

Welcome to the early Winter edition of *Commercial eSpeaking*. We hope you find the articles both useful and interesting.

If you would like to talk further about any of the topics covered in this newsletter, or indeed any business law matter, please be in touch with us.

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Copyright, NZ LAW Limited, 2012. Editor: Adrienne Olsen. E-mail: adrienne@adroite.co.nz. Ph: 04-496 5513.

Using Intellectual Property to Sustain your Business

IP can open new markets and develop new revenue streams

All businesses, no matter how different, strive for success in a sustainable way. Intellectual property is one tool a business can use to sustain itself.

The term 'sustainable business' means different things to different people. Originally synonymous with 'green business', it now has a broader meaning more closely aligned with the true priorities of most enterprises. A sustainable business strives to meet commitments to *people, planet and profit*, the so-called three pillars. Crucially, a sustainable business also does exactly what it says on the tin – sustains itself over an extended period. The benefits of fulfilling commitments to the three pillars have no consequence if a business cannot continue providing those benefits.

IP rights and sustainable profit

Out of the three pillars of a sustainable business, intellectual property (IP) principally helps to maximise and maintain profits. By ensuring its profitability, a business will be in a better financial position to look after its people and make decisions that are better for the planet.

A *trade mark* is a badge of origin which distinguishes products or services of one business from those of another and can be a word, phrase, logo or even a shape, colour, sound or smell. Registering a trade mark prevents others trading off the goodwill or reputation established by one company in particular products or services. Trade marks enable customers to clearly distinguish one company's products or services from those of its competitors, meaning its profit streams can be protected. Registered trade marks can be renewed indefinitely, giving sustainable protection for a long time.

Patents give exclusive rights in an invention for up to 20 years. Protecting new innovations is critical for obtaining and, subsequently, sustaining the market share won by virtue of the advantage innovations provide over existing technology.

Trade secrets refer to information kept confidential to provide a competitive advantage. Examples are the Coca-Cola formula and KFC's 11 herbs and spices recipe. Only information that cannot be easily ascertained (for example, by reverse engineering) is suitable for protection as a trade secret. A trade secret has the potential to endure indefinitely. Maintaining the secret may mean ensuring staff work on a need-to-know basis and minimising the number of people (usually only executives) who are privy to the entire secret.

IP rights and sustainable people

Many forward-thinking businesses use IP to reward the innovation of their employees. Companies such as 3M actively encourage innovation by staff at all levels by allowing 'inventors' to benefit financially from the return generated by the innovations they create. Some trade marks show accreditation to particular standards, for example, safety standard marks. By conforming to the requirements for such marks and using them in relation to goods and services, a company can demonstrate care for its customers in a universally recognisable way.

IP rights and sustainable planet

Trade marks can also certify that a company has reached specific standards demonstrating its commitment to the environment, for example, carbon emission standards. Many modern innovations involve technologies that lessen environmental impact. From an altruistic perspective, it would be beneficial for improvements such as these to become industry standards. Patents not only encourage innovations to be developed in the first place, but also enable quick, global licensing so that innovators can realise financial rewards from these innovations while enabling their rapid, widespread use and consequent benefits to society.

IP is critical to sustained success

Every business, no matter how big or small, should formulate an IP strategy. Clever use of IP can minimise the risk posed by competitors and open up new markets and revenue streams. The value of intangible assets to a business should not be underestimated. While physical assets such as bricks and mortar may come and go, reputation, ideas and relationships will sustain a business for a long time and should be nurtured carefully through smart IP protection. ■

Recent Changes to the Credit Reporting System

Your repayment history information can now be shared

As part of the government's overhaul of privacy laws, amendments have been made to the Credit Reporting Privacy Code 2004 about which individuals and businesses should be aware.

The most significant change is that since 1 April 2012 credit reporters, such as Veda Advantage, can collect and share 'repayment history information' about you and your business with finance companies, phone or power companies, and other credit providers. The collected information will be recorded in credit reports that detail how you have performed in respect to paying your accounts. Monthly payments on credit cards or utility accounts, and your mortgage payments can also be collected and shared.

Implications for you

The sharing of this type of information may be an issue for you if you have a poor history with repayments. Credit providers, such as banks or trade suppliers, are likely to use this information to decide whether to lend money to you, or to grant you a trade account. For example, a car financier can request a credit report about your repayment history when deciding whether to give you a loan to buy a car. If your credit report is poor and shows a history of, say, frequent late payments and careless account management, the car financier is less likely to give you that loan.

What are your rights?

Credit providers must make you aware of the changes to any of their credit reporting practices before they start sharing information about your credit accounts and repayment history with credit reporters. To do this, credit providers must obtain your consent to permit disclosure of your information.

Further, the government has also imposed controls and accountabilities to protect you as a consumer. Only credit providers can share information. This excludes prospective employers and landlords. Credit reporters are prohibited from listing small defaults of less than \$100, and are required to send annual compliance reviews to the Privacy Commissioner.

Why give consent?

You may be asking yourself why you would give consent to the collection and disclosure of your repayment history information. There are some advantages in allowing this sharing of information. Up until now, New Zealand has had what is termed a 'negative credit reporting system' that only recorded defaults, bankruptcies and court judgments. As a result of the amendments, New Zealand now has a 'positive reporting regime', enabling credit providers and credit reporters to also share positive information about you, including records showing that you or your business have a good payment history. Most significantly, this positive reporting regime may open up new opportunities to obtain credit to those who may have otherwise been excluded due to a lack of information about them. This could be an extremely important benefit for small businesses that were previously ineligible for credit.

Also, it's likely you will have to consent to the disclosure of your information by your bank or credit provider in order to obtain a loan or a trade account.

What should you do?

All credit providers in New Zealand can now access your repayment information. As such you should check the content of your personal credit report, amend any errors and take steps to improve any bad repayment history. To request your free personal credit report contact Dun & Bradstreet at www.dnbcreditreport.co.nz.

Most importantly, pay your bills on time and manage your debt. For businesses, do your housekeeping and make sure you have a robust accounting system. ■

Business Briefs

Consumer Law Reform Bill update

The Consumer Law Reform Bill 2011 had its first reading in Parliament on 9 February 2012. The Bill repeals a number of 'outdated' Acts and introduces a number of changes under the Fair Trading Act 1986. The most notable changes include the introduction of criminal penalties for 'unsubstantiated claims' that is where no reasonable grounds exist for making a claim, regulating the sale of extended warranties to consumers, the ability for parties 'in trade' to contract out of the Fair Trading Act and the extended jurisdiction of the Disputes Tribunal in terms of claims of misleading or deceptive conduct.

The Consumer Guarantees Act 1993 will also be amended to provide that the statutory guarantees under that Act will apply to goods sold by businesses to consumers via auction, including internet auctions. ■

'Would' v 'Could'

The full court of the Employment Court has recently released its preliminary decision in the judgment of *Angus v Ports of Auckland and McKean v Ports of Auckland*¹. This decision confirms the new test for justification of dismissals and other actions taken by employers when section 103A of the Employment Relations Act (ERA) was amended on 1 April 2011.

Previously the test under section 103A was what a reasonable and fair employer 'would' have done in all the circumstances. From 1 April 2011, the test changed to what a fair and reasonable employer 'could' have done. The full court concluded that:

- » The change was not ineffectual or insignificant, and
- » The new test means that there may be more than one possible justifiable outcome and more than one possible justifiable method adopted by employers to get to that outcome. This contrasts to the previous 'would' test which indicated a single appropriate outcome.

The court stressed that nothing in the new test alters the importance of an employer following procedural fairness. Minor defects in the process, however, would not necessarily lead to a finding that an employer's conduct was unjustifiable (as is now expressly recognised in the ERA). ■

Why the concept of traditional gifting should not be easily dismissed

Business owners often look to divest themselves of ownership of some of their assets to protect those assets against business risk. As a result of the abolition of gift duty in 2011, there is a strong temptation to forget about the old three-step approach of sale-debt-forgiveness and, instead, simply gift the assets directly to the recipient.

In the personal insolvency area, a recent High Court case² has highlighted a significant risk associated with direct gifts of assets (as opposed to the traditional three-step manner described above). In that case the court held that when the settlor of a trust was bankrupted and it was apparent that the settlor had previously forgiven debts owing to it by a trust in connection with assets sold by that settlor to the trust, the court could not order the trustees to transfer the forgiven sum to the Official Assignee in the bankruptcy of the settlor under the Insolvency Act 2006. The rationale given was that forgiveness of a debt is not a transfer of property (or a right in property). A direct gift, on the other hand, is a transfer of property and is therefore far more susceptible to being reversed in an insolvency situation.

This case is a useful reminder for everyone, especially those in business, who want to protect their assets by divesting themselves of ownership of those assets. ■

1 [2011] NZEmpC 160.

2 Official Assignee v Mayers [2012] NZHC 34