edition of Rainey Collins Commercial Issues newsletter. In this edition we look at Asset Protection for business owners, announce our new e-dealing capability, address reviewing business structures, consider the perils of buying off plans, look at business succession, set out how to get the best out of your legal advisors, provide a will update reminder and I review corporate governance.

These articles, and others, are also available on our website www.raineycollins.co.nz if you want to download them or send them to anyone.

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

James Johnston
Chairman of Partners

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Protecting Your Assets: A Crucial Part of Your Business Planning

So what is asset protection? Imagine you are 50 years old having spent a good part of your life working hard, taking the usual commercial risks, managing the never ending problems with customers, staff, suppliers, banks, the IRD – have done very well and have got to the stage where your wealth has been built to the extent that you are looking forward to an enjoyable retirement and being able to pass on what is left to your children.

But then something similar to what happened to a client of ours occurs. One of his staff, after a long lunch, lost control of his company car and crashed into a shopfront. The resulting fire was quickly put out, but the damage nevertheless exceeded $750,000.00. As the driver had been drinking, the insurance was void and the business was held by the Court to be liable for the full cost of reinstatement.

If you are in business, you run the risk of losing all your assets. It does not matter whether you have a small service business, practise a profession or a trade. You are at risk of someone making a claim against you and all of your assets.

Asset protection is about reviewing the way you carry on your business, trade or profession, and how you own your wealth, to ensure that if the worst occurs you do not lose everything that you have worked so hard to create.

Of course we are not talking about disposing of assets to avoid your creditors when you are about to go bankrupt. By then it is too late. If you try to protect your assets in those circumstances, it is likely that more harm than good will be done and you could even face prosecution and/or a term in jail.

Asset protection is sensibly organising your affairs whilst things are going well.

Appropriate and timely planning will ensure that your hard earned assets are protected. That way, if the unexpected occurs, you are prepared. In the above example, our client's business was a company, so even though it had to pay, our client's personal assets were not at risk. His savings and investments were protected. In another similar instance, a client who was a sole trader, i.e. not a company, had put his assets into a Trust. Again these assets could not be touched. They remained fully protected from unexpected claims.

Nick Miles

E-dealing – Rainey Collins Now Online

We are pleased to announce that Rainey Collins is now capable of electronic e-dealing with LINZ. This means we can effect registration instantly when a property settlement occurs. This offers you and your lender extra protection because you become the owner immediately and their mortgage is registered immediately.

Is Your Business Structure Working?

As your business grows and your business needs change it is wise to review whether or not your business structure is appropriate. Jane Stevenson discusses this important issue.

A review of your business structure can ensure that your business is positioned to take advantage of changing market conditions and trends. It can also ensure that your business can maximize opportunities for growth and returns.

Key considerations include:

- Taxation
  - Are you paying too much?
  - Do you need to pay tax?
- Control
  - Who controls the business and is this appropriate in the current climate?
  - What happens when the climate changes?
- Ability to expand or retract
  - Is your existing structure able to cope with expansion?
  - What about joint ventures?
  - What about injections of capital?
- Flexibility
  - Is the existing structure able to adapt to changing circumstances?
- Clear rules
  - Is your partnership deed, trust deed or constitution clear?
- Succession
  - Have you got succession plans in place for your business, especially where the business is a family one.

Common scenarios include the following:

A sole trader may for instance wish to expand and turn the business into a partnership. An existing partnership may consider a limited liability company structure. An incorporated society may wish to choose a charitable trust structure.

There are a number of options and structures available. There are many pros and cons to consider but a regular review will ensure that you have the right structure to meet your ever-changing business needs.

A regular review can confirm that your existing structure is working well. Sometimes a few enhancements may be required to the existing structure rather than a brand new structure.

We recommend that reviews be undertaken at least once every three years.

Consult your legal advisor in the first instance to go over the underlying documentation; scope the job; discuss the options; and to provide an estimate of the cost.

Taking the time to get this part of your business right can add significantly to your bottom line and ensure the ongoing success of your business.

Jane Stevenson

The Perils of Buying Property Off Plans

Buying a property where you can thoroughly inspect it can be complicated. Buying off plans, where you cannot inspect a physical structure, is fraught with potential perils.

This practice has become increasingly common in the booming property market of the last few years. The buyer perceives advantages, because they can fix the price and often negotiate a discounted price. At the time of completion they can achieve instant capital appreciation.

There are however significant perils. John and Helen (not their real names) had entered in good faith into a contract to buy an apartment as a change of lifestyle, they sold their existing family home, paid a deposit and sat waiting in rental accommodation for their new apartment, only to be told 8 months later, that the developer was cancelling their contract.

Receiving a refund of their deposit was not much consolation. They had missed out on the capital gains from their previous property during the wait and had to start looking all over again and pay the current market value for a new property.

Other perils include:

- The developer going under financially before completing the project;
- Failure of the developer/builder to complete the project by the estimated time, which restricts the ability to forward plan finance at fixed rates and put in place potential tenant arrangements;
- No opportunity to check the title before the purchaser is committed, as title is yet to be issued;
- Loss of value against purchase price if the surrounding apartments are not sold by the time of settlement;
- Potential loss of value or desirability if the developer/builder has the ability to substitute materials or amend plans, which is a common clause in contracts;
- Long-term loss of value due to artificially inflated guaranteed rents, which subsequently drop to a point where they do not cover the property outgoings.
- Lack of Body Corporate information, which can result in problems later when purchasers find themselves stuck with restrictive rules or high Body Corporate levies.

Risks such as those faced by John and Helen can be minimised by consulting your lawyer early in the process and before the contract is signed. This will enable your lawyer to carefully consider the contractual documents and negotiate the insertion of provisions designed to protect you.

Jane Stevenson

Succession - What Will Happen To My Business If I Die Or Retire

New Zealand is a nation of small businesses. Most are owned or run by one person. If the working proprietor should become incapacitated or die suddenly, how is the business to continue without their driving input? If this happens the business can be very vulnerable to its competitors, or from mismanagement, or might simply be unable to continue to operate at all.

Proper succession planning is therefore crucial.

Here are some suggestions

- Have a plan. Hopefully it will never have to be used, but at least you will know that arrangements are in place should anything happen to you.
- Consider the following:
  - How will the day-to-day operations continue without you?
  - Are other family members in a position to run the business?
  - If the business should discontinue, have a plan for its immediate sale so that at least its value will not be lost entirely.
  - Take advice about what insurance is available and appropriate. The bills will still have to be paid so a fund to assist with this could be vital.
- If the business can continue without you, make sure that you have competent and trustworthy management in place, and that your executors are capable of giving the appropriate supervision.
- Make a Will and keep it up to date.

What if I want to retire?

- You can sell the business outright, and retire on the proceeds
- If you want to hand it down to family members, how do they pay you? Are you sure they are capable of running the business? What if there are competing interests?
- You might want to retain a minority interest in the business, but you will need to ensure that you are adequately protected if you do this.
- Be aware that any personal guarantees of the business's liabilities, e.g. the bank overdraft, will remain binding on you after you retire unless you cancel them.

We believe that all small business owners should give serious thought to these issues, and take steps to put a suitable contingency plan in place.

Typically our clients go about it by simply picking up the phone. All it requires to get started is to call us to arrange an initial consultation.

Nick Miles

Getting The Best Out Of Your Legal Advisors

Dealing with your lawyer can be a daunting exercise for some. How do you get the best out of the relationship? In this article, Nick Miles draws on many years of experience to give you some useful and cost effective tips.

You can help yourself and your lawyer by following a few simple rules:

- Be clear and concise. The fee your lawyer charges will often depend on the time that it takes to deal with the matter. Try to explain your problem or transaction, and the result you seek, directly and simply.

- Keep written records wherever possible and ensure that you keep and have available all relevant documents.

- Don't be afraid to discuss the likely cost. It is much better that you have an idea of what the work might involve from the outset.

- Try to make yourself reasonably available for meetings or for signing documents when required.

- Do not hide or overlook information that may be important. To help you properly your lawyer needs to have the full picture.

- Do not be afraid to ask questions. If you do not fully understand something it could be important that your lawyer knows this.

- Try to keep appointments or at least give some warning if you cannot.

Nick Miles

Moving House Checklist For Busy Business Operators…

Remember to check out our website for free downloads. A popular item is the Moving House Checklist, which helps to make the transition into your new home organised and less stressful. If you would prefer to be sent a hard copy of the checklist please contact Michelle Curtis on (04) 473 6850 or by email mcurtis@raineycollins.co.nz.

Governance Review with James Johnston

The dramatic collapses of major multinational corporates, including Enron, WorldCom, HIH and Ansett have brought governance into the spotlight. So, what is "good" governance, and is "bad" corporate governance a significant factor behind these collapses?

In essence, corporate governance is the combination of the principles underlying an organization and the people appointed or elected to implement those principles and direct the business. In large multinational companies, corporate governance has a responsibility to protect the interest of investors and create trust and confidence in the capital market.

In the wake of some dramatic recent collapses, the United States recently introduced "rules based" legislation designed to ensure this occurs. The changes implemented tough penalties for false certifications in financial statements, compulsory independent audits and banning loans from Companies to their Executives and Directors. There is talk of extending the ambit of this legislation to privately owned companies.

New Zealand has historically taken a more "principle based" approach to corporate governance, reflected in the guidelines released by the Securities Commission. These guidelines call for a high ethical standard amongst Company Directors, with a balance of independence, skills and knowledge, transparent remuneration arrangements, regular consideration of risk management processes, independent audit processes and constructive relationships with shareholders.

The advantage of avoiding the rules based approach and maintaining a principle based approach, is the need for flexibility to foster a growth environment. Corporate governance compliance should not limit legitimate risk taking, which is part of most business ventures. By the same token however, risk needs to be managed and this is the role of top management and their advisors, acting under the direction of the Board.

If compliance codes and policies are ignored or are not implemented as part of the general culture of an organization, then inherently risks are not managed. These risks can be in many forms, some examples of which are operational IT risks, breach of confidentiality risks and business disruption risks caused by absence of key staff.

Some can be highlighted by audits but others come back to the implementation of appropriate management strategies from the beginning. Perhaps the most underestimated risk is the part human resources play in any enterprise. Good corporate governance includes ethical conduct. The issue is whether or not ethics can be imposed by legislation.

While adopting an efficient corporate governance model in itself is no guarantee of success, in our view it is certainly a vital step in the right direction to avoid business failure. Leading law firms all offer effective Compliance Audits, which assist businesses to identify areas in which they need to tighten up or implement procedures.

Time To Update Your Will

There are circumstance where your will needs to be updated. Have you had a major change in your life since you made your will including:

- Been married, separated or divorced?
- Entered into or ended a de facto relationship?
- Had children?
- Started a business?
- Purchased significant property? Inherited money?

Bob separated from his second wife some years ago, but did not get around to updating his Will. That Will left half of his estate to his second wife.

When Bob died, his only children from his first marriage were stunned to find that his ex-second wife was to receive benefits that she would otherwise not have had.

If Bob had simply updated his Will, the anguish and expense of a legal battle would have been saved.

Updating your Will, which can be done quite simply in most cases, will ensure that your wishes are followed.

If any of the above circumstances apply to you it's important to act promptly to update your Will.

Neela Parsotam

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