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## Selling a business – things to consider

You've worked hard to make your business what it is, but you're now ready to move on. So you list it for sale, accept an offer, receive the funds and hand over possession. Sounds simple, right? Not always.

There are many things you should consider if you want to achieve the best price, minimise your ongoing risk, and ensure your business will have the best opportunity to thrive once sold. As each business is different there is no one size fits all approach. Things to consider include:

- Why are you selling? Probably the most important question, this can affect how the transaction is structured and timing.
- Are you replaceable? Many business owners have unique and integral knowledge and skills that may be difficult for a purchaser to learn or replicate. Remove that key person, and the business suffers. It can be important therefore to devise an exit strategy, perhaps by employing and training a potential new owner for some time (often years) before the business is eventually offered to them. Depending on your business structure, a shareholders agreement could record that the shares of the business are transferred to your successor in parts over time.
- Are you selling the shares in your company, or just the assets of the business? Selling shares can be simpler, but can include more risk.
- Your business accounts and turnover figures should be up-to-date and accurate. You will usually be asked to provide a warranty that the



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- turnover figures for the last 12 months are accurate.
- Landlords and tenants on good terms sometimes overlook completing the proper paperwork to renew a lease. It is important to ensure you have signed copies of the lease together with any deeds of assignment, renewal and rent review. A purchaser will typically want to ensure there are several rights of renewal available so they can be confident they won't be forced to relocate shortly after purchasing (especially if there is goodwill tied to the business location).
  - Your landlord can usually stop a sale transaction if they are not reasonably satisfied that the new purchaser will be a good tenant. Also, your liability under the lease often extends beyond settlement if the new purchaser turns out to be a bad tenant.
  - Do you own everything your business needs to operate? Is any plant or equipment leased or owned by the landlord? If so, these need to be disclosed and you need to ensure that they can be assigned to the purchaser (if they so require).

- What is happening with your employees? Do you have employment agreements in place? Do you expect the new purchaser to take over all existing employees? If not, will you need to make redundancy payments?
- Do you have all the consents, licences, permits, certificates or authorisations required to carry out your business?
- What is your business actually worth? Have you valued the assets? What is the goodwill in the business worth, and how much of that is tied to the business itself, to you as the owner, or to the physical location? With that knowledge, what can you do to ensure you can sell as much goodwill as you can to the new owner?

Finally, when do you need to sell? A common theme here is that there are many things you can do to make your business more attractive (and therefore more valuable and easier to sell), but they can take time. Seek advice early to ensure you are on the right track.

## Trusts and relationship property - what does Clayton v Clayton mean for me?

Clayton v Clayton [2015] NZCA 30 (Clayton) considers whether property owned by a particular Trust is relationship property for the purposes of the Property (Relationship) Act 1976 (the Act).

### Relevant facts

Mr and Mrs Clayton separated in 2006 after 17 years of marriage. During the marriage, Mr Clayton established a number of Trusts, including the Vaughan Road Property Trust (the Trust). The discretionary beneficiaries of the Trust were Mr Clayton and Mrs Clayton, together with their two children, who were also the Trust's final beneficiaries. The Trust Deed nominated Mr Clayton as the Principal Family Member which conferred on him certain powers including: exclusive powers of appointment and removal of trustees and beneficiaries, wide powers that permitted the Trustees to act contrary to the benefit of the Trust's beneficiaries, and the power to distribute Trust assets to himself.

### Family Court decision

The Family Court held that the Trust's assets were relationship property for the purposes of the Act, as the Trust was illusory. It was held to be an illusory Trust because the powers conferred upon the Trustees hamstrung the ability of the Trust's beneficiaries to hold the Trustees to account. This type of administration over the Trust was described

as a convenient structure for commercial purposes, carrying few hallmarks of a Trust.

### High Court decision

On appeal, the High Court also held that the Trust was illusory but for different reasons. The High Court held that the powers conferred on Mr Clayton were analogous to ownership over the Trust's assets, allowing Mr Clayton to manage the Trust's assets,

as though the Trust itself did not exist. As a result the High Court held that the Trust's assets were relationship property for the purposes of the Act.

### Court of Appeal decision

On appeal, the Court of Appeal disagreed that the Trust was illusory and concluded that the Trust was valid. However, the Court considered the wide definition of property in the Act, which defines property to include any other right or interest. The Court held that Mr Clayton's power to appoint and remove beneficiaries met that definition. As a result the Trust's assets were relationship property for the purposes of the Act. The Court went on to hold that the value of Mr Clayton's powers would be equal to the value of the Trust's assets.

### Practical implications

The Supreme Court is yet to deliver its judgement; however, the Family Court, High Court and the Court of Appeal all reached the same conclusion; that the Trust's assets were relationship property for the purposes of the Act, but for different reasons.



The Court of Appeal's decision means that Trust powers may now be possibly defined as relationship property for the purposes of the Act, despite being sheltered behind a validly constructed Trust.

While the implications of Clayton are fact specific, it is a current reminder of the critical importance of both

effective asset planning and Trust drafting. Clayton compels those drafting Trust Deeds to carefully contemplate the nature and extent of Trust powers. If you think your situation may be effected by the decision of Clayton it is recommended that you seek professional legal advice.

## Tax changes for settlements and the proposed “bright-line” test

With effect from 1 October 2015, there are new requirements around disclosure of tax information when buying, selling and transferring New Zealand property. There is also a new proposed “bright-line” test that will apply solely to residential land transactions to clarify and supplement the existing laws around taxation of property transactions.

The disclosure changes (which do not apply when the party is dealing with their “main home”) require parties to a property transaction to provide their IRD numbers, and where applicable, their taxpayer identification number from any overseas countries where they have to pay tax on their worldwide income.



Where a Trust is dealing with property, the IRD number to be supplied must be the IRD number for the Trust itself . not the trustees' personal IRD numbers.

One effect is that entities involved in property transactions (other than in some specific exempt transactions, for example where the property sold satisfies the requirements of the “main home” exemption) will need an IRD number to complete the transaction. It is therefore advisable to consider the time it may take for you to obtain an IRD number when agreeing to timeframes in any property transaction.

Tying into the new disclosure requirements is the proposed bright-line test that will apply to residential property transactions entered into on or after 1

October 2015. This proposed test (which has not as yet been enacted and may be subject to changes before being passed) is intended to complement our current property tax rules.

The bright-line test is expected to require income tax to be paid on any gains made from the sale of residential property within two years of purchase. The current proposed exceptions are if the transaction relates to the “main home”, to a relationship property transfer, or to inherited property.

Under existing law, gains from the sale of land can already be taxed as income if that land was acquired for the purpose or intention of disposing of the land. This law remains unchanged, but has proved problematic for the IRD to implement as the IRD cannot always prove intention on the part of the taxpayer. The proposed bright-line test was introduced in part to resolve this problem for the IRD.

As the bright-line test is only intended to apply to residential land, there is also an associated definition of residential land. Residential land means land that has a dwelling on it, or for which there is an arrangement to build a dwelling, or bare land that is capable of having a dwelling on it due to its area and nature.

If you are involved in or anticipating entering into a property transaction in the near future it is important that you make sure you can comply with these new disclosure requirements and have considered the bright-line test and its potential effect

## How to obtain a Limited Licence

John is the owner and sole driver of a local courier business in Hamilton. John is also a single father to a son aged six years. One afternoon, John is breath tested following a friend's barbeque where he has consumed three bottles of beer. Unfortunately, John records an alcohol level of 479 micrograms of alcohol per litre of breath. Despite 250 micrograms per litre of breath being the new legal limit for drivers over 20, John will only face criminal conviction if he registers a failed result of over 400 micrograms per litre of breath. Four weeks later at the Hamilton District Court John is found guilty of driving with excess breath alcohol, and he is disqualified from driving for six months.

### What are John's options?

John's only source of income for him and his son is his business. John may be able to apply to the District Court for a Court Order authorising him to obtain a Limited Licence. If the District Court grants John this Order he will be able to apply to the New Zealand Transport Agency (NZTA) for a Limited Licence. A Limited Licence permits a person to drive while they are disqualified from driving under limited situations, times, or areas.

### How does the District Court decide whether or not someone may obtain a Limited Licence?

The District Court must be satisfied that John will suffer %extreme hardship+or someone else will suffer %undue hardship+as a result of the disqualification. If John is unable to drive he may lose his business and livelihood, which could be determined as %extreme hardship+. This may cause %undue hardship+ to John's son where he needs to be picked up and dropped off at school.

#### Step 1 - Application

John must apply to the District Court for a Court Order authorising him to obtain a Limited Licence. This includes the application form, an affidavit, and where applicable an affidavit in support of his application, letters in support of his application, and a draft Court Order. Although John can prepare all of this paper work himself, he decides to see a lawyer who will ensure the application is strong and filed quickly.

#### Step 2 - Documents

John must deliver his application and supporting documents to the court that imposed the disqualification and also the local police station. The Judge evaluates John's application at the District

#### Step 3 – Court hearing

Court hearing, questioning John about his affidavit and application. John is able to demonstrate that he will suffer %extreme hardship+and his son will suffer %undue hardship+because of his disqualification from driving. The Court Order is granted and he is now authorised to obtain a Limited Licence.

#### Step 4 – Applying to the NZTA

Getting a Court Order does not necessarily mean that John is able to drive. John now has to make an application to NZTA, which involves:

- paying the Limited Licence application fee,
- giving the agent (an NZTA staff member) a copy of the Court Order, and
- completing an application form.

John has to wait and see if NZTA will approve his application. If John is approved then he will receive a temporary licence while his photograph licence is being issued. If John is unsuccessful, for example, if he is found to have pre-existing driving offences, then he will not be permitted to drive during his disqualification, and he will have to wait three months until he can reapply for a Limited Licence.

## Snippets

### Alcohol control

It is not an offence per se to have alcohol in a public place.

It is however an offence to breach council bylaws. Each council makes their own alcohol control rules that best suit their circumstances. You might therefore find each holiday hotspot liquor bans differently.



Using Tauranga as a famous example, parts of Papamoa are liquor-free from 9pm to 7am each night, while other popular public areas are liquor-free permanently, such as Mount Maunganui, Mount town and main beach, and Tauranga CBD. From 26 December to 6 January the ban in these public areas is significantly extended to cover other past problem areas, including Pilot Bay, Marine Parade and its adjacent beach, and Papamoa beach.

Alcohol in an unopened container can typically be transported through a liquor-controlled area to a private residence, although this should be prompt - storing alcohol in a vehicle will not protect you. Recent changes mean a breach of a liquor ban will likely mean an instant \$250 fine and your alcohol confiscated.



### Trans-Pacific Partnership Agreement update

In October 2015 the final form of the Trans-Pacific Partnership Agreement (TPPA) was agreed upon in principle by the trade representatives for each of the 12 member states. although this does not mean it has yet become law.

The TPPA process has proved to be controversial, with the secrecy of negotiations and contents of the leaked TPPA text being criticised in some quarters.

Under a rule set by the US, the full text of the TPPA should be released to the public within 30 days, and the TPPA cannot be ratified by any country within 90 days of conclusion of negotiations. The Ministry of Foreign Affairs and Trade advises that the final text may however be delayed due to ongoing discussions as to the interpretation of some of the terms of the agreement between the negotiators, which has affected preparation of a complete text.

Once the TPPA text is released it is expected to go through the parliamentary treaty examination process. Being an international treaty it is, if approved, ratified by Cabinet and not Parliament.

### CHRISTMAS GREETING

*We wish you and your families all the best for the festive season and the coming year. Our offices will close on 23 December 2015 and re-open on 18 January 2016.*

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