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LAWYERS

# LAW *for* SUCCESS

## Winter Issue

- We are pleased to offer our first newsletter for 2006 as a six page bumper issue. Leading the way is an article answering a commonly asked question of lawyers “Is a verbal contract binding?”
- If you employ staff, an article on “Four Weeks Annual Holidays” highlights some key issues employers will need to give some thought to. We also explore the dilemma of when Will bequests are challenged, and for our commercial readers, what options are available to businesses when faced with tougher times.
- Finally, on 14 and 21 June we are hosting one of our most popular free seminars on Family Trusts at Richmond and Motueka – details on the back page.

**Steve Fraser**  
Business Manager

## Is a Verbal Contract Binding?



*Andrew Challis*  
Solicitor  
Nelson Litigation Team  
Tel: (03) 548 2994

The American movie mogul Samuel Goldwyn, once said that “A verbal contract was not worth the paper it was written on”. This quirky saying appears to have reinforced a widely held view that verbal contracts are unenforceable.

This article will attempt to debunk that myth, and highlight the necessary elements which form a binding contract.

Everyday we enter into simple contracts, whether it be going into a service station to buy petrol, ordering flowers over the telephone or going to a restaurant. All of these transactions are contracts. Yet, unless things go wrong, we never give these day to day contracts a second thought.

The necessary elements for formation of a contract are:

**1. Capacity** – By this we mean of age, mental ability or, in the case of a company or trust, the authority to enter into a contract.

For example, children under the age of 18 years generally lack capacity to enter into a contract, although there are exceptions. Persons of unsound mind, whether by disability or impact due to alcohol or drugs, may also lack capacity to enter into a contract. The law established by

legal cases has been modified by the Minors Contracts Act 1969 which clarifies and defines when minors (children) have capacity to enter into a contract.

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The capacity for authority of companies and trusts to enter into binding contracts will be canvassed in a later newsletter, as it is a topic in itself.

## **2. Offer and Acceptance**

– There must be an offer (to sell goods or provide services) and acceptance of that offer - a “meeting of minds” regarding the transaction. Acceptance is generally by way of a statement, a sign or an action that indicates that the party to whom an offer is made intends to be bound by the terms of that offer.



## **3. Intention to Create Legal Relations**

– This requires the parties to a contract to have the intention (express or implied) to enter into a legally binding relationship. Here the law relies on certain presumptions about what a reasonable person would have understood the intention to be. For example, certain transactions between family members or close friends may fail to create a contract due to

lack of intent to create legal relations.

## **4. Consideration**

– At its simplest definition, consideration is the price of the promise. For example, I pay \$1.00 and you give me a bag of sweets. The consideration is \$1.00.

If all of the above elements are present, you create a contract, whether written or verbal.

Where there is a contract, any breaches can be argued within the Courts. The difficulty with verbal contracts, of course, is that it may be difficult to prove what was agreed between the parties. However, the Courts will attempt to define verbal contracts by a combination of factors, including the conduct of the parties, past dealings and simply whether or not a particular party appears credible.

Many people who seek to rely on a verbal contract will often find that a Court has to make a judgment on scant evidence which is the difficulty of verbal contracts.

In practicality therefore, a verbal contract may effectively become unenforceable due to lack of evidence. Therein lies the difficulty of not being able to prove what was agreed as opposed to the actual agreement that leads many to believe that verbal contracts are unenforceable, and hence the

wisdom of Samuel Goldwyn.

For the majority of simple contracts, there is probably little point in recording the contract in writing. However, for more complex dealings, or where the

*Many people who seek to rely on a verbal contract will often find that a Court has to make a judgment on scant evidence...*

consideration is significant, it is clearly beneficial (and indeed desirable) to record the contract terms and conditions in writing.

Although beyond the scope of this brief article, it is also worth pointing out that there are certain contracts that must be in writing, for example any contract dealing with an interest in land eg. sale, lease or licence.

It is also a legal requirement that employment agreements be put in writing, the breach of which can be a penalty imposed by the Employment Relations Authority.

## **Our Advice**

If you are in business, or are contemplating a commercial or personal transaction beyond the every day, then you would be well advised to ensure you have a written contract and to take legal advice before concluding any agreement. In that way your interests will be better protected, and there will hopefully be greater certainty as to what was agreed. ▲

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## Four Weeks Annual Holidays – 1 April 2007

**Employers – Have you thought about how this will impact on your business?**

From 1 April 2007, all employees will become eligible for four weeks annual holiday under the Holidays Act 2003.

Holiday pay increases from 6% to 8% of an employee's gross earnings since their last anniversary date\* (or for new employees, since starting work), if employees leave their employment after 1 April 2007 and before their next anniversary date.

\*Anniversary date means the anniversary of the date an employee started work (or a nominated date if the employer has an annual closedown), and is the date the employee receives their next full annual holiday entitlement.

The effects and issues faced as a consequence of this change in legislation will vary from business to business. For all employers, however, careful consideration, planning and possible action should be taken now in order to better prepare their business and staff.

Some issues to consider are:

### Business Success

Thought should be given as to how increased staff absences may impede the operation and efficiency of your business.

Identify potential problem areas and possible solutions. There may be benefit in involving your staff in this initial thinking process and planning.

### Financial

The cost of an increase in annual leave entitlements will need to be budgeted for, as there may be additional costs of employing relief or temporary staff after 1 April 2007.

### Payroll

Identify how many employees will move from three to four weeks annual holiday and when their anniversary dates are. It may be necessary to talk to your payroll software provider and/or other advisors about options for managing this through their payroll system.



### Staff Absence Arrangements

The way in which businesses currently deal with staff absences and cover arrangements differs from business to business. However, the effects of having all staff entitled to at least four weeks annual leave will likely result in increased staffing challenges for most employers. There is also likely to be instances of multiple staff being concurrently absent.

As a result, if you have casual on-call staff, you may need to review your current situation

and whether those resources will be sufficient in the future. Recruiting and training additional staff takes time, effort and cost, and with the current shortage of skilled workers available to choose from, seeking cover or temporary staff is likely to be a challenge in itself, and best looked at well in advance.

It may also be appropriate to extend the length of notice of intended leave you require your staff to give.

### Training

For some businesses, training existing employees to carry out co-workers' tasks, in part or full, may be one way of dealing with short term absences. Supporting an approach for multi-skilled employees will also provide professional development opportunities for your staff.

Also, a more structured leave plan system may be helpful to avoid multiple absences at any one time.

In our Spring newsletter issue, we will explore how your payroll calculations will be affected and some examples of how four weeks annual holidays will work in practice. We will also review some specific wording which may appear in your existing employment contracts.

**If you would like to know more about this issue, contact any one of our employment law specialists. ▲**

### ■ Successful Employer Seminars

In May we hosted a seminar for employers at Nelson, Richmond and Motueka entitled "Managing Poor Performance, Misconduct and Dismissal of Employees". These popular seminars were presented by Nelson Litigation Team Solicitor, Nicole Ironside, and may be repeated later in the year. Enquiries to Penny Menzies 03 539 1717.

### ■ Future Seminar on Elder Law

Plans are underway to host this new seminar around August/September covering Wills, Powers of Attorney, estate administration, trusts, accommodation issues and financing including reverse mortgages. Dates and further details will be on our website shortly. Enquiries to Penny Menzies 03 539 1717.

## To Give or Not to Give – That is the Question!

**Many a person making their last Will has been confronted with the question of whether or not to leave a gift to a particular person or persons.**

The reasons for this dilemma are as varied as the terms of different Wills. With apologies to Shakespeare, “To give or not to give, that is the question”, often the answer will be dictated by personal circumstances and commitments, but you should be aware that such views might not be decisive, and there are situations where the Courts will override your wishes.

New Zealand has been an international pacesetter in many fields over the years. We were the first country in the world to give women the vote. We were amongst the first in the western world to enact comprehensive social welfare legislation.

New Zealand was also the first commonwealth country to impose family protection legislation when it passed the Testator’s Family Maintenance Act 1900. That Act limited the scope of a person’s power to dispose of assets by Will. In the ensuing years the intrusion on a person’s ability to deal with their property as they wish on their death has increased.



A person making a Will today does not have the total freedom to deal with their assets as they see fit. Legislation passed by Parliament over the years allows various disaffected persons to challenge a Will and to seek support/payment from a

deceased’s estate. Of note:

- The Family Protection Act 1955 bestows on members of a deceased’s family (from spouse/de facto partner to children, grandchildren and even parents or stepchildren who were being wholly/partly maintained) the right to challenge the Will if it does not provide “for the proper maintenance and support” of such person(s).

The Courts have consistently drawn a distinction between “proper maintenance and support” on the one hand and “adequate maintenance and support” on the other but the distinction is often not easy to draw. A recent Court of Appeal decision makes it clear that the claim is based on a sense of family belonging – not need.

- The Law Reform (Testamentary Promises) Act 1949 allows any person (including non-family members) to bring a claim against an estate on the grounds that he/she had rendered services to or performed work for the deceased, and the deceased had promised to reward them for such services or work.

The Act has led to some interesting claims over the years, and has no counterpart elsewhere in the world. Difficulties can arise not only because the promise may be implicit as well as express, but also because the one person uniquely qualified to comment on the claim is no longer available to give evidence.



*Bruce Fraser*  
Partner  
Nelson Commercial Team  
DDI: (03) 539 1735

The potential issues are compounded by the rather liberal definition of the word “promise”, which can include a mere statement/representation falling short of a contractual commitment.

Historically the Courts have tended to take a rather liberal view of such claims, although it is to be noted that the discretion vested in the Court is to award a “reasonable sum”, not necessarily the quantum of the alleged promise.

- The Property (Relationships) Act 1976 as now enacted also gives further powers to a surviving spouse or de facto partner who may elect to pursue a claim under this Act (which starts with, in the normal course, a presumption of equal entitlement, 50%) rather than under the less certain Family Protection Act.

### Conclusion

It will be clear from the above that in making a Will you need to give careful thought to potential claims which might be brought against your estate. There may well be situations where it is appropriate to structure your Will in a way which addresses claims before they arise and/or to leave notes or records which explain your thinking and reasoning so that you can speak beyond the grave. ▲

## Tougher Times

***As lawyers, we help our clients during prosperous times, but we also play an important role when the economic climate deteriorates.***



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

Unfortunately, over the last 18 months our legal work has involved helping clients who are struggling as a result of a changed economic environment. We thought it timely to highlight how we can assist when the downturn hits you and your business.

Firstly, it is important to seek practical accounting and legal advice at an early stage. Creditors, especially your bank, will often view this as a positive step. The use of skilled professionals is important evidence that you are proactively looking to deal with your predicament.

We have recently been interacting with banks who have refrained from enforcement action primarily because appropriate advisors are involved to assist in managing the situation. As a result, we have been able to work through and achieve positive outcomes for our clients in situations where a mortgagee sale was looming.

A critical point is to maintain open communication with

creditors. Our experience is that creditors (especially banks and lenders) will have an appreciation that times are tough, and will generally look to try and work through any difficult financial periods as long as there is some prospect of financial recovery.

When your business is in strife there are always options. Some of these include:

- Sale of assets, some or all. You may own assets which can be better turned into cash when times are tough - every bit of positive cashflow helps considerably.
- Lease assets instead of own. Leasing of assets not only avoids the necessity for capital outlay, but it also allows a tax write-off for the cost of leasing as well as minimising exposure to older technology.
- Refinance or restructure debt. While there may be an initial cost, the longer term savings can be substantial in many situations and, to an extent, allows a fresh start.
- Capitalisation of interest to help fund a period of poor cashflow.
- Cease trading either partially or entirely. Hard as it is, sometimes this is the best option and one which may stop further losses.
- Introduce a new partner. Not only does this allow for capital injection, but it also introduces new ideas, strategies, skills and contacts to the business.
- Seek financial support from a creditor or investor. You might be surprised how supportive some creditors can be once they know the commercial reality. It may be in their interests to work with you rather than force the issue.
- Enter into a compromise with creditors. This could be a short-term measure to help through a cashflow predicament. Alternatively, it may help to “park” hardcore debt with payment over time.



Whilst we don't have magic wands in our bottom drawer, we do have a number of experienced solicitors with a combined wealth of expertise in this field of law who are available to help you when times get tough.

**Contact Chris Royds or any one of our Commercial Team lawyers for advice and assistance. ▲**

## 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:

- Structuring your Business for Maximum Benefit
- Protection Against Asset/Income Testing
- Criminal Records (Clean Slate Act) 2004 Review
- Holidays Act Highlights
- Thinking of Subdividing?

**Free Seminars****HOW CAN FAMILY TRUSTS HELP YOU?**

Find out how to protect assets for yourself and your family by taking informed action now.

All existing and new clients are invited to attend one of two free seminars on Family Trusts and asset protection planning including:

- How a Family Trust is established and how it operates
- Protection offered by Family Trusts
- Changes to asset testing and residential care subsidies effective from 1 July 2005
- Commonly asked questions about Family Trusts and protection of assets

**Presenters**

Fiona McConnochie  
Solicitor



Roger Slade  
Partner



Lee Stevens  
Solicitor

View presenter profiles at  
[www.fvm.co.nz](http://www.fvm.co.nz) - 'Our People'

**RICHMOND:** Wed 14 June – Waimea College

**MOTUEKA:** Wed 21 June – Gothic Café

5.30 – 6.30 pm

followed by complimentary refreshments

**RSVP by**

12 June (Richmond) / 19 June (Motueka)

to Penny Menzies phone direct 03 539 1717  
or e-mail [pmenzies@fvm.co.nz](mailto:pmenzies@fvm.co.nz)

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

**Staff Announcements**

**Andrew Challis** was welcomed to the firm at the end of January.

As part of our Nelson Litigation Team, Andrew specialises in all aspects of litigation and dispute resolution. Having originally graduated in and emigrated from the UK, Andrew practised in a number of small Nelson legal firms before joining Fletcher Vautier Moore.



Andrew can be contacted at our Nelson Office on 03 548 1469.

**Andrew Challis**  
[achallis@fvm.co.nz](mailto:achallis@fvm.co.nz)

**Stephen Webb** joined the firm in April, having previously practised as a solicitor at a Christchurch law firm for several years.

While pursuing a career in law, Stephen served with the New Zealand Police Force for 14 years in Auckland and Christchurch.

For assistance with property and business law matters, contact Stephen Webb on 539 1725.



**Stephen Webb**  
[swebb@fvm.co.nz](mailto:swebb@fvm.co.nz)

**Kelly Sheldon** joined our Nelson Litigation Team as Personal Assistant to Nicole Ironside in January.

In February we farewelled from our Richmond Office **Graeme Malone**, Solicitor Consultant, and **Deb Olsen**, Receptionist/Administrator, both long-standing staff members.

**Krista Hawken** was welcomed to the Richmond Team as Receptionist/Administrator, together with **Lyn Frampton** who was appointed part-time Personal Assistant to the Resource Management Team, replacing **Julie Jar**.



**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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