

PRESENTERS



Luke Balmforth, Lowndes Jordan, Auckland

Luke is a Senior Associate at Lowndes Jordan, a niche business law firm based in Auckland. He is a corporate and commercial law specialist with experience advising listed and unlisted entities and individuals on share and business acquisitions and dispositions, business reorganisations, offers of securities, shareholders' agreements, commercial contracts, regulatory compliance, and general corporate and commercial law matters. Luke joined Lowndes Jordan in 2015 having previously worked as a senior in-house legal counsel at a New Zealand corporate and prior to that in the corporate advisory group of a leading national law firm.



Lauren Hibberd, Sainsbury, Logan & Williams, Napier

Lauren is a Partner in the long established Napier firm of Sainsbury, Logan & Williams. As part of the corporate and commercial team she advises clients on a range of commercial issues including business structures, acquisitions and sales, shareholder agreements and commercial contracts. Her clients include wholesale investors, investment syndicates, wineries, horticulturalists, medical practices and institutional organisations. Lauren joined Sainsbury, Logan & Williams in 2009 having previously worked for national firms in Wellington and Auckland.

Cover and text stocks used in this publication are from Forestry Stewardship Council certified mills, manufactured under the environmentally responsible paper manufactured environmental management system ISO 14001, using pulp from well managed forests and other controlled sources.

CONTENTS

1. INITIAL STAGES – TERM SHEETS, EXCLUSIVITY AND CONFIDENTIALITY	1
INFORMATION MEMORANDA	1
TERM SHEETS	1
<i>Key Features</i>	1
<i>Rationale for Purchaser</i>	2
<i>Rationale for Vendor</i>	2
<i>Deposit</i>	2
<i>Costs</i>	2
<i>Non-binding</i>	2
EXCLUSIVITY	3
CONFIDENTIALITY	3
<i>Agreements</i>	3
<i>Common law position</i>	4
<i>AB Consolidated v Europe Strength Food Co Pty Limited 2 NZLR [1978]</i>	5
<i>Terrapin Limited v Builders’ Supply Company (Hayes) Limited and Ors RPC [1967] 375 (England)</i> 6	
<i>Auckland International Airport Limited v Air New Zealand Limited, High Court, Auckland, 22 September 2006, Harrison J.</i>	6
<i>Enforcement</i>	8
2. STRUCTURING THE SALE – WHAT IS A BUSINESS?	13
LEGAL DEFINITIONS	13
CASE STUDIES TO CONSIDER	14
<i>Example 1</i>	14
<i>Example 2</i>	14
<i>Example 3</i>	15
COMPONENTS IN A BUSINESS	15
LAND	15
3. STRUCTURING THE SALE – DISTINCTION BETWEEN SHARE SALES AND ASSET SALES	17
INTRODUCTION	17
FACTORS INFLUENCING TRANSACTION STRUCTURE	17
<i>Implications of the chosen structure</i>	18
4. THE DUE DILIGENCE PROCESS	21
INTRODUCTION	21
VENDOR DUE DILIGENCE	21
<i>Purpose and scope</i>	21
<i>Vendor due diligence reports</i>	22
<i>Due diligence on prospective purchasers</i>	23
PURCHASER DUE DILIGENCE	23
<i>Scope and materiality</i>	23
<i>Timing</i>	25
<i>Provision of due diligence materials</i>	26
<i>Purchaser due diligence report</i>	28
5. PAYMENT STRUCTURE OPTIONS	29
CLEAN EXIT	29
DELAYED EXIT	29
EARN OUT	29
STAGGERED PAYMENTS.....	30
SHAREHOLDINGS	30
SHAREHOLDER LOANS.....	30
METRIC FOR PURCHASE PRICE.....	31
COMPLETION ACCOUNTS AND WORKING CAPITAL ADJUSTMENTS.....	31
ACCRUALS AND TAXATION.....	31

6. EMPLOYMENT CONSIDERATIONS IN RELATION TO THE SALE AND PURCHASE OF A BUSINESS	33
STRUCTURE OF THE SALE AND PURCHASE TRANSACTION	33
APPROACH FOR DEALING WITH EMPLOYEES IN AN ASSET SALE	34
1. <i>Review the employees' employment agreements</i>	34
2. <i>Commence consultation with employees</i>	35
3. <i>Make sure employees have access to all relevant information about the proposed decision</i>	35
4. <i>Give employees an opportunity to consider all relevant information about the proposed decision</i>	36
5. <i>Regularly meet with employees to discuss any developments in the sale process and/or any comments employees may have</i>	36
6. <i>Communicate with the purchaser throughout the consultation process to keep up to date with its intentions</i>	36
7. <i>Consider employees' comments and advise them of the decision</i>	36
IMPORTANT CONSIDERATIONS WHEN DRAFTING THE SALE AND PURCHASE AGREEMENT	36
<i>Notice periods</i>	36
<i>Accrued entitlements</i>	37
<i>Redundancy</i>	37
STANDARD EMPLOYMENT CLAUSE IN A SALE AND PURCHASE AGREEMENT.....	38
<i>Offer of employment</i>	38
<i>Payment of accrued entitlements</i>	38
<i>Co-operation</i>	38
<i>Recognition of service</i>	38
<i>Redundancy obligations</i>	38
VULNERABLE EMPLOYEES	39
RESTRAINT OF TRADE AND NON-COMPETITION CLAUSES	39
7. WARRANTIES AND INDEMNITIES	41
WARRANTIES	41
<i>Elements of Warranties</i>	41
<i>Notification of Breach</i>	42
<i>Mitigation of Loss</i>	43
<i>Assessment of Liability</i>	43
<i>Escrow</i>	43
<i>Contractual Remedies Act 1979</i>	43
<i>Exclusion of Implied Warranties</i>	43
<i>Classes of Warranties</i>	44
<i>Subject Matter of Warranties</i>	44
<i>Purchaser Warranties</i>	47
INDEMNITIES	47
APPENDIX: CONTRACTUAL REMEDIES ACT 1979, SECTIONS 5 TO 10	49
8. LIMITATIONS OF LIABILITY AND EXCLUSIONS	53
LIMITATIONS OF LIABILITY	53
<i>Minimum Amounts</i>	53
<i>Maximum Amounts</i>	53
<i>Timeframes</i>	54
<i>Winding Up</i>	54
<i>Consequential Loss</i>	54
EXCLUSIONS AND QUALIFICATIONS	55
<i>Exclusions</i>	55
<i>Qualifications</i>	55

9. COMPLETION OF THE SALE AND PURCHASE OF A BUSINESS.....	57
INTRODUCTION	57
PRE-COMPLETION	57
<i>Conditions</i>	57
<i>Pre-completion obligations</i>	59
<i>Preparing for completion</i>	59
<i>Counterparty consents</i>	60
COMPLETION	62
<i>Standard completion deliverables</i>	62
POST-COMPLETION	63