



# S J SCANNELL & CO

## NEWSLETTER - DECEMBER / FEBRUARY 2017



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

### Intellectual Property Licensing

Intellectual property (IP) forms a fundamental element of most businesses. It encompasses creativity, innovation and in some instances, education. In certain circumstances, intellectual property rights may be registered, thereby making provision for particular, exclusive rights over an invention, creative expression or brand. Securing protection for intellectual property, may provide for a competitive market place advantage, and facilitate an increase in profit margins and growth.

Multiple forms of rights are available for intellectual property. Available rights include, but are not limited to trade marks, patents, plant variety rights and copyright. Forms of intellectual property rights are predominantly territorial, meaning enforceability is often limited to the country in which the right is registered, granted or otherwise issued.

#### Intellectual Property Licensing

All forms of IP including patents, trademarks, copyright, designs and plant varieties can be licensed. IP licensing relates to an IP owner granting permission to another to use, sell or reproduce their intellectual property, which in the absence of permission, would likely amount to an infringement of the owners' IP right.

By way of comparison (for ease of understanding), a bus owner might lease a bus to another person in the same way as a trademark owner might license a trademark to another person. The lease of the bus grants that other person an exclusive right to use the bus.



In that same analogy, the lease/license differs from sale in that a sale results in the transfer of ownership in the bus/IP. Further, in the event a person used the bus or trade mark without permission, the person would be breaching on the owners' rights and the owner would be entitled to sue for that breach.

#### Licensing vs Sale

A particular advantage of licensing over sale is that the potential to maximise profits is maintained better under a license. The financial benefit of selling IP is certainty of payment; however the transaction is disadvantaged in that the return on the investment made in developing IP is limited to the sale price.

Further benefits of licensing include that it allows for the IP to be placed in the hands of a person, or persons with the necessary capabilities, skills and/or capacity to bring about the best return. In addition, this method also provides scope for ongoing improvements to the IP.

### Royalties and License Fees

Most licence agreements require the licensee to pay fees comprising of an upfront license fee and ongoing royalties. To refer back to the earlier analogy, the fee scheme may be compared with a rental plan for a bus lease with the requirement of regular monetary instalments.

Royalties are generally calculated as a percentage of the net sales or profits, or on an amount per unit of the

licensed property sold. Three main methodologies exist in relation to royalty valuation, including the cost approach, comparable market approach and the income approach.

However, as a rule of thumb, the IP owner will seek to be paid 25% of the net value obtained by the licensee. For example, if a licensee was selling jeans at a profit of \$40 then the royalties might be structured in such a way that the owner of the trademark under which the jeans were sold (e.g. Levi) would make \$10 per pair of jeans.

## Plant Variety Rights

Grants of Plant Variety Rights (PVR) are available for any plant variety with the exceptions of algae and bacteria. Currently, New Zealand has a noteworthy plant breeding industry. New Zealand growers and breeders take the lion's share of some of the plant variety registered crops that include kiwifruit, clover and apples. There is a potential for New Zealand to generate significant income not only from the sale of produce but also from obtaining and licensing new varieties from other countries.

In application 'variety' means a cultivated plant variety, and encompasses any clone, hybrid, stock or line of plant. Within this context, the PVR scheme promotes investment into plant breeding through allocating and providing for commercial rights, for example, an exclusive right may be granted for the commercial production of vegetative propagated fruit, ornamental and vegetable varieties. In addition, the scheme also provides access to varieties bred offshore. Consequently, an increased number and range of varieties are accessible to New Zealand farmers, gardeners and horticulture producers.



### Criteria

Plant variety rights may be granted where the variety is new, distinct, homogenous and stable. A plant variety is considered new if it has not been sold in New Zealand within certain time frames (that vary depending on the plant in question).

## Best vs Reasonable Endeavours

Have you ever seen a contract or agreement including terms such as "best endeavours", "reasonable endeavours", or "all reasonable endeavours"? What do these terms mean? What is a party expected to do under these terms?

These common terms are generally misunderstood. However, as a general rule, these terms are used to compel a person to take action to fulfil an obligation or condition that might be, to some extent, beyond that person's immediate control.

However, as with any contractual obligation, the devil is in the detail and courts are often called upon to determine what the detail actually requires of the person under the obligation.

### Best Endeavours

A best endeavours obligation is more onerous on a party than an obligation of "reasonable endeavours". It obliges a party to take all available courses of action to fulfil the

To deal with the three components of a successful application for a PVR, a variety will be considered:

- Distinct if it can be distinguished by one or more characteristics from other known varieties;
- Homogenous if it relates to the particular features of the varieties, sexual reproduction or vegetative propagation; and
- Stable if it is established in its essential characteristics that it remains true to its description in repeated propagation or reproduction.

### Grant

In most instances, a successful application will see a plant variety right granted for a term of twenty to twenty three years (depending on the type of plant). The term comes into force from the date of grant. Thereafter, a grantee shall have the exclusive right to produce, sell, reproduce, and propagate for commercial production and to authorise any other person to carry out these steps on the behalf of grantees. The PVR is capable of being assigned, licensed (as with any intellectual property right), mortgaged or otherwise disposed of.

### Notification

To assert and/or enforce rights acquired as a grantee, reasonable steps by means of suitable labelling or other identification must be affixed to the plant variety to inform, or to give notice to the purchaser concerned of those rights.

obligation that a prudent, determined and reasonable person might have taken.

The steps that must be taken will likely include spending money to fulfil the obligation. However, under current New Zealand common-law, that person would not be expected to spend more than a reasonable amount of money or put itself in financial jeopardy.

### Reasonable Endeavours

An obligation to use "reasonable endeavours" is less onerous on a party than a "best endeavours" obligation. The "reasonable endeavours" obligation is typically defined by reference to an objective standard of what an ordinary competent and reasonable person might do in the same circumstances. Under an obligation of "reasonable endeavours" a person is able to balance their contractual obligations against their commercial operations, in deciding which course of action to pursue. Accordingly, a party is not required to take any course of action that might prejudice the interests of that party.

However, if the clause that requires reasonable endeavours sets out specific steps, then the person having that obligation must take those steps regardless of costs.

#### All Reasonable Endeavours

The courts have grappled with the interpretation of an obligation of “all reasonable endeavours”, and considered whether it is a middle ground between “reasonable endeavours” and “best endeavours”, or as recent Court interpretation suggests, whether there is no real difference between “all reasonable endeavours” and “best endeavours”.

With that in mind, if a person is under an “all reasonable endeavours” obligation it is expected that the person will not be obliged to take a course of action in order to fulfil that condition, where fulfilling that condition is beyond that party’s control, and where that action may result in the sacrifice of its own financial interests.

However, if a party is under an “all reasonable endeavours” obligation to do something that is within its control, then that party is obliged to fulfil that condition and cannot choose what to do in light of its commercial interests. In the event that the term is extended to read



“all reasonable but commercially prudent endeavours”, then the party concerned may consider its commercial interests in deciding how to fulfil the condition.

#### Clearing up confusion

Where these matters are left to the Court for interpretation, the situation will always be fact specific. However, the use of these terms and what they oblige a party to do or not do is always an issue. Caution should always be observed when using these terms, as the likely hood of

requiring Court interpretation is ever-present.

To ensure that the interpretation of your contract or agreement does not end up in Court, it is advisable to stipulate specific steps a party must take in order to fulfil a condition. This can be bolstered by setting a timeframe in which the condition should be satisfied or endured. Outlining possible penalties, remedies or responses if the condition is not fulfilled could add some clarity around what is expected by each party.

Please note that there are a number of cases before the Courts reconsidering the position of “best endeavours”, “reasonable endeavours”, and “all reasonable endeavours”, as such the current interpretation of these terms may be subject to change.

## Sharemilking Agreements

### What is Sharemilking?

For a number of years dairy industry has been an integral part of New Zealand’s economy and a sharemilking arrangement provides a stepping stone for farmers looking to become farm owners themselves.

Two parties exist under a sharemilking agreement, the farm owner and the sharemilker. Essentially, the parties enter into a sharemilking agreement on the basis that the sharemilker is responsible for operating the farm on behalf of the owner, but does not own the land and in return is paid a share of the income from selling milk and anything else produced off the land (e.g. silage). As a result, the legal relationship between a sharemilker and the farm owner is that of principal and independent contractor, not employer and employee.

The key requirement for a sharemilking arrangement is that the payments are distributed between the parties in accordance with an agreed percentage share of the farm’s income.

### Types of Sharemilking Agreements

Sharemilking agreements may be classified as either a Variable or Lower Order Sharemilker Agreement, or Herd Owing Sharemilker Agreement (also known as a 50/50 Sharemilker Agreement).

#### 50/50 or Herd Owing Sharemilker Agreement

The farm owner under this type of agreement provides the land, buildings and milking plant, water supply and pump and ensures that the property complies with the requirements of milk buyer (e.g. dairy company). The owner also pays for fertiliser and materials and repairs to buildings, fences, gates and weed control in addition to paying the rates, insurance and any capital costs.

The sharemilker provides the herd, tractors, bikes and implements and meets all of the farm operating costs, and supplies. The sharemilker also provides labour

necessary for the operation and maintenance of the farm. Furthermore, the sharemilker also carries out all of the farm work or employs labour at their cost to do so.

#### Variable Order Sharemilker Agreement

Variable or lower order sharemilker agreements refer to any sharemilking arrangement where the parties negotiate the share split from the outset. If the sharemilker provides a herd with less than 300 cows, the minimum share the sharemilker must receive is 21% or greater excluding expenses.



Under this type of agreement the farm owner has more responsibility; meeting a majority of the farm costs and outgoings as well as supplying the land, buildings, milking, plant and water supply pumps, the tractor and farm implements. In contrast, the sharemilker does not provide the herd or may only provide some of the herd. They provide the labour, meet the shed expenses and cover some of the costs such as electricity and may provide a small amount of equipment such as bikes or tractors.

Obviously, the farm owner’s share will be significantly higher than the sharemilker’s share; which is proportionate to the costs and resources the farm owner provides under this type of agreement.

### Considerations

A farm owner considering a sharemilking agreement should be cautious that they are not providing a lease to the sharemilker; rather a license allowing the sharemilker to use the land. If the agreement creates a lease between the parties, the sharemilker may have the right of

exclusive possession of the land, which could result in the owner having restricted access to their farm.

Anyone considering becoming sharemilker should be aware that they will become an independent contractor rather than an employee and as such cannot rely on the Employment Relations Act 2000 to settle disputes with the farm owner. Additionally the sharemilker will have to obtain an IRD number and become GST registered.

There are a number of uncertainties and considerations to make when entering into a sharemilking agreement. Having a sturdy, easy to follow and encompassing agreement in place will remove uncertainty around the roles and responsibilities of the parties, as well as providing you with the confidence to go about your business.

## Going to Court – Checklist

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The prospect of appearing in or even simply attending Court proceedings will fill most people with a sense of dread. There are a great number of unknowns and a Courtroom is not known as being an inviting or friendly environment.

However, a Courtroom is certainly a safe environment and while the participants in a Court process may appear to be aloof and unfriendly, in fact these people are well aware of the stress and anxiety that a person may feel when coming to Court and will happily answer questions or provide help.

The Courtroom is used for several types of cases and depending on the nature of the case or what stage it is at in the process, the Courtroom and the people in it can look quite different. For instance, if the Court is set up for a criminal matter there will likely be a jury, a full press box, an accused person near the back of the Court, several lawyers, the Judge, a registrar and members of the New Zealand Police. However, a commercial matter in the early stages of the process will be handled in what is called the commercial list and in that case there is no jury, any police and several matters will be heard one after another involving different lawyers that will come and go as their matters are called.

Accordingly, how to prepare to come to Court will depend on the reason for attendance and the type of case. However, here is a checklist of key things to do in preparation for attending Court as a support person or as a client in a civil (non-criminal) matter:

1. If you are the client, travel to court with your lawyer. It is the best way to appear as if you know what you are doing and to avoid becoming lost or anxious. Your lawyer will have been to Court many times before.

2. If you are to appear in Court (as a witness for example), prepare and ask questions about when you will be asked to appear and who will speak to you and when.
3. Check whether the matter is to be heard in the District Court, High Court or Family Court (or indeed the Court of Appeal or Supreme Court) as these Courts may be in different places.
4. Dress tidily. Judges have been known to refuse entry into their Court because of what a person is wearing. Unless you are appearing as a party to the matter, a witness or you are a lawyer, you do not need to wear a suit or equivalent. However, you are expected to dress professionally.
5. Turn your mobile phone to silent. Mobile phones may not be used in Court and the Judge will become annoyed if he/she hears a phone ring.
6. Do not take photographs.
7. Be respectful. The Court is the Judge's office and like anyone, the Judge will demand respect from people when they are in their office. The Courtroom is a solemn place and loud conversations, rudeness, foul language or poor behaviour will not be tolerated.
8. Call the day before to ask any questions about the appearance, the time that the particular matter is to be heard and which Courtroom will be used (there are often several Courtrooms in one place).
9. Be prepared to wait or stay for longer than you may have planned. The process of administering justice is not straight forward and hiccups do occur. So, bring a book.

## Snippets

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### Building a Boundary Fence

The Fencing Act 1978 prescribes the steps that a person must take before building a fence on or near the boundary with a neighbour. It is a three step process:

#### 1. Send a fencing notice

The neighbour wishing to build, replace or repair a boundary fence must notify the other neighbour(s) about the type of fence and materials to be used, the cost of the fence and the details of when the work will start and who will do it. The notice must also confirm that the neighbour(s) may object and make a proposal of its own or may refuse to accept liability (if good reasons exist to do so) for the cost of the fence.

#### 2. Objection

The neighbour(s) to whom the fencing notice is given may object to any element of the proposal and may provide a counter proposal.

#### 3. Build a fence or negotiate

If there is no objection (either because the neighbour does not respond or accept the proposal) within 21 days of the date of the fencing notice, the process is complete and the fence may be constructed as per the fencing notice and the costs split 50/50. However, if there is an objection, the neighbours must come to an agreement and if they cannot do so, either party may refer the matter to a mediator, adjudicator, the Disputes Tribunal or the District Court.

**Strange and Wonderful Land Covenants**

Land covenants are standard in residential developments. They are essentially the rules that the owners and occupiers of land within the subdivision/development must abide by and they keep the area and properties within that residential area up to the standard hoped for by the developer and the buyers of properties in that area.

Covenants are relatively harmless and usually confirm the ordinary good neighbour rules that we all try and live by. However, strange and wonderful rules are adopted from time to time. Here are some of examples:

- Rules about permitted breeds of dogs and cats and a cap on the number of dogs and cats
- Other general animal restrictions (e.g. no roosters and no more than two chickens)
- Rules about where to place trampolines and other children's toys (e.g. less than 4 metres from a roof)
- Rules to stop certain washing lines and sheds being used including restricting the colour and type
- Rules that stop residents hanging their washing within sight of the road
- Restrictions as to the planting of certain trees or hedges
- Imposition to maintain gardens and use certain contractors for servicing maintenance of gardens with neighbours/development
- Restrictions on parking including the number of vehicles, placement and colour / type of vehicle
- Rules about where to park boats and caravans (and some instances of a ban on parking these vehicles).

**S J Scannell & Co**

**Would like to wish you and your family a Merry Christmas and prosperous New Year**



**We advise our offices will be closing on Thursday, 22<sup>nd</sup> December 2016 at 5pm  
and re-opening on  
Thursday, 12<sup>th</sup> January 2017 at 8.30 am**