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LAWYERS

# LAW *for* SUCCESS

## Spring Issue

Welcome to our Spring Newsletter. Phil Bellamy contributes the first of two articles on the question of Debt Recovery. Chris Wright summarises the topic of licences to occupy, commonly referred to as an “Estate for Life” or “Lease for Life”, and Chris Royds reviews the matter of Immigration in relation to the Skilled Migrant and Investor categories.

Nicole Ironside writes the second of two articles relating to the four weeks annual holidays law change, this time on entitlement calculations, and finally, on the back page, we invite those who are interested to join us at one of two free seminars being held at Richmond on “Legal Issues for the Nifty 50s & Beyond”.

## Debt Recovery

***In the first of two articles, we discuss what makes up a robust recovery process.***



*Phil Bellamy*  
Senior Solicitor  
Nelson Litigation Team  
Tel: (03) 548 1469

Every business will have bad debts from time to time. However, for many businesses, the debt recovery process isn't given any real thought until such time as a debtor refuses to pay. In many cases this can be too late.

Some people think the process begins when they hand their account over to their solicitor

or debt collector, others see the start point as being when the account first goes into default. In fact, the debt recovery process starts from the moment a business decides to extend credit.

Our experience tells us that a robust debt recovery process should, from the start, establish:

1. The identity of the debtor;
2. The terms of the contract between the parties;
3. Whether or not security can be given for the debt;
4. The limits of credit; and
5. Alternative contact details for the debtor.

By addressing these issues before a client incurs debt, a business can simplify its debt

recovery process. Not only is it quicker and less expensive, but good procedures often make the difference between recovery and non-recovery.

Let's now discuss each of these items in more depth:

### ***1. Identity of Debtor***

One of the most common defences in a debt recovery action is for a defendant to say

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*“The debt recovery process starts from the moment a business decides to extend credit”*

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*“I’m not the person who was contracted with”.*

All too commonly, extensive time and cost is dedicated to establishing who the parties to the contract actually were. The problem can simply be avoided by having the client fill in some basic forms right from the start, which clearly identify the person or legal entity that is incurring the debt.

## **2. Terms of Contract**

The documentation that identifies the parties will also contain the terms of the contract between them. Many business people incorrectly believe that if their terms of trade are printed on the back of the invoice which is sent out at the end of the month, then the parties are bound by those terms of trade.

The basic rule relating to contract is that the terms of the contract must be established at the time the contract is entered into. The contract is essentially entered into when the parties agree to the sale of goods or the supply of services. If the terms of the contract have not been agreed at that time, then neither party can impose terms which have not been discussed.

The legal definition of a contract is *“a meeting of minds”*. There cannot be a meeting of minds if the terms of the contract are only known to one of the parties. (You may recall reference to *“a meeting of minds”* in our last issue’s article *“Is a verbal contract binding?”*)

While the Courts have accepted arguments from creditors to the effect that, as the parties have been guided by the terms on the back of an invoice for a long period of time, they should now be deemed binding, they have also declined such arguments.

Having a signed agreement with clearly outlined terms removes

any doubt as to what the terms of the contract were.

Written terms in the contract should allow for:

- Recovery of all costs associated with collecting outstanding money;
- The charging of interest on overdue unpaid money;
- The right to claim goods back where they have not been paid for; and
- Clear terms of payment.

## **3. Obtaining Security / Personal Guarantees**

The bigger the amount of credit that is extended, the more thought a creditor should give to obtaining security for the debt. Too often suppliers are only too happy to land the account of XYZ Limited, which will turn over thousands of dollars each month, without giving any thought to a default situation where, within a relatively short period of time, a company could owe thousands of dollars for which there is no security.

A company is a separate legal entity from its shareholders and directors. A company owns property, incurs debt in its own name, and is required to use its own assets and earnings to pay its debts. If the company’s debts exceed the value of its assets and income, the company becomes insolvent. When a company is insolvent, it is the unsecured debtors who generally lose out and, generally speaking, it is also the unsecured debtors who supply goods and services.

One way of improving the chances of recovering in a default situation is to obtain a personal guarantee of the company shareholders. In effect this guarantee says that if the company does not pay its debts,



then the guarantors will. If the guarantee documentation is incorporated or attached to the terms of trade, then the guarantors are also deemed to know the terms of trade.

While additional security can mean mortgage or caveat security over land, this is not a common occurrence unless a debtor has got into difficulty and needs to provide this further security to allow trading to continue.

A word of warning - if personal guarantees are not obtained before a debt is incurred, unless very specific requirements are met, a guarantee given later is void and unenforceable. If a business ever finds itself in a position of being asked to accept a guarantee for goods and services already supplied, it should consult its solicitor before signing any documentation.

## **4. Limits on Amount of Debt**

There are many stories of creditor companies facing collapse or even collapsing because of the default of a major debtor. In a significant number of cases this could have been avoided had the parties agreed on the level of credit to be extended and stuck to those limits.

Your bank puts a credit limit on you, and it makes sense that if your business is going to extend credit then it, like a bank, limits the credit.

A credit limit enables parties to assess their relationship at crucial times, and if the limit

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## Licences to Occupy

**A regular question raised with our Trust practitioners is “What is a licence to occupy, and do I need one?”**



**Chris Wright**  
Partner  
Nelson Commercial Team  
DDI: (03) 539 1721

A “Licence to Occupy” is more properly described as an “Estate for Life” or “Lease for Life”. The concept is simple. A property owner, typically a homeowner, obtains the right to occupy a property during their lifetime, and sells the remaining interest in the property to a Trust or to close members of the family.

The rationale for this transaction is that by creating a Lease for Life, the value of the property to a purchaser is reduced, and therefore the final purchase price will be discounted by the value of the life interest retained in the Lease for Life.

The value of the Lease for Life

is determined by the Estate and Gift Duties Act, and is based on the seller’s age and gender.

An example of such a transaction would be:

- Valuation of home \$200,000
- Seller - female age 50
- Value of Lease for Life \$145,570
- Sale price determined after creation of Lease for Life \$54,430

It is crucial that the Lease for Life be created *before* a property is sold. If this does not occur, then an adverse tax liability can be created.

The obvious benefit of a Lease for Life when establishing a Family Trust is that it can, in theory, significantly reduce the amount that needs to be gifted by the settlors. Further, it provides the seller with protection that the house cannot be sold without his or her agreement.

There are, however, potential difficulties and complications in creating a Lease for Life. For example, when a house is sold

subject to a Lease for Life, the process must be reversed using the value of the house at that time.

If we follow on from our earlier example and the property is sold five years later for \$400,000, the female now aged 55 would have to surrender the Lease for Life at a value of \$266,452. If another property is not purchased, then this surrender value needs to be gifted.

We have encountered several examples in the last few years in which, because of the significant increase in house values, the surrender value has created a larger gifting obligation than was ever anticipated.

### Our Advice

If you are considering establishing a Trust, or undertaking estate planning, a Lease for Life is a useful tool to be considered. It does, however, require careful evaluation before it is included in any final estate planning process.

For assistance, contact Chris Wright or any one of our Trust Team specialists. ▲▲

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is to be increased, it gives the parties the opportunity to discuss security or better security measures for the debt owed.

### 5. Alternative Contacts

When a business is in financial difficulty, it is not uncommon for the proprietors to walk away from the business altogether and move to a different city to start all over again. Tracking the debtor down can be time consuming and expensive. However, one relatively simple way of keeping track of people is through their relatives.

While absconding debtors will go to great lengths to avoid creditors, they always keep in contact with their relatives, whom more often than not give accurate information on how to contact the debtor or can pass on messages which result in the debtor contacting the creditor.



A small detail such as parents’, brothers’ and sisters’ names and addresses can be of great assistance.

In our December issue we will look at some of the options available for recovering a debt, depending on how robust a debt recovery process may be.

**For assistance with your credit procedure and documentation, contact Phil Bellamy or Andrew Challis. ▲▲**

# Immigration

## Skilled Migrant and Investor Categories



*Chris Royds  
Partner  
Nelson Commercial Team  
DDI: (03) 539 1736*

Immigration is a unique area of law in a variety of ways. One significant difference is that immigration law is primarily governed by policies.

The Immigration Act 1987 (currently under review) is a concise statute, and enables the mechanical aspects of immigration law to be governed by policies issued by the New Zealand Immigration Service (NZIS).

Under this framework, the advantage is that immigration law can quickly change to reflect New Zealand's immigration needs.

The disadvantage is that policies are constantly changing. This aspect, combined with the fact that no application to the NZIS is the same, makes immigration law a very dynamic area.

### Expressions of Interest

Criticism has been levelled at the NZIS in the past for slow processing of residence

applications. In response, the NZIS has introduced a preliminary "expression of interest" stage that currently applies to "skilled migrant" and "investor category" applications.

An expression of interest requires an applicant's details and background information to be provided as a first step, without enclosing any documentary evidence. This enables rejection of applications that clearly would not meet the relevant criteria, and as a result not bog down immigration officers processing a full application only to reject it months later.

### Investor Category

This category of residence application underwent significant amendment in July 2005. In general terms, an applicant under the investor category would now need to:

1. Be under 55 years of age; and
2. Have business experience; and
3. Invest \$2,000,000 with the New Zealand Government for two to five years and only receive a return on that investment tagged to the consumer price index; and
4. Establish New Zealand as their principal abode at the

end of the five-year period. A number of tests are applied to determine whether this criteria has been met.

These changes to the investor category introduced a significant change in philosophy to this residence category, as previously there were no stringent obligations to establish New Zealand as a home once a residence permit was granted. In most cases that occurred as a matter of course, but the



changes to the investor category now make this a requirement.

Consequently, this residence category is only available to overseas people who wish to live and invest in New Zealand permanently.

If you have any queries, either general or relating to the skilled migrant or investor categories, please contact Chris Royds or Andrew Challis at our Nelson Office. ▲▲

## Four Weeks Annual Holidays Calculations

**This article follows on from our previous issue, which explored changes to the Holidays Act 2003, which come into effect on 1 April 2007**



*Nicole Ironside  
Senior Solicitor  
Nelson Litigation Team  
Tel: (03) 548 1469*

At present employees are entitled to three weeks or 15 days annual holidays once they have worked for 12 months. As from 1 April 2007, this entitlement increases to four weeks or 20 days annual holidays.

For casual employees and those employees on fixed term contracts for less than 12 months, employers are able to pay holiday pay as part of the employee's weekly wages. At present, the holiday rate is set at 6% of gross earnings. This rate will increase to 8% as from 1 April 2007.

### Leave Entitlements for Existing Staff

Employers may not find it easy to calculate an employee's holiday entitlement as a result of these changes.

To assist, below is a step-by-step process for calculating leave entitlements:

**Step 1** – Check the employment contract to establish whether the employee is casual, or on a fixed term for less than 12 months, and whether they are paid holiday pay at the 6% rate with their weekly wages.

**Step 2** – Determine the start date of employment and the anniversary date for the employee's leave entitlement. This will normally be 12 months after the start date of employment, although there may be a different anniversary date if the employer has a close-down period eg. at Christmas.

**Step 3** – If the anniversary date falls on or after 1 April 2007, then the employee will be entitled to four weeks annual holidays. For casual or fixed term employees on contracts for less than 12 months

and who are paid holiday pay with their weekly pay, the holiday rate will increase to 8% on 1 April 2007.

### Leave Entitlements when an Employee Leaves

Employees who leave prior to 1 April 2007 will not be entitled to the new entitlement leave of four weeks or the new rate of 8%. Their existing entitlement of three weeks leave or 6% will apply.

- If an employee leaves on or after 1 April 2007, the employer should establish when the employee's anniversary date is. If their anniversary date is prior to 1 April 2007, then the employee is entitled to:

- (a) three weeks' annual leave less any leave taken in advance together with any outstanding annual holidays that they have accrued on their anniversary date; plus
- (b) payment of 8% gross earnings for the period commencing from their last anniversary date, ie. prior to 1 April 2007 to termination date after 1 April 2007.



- If the employee's last anniversary date is after 1 April 2007, then the employee is entitled to:
  - (a) four weeks' annual holidays less any leave taken

in advance, together with any outstanding annual holidays that the employee has accrued on their anniversary date; plus

- (b) payment of 8% gross earnings for the period commencing from their last anniversary date, ie. after 1 April 2007 to termination date.

### Examples

- Tina's anniversary date is 27 November 2007. On that date she will become entitled to four weeks' annual holidays, plus a further four weeks' annual holidays on each anniversary date thereafter.
- Tom leaves his employment on 1 August 2007. His anniversary date was 1 November 2006. Tom's entitlements would include three weeks' annual holidays on 1 November 2006; plus payment for any annual holidays owing as at 1 August 2007 at the greater of average or ordinary earnings; plus payment of 8% gross earnings for the nine-month period between 1 November 2006 and 1 August 2007.

**For assistance with your payroll calculations or implications of the Holidays Act, contact Nicole Ironside on 548 1469. ▲▲**

**Free Seminars****“Legal Issues  
for the Nifty 50s & Beyond”****Wednesday 27 September – Richmond**

(venue advised at RSVP)

**3.00 – 4.00 pm and 5.30 – 6.30 pm**

(followed by complimentary refreshments)

- Wills and Powers of Attorney
- Resthomes (Unit Ownership and Licences to Occupy)
  - Recent Changes to Residential Care Subsidies
- Financial Considerations including Reverse Mortgages
  - The benefits of Family Trusts
  - Administering your Estate

**RSVP** by 22 September to Krista Hawken  
Tel: 544 8666 or e-mail [khawken@fvm.co.nz](mailto:khawken@fvm.co.nz)

**Presenters**

Fiona  
McConnochie  
Solicitor



Shelley  
Conlon  
Legal Executive



Stephen  
Webb  
Solicitor



Pam  
Coltman  
Legal Executive

[www.fvm.co.nz](http://www.fvm.co.nz)

**Staff  
Announcements**

In August we welcomed **Audrey Price** to our Motueka Team as Personal Assistant to Marian Lyders and Judy Lucre.

Shortly after we also welcomed the return of **Kate Mitchell**, on a part-time basis while juggling motherhood. Kate is a Solicitor with our Richmond Resource Management Team. **Lauren Wallace** was farewelled at the end of her six month parental leave cover before moving to Tauranga.

**Visit Website for  
Legal Articles**

Visit our website **[www.fvm.co.nz](http://www.fvm.co.nz)** to view a variety of extended Legal Articles including:

- Holidays Act Highlights
- Protection Against Asset/Income Testing
- Structuring your Business for Maximum Benefit
- Thinking of Subdividing?



**Would you prefer to receive our newsletter via e-mail?**

If so, please contact Penny Menzies PA to Management Team, Nelson Office

E-mail: [pmenzies@fvm.co.nz](mailto:pmenzies@fvm.co.nz) Telephone: 03 539 1717



**FLETCHER VAUTIER MOORE**  
LAWYERS

**Nelson** Level 1, 126 Trafalgar Street, PO Box 90, Tel: (03) 548 1469, Fax: (03) 548 2994

**Richmond** 2 Cambridge Street, PO Box 3029, Tel: (03) 544 8666, Fax: (03) 544 4036

**Motueka** 12 Wallace Street, PO Box 23, Tel: (03) 528 7030, Fax: (03) 528 9120

Visits to **Takaka** every Thursday/Friday and to **Havelock** by appointment

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