S J SCANNELL & CO

NEWSLETTER - OCTOBER / NOVEMBER 2016

INSIDE THIS EDITION

Simon Scannell

S J Scannell & Co

122 Queen Street East,

Hastings 4122

New Zealand

office@scannelllaw.co.nz

www.scannelllaw.co.nz

Phone: 06 8766699

Fax: 06 8764114

Mobile: 021 439 567

Like us on Facebook

If you have any questions about the newsletter items, please contact me, I am here to help.

Staff Update

We have not provided staff update details in the past as for the last 15 years we had not had any staff changes.

This year however Liz left us to travel the world and Jo left to return to a nursing role, Paula left to expand her areas of practice and we have been joined by Jacynda and Darren.

Jacynda fulfills the role left vacant by Jo and Darren joins us as a solicitor having come from the Public Defenders Office. He covers criminal and traffic law and is developing the family law and civil litigation areas within the practice.

Eureka! Now What?

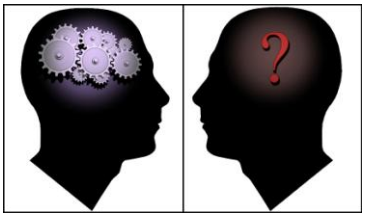
New Zealanders are master inventors. What Kiwi inventors are not quite so good at is moving beyond the eureka moment and into the next stages of the innovation cycle.

This article does not delve into the patent process. That is the domain of patent attorneys. However, to move beyond eureka, an inventor needs to know:

- Who to speak to;
- Where to put scarce capital; and
- What the ultimate end points might be.

Who to speak to?

Speed to market is achieved through collaboration with the right advisers and commercial partners. Finding these partners is simple enough after speaking with a lawyer that specialises in technology and/or early stage commercialisation, local innovation hubs or government agencies. Under the veil of protection from a secrecy agreement, a discussion with a business adviser might lead to investors, manufacturers, designers or potential customers who may partner with you to source capital, knowledge and other valuable resources.



Where to spend the money?

It is common for time and money to be spent on version 2, 3 or 4 of an invention only to discover that a patent already exists in another part of the world and the inventor will be stopped from selling the invention, or that a big customer would have been happy to pay for the development work for versions 2, 3 and 4 including a salary for the inventor.

Money is better spent (when it is scarce) on protecting the invention (or at least confirming it is indeed new) and then talking to investors, manufacturers, designers or potential customers about the invention to establish what the market wants from versions 2, 3 and 4 and whether the inventor needs to pay for it him/herself.

Where will it end?

People who invent and develop products for a living generally have a commercial and exit strategy in mind:

1. To operate a business selling the product (requires marketing, financial and business nous) and take a wage from that business;
2. Sell the invention at an early stage and invent something else while the buyer develops the invention and takes it to market (usually adopted by inventors without the skill or desire to develop the invention further); or
3. Develop the invention to the market stage (such that it is ready to sell and a market has been proven to exist) and then sell it or license it to a third party to sell the product to customers (this is a common approach which maximises gains to the inventor without requiring the inventor to have or develop marketing, financial and business nous; though does require an ability to collaborate and convince investors and partners to fund early stage development).

How an inventor should manage their invention, what steps to take and what advice to obtain will vary depending on which of the above three (albeit broadly framed) approaches the inventor intends to take. Deciding on which approach or learning more about what each approach actually entails is critical.

Conclusion

The eureka moment is the most exhilarating step in the invention lifecycle, but it is only the first critical step to getting the invention into the market. Getting advice early will save money, speed up the process to market and maximise the outcomes available to each inventor.

Secrecy Agreements

The following mistakes are common with secrecy agreements (otherwise known as confidentiality or non-disclosure agreements):

1. The parties rely on a template off the internet; and
2. The secrecy agreement remains the only agreement in place past the initial discussion stage.

Beware the template

Secrecy agreements are drafted with specific purposes, discussions and circumstances in mind. In the first instance a secrecy agreement may place the obligations of confidence on one party only or on both parties). If both parties intend to share information, the agreement should be mutual. However, if only one party intends to share information then the one-way agreement is used.

The discussions may relate to intellectual property (including copyright, patent rights, technical information and know how). Any intellectual property that results from the discussions may, depending on the terms of the agreement, belong to:

1. The discloser;
2. The recipient; or
3. The parties jointly.

Some templates omit reference to intellectual property entirely; this is dangerous. The provisions dealing with ownership are critical and who owns intellectual property will depend on the circumstances and purpose of the disclosure. In any event, the discloser would be concerned to discover that the recipient owned the intellectual property or might share ownership if he or she was simply looking to have a preliminary discussion with the recipient and nothing more.

Horses for courses

Relying on a secrecy agreement beyond the initial discussions is dangerous.

Secrecy agreements are only intended to cover the initial discussion. If the discussion leads to a relationship (whether that is to develop an idea further, invest, consult or purchase), that relationship needs to be governed by an agreement that deals, amongst other matters, with what each party will be doing with the secret information that was initially disclosed. For instance, if the recipient of information is asked to invest in an idea, that person will want to own or lay claim to intellectual property relating to the idea. As such, while it would have been inappropriate to grant an interest in the intellectual property at disclosure stage, it might become vital for intellectual property to be jointly owned beyond the initial disclosure. Unless the change in approach to intellectual property is recorded in a fresh agreement, one party or the other risks losing their investment (in time or money).

The hesitance to record the next stage of the relationship is understandable. Relationships are fluid and evolve quickly. The discloser may be “selling” the concept to the recipient and attempting to avoid roadblocks and in many cases money is stretched, so the discloser will hope to avoid the cost of having an agreement drafted.

However, some agreement, even an informal one, is better than nothing.

Conclusion

It is common to see an idea or business relationship not reach its potential or for disputes to slow progress due to poorly drafted or ill-considered secrecy agreements. As the first agreement to be signed between potential partners, investors, consultants or investors, it is often the most vital.

What goes on in a property transaction?

Many kiwis will, during their lifetimes buy and sell property. Property transactions are not simple; nor should they be. The importance and value of a property transaction alone necessitates a degree of complexity and care.

However, the transaction and how it is completed is not well understood by the general public. It may, therefore, be useful for property owners and potential property owners to consider what the lawyers do in the background to complete a sale, purchase or refinance.

Manager
A lawyer in a standard property transaction is the key-point of contact for several parties to the transaction. The lawyers (for both sides of a sale) are the "keepers" and enforcer of the contract, the negotiator, and an advisor.

Consequently, a lawyer manages the transaction by communicating with the key participants in the transaction, including banks/lenders, Kiwi Saver scheme and fund managers, real estate agents, Government agencies, local authorities, mortgage and insurance brokers, tenants and property managers, body corporate managers, valuers, surveyors, engineers and builders.

Informer
Behind the scenes, the lawyer obtains and collates all of the information received by the various participants to the transaction and, if required, informs the client of the critical points in each report, agreement or offer.

Key to the role as informer is to keep all participants, but crucially the client, informed of key dates and deadlines in the transaction. Missing a date or deadline can have significant financial and practical implications.

Adviser
A lawyer will advise the client on legal and other issues that arise in the transaction. Advice may include raising issues with the legal elements of the title to the land, problems with a Land Information Memorandum ("LIM"), assisting the client to exit an agreement or providing options for handling problems on the day of settlement.

In certain circumstances, the lawyer may also be asked to give advice on structures for ownership of the property, relationship property considerations and complexities around family trusts, guarantees, gifting and insurance.

Custodian and transactor
A lawyer must communicate with and meet the requirements of banks and other lenders. For instance, the lawyer must give certain assurances to lenders before they will advance money to complete the transaction. To give these assurances, the lawyer must investigate, compliance with the lender's instructions and various laws. Unless such investigation is completed and the bank/lender is comfortable, the funds will not be advanced and even when funds are advanced, in most cases they will only be advanced to the lawyer, as custodian, to use in buying the property.

The lawyer must ensure that the legal title to the property, the physical ownership of the property and the funds themselves change hands in such a way as the parties are protected. This process of settlement is carefully staged so that the funds, securities (such as mortgages) and the property change hands concurrently.

Once the lawyer has the necessary funds to complete the transaction or has received those funds following a sale, the lawyer is required to pay those funds to the correct person; be it the other lawyer, the bank/lender, secured parties, real-estate agents or the client themselves.

Completion
Hopefully, after the lawyer plays its part, a buyer gets the land, the seller gets some money, the bank gets a mortgage and all other participants in the transaction get what they need without a hitch.

The legal results of a market decline

When a market is in relative good health, there is a good chance economists will be predicting a future decline. In light of the current press on New Zealand's economy, this article explores some things that can happen, in a legal sense, during a market decline.

Insolvency
A person (including corporate persons and trusts) that is insolvent, put simply, is a person that cannot pay debts as they fall due. The implications of insolvency depend on whether that person is an individual, a company, a trust or another type of entity. However, in all cases the risks to that person's property/assets are much the same.

Creditors (parties to whom the insolvent person owes money) have certain rights that crystallise upon the person's insolvency, including:

1. A right to place the person, if an individual, into bankruptcy;
2. A right to place the person, if a company into receivership or liquidation; and
3. A right to seek the return of sums paid by the person to other creditors or third parties back to that person to pay the debt (or a portion of it).

The person that is insolvent is able to take steps to delay or stop the above (and other steps) by creditors and it falls to the Courts to make orders that the above steps are carried out. However, in a market decline where capital to defend claims by creditors may be scarce it is often difficult for a person that is being pursued by creditors to stave off the inevitable.

Bankruptcy
If a natural person is adjudicated bankrupt, their assets are placed under the control of the Official Assignee. The Official Assignee is then able to use those assets to pay that person's debts. The insolvent person is restricted from certain activities and roles and the effects of the bankruptcy survive until the insolvent person applies for a discharge from bankruptcy.

In certain circumstances, sums that may have been paid or gifted by the insolvent person to creditors, related

parties or third parties may be clawed back by the Official Assignee to be added to the pool of assets available to satisfy debt.

Where the insolvent person has no realisable assets and the debts are less than $47,000, the Official Assignee may take a step short of placing the person into bankruptcy. The process involves using the "no asset procedure" in the Insolvency Act 2006 which allows the person to resolve their short term credit problems.

Receivership

Receivership is a process in which the assets of the insolvent company are placed under the control of a receiver. The receiver then uses the assets of that company and income that continues to be derived from the company's business, to pay the debts and attempt to negotiate terms with the creditors such that the company may trade out of insolvency. If the receivership is successful, an application may be made to the Court to remove the company from receivership. If the receivership is unsuccessful, the company may be placed into liquidation.

Liquidation

In liquidation, the assets of the company are sold to pay debts and the company is eventually removed from the register.

A company may, before receivership or liquidation is triggered, place itself into voluntary administration to, hopefully, improve the outcome of the insolvency to the company and its creditors. However, the process is complicated and therefore still requires an administrator to be appointed and relies on the creditors' cooperation. Advice should be taken before taking steps to enter voluntary administration.

Eviction

If the insolvent person owes money to a landlord, to whom they are obligated to pay rental, the landlord may (in addition to pursuing the debt):

1. In a commercial tenancy (for instance office or warehouse space) seek an order from the Court to lock the tenant out of the premises and require the tenant to remove its property.
2. In a residential tenancy, apply to the Tenancy Tribunal to terminate the tenancy.

Both parties should take specialist advice on eviction and termination.

Mortgagee sales

Mortgagee sales are a common occurrence in a market decline. When entering into a mortgage with a lender, the borrower agrees that money against which the mortgage is secured, if they are unable to pay the interest and/or principal, the holder of the mortgage security may sell the property to pay off the loan.

Similar rights accrue to holders of other securities such as those that might apply to cars and other personal assets.

Conclusion

Anyone experiencing credit problems or finding it difficult to pay debts as they fall due should seek immediate advice so that early intervention is possible and the best outcomes can be achieved for all involved.

Brexit – A comparison with the NZ China FTA

Brexit is the name given to the UK's exit from the EU. What the Brexit, should it indeed proceed, means in a legal sense is that the UK must trigger the termination provisions in its treaty with the other nations within the EU (Treaty).

Article 50(2) of the Treaty states:

> A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

Article 50 is remarkably simplistic, and accordingly poses political, legislative and market problems that the press believe will take months to untangle. We will leave this untangling to the UK politicians and EU leaders, and simply watch the effects in the international market from afar. However, what would happen if New Zealand wished to exit from a significant international relationship of its own?

Given the significant upside experienced by New Zealanders following the trade deal with China, it is unlikely that New Zealand would look to terminate that relationship. However, for the sake of argument, we have considered how that process might play out.

The agreement with China is aptly entitled, the Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China; we shall call it NZFTA. The NZFTA provides at Article 213(3):

> This Agreement shall remain in force until one Party gives written notice of its intention to terminate it, in which case this Agreement shall terminate 180 days after the date of the notice of termination.

The exit provision bears some similarities to Article 50 in that it is likewise simplistic. However, while it is helpful to the leaver, it is not so helpful; to the state wishing to remain. The notice period is short (180 days will evaporate very quickly) and the lack of provision for

consultation as to the effects of the exit is potentially problematic.

So, if we consider the two Articles side by side we see:

Consideration	Brexit	NZFTA
Clarity	Not clear: While simple, Article 50 does not cover certain contingencies such as what will occur if the consultation process breaks down and there is no agreement as to future relations between the UK and the EU.	Clearer: How termination is triggered, the timeframe and consequences of termination are clear though how trade relationships formed under the NZFTA might be continued is not clear.
Certainty	Uncertain: Until the exit agreement is negotiated, the terms of the exit (as opposed to the fact of it) will remain a mystery. This uncertainty will wreak havoc with international markets.	Certain: Once triggered, Article 213(3) will take effect in 180 days.
Timeframe for exit	Medium: Two years will not be long enough to allow the political machine in the UK to come to agreement with the other 26 countries in the EU. However, it is a longer period than granted to NZ or China at Article 213(3)	Short: If either state were to trigger Article 213(3) the other would have no time to react and insulate against the effects of the exit. However, as there is no requirement to consult, the timeframe will not itself place pressure on the two states to negotiate terms for the exit.
Requirement for consultation	High: Effectively, the UK must consult extensively, through the negotiation of the exit agreement, with the EU.	Nil: Article 213(3) requires no consultation. However, as the NZFTA is not a treaty with the same wide reaching and critical effects (it deals predominantly with ease of trade), consultation is not as critical. It will fall to the individual states to resolve the effects of an exit internally and manage a reversion back to trade relations pre NZFTA.
Legislative impact	High: Due to the nature of the Treaty more so than Article 50, the Brexit will require legislative change. The UK has, since 1973, implemented a number of EU edicts into UK law and now needs to determine which of these should remain part of UK law and which should be repealed or varied.	Medium: As a function of adopting the NZFTA, New Zealand has varied and enacted legislation. However, the NZFTA relates predominantly to trade relationships and so the legislative impact of an exit from the NZFTA will be limited to a smaller (than in the Brexit) number of statutes. Also, the NZFTA is a relatively recent agreement and is not so woven into our legislative framework as is the case with the Treaty in the UK.
Fairness	Fair: It is fair that a unilateral decision to exit places requirements on the exiter to permit the other party or parties to	Fair: in the context of a trade relationship, the short notice period, lack of consultation and simplicity of the exit provision

	contend with the implications of that decision. This is particularly true in a relationship such as that recorded in the Treaty, where the nations to that Treaty have relied on each other and their respective good faith in entering the agreement.	does not unfairly disadvantage one party over another. The exiter will be in much the same position as the other party and the cards will lie where they fall; though if the NZFTA ever evolved into a wider treaty, more time and more consequences on the exiter might be appropriate.

In conclusion, NZ is better placed (than the UK in the Brexit) in the event of a termination under the NZFTA due to the nature of that agreement and the terms of Article 213(3).

However, the terms of Article 50 might suggest that the drafters of the Treaty never expected a state to unilaterally exit the EU and might be left pondering how they may have drafted Article 50 had they considered the prospect of David Cameron calling a referendum, the people of the UK voting to exit the EU and the advent of a porcine flying school.

Snippets

Net Migration

Recently, New Zealand has witnessed record high net migration. In the May 2016 year, 68,400 non-New Zealand citizens have migrated to New Zealand. Unsurprisingly, therefore, the media has been filled with reports on net migration and its effects on New Zealand's economy; in particular, the coincidental rise in house prices.

Net migration is a calculation of the balance between people moving to a country for more than one year ("immigrants"), and people leaving the country ("emigrants"), over a twelve-month period. Undoubtedly, social, economic and fiscal effects result from fluctuations in migration; however the degree of benefit to a country remains a contentious matter. In respect of the housing market, recent studies have shown a strong correlation between net gain and house price inflation.

Essentially, the correlation between net migration and property values is attributed to an imbalance in supply and demand. Similar studies focused on the housing market, determined migration flow quantified at one percent of the population, is associated with an eight to twelve percent change in house prices after a year.

We appear to be experiencing that correlation in New Zealand, as in the May 2016 year, New Zealand property values grew by around thirteen percent.

"Click Agree" Agreements

Do you have Facebook or a smart phone or have you brought goods or services online? If so, then you have likely entered into an enforceable contract; all with the simple click of your mouse or swipe of your finger.

The past decade has posed enormous changes to consumerism including the way we trade and carry-out our business online, even more so with the advent of smartphones, online shopping and social media. Consumers must ensure their understanding of the content and enforceability of "Click Agreements."

Click Agreements include warranties, exclusions and disclaimers of liability, intellectual property ownership, and the relevant governing law.

The enforceability of Click Agreements is yet to be tested in New Zealand courts. However, it has been established and widely accepted overseas that the traditional principles of contract law apply and if ever tested here, the outcome will likely be the same.

Critically, there must be an express record of acceptance by the consumer, as part of the transaction process; hence the requirement to "click agree.