Welcome to our first newsletter specifically **for business.**

For those in business like you, we plan to do at least 3 focussed newsletters a year, with items of practical importance or interest.

If you have any topics which would interest you and might interest others, please let one of us know. If we don't use it in one of our newsletters, it could perhaps be incorporated into one of our seminars.

Through working together and keeping you informed, we hope to build on and add value to our existing business relationships.

Wishing you well in your ventures.

Phil Sewell and Brad McDonald – business partners at Godfreys Law

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Shareholder's Agreement – Why have one? – Brad McDonald

A large proportion of New Zealand businesses are operated through companies that are small and closely held. It is also common that many of these companies are owned and operated by families, with no involvement by "third parties". As these companies are family-owned and operated, there tend to be few issues that cannot be resolved through family discussion.

In companies that are owned and operated by persons who are unrelated to each other, disputes or other issues may arise were there is no "family relationship" to fall back on to reach a resolution. For companies like this, it is imperative that there is a mechanism established from the outset to overcome any hurdles that may arise or provide for future events not anticipated. The shareholders' agreement provides such a mechanism.

What is a Shareholders' Agreement
A shareholders' agreement is a legally binding agreement between the shareholders of a company, which sets out rules or procedures relating to the operation of the company. These rules and procedures can span a wide range of matters and situations. Unlike a company's constitution, which is publicly accessible, a shareholders' agreement is confidential between the shareholders of the company. Therefore, it is often preferable for some matters to be dealt with in a shareholders' agreement rather than the constitution. To ensure that the shareholders' agreement takes precedence over the constitution, it is usual to state in the constitution that where there are conflicts between the constitution and the shareholders' agreement, the shareholders' agreement will prevail.

What does a Shareholders' Agreement Typically Cover?
While there is no prescribed format or list of inclusions for a shareholders' agreement, there are a number of matters that would usually be included, for example:

- Management and control of the company, including the right to appoint and remove directors;
- The right to vote and the matters that require unanimous or majority decisions;
- The process for entry and exit of shareholders;
- Dividend policy;
- Capital and funding structure;
- Dispute resolution

Disputes and Deadlocks
Apart from establishing the processes and mechanisms for managing and operating the company, two very important reasons for having a shareholders' agreement are to:

- Provide resolution when there are shareholder disputes. While shareholders might hope to always be able to reach an agreement with each other, unfortunately shareholders' disputes are all too common. If there is no shareholders' agreement the process of resolving such disputes can be messy, expensive and extremely distracting from the day-to-day operations of the company.

- Provide a process to resolve deadlocks. Deadlocks occur when shareholders holding equal voting rights are unable to agree. A "deadlock provision" will set out a mechanism by which deadlocks can be resolved and enable the company to move forward.

A shareholders' agreement is often overlooked because legally a company constitution is all that is required. However, a shareholders' agreement can prove invaluable down the track. To adopt a shareholders' agreement the first point of contact should be a professional advisor, who can help you determine what needs to be included in the agreement. While there is an initial expense upfront in professional fees, the avoidance of pain later is worth the investment if things don't quite go to plan.

Reviewing Terms of Trade – Julie Aitken

When did you last look at the terms of trade on which you supply goods or services?

Most firms are too busy "doing the business" to worry too much about the fine print – but when problems arise, it is too late then to realise the fine print is a muddle, or cannot really be understood, or lacks the clauses you thought.

Some industries need good terms of trade more than others. For example if you have a established and long running business supplying goods to a customer then it would be worth registering your interest in relation to those goods on the PPSR. You can only do so if the customer has agreed with this and authorised it (and this is normally achieved by getting the customer to agree to your terms of trade). In theory, if later on there is default by that customer, you may be able to retain title to some of the goods which have not been paid for; though often there are practical difficulties in enforcing that. However, without the basic foundation (right clauses in your documentation) it is not even a possibility.

Another thing worth remembering are personal guarantees – see article below.

If you think that your terms of trade/conditions need reviewing please contact your usual business advisor at Godfreys. We would be pleased to help.

Personal Guarantees – Philip Sewell

When business is going well, we often think little about what might happen later when things are slower – our marketing plans get overlooked, we do things in a rush and sometimes this means signing documents without adequate checking. Sometimes this includes signing forms to open new credit accounts. Such forms always include terms of trade (or conditions) and often include Personal Guarantees – sometimes these are not obvious.

When business conditions are tougher (and in times of business failures), there is normally a surge of litigation over personal guarantees. This is always of interest to lawyers but possibly a bit more alarming for those people who during good times, had signed those guarantees only to find them come back and "bite them" a long time later.

If you are a supplier of goods and services, then you will want to get personal guarantees with your customers wherever possible. Some people would say you should do it for every smaller business, just in case. On the other hand, when your business is acting as a consumer (receiving goods and services from others) then you should resist giving personal guarantees if at all possible.

In a 2012 case Ravensdown Fertiliser Cooperative v Eveleigh there was an argument whether Mr Eveleigh and his son had in fact agreed to the personal guarantee. They had signed the form only once and they argued, they had signed it in their capacity as company directors. In support of that, the personal guarantee was on the reverse side of the form and seemed to need signing separately.

The details of the case are not so important as the legal principle which emerges. Although there is legal presumption that when a company director signs they do so only in their capacity as company director, that presumption can be displaced.

In the circumstances of this particular case, after close examination of the form and the wording, the High Court found that the Eveleighs had signed in dual capacity – in other words, they had signed it as company director and also as personal guarantors.

This was a very unwelcome result for them and demonstrates the real care which everyone must take when signing a new account opening form or agreeing to terms of trade.

In summary, you should avoid giving personal guarantees if at all possible. If it is not possible, then at least try to get the guarantee limited in some way. If that is not possible, keep a record of your exposure (personal exposure as guarantor) and monitor that carefully and if need be switch suppliers to a new supplier which does not require a guarantee. Also, on finishing business with the supplier be extra careful about ensuring that all personal guarantees have been dealt with either by repayment in closing the account or otherwise.