

Fineprint

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Buy/Sell Agreements for Your Business

ARE YOU PREPARED FOR THE UNEXPECTED?

If you run a small business in partnership with others, often you and the other owners are a key asset of the business. Are you prepared if one of the other owners suddenly dies or has to retire due to illness or an accident? How will you ensure that they or their family are paid out for their interest in the business without causing financial hardship to you and the remaining owners? This article explains how a Buy/Sell Agreement can help.

A Buy/Sell Agreement is an agreement between the owners of a business as to what will happen to the shares or partnership interest of one of the owners if they die, have a terminal or critical illness, or become totally and permanently disabled. It requires the remaining owners to buy the former owner's shares or partnership interest at a price set in advance or through a formula. The purchase price for the shares or partnership interest is likely to be met by the proceeds of an insurance policy taken out to cover the risk of death, illness or disability.

WHY DO THIS?

Buy/Sell Agreements are intended mainly for companies with a small number of owners who are both directors and shareholders. They can also be used for partnerships. In these situations the death, illness or disablement of a director or partner are major events for the business.

If one of the above events occurs to one of your colleagues, having a Buy/Sell Agreement and the necessary insurance policies in place will be reassuring for you and the other business owners. It will enable you to concentrate on dealing with the impact on your business of the absence of your former colleague without having to worry about how you are to buy their share of the business or prevent a third party from buying those shares. It will also provide comfort to your former colleague's family to know that they will receive money for their shareholding or partnership interest relatively quickly without having to search for a buyer.

You should consider how you or your family would cope with the loss of income from your business and not knowing when or if your interest in the business will be paid out.

WHAT ABOUT THE CONSTITUTION OR SHAREHOLDERS' AGREEMENT?

Most company constitutions state that if you wish to sell your shares you must first offer them to the other shareholders before selling them to a third party. Sometimes, a formula will be set for determining a fair value for those shares. However, these pre-emptive rights provisions won't be sufficient to ensure that a business owner, or their family, is paid out if the business owner exits involuntarily. The other owners may be unwilling, or unable, to buy the shares and it may not be possible or desirable for the shares to be sold to a third party.

If the owners of your company aren't within the same family you should have a shareholders' agreement in place. A well-drafted shareholders' agreement should provide for situations where the owners are in a deadlock situation or one owner wishes to leave the company voluntarily. However, even if you have a shareholders' agreement, it may not provide for situations where the event causing an owner to leave the company is insurable with the purchase price paid through insurance, so a Buy/Sell Agreement will still be necessary.

PUTTING AN AGREEMENT IN PLACE

There are three main actions you need to take:

First, you and the other owners should arrange to see one of our lawyers. Each business situation is different and we'll need to discuss how best to tailor a Buy/Sell Agreement to your situation.

Second, you and the other owners will need to agree upon a share price or a formula for determining the value of the shares in the event that one of you needs to be paid out. There are several ways to do this; your accountant can help you to decide the best option. The share price should be reviewed annually.

Third, you and the other owners will need to put in place insurance policies to cover the risk of an event which prevents any of you from being able to work in the business. An insurance broker can help to ensure the policies suit your situation and that the insured amount will be sufficient to meet the agreed share purchase price. The insurance policies should be held by an independent trustee on behalf of you all, but the premiums will be payable by the owners. Usually the premiums are pooled and the cost is shared equally between the business owners, but sometimes it may be appropriate to divide the cost unequally if the premium for one owner is significantly more due to their age or pre-existing health conditions. You should review these policies annually to ensure that the cover is still sufficient.

HOW DOES THE AGREEMENT WORK?

A Buy/Sell Agreement will impose obligations on you and the other owners to pay your share of the insurance premiums when due. It will also require you to disclose any information which may affect the insurance to the insurer.

If an insured event occurs, the independent trustee will make a claim under the relevant insurance policy and will hold the proceeds on trust until the settlement date. The Buy/Sell Agreement will stipulate when settlement must occur. The settlement date will need to be close enough to the insured event to ensure that the former business owner or their family receives prompt payment but should also allow enough time for the proceeds to be received, any top-up amount collected, and dividends paid out if the change of ownership is likely to affect imputation credits.

On the settlement date the former owner, or the executor and trustee under their Will, must sell their shares to the remaining owners at the price set in the Buy/Sell Agreement; the independent trustee will pay to them that part of the insurance proceeds which is required to meet the purchase price less any amount owed by the former owner on their business current account. If the insurance proceeds exceed the purchase price then the surplus will be used to repay the former owner's current account and usually any balance will belong to the remaining owners. If the insurance proceeds are not enough to cover the purchase price then the remaining owners will need to pay the balance. The Buy/Sell Agreement may allow for the balance to be paid in instalments over a period of time and potentially be subject to interest. The former owner's current account will also need to be paid out.

WHAT IF THE OWNERSHIP CHANGES?

If the ownership of your business changes before the buy/sell is triggered you'll usually need to enter into a new Buy/Sell Agreement. The Agreement will generally require that if an owner sells their shares to a third party, the person buying the shares must enter into a Buy/Sell Agreement with the other owners of the business in a similar form.

If you think that your company or partnership needs a Buy/Sell Agreement we can give you advice on this and help you put one in place. We recommend that you don't delay as you never know when the unexpected may happen to your business. ■



Dealing with a Death

SOME PRACTICAL POINTS

When someone dies, the responsibility usually falls to their nearest and dearest to deal with the details that arise from that death. This may be a straightforward exercise for lawyers who regularly deal with estates, but it's more difficult for family or trusted friends who often don't know where to start. This article suggests some practical points to guide you if you find yourself in this position.

Check for written instructions about their funeral: Many people will write down how they want (or don't want) their funeral to be conducted. They may also say how they would like their body to be dealt with. They may ask for particular people to be notified. Even if you think you already know their wishes, do check their personal papers, in their home and also with their lawyer, in case something has been written down.

Celebrate their life: Don't concern yourself with legal issues too quickly . . . your priority should be to make appropriate funeral arrangements. The funeral director will attend to any formal notification requirements, and the legalities can be dealt with once the funeral is behind you.

Locate their last Will: The original Will is usually held by their lawyer. If you find a copy among their papers at home, this usually has on it the name of the law firm that prepared the Will, and they will normally hold the original. The Will appoints one or more executors, and it is important to establish early on who they are.

Identify and protect estate assets: The executor/s should find out what assets are owned at the date of death, and should take steps to protect those assets. For example, a vacant home or unattended vehicles may need to be secured or stored. Make sure adequate insurance is in place. You may need to agree with an insurer about what must be done to maintain insurance on an unoccupied property.

Find out what legal steps need to be taken, and by whom: The High Court issues probate to the executor/s as authority to administer the estate. However, it's not always needed. Once the lawyer knows what assets are involved in the estate, he/she can tell you whether it will be necessary to apply for a grant of probate. If assets are held in joint names, on behalf of a trust or have a low value, probate may not be needed.

There's no rush: In cases of urgent need there are ways to obtain access to some funds of the estate. Funeral directors are normally willing to wait a reasonable time for payment of their account from funds that will be released after probate is granted. Alternatively one of the family may be happy to pay the funeral account personally and be reimbursed by the estate.

The High Court now deals with a probate application quite quickly, and you can expect to have this issued within four to six weeks of making the application. It's a good idea to let Work and Income NZ (WINZ), or any other pension payer, know of the death. This will enable them to stop payments that will otherwise need to be refunded; if it's necessary to repay some superannuation payments the funds should be available in the bank account to which they were paid.

What if you can't find a Will? The deceased's lawyer can advertise to try and find the Will. If no Will is found, an application will be made to the High Court for an Administrator to be appointed. Letters of Administration grant powers similar to probate. The estate is distributed according to the Administration Act 1969 which generally follows bloodlines.

A named executor can refuse: An executor appointed under a Will can renounce that appointment. A suitable replacement can be appointed with the consent of the High Court. Before going down this path, however, check how you might be able to work with the deceased's lawyer to see whether there's an efficient and practical way of receiving advice and dealing with the estate.

Our law provides sensible and orderly procedures for dealing with a death. These encourage a responsible and accountable approach which is transparent to all affected parties. There is plenty of time for people to be heard if they feel they haven't been appropriately treated in the Will.

The estate's lawyer will ensure that the distributions from the estate are not disbursed too soon, as it takes a few months to organise even the tidiest estate. Don't be persuaded by beneficiaries who wish to short cut due process in order to obtain their legacies. Follow the legal steps and administration of an estate should not be difficult. ■

Passport Fees Now Reduced

From 2 November it became a whole lot cheaper for New Zealand passport holders to apply and renew for their passports. Adult passports used to cost \$153.30. Online renewal has also been introduced. The new fees are now:

- Adult first-time applications (printed form): \$140.00
- Adult renewal (printed form): \$134.50
- Adult renewal (online): \$124.50

The online service is available for people over 16 years of age who are renewing their passports; almost 70% of passport applications are renewals.

Children under the age of 16, first-time applicants, applicants who have changed their names since their past passport, and applicants who have an endorsement (a headdress, for example) on their passport must continue to use printed forms.

To renew your passport, or to get information on passports generally, go to www.passports.govt.nz

Discrimination in the Workplace



EMPLOYERS ALWAYS NEED TO BE AWARE

When employers think of workplace discrimination, most believe discrimination is based on race, gender or religion. But there are many types of discrimination that are unlawful in New Zealand and some of the lesser known ones can cause headaches for you as an employer if they aren't properly addressed.

In employment, you're discriminating if you treat an employee differently from other employees because of their circumstances. The well-known categories of discrimination are sex, religious belief, sexual orientation and race. However, it's also illegal to treat someone less favourably on the basis of their disability, marital status, ethical belief, age, political opinion and family status. You need to be careful to avoid all types of discrimination, but two areas that can be easily overlooked are pregnancy and age.

PREGNANCY

The Employment Relations Act in New Zealand defines 'sex' to include pregnancy. It's unlawful to treat your employee, or potential employee, differently because they are pregnant. That includes refusing to employ, denying the opportunity to apply for a position or a demotion, due to a woman's pregnancy. Moving a woman off the front desk of an office to telephone duties because her bump is beginning to show, or failing to include a pregnant woman in your work place training or events have been held to be unlawful.

Discrimination against a woman due to an actual or perceived likelihood of pregnancy is also unlawful. For example, if a woman expresses a desire to have children, it's unlawful to treat her differently because of her possible future pregnancy.

In certain circumstances, however, it's lawful to treat a pregnant woman differently. For example, if your employee is genuinely unable to complete the terms of her employment or even her usual duties, discrimination laws don't apply. The key is that the different treatment is for honestly held reasons and applied in good faith. It's important to discuss the situation with your employee and consider how any issues can be resolved without changing her role.

AGE-BASED DISCRIMINATION

New Zealand's aging population is leading to an aging workforce. Workers are staying longer in their jobs and putting off retirement well beyond the age of 65. While their institutional knowledge can benefit your business, in some cases elderly employees can hold a business back. Younger employees can become frustrated

and decide to go elsewhere in search of better opportunities if it is too difficult for them to progress. Elderly employees' productivity can also suffer if they fail to keep pace with the rapidly changing technologies and new procedures.

It's unlawful to treat an employee differently because of their age. So what can you do? If it's a performance issue, your only option is the usual performance review and evaluation process. Your employee needs to be told how they are underperforming, and be given the tools and time to improve their performance. However, if it's simply a case of wanting to move your employee on, to make way for younger staff, it can be tricky. Some employers encourage employees to take up voluntary retirement schemes. Unless those packages are offered to all staff and not just those over a certain age, there is a risk the packages will be discriminatory.

Whatever the situation, it's important is to start discussions with your employee early. That way you can explore options with them and come up with plans to avoid any issues later on.

MINIMISING THE RISK OF A CLAIM

New Zealand has an Employment Resolution Service and a Human Rights Commissioner. These provide options for people wishing to pursue discrimination claims.

To minimise risk, you need to be aware of your obligation to treat all your employees the same regardless of their circumstances, and consider whether there is anything reasonable you can do to accommodate them. It also helps to:

- Identify what the key requirements for the job or promotion are and ask all applicants about their ability to fulfil these, regardless of their circumstances
- If the applicant would be suitable but for their disability or circumstances, consider whether any reasonable workplace adjustments can be made so that they can meet the requirements
- Only ask questions about the applicant's situation if there are genuine reasons for doing so, and
- Select the most suited person for the job or promotion.

As an employer you may find it daunting at times to manage all of your responsibilities and duties, and the issue of discrimination can sometimes be tricky. With the right planning and forethought, however, discrimination can be avoided. In some cases you may even discover an employee that at first seemed unsuitable because of their circumstances is in fact a perfect fit for your organisation when workplace adjustments are made. ■



A Kiwi Dream for a Place in the Country

OR THE POTENTIAL FOR A NIGHTMARE?



New Zealanders' material aspirations have often revolved around property, whether it's the traditional kiwi quarter acre, the bach or a place in the country — also known as a lifestyle property. There can be, however, all sorts of issues associated with lifestyle properties; this article highlights some issues when you're considering either the purchase or creation of a place in the country.

The general concept of a lifestyle property is that of 'a bit of land' in the country, but obtaining a more precise definition than that is not so simple. While there's general agreement between property professionals that the land should be in the country, have a dwelling and 'curtilage' (the surrounding 4,500m² site) and be at least around one hectare in size, there's some division over whether there needs to be a taxable activity carried out. This last area contains some fish hooks.

A TAXING ASPECT

The potential for income tax and GST implications on a lifestyle block can cause worries for both a landowner looking to create such a block, as well as the eventual purchaser. A landowner creating a lifestyle block faces tax issues, as well as the risk of being classed as a developer by the IRD.

GST can cause potential pitfalls. Where a landowner claimed GST on the purchase and made taxable supplies from the property then GST must also be accounted for on the sale of that land. GST, however, will be zero if the land is sold as a going concern to a purchaser, also registered for GST.

In addition, recent changes to the GST Act have also allowed the transaction to be zero-rated where:

- Both parties are registered for GST
- The purchaser will be using the land for the purpose of making taxable supplies, and
- Will not be using the land as a principal place of residence.

The latter point can cause uncertainty, but generally the dwelling and curtilage will be treated as a 'separate supply' to the rest of the land, and that separate supply will be exempt from GST. That means that the rest of the land, which would not ordinarily be used as a principal place of residence, can then help qualify the transaction for zero-rated status.

RIGHTS (AND WRONGS)

It's not uncommon for a lifestyle property to have easements registered against it. These either contain restrictive land covenants protecting the rights of the adjoining land owner, or supply easements for power and water in favour of the property. There's more on this in *Fineprint*, Issue 56, Spring/Summer 2011.

In a nutshell, a covenant is a restriction placed on the land by a previous owner in favour of an adjoining owner. It may prevent the property owner from, amongst other things, complaining about noise or smell from an adjoining farm or restrict the location/type of house to be erected.

Thought must be given about access for essential utilities, and whether that access is legally recorded as being in place for the property's benefit. For example, as lifestyle properties are often not on town supply there will need to be a right to source water which should be contained in an easement registered against the property's title.

So to answer the original question — yes, buying a lifestyle property can fulfil part of the kiwi dream but care must be taken to ensure that it doesn't become a nightmare. As is always the case when dealing with property, talk with us at the start of the process and before you sign any contract. ■

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Postscript

Leaky homes and now leaky buildings

An October Supreme Court decision¹ now means that if the property is a leaky building, non-residential property owners can claim against a local authority. Until now it had only been residential property owners who could claim as it was believed that they were more vulnerable than commercial property owners.

The case concerned the Spencer on Byron building in Auckland's Takapuna, whose 249 units were leased to a hotel manager for 10 years. The building had been constructed in 2000-2001. The North Shore City Council had inspected the building and issued code compliance certificates under the Building Act 1991.

The court found that there was no policy reason to differentiate between residential and non-residential property owners. Non-residential property owners with a leaky building can now claim against the relevant council which inspected and certified the construction. ■

Better deal for retirement village residents

Retirement village residents will soon be entitled to the original capital sum of their investment following situations such as the Canterbury earthquakes or other natural disaster.

Previously a retirement village operator could choose to deduct deferred maintenance charges from the original capital payment unless the Occupation Right Agreement had a higher requirement.

A variation will be made to the Retirement Villages Code of Practice 2008 meaning deferred maintenance charges will not be deducted from the original capital sum in a no-fault termination situation such as a significant earthquake.

The variation will come into effect from October 2013, although some retirement village operators may incorporate the variation before that date.

There's more information about this on the Building and Housing Group's section of the new Ministry of Business, Innovation & Employment's website: www.dbh.govt.nz. ■

GST returns now easier online

Submitting your GST return online has now got a whole lot easier, says the IRD. Taxpayers no longer need a document lodgement number (DLN) when filing online and details will be pre-populated onto your online return. The GST online service now includes:

- Registration for GST in real time
- Calculations are pre-populated
- The ability to save a draft and complete the return at a later date
- Instant confirmation when you file your return, and
- Tracking your return's status.

For more information, go to the IRD's website: www.ird.govt.nz ■



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¹ Body Corporate No 207624 & Ors v North Shore City Council [2012] NZSC 83.