

Legal Pitfalls of Selling a Business

Partner

Stewart Lloyd Germann
B.Com, LLB, FCIS, CFInstD, Notary Public

Ground Floor, Princes Court
2 Princes Street, PO Box 1542
Auckland, New Zealand

Telephone 0-9-308 9925
Facsimile 0-9-308 9922
Email stewart@germann.co.nz
Web www.germann.co.nz

Selling a business may be regarded as the “end of a chapter” but care must be taken to ensure successful conclusion and to prevent future problems or liabilities.

Before you or your agent offer the business for sale you should consider the following:

- Ensure that for a year or possibly more prior to your proposed sale of the business you perform your obligations under any Agreement (including the Franchise Agreement), lease or other agreement under which the business is run and/or any of its assets held.
- Ensure that all governmental and Council or other requirements relating to the business are complied with.
- Ensure that all licences or other permits under which the business is run are current and renewable.
- Have your Accountant carry out an audit and prepare up to date accounts so that any representation you make regarding the turnover, profitability or other financial performance of the business is made on a sound and accurate base so that you can provide copies of these accounts to the Purchaser during due diligence and avoid allegations after the event of misrepresentation.
- Take tax advice on the structure of the proposed sale of the business to minimise adverse taxation implications.
- Ensure that the selling agent has a copy of the lease, Franchise Agreement or any other Agreement which gives you the right to carry on the business and under which you require consents from the Landlord, Franchisor or anyone for the sale/transfer of the business.
- Ensure that the selling agent and your solicitor have liaised so that the draft agreement submitted to the proposed Purchaser contains appropriate terms, including:
 - (a) a reasonable period for the Purchaser to carry out due diligence. It is not appropriate to try and make the period of due diligence as short as possible because if adverse matters are revealed after the event, then an unrealistically short period of due diligence could work against you. Documentation requested by the Purchaser during

due diligence should be supplied wherever possible and a documentary record maintained;

- (b) conditions and an appropriate period for obtaining Landlord approval to the assignment of the lease and Franchisor's approval of transfer (whether by assignment or grant of a new Franchise Agreement);
 - (c) make sure that any restraint of trade provision is not so restrictive as to prevent you from doing your intended work or business after you have sold your business; and
 - (d) other conditions as may be advised by your solicitor as appropriate in the case of your business.
- Ensure that a schedule of all plant, fittings and equipment is attached to the Agreement.
 - Do not sign any Agreement unless approved by your solicitor.
 - Carry out a search of your company on the Personal Property Securities Register (PPSR). The Purchaser will require that any security over any assets included in the sale be removed before settlement. Typically such security will exist over trading stock and over assets the subject of hire purchase or similar arrangements. While you may not wish to advise the creditors of any proposed sale before it is unconditional, it is good practice to know in advance the parties who will have to be contacted to arrange appropriate discharges prior to settlement.
 - Check the Employment Contracts of employees of the business and their entitlements. Usually the Vendor will be responsible for all termination payments including leave entitlements.
 - There is the belief by some Vendors that it is better and easier to get the Agreement "unconditional" by the Vendor giving warranties to cover aspects that would be the subject of Purchaser's due diligence such as turnover of the business and other aspects of its financial affairs. We believe the Vendor is better protected by obliging the Purchaser to carry out its own due diligence instead of giving warranties.

Take Legal Advice

- It is very important if you are selling a business whether it be franchised or non-franchised to engage the services of an accountant and an experienced lawyer and Stewart Germann of Stewart Germann Law Office is here to assist you. Agreements for Sale and Purchase of Businesses may be thought to be less complicated than they are. It is important that they contain provisions to protect you. Once an Agreement is signed it is too late to go back and negotiate missing provisions or required protections. SGL is a member of the Franchise Association of New Zealand and adheres to the Code of Practice. SGL is a boutique business firm providing friendly service and expert advice.