

Newsletter

September 2004



Buying at Auction

There is an increasing trend today for properties to be bought and sold at auction. If you are considering buying at auction for the first time, be aware that there are some matters which differ from the usual 'offer on paper' approach and which require your attention beforehand.

Register your interest

Firstly, you would do well to advise the real estate agent of your interest. Then, if the vendors are considering a pre-auction offer, the agent will be able to contact you and, if necessary, help you to submit your own offer. Reference to a sale by auction does not prevent the vendors from selling prior to the auction date.

Unconditional offer

Secondly, all offers at auction must be unconditional. If you require a mortgage to purchase the property you must arrange finance beforehand. Generally you will be required to pay a deposit of 10% of the purchase price on the day of the auction.

Because you cannot make the agreement conditional on any matters, it is advisable to ask your lawyer to read and approve the auction contract before the auction. The contract contains the terms and conditions of the sale, legal description of the property and list of chattels. If you wish to change any of the details, e.g. the amount of the deposit or the settlement date, you will need approval from the vendors prior to the auction.

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If you want to undertake any further investigations of the property you must arrange for those to be completed beforehand. Obtain a LIM report or a building inspection before the day of the auction.

Know the Value and the Process

Make sure you have a realistic idea of the value of the property and the amount you are prepared to pay for it. You may need to look at other properties of similar value, or if in any doubt, obtain a valuation from a valuer.

Talk to the real estate agent so that you know what the auction process involves and, if necessary, enlist his or her assistance on the day. You may like to attend other auctions beforehand to familiarise yourself with the process.

Vendor Bidding

Finally, be aware that if the property has a reserve price, the vendors may reserve the right to bid themselves. That right is generally assigned to the

auctioneer and must be disclosed at the start of the auction.

The High Court last year considered a case where the auctioneer appeared to be taking bids from different parts of the room when in fact he was bidding himself on behalf of the vendor. On receiving a complaint, the Commerce Commission alleged that the auctioneer had engaged in conduct that was deceptive or misleading.

Although there was insufficient evidence in that case to uphold the claim, the Court of Appeal held that the auction must be conducted in a manner which does not mislead or deceive. It would be misleading of an auctioneer to create the illusion of real competition where there is none, and it must be made clear when vendor bids are being made.

So, if you have done your homework and consulted the relevant professionals beforehand, good luck with your bidding!

Feeling Harassed?

You may be aware that the Domestic Violence Act 1995 provides a means to give protection to any person who has shared a domestic relationship with another person, and who has then been subjected to violence by that other person.

But are you aware that there is also an Act that protects those being victimised by someone other than a person with whom they have shared a domestic relationship? This Act is the Harassment Act 1997 ("the Act"). The Act deals with criminal harassment and civil harassment.

What is "harassment"?

"Harassment" is defined as engaging in a pattern of behaviour that is directed against a particular person and includes doing any specified act against that person on at least two separate occasions within a period of 12 months.

What are "specified acts"?

Specified acts include:

- (a) Watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose;
- (b) Following, stopping, or accosting that person;

- (c) Entering, or interfering with, property in that person's possession;
- (d) Making contact with that person whether by telephone, correspondence, or in any other way;
- (e) Giving offensive material to that person or leaving it where it will be found by, given to, or brought to the attention of, that person;
- (f) Acting in any other way that causes that person to fear for his or her safety and that would cause a reasonable person in the particular circumstances to fear for his or her safety.

What is Criminal Harassment?

Harassment is considered to be criminal if the harasser intends their behaviour to cause the victim to fear for his or her safety or the safety of a family member.

Criminal harassment is an offence and should be reported to the Police.

A person who commits criminal harassment is liable, on conviction, to imprisonment for a term not exceeding two years.

What is Civil Harassment?

Civil harassment is generally behaviour that falls outside the category of criminal harassment.

What can I do if I am the victim of civil harassment?

If you have been the victim of civil harassment, you can apply to the District Court for a restraining order. Once an application has been received by the Court, the Registrar will arrange to have it served on the person who has been harassing you ("the harasser"). The Registrar will also fix a date and time for a hearing of the application as soon as practicable.

When the harasser has been served with the application, he or she may choose to respond by filing a notice of defence and attending the hearing.

The Hearing

At the hearing, a District Court Judge will decide whether a restraining order should be made.

In deciding whether or not to make an order, the Judge will consider whether:

1. The applicant has been "harassed" as defined in the Act;
2. The harassment has caused distress, or threatened to cause distress;
3. The harassment would cause distress, or threaten to cause distress, to a reasonable person;
4. The degree of distress justifies the making of an order;
5. order is necessary to protect the applicant.

What happens if an order is made?

If the applicant is successful in obtaining an order, the harasser must not do, or threaten to do, any specified act to the applicant. A breach of the restraining order is a criminal offence.

Unless the order is discharged, it will remain in force for one year, or for any other period specified by the Court.

Protecting Your IP

What is Intellectual Property?

Intellectual property consists of intangible property assets, such as concepts, goodwill or trademarks.

A business' intellectual property ("IP") will often comprise a mix of trademarks (either registered or unregistered), patents (which protect a novel concept or idea, and the application of such ideas), copyright in particular text or drawings, registered designs, business know-how, trade secrets and information such as customer lists.

Have you identified your IP?

Your business may have a considerable amount of IP that is not being adequately safeguarded or utilised. Assets such as your trademarks, customer lists and general business know-how can be critical to the success or failure of your business by giving you the competitive edge that you need over your competitors.

If you think that you may seek investment in your business, or that you may look at selling your business in the future, be aware that any potential investor or purchaser will want to know:

- What IP the business owns;
- What steps you have taken to protect the IP; and

- How such IP will give your business the edge over your competitors.

You should take steps to identify your intellectual property and ensure it is protected. This could be as simple as having adequate confidentiality agreements in place with your staff and contractors, or may involve obtaining registration of any trademarks, designs or concepts that your business has developed.

You should look at doing this sooner rather than later - once a concept is in the public domain it will not be patentable.

We will focus on one common type of IP - the trademark. When you think of trademarks, several well known brands will probably jump to mind.

Most businesses will have a trademark or trademarks that they use in the operation of their business. It may be a name, a catchy phrase or a distinctive logo.

What is a Trademark?

A trademark is a brand or sign that has distinctive qualities. It can be a name, signature, word, colour, logo or even a sound or smell. It must be capable of being represented graphically and distinguishing the goods or services of one person from that of another.

Your business may have a trademark or brand that it is using, that you have not considered obtaining protection for.

Why register your trademark?

You may consider that registration of your trademark is not relevant to your business. However, a registered trademark means that you are in a better position to enforce your rights against others who may try to use it. Registration prevents a competitor from using or obtaining rights to use a brand or distinctive name that you have developed.

A registered trademark should add to the value of your business and be an asset in any sale.

On the other side, you run the risk that your brand or even your company name may infringe that of a registered trademark. so a check of the register may be in order.

Don't Wait!

Registration may not be as costly as you think. The filing fees are not excessive and legal fees for obtaining the registration may be less than you anticipate. If you are interested, consult your professional advisor.

Thinking of Paying Yourself Directors Fees?

If you are a director of a small or medium sized company, you may be faced with the question of determining what is a reasonable and acceptable level of remuneration for yourself as a director.

Remuneration can take many forms e.g. paying a director a fee in the form of cash, requiring the company to give a guarantee for the director's borrowings or by the company lending money directly to the director.

The Companies Act 1993 ("the Act") places a restriction on the payment of remuneration or other benefits to a director. All the directors must certify that the remuneration is fair to the company and that they have reasonable grounds for that view.

Where the procedures in the Act are not followed, or if there are no grounds for the view that the proposal is

fair to the company, each director is personally liable to the company if he or she cannot prove fairness.

The Act does not provide any further guidance as to what is fair remuneration for a director. Fortunately, the New Zealand Institute of Directors has published "Guidelines for Non-Executive Director Remuneration" which sets out guidelines to achieving a reasonable and acceptable level of remuneration for directors.

These guidelines may be purchased online from the Institute's website at

www.iod.org.nz

Directors who are concerned that their levels of remuneration may not be fair would do well to seek advice and help.

Govett Quilliam News



Continuing Education

The following seminars have recently been attended by members of our firm. It is a requirement that all solicitors attend seminars to keep up with legal developments in their fields of expertise. If you would like information on any of the following topics please contact us:

- ★ *Litigation Involving Companies*
David Anderson

- ★ *NZLS Property & Law Conference*
Paul Anderson
- ★ *Residential Property Transactions*
Rich Flitcroft
- ★ *Duty Solicitor Training Programme*
David Anderson
- ★ *Mediation Skills for Family Law Practitioners*
Emma Smith
- ★ *Family Trusts*
Kirsty Rowe

Govett Quilliam Announcements



Paul Franklin will be chairing the National Rural Law Conference which will be held in Rotorua on 14 and 15 October 2004.

The partners are delighted to announce that Sandy Ellice has taken up a legal executive role in the Inglewood office. Sandy completed her Legal Executive papers in 1998 and has been John Eagle's personal assistant for several years. She will be primarily involved in residential conveyancing, trusts and estates.

Richard Flitcroft is now practising out of the Inglewood office and has settled into a rental property on the outskirts of Inglewood. No doubt he is delighted that his partner (and her four horses) have moved up from Wellington. Sarah has taken up a position at the Stratford District Veterinary Services.

Please note that all the Govett Quilliam Guides to many interesting legal topics and opportunities are available on line on www.thelawyers.co.nz. Please download them at your leisure

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