

Fleming Foster Solicitors

NEWSLETTER

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Protecting Your Intellectual Property From Trading Risks

Running a business has its risks – the ultimate being the entity going out of business and having to shut up shop. The recent recession increased such a risk for many businesses with some being unable to cope with the economic pressures and consequently becoming insolvent.

When a business becomes insolvent and is subsequently liquidated, the assets of the entity are seized and sold with the view to pay creditors. Intellectual property assets are no exception and assets such as domain names, trademarks and copyrights as well as concepts relating to branding are often lost in the process as well. More often than not, such intellectual property assets are irreplaceable. It is therefore important that time and effort is invested in protecting such assets in the event that a company is put into liquidation.



Separating assets into two or more legal entities as a means of protection has been common practice for some time, with business owners transferring their houses and other personal assets into trusts. However with intellectual property, while it is possible to register legal ownership rights in a trust (provided that ownership is recorded in the joint names of the trustees and not in the name of the trust itself) problems can arise relating to sub-licensing due to consent issues from co-owners. Additionally, the Intellectual Property Office of New Zealand is adopting a stricter interpretation of intellectual property laws that prohibits trusts from owning intellectual property.

The separation of assets through the use of limited liability companies is therefore a more suitable vehicle for the purposes of intellectual property asset protection. Separate ownership using companies requires the establishment of two or more registered companies where one company, Company A, owns the intellectual property and the other company, Company B, acquires a licence from Company A to sub-licence the intellectual property to clients.

All ownership of the intellectual property assets are vested in Company A, and Company B at no stage actually owns the intellectual property. In the event that Company B becomes insolvent, its creditors are not able to lay claim to the intellectual property assets by virtue of it being owned by a separate legal entity, Company A.

This model is particularly suited to software companies as they don't sell their products, but rather license them by granting a customer non-exclusive rights to use the

software. The actual software remains the property of the original owner. The separate-ownership model can also be tailored to suit most business genres.

Although appropriate licences and insurance policies are worthy components of risk management, many policies do not guard against insolvency of a company or bankruptcy. As a consequence, while some effort may be required in setting up an appropriate structure, separating valuable intellectual property could be well worth the time and money.

Alcohol Reform Bill

Introduction

The Alcohol Reform Bill (the 'Bill'), if passed by Parliament, will repeal and replace the Sale of Liquor Act 1989. While many of the provisions of the Sale of Liquor Act 1989 are carried over, the Bill proposes a major revamp of our primary liquor laws. Some of the significant and more controversial areas of change include the minimum age for the purchase and consumption of alcohol, maximum trading hours for suppliers of alcohol, local alcohol policies, and applications for licences. In addition, the Bill proposes to replace the current Liquor Licensing Authority with the Alcohol Regulatory and Licensing Authority. The proposed name for the Bill is, "Sale and Supply of Alcohol Act". It will amend parts of the Summary Offences Act 1981, the Children, Young Persons and their Families Act 1989 and Local Government Act 2002, among others.

The Bill is in response to the Law Commission's Report published last year titled "Alcohol in Our Lives; Curbing the Harm". The report recognised the increasing toll that intoxication and excessive drinking is having on the nation's level of health. The Bill resultantly is drafted to facilitate and encourage a safer and more responsible drinking culture, especially among young people.

Age

The Bill proposes a 'split-age' approach in relation to the purchase of alcohol. It proposes to increase the minimum age for purchase of alcohol from off-licensed premises to 20 years of age or over while the age restriction on purchase of alcohol from on-licensed premises remains unchanged at 18 years. Off-licensed premises include establishments such as supermarkets, grocery stores and bottle shops. On-licensed premises



include cafés, bars, restaurants and entertainment venues.

Trading Hours

The Bill also prescribes maximum trading hours for liquor suppliers. Default trading hours are set between 8am to 4am on the following day for on-licensed premises and between 7am to 11pm for off-licensed premises. However, newly introduced Local Authority Policies (LAP) may impose more lenient or stringent

trading hours than the prescribed default trading hours in the Bill.

Local Authority Policies (LAP)

The Bill empowers local communities to cater specifically to the needs of their community by adopting local alcohol policies. LAPs allow local communities to have more say on the concentration, location and trading hours of alcohol outlets in the community.

Advertising

Currently, the Alcohol Industry is allowed to regulate its own advertising. The Bill seeks to change this by strengthening advertising controls relating to liquor and alcoholic products. For example, promotions that involve free distribution of alcoholic products will be deemed to be unacceptable.

Conclusion

The new Bill undoubtedly presents some challenges as the Government tries to balance the interests of its citizens while trying to maintain a sustainable liquor industry within which manufacturers and retailers are not prejudiced. The Select Committee is due to report back to Parliament by the end of August 2011.

Your Rights: Consumer Guarantees Act

The Consumer Guarantees Act 1993 ('the Act') provides guarantees for consumers on goods and services ordinarily acquired for personal, domestic and household use. The Act also applies to gifted goods and services. The Act imposes on retailers, manufacturers and service providers automatic guarantees ensuring that:

- goods are of acceptable quality,
- goods and services are fit for the purpose they were acquired for,
- goods and services match any advertising/promotion claim(s) made by the sales consultant,
- ownership of the goods must pass to the consumer once it is purchased,

- goods and services must be of a reasonable price if no price has previously been agreed upon,
- services are performed with reasonable care and skill,
- services are completed within a reasonable period of time.

Manufacturers have the added obligation of ensuring spare parts and repairs are available for a reasonable time after purchase and any written warranties are honoured. No trader can contract out of the Act unless the trader is supplying to a business.

Redress

If a defect is discovered in goods or a service, and it is relatively small, the retailer can choose to either repair, replace or refund the affected goods or service provided the fault is remedied within a reasonable timeframe. If the defect cannot be restored in a timely manner or the defect is substantial, the consumer has the right to reject the goods or service.

Substantial defects in goods and services are where:

- the goods and services would not have been acquired by a reasonable consumer had they known of the nature and extent of the failure, or
- the goods are significantly different from the description, sample or demonstration provided by the supplier, or

- the goods and services are substantially unfit for the purpose, or the product generated through the service is of such a nature and quality that any particular results cannot be expected from it, or
- the goods and services are unsafe.

In rejecting the goods or service, the consumer is entitled to choose a replacement of a similar type or value, or they can demand a full refund of the purchase price. Any refund must be in cash, cheque or credit card reversal. The Act also allows consumers to cancel service contracts and claim for compensation for any decrease in value of the product or service.

Consumers can also claim for losses that are reasonably foreseeable and are causally linked to the breach of a guarantee. For example, if a new lawnmower is faulty, the consumer can claim for lawn-mowing services or hiring a replacement lawn-mower while the original mower is being repaired. In situations where a retailer is not co-operative or has ceased to trade, consumers can lodge a complaint to the manufacturer. Consumers can also direct their concerns to the Disputes Tribunal, the Commerce Commission or any relevant industry body complaints service.

So next time a retailer tells you “we have a no returns/refund policy”, politely remind them their policy is unlawful. Even if the items are on sale/clearance, they are subject to all the guarantees provided under the Act.

The Unit Titles Act 2010

The Unit Titles Act 2010 (the ‘2010 Act’) came into force on 20 June 2011 and replaced the Unit Titles Act 1972. The 2010 Act contains material changes from its predecessor and is now the principal authority pertaining to the establishment and management of developments such as apartment blocks, multi-layered commercial spaces and flats.

The key changes included in the 2010 Act are discussed below.

All common property in an establishment is now owned by the Body Corporate. Previously, ownership of common property was jointly vested in all unit owners. The change now allows the Body Corporate to more effectively promote the benefit of the development as a whole by representing all unit owners in relation to the improvement and maintenance of common property.

Responsibility for the maintenance of building elements and infrastructure affecting more than one unit now lies with the Body Corporate. This means for example, that the Body Corporate will be responsible for repairing a leak from a top floor apartment to a unit below (provided the leak is not attributable to the recklessness or negligence of the unit owner and/or occupier.) Previously, the obligation to remedy the leak would have fallen solely on the owner of the top floor apartment.

Minor alterations to individual units are now more

feasible as the 2010 Act allows for increased flexibility relating to re-developments. Obtaining the consent of a body corporate is no longer required to carry out additions or structural alterations to units, provided the modifications do not materially affect the common property or the property of another owner.

The subdivision of principal units is also possible under the 2010 Act, allowing for the creation of a separate unit title development within the principal title known as a subsidiary. This is known as a layered development and allows for multiple use of a building – such as where a building has car parking, shopping complexes and apartments all within its confines.



The 2010 Act also allows for the creation of separate Bodies Corporate that govern subsidiary units, which are also part of the Head Body Corporate responsible for overall management of the development.

Unanimous consent of the Body Corporate is no longer required under the 2010 Act and a 75% majority is sufficient for decisions to be made. This change has

been welcomed by many as it means decisions will less likely be held up by difficult owners.

Bodies Corporate are also required to develop long term maintenance plans in advance, giving owners the opportunity to pay regular instalments over time. This is to avoid owners having to pay large one off special

levies for work required on common property such as lifts.

The 2010 Act seems to attempt to be more flexible and pragmatic. To some extent the 2010 Act may give unit title owners more certainty and therefore promote unit titles as a form of land ownership.

Snippets

Supreme Court Goes Live

As of 16 May 2011, public access to Court proceedings took on a whole new meaning as the United Kingdom Supreme Court made history by launching its first live coverage of proceedings. It is the only British Court to televise proceedings with four cameras installed in each of its three Courts.



The broadcasting of proceedings will make it easier for legal professionals, students and members of the public to gain access to Supreme Court proceedings without travelling to London.

It is envisaged by the Supreme Court's Chief Executive Jenny Rowe that the live streaming of proceedings will help the legal profession and inspire and educate the next generation.

Although it is intended that all proceedings will be televised, on occasion there will be cases where the nature of the proceedings means that live streaming is suspended.

Live coverage of hearings can be viewed at <http://news.sky.com/skynews/Supreme-Court>.

Weddings and Wills

Death and Wills! This generally is not a typical topic of conversation when you are preparing for your wedding. But due consideration should be given to documents such as Wills and Contracting Out Agreements (i.e. Pre-Nuptial Agreements) as marriage imposes significant obligations in relation to property division and the allocation of assets.

If a person dies intestate (without leaving a Will), the allocation of their assets is determined by legislation such as the Property (Relationships) Act 1976 and may be divided differently to the way the person had envisioned it would be.

The advent of a new marriage also automatically invalidates all Wills that were made prior to the date of the marriage.

A review of a person's estate planning should also be undertaken prior to marriage as it too will be significantly affected. Consideration must be given to those who will benefit from a person's estate and legacy (a gift of personal property or money to a beneficiary of a Will). Failure to execute the requisite documents to reflect one's wishes can have negative consequences for all concerned.



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If you have any questions about the newsletter items, please contact us, we are here to help.