

# The Jackson Russell report

AUTUMN 2011

## Protecting Intellectual Property – An Investment Worth Making

By Marcus Rudkin

In today's knowledge-driven economy there is a lot written and said about intellectual property and the importance of protecting it. But what exactly is IP and why should you be concerned about protecting it? Marcus Rudkin (Jackson Russell Partner and IP lawyer) explains:

Broadly speaking intellectual property refers to those business assets that result from human innovation and creativity; these may be ideas, products or processes, brands or designs. Trade secrets if you like. By trade marking you are legally protecting those assets- intellectual property – from exploitation by any other company or individual.

Trademarks can include words, logos, colours, shapes, smells or any combination of these. Your trademark should be distinctive – a badge or origin. And, it's important to think of it as an investment, not a cost. As more and more enterprises find themselves working in a global market, registering your trademark in New Zealand and in any other country you may do business with, becomes even more important.

### Consider the following points:

1. Your trademark will deter competitors. Other businesses will see your trademark on the publicly searchable trademark database at IPONZ (the Intellectual Property Office of New Zealand) and will understand or realise you already have a protected, registered trademark. This may well deter them from competing in your space.
2. Trademarks can be a key asset in the valuation of your business. A buyer will look at your intellectual property and determine a value for it. Registered intellectual property such as trademarks will add to the value of your business. A lack of registered trademarks may reduce the value of your business as no registered trademark may mean competitors have a larger share of the market and also the buyer's plans for expansion may be limited if there is no registered trademark.
3. Trademark registration allows you to preserve your rights in your trademark allowing you a statutory right to sue for infringement without the need to prove that you have a "reputation" in a trademark or business area in which you operate.
4. You will have the exclusive right to use your trademark around New Zealand on the goods or services covered by the registration. If you are an exporter of goods or services a New Zealand registered trademark will generally enable you to protect your business in other jurisdictions in a cheaper and easier fashion, as you can apply for international protection using your New Zealand application.
5. A registered trademark allows you to defend your rights even in the internet advertising space. If your competitor lists your trademarked name as a 'key word' on Google or other search engines to attract customers to its website, you can seek to eliminate the link by demonstrating that you own the registered trademark and use of it by others infringes your rights.
6. You can object to the incorporation of a company with the same name or one similar to your trademark if you are both operating in the same or similar type of business.

It's best to start early when protecting your intellectual property. We can help you get your trademarking right and manage the application and communications with IPONZ. We can also refer you to one of our many international contacts should you wish to apply to register trademarks around the world.

Call Marcus Rudkin on (09) 300 6918 or email [mrudkin@jacksonrussell.co.nz](mailto:mrudkin@jacksonrussell.co.nz) to ensure your IP is fully protected.

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## Employment Law – Changes By Glenn Finnigan

The Employment Relations Amendment Act and the Holidays Amendment Act have now passed into law. Most of the changes take effect from 1 April 2011. The amendments are broad ranging and employers need to be aware of them. Here are the more important changes:

### 90 Day Trial Period

90 day trial period provisions are now permitted for all employers of new employees.

To be effective the 90 day trial period provision has to be a written provision in an employment agreement entered into with an employee who has not previously been employed.

The provision informs an employee they are employed on a trial for a period (not exceeding 90 days) starting from the beginning of the employee's employment. The provision states the employer may dismiss the employee during this period and that if this happens the employee is not entitled to bring a personal grievance or other legal proceeding relating to the dismissal.

While this provision can be used prior to 1st April 2011 by businesses with less than 20 staff, all employers will be able to use the clause for new hires after that date.

### Cashing up annual leave

From 1 April 2011 employees will be able to request to be paid out up to one week of their minimum entitlement to annual holidays arising after 1 April 2011. The employer is able to decline any such requests without reason.

Employers should review their policies and include in them a process about how to request annual leave to be cashed up and the process to be followed in considering such requests. Employers can have a policy preventing employees cashing up the prescribed portion of their annual holidays which would avoid a case by case consideration of requests from employees but should consult with employees about such a policy. Employers can't put pressure on employees to request leave to be cashed up.

### Proof of sickness or injury

Employers can now require proof of sickness or injury for any period of absence. Where proof is requested within 3 consecutive calendar days the employer needs to inform the employee as soon as possible that proof is required and will need to meet the cost of obtaining the proof.

Employers should review their existing employment agreements and policies and consider changing these to allow for the right to require medical certificates in terms of the new legislation.

### Transfer of public holidays

Employers and employees can agree to transfer the observance of public holidays to another working day. An employer may adopt a policy that prohibits these agreements. Where there is agreement to transfer a public holiday then this must be recorded in writing.

Employers need to make sure that as from the 1st April 2011 their leave records record any annual leave that is paid out and any public holidays transferred to other days.

### Requirements relating to written individual employment agreements

As from the 1st July 2011 employers are under a statutory requirement to retain a copy of the signed individual employment agreement or the current individual terms and conditions of employment of its employees. Where an employer has provided an employee with an intended agreement, the employer must retain the intended agreement even if the employee has not signed it or agreed to the terms and conditions specified in it. An intended agreement cannot be treated as the employee's employment agreement if the employee has not signed the agreement or not agreed to the terms and conditions specified in the intended agreement.

Employers are required to provide a copy of the agreement on request from the employee.

### Penalties

The changes to the law also doubled the maximum penalties for non-compliance to a maximum of \$10,000 for individuals and \$20,000 for companies and other bodies corporate.

### Other changes

Other important changes that have been introduced by the new legislation are:

#### Test of justification for dismissals

The test of justification under s103A of the Employment Relations Act 2000 will be what a reasonable employer "could" have done instead of what a reasonable employer "would" have done.

#### Reinstatement

Reinstatement is no longer the primary remedy but is still available for dealing with cases of unjustified dismissal.

#### Average Daily Pay

A new formula for "average daily pay" has been introduced in relation to calculating leave entitlements.

#### Union Access and Bargaining

Union access to workplaces will require employer consent which cannot be unreasonably withheld.

Employers are able to communicate directly with employees during collective bargaining, including communicating about the employer's proposals for the collective bargaining provided the communications are consistent with the duty of good faith.

## How to get paid in a recession By Amy Williamson

The recent - and arguably ongoing - global financial crisis has highlighted how difficult it can be to get paid when individuals or companies who owe you money may be struggling financially.

This can be especially true if you want to retain a workable commercial relationship with the debtor. If you have tried unsuccessfully to prompt payment, it may be time to talk with us about taking steps to recover the debt.

### **A debtor who is willing to pay, but has no ready funds**

#### **Make a demand for payment**

Our first step is usually to write a letter of demand. This is relatively inexpensive, and sometimes a letter on lawyer's letterhead demanding payment by a set date is all it takes to show the debtor that you are serious. This is also a way to try to preserve any existing commercial relationship you might have with the debtor.

#### **Secure the debt**

If the debtor cannot repay the debt in one lump sum, we can draft an agreement for an instalment regime acceptable to you. This can be secured in a number of ways, including by registering a charge over any property owned by the debtor, if the debtor is willing to agree.

If the debtor is a company, arranging for a director of the company to execute a personal guarantee may be an option. So that if the debtor fails to keep up instalments, the director guarantor becomes liable to pay the debt.

### **A debtor who is unwilling to pay**

In the situation where a debtor is simply ignoring your requests for payment or refusing to pay a debt, there are certain steps you can take to get to the front of the queue i.e. ahead of any other creditors owed money by the debtor.

#### **Obtain a Judgment**

If the debt is for less than \$15,000 and the debt is disputed (i.e. the debtor has refused to pay for some reason as opposed to simply ignoring your demands for payment), you may apply for Judgment in the Disputes Tribunal. This is a 'do-it-yourself' jurisdiction, where lawyers do not appear. However, we can help you prepare your application to give you the best chance of success at your hearing.

If the debt is for a sum of between \$15,000 and \$200,000 we can file and serve a Notice of Claim in the District Court. This alone can prompt payment. The debtor then has 30 working days to serve a response. If no response is served, we would be able to file an application for judgment. If a response is served, Information Capsules are exchanged (with all documents each side relies on to prove their case) and the parties then attend a Judicial Settlement Conference or, failing settlement at a Conference, a hearing in the District Court.

If the debt is more than \$200,000, proceedings are commenced in the High Court. There are a range of options for filing proceedings in the High Court, which will depend on the circumstances of the dispute.

#### **Enforce your Judgment**

If, once you have obtained a Judgment against the debtor, they are still not paying up, there are various options available for the enforcement of the Judgment.

If the debtor is an individual, these options can include applying for an Attachment Order, which is an Order that a certain sum is taken out of the debtor's salary each week; or applying for a Charging Order, which gives you a charge over the debtor's interest in any land he or she owns and can lead to an Application for a Writ of Sale allowing you to sell that land and take your debt from the proceeds of sale.

You can also serve the debtor with a Bankruptcy Notice. While this is not technically a process aimed at enforcing a Judgment, it is often an effective and economical method of obtaining payment. A Bankruptcy Notice gives the debtor 10 working days to pay the debt. If he or she fails to pay you, you can make an application to the High Court to bankrupt the debtor.

If the debtor is a company, the fastest, most cost-effective method may be to issue a Statutory Demand. This gives the debtor company 15 working days in which to pay the debt. If it fails to comply with the Statutory Demand by paying the debt, or coming to some kind of arrangement with you, you may then make an application to the High Court to liquidate the company.

### **But First...Talk to Us**

As with most legal problems, your first step should be to talk to us. We will be able to discuss your options with you and provide you with a cost estimate so that you can make an informed decision about how to progress your matter, which will hopefully result in you getting paid, recession or no recession.

If you would like to talk through your options, please contact one of our litigation partners.

## New Faces at Jackson Russell

**Kelly Seabourne** – Solicitor Commercial/Property Team



Kelly is from Northland. She completed her law degree at Auckland University and was admitted in 2005. Kelly began her working career with a law firm in Orewa as a general practitioner, including acting for commercially-minded clients with large leased property portfolios. She later joined an Auckland City law firm where she worked primarily with property developer clients on large scale development projects. Kelly has wide experience in all aspects of property law including subdivisions, leasing, funding, major property acquisitions and apartment developments. Kelly also advises on trusts and private client matters. Kelly enjoys the challenge of identifying and presenting practical, effective solutions to her clients. Her interests cover music, walking and photography.

**Nikola Matich** – Legal Executive Commercial Property Team



Nikola is with Jackson Russell covering the parental leave situations of Kim McDonald and Jennifer Edwards. Nikola is also from Northland. She finished her legal executive course in 2004 and soon after began working for a Whangarei law firm. Nikola describes her interests as, music, reading, and art.

## NZ Womens Polo Open – February 2011

Polo is one of the fastest growing equestrian sports in the world. Women's polo is not quite as well known as the "sport of kings": so it was with some pride Jackson Russell became a principal sponsor of the 2011 New Zealand Women's Polo open at Hololio in Clevedon. The finals day of the event was contested by four teams and in fast and furious action on a Friday afternoon the tournament was won by a team containing some of New Zealand's top players. As the event preceded the BMW Men's New Zealand Open it did draw considerable spectator and media interest.

## Jackson Russell – New Premises

Later in the year we will be on the move as our lease expires in the Fonterra Centre. The next edition of our client newsletter which we are planning for late May or early June will contain full details of our new address. Jackson Russell has just secured new premises and we will be retaining our presence in the Shortland Street precinct of central Auckland.

### Disclaimer

*The information contained in this newsletter is of a general nature and should be used as a guide only. Every effort has been made to ensure the accuracy of the information published, but readers are requested to seek legal advice before acting upon this information and should not rely on what is published in this newsletter.*

### DIRECTORY

Level 3, Fonterra Centre  
9 Princes Street, Auckland, New Zealand  
PO Box 3451, Auckland 1140  
Telephone: 09-303 3849  
Facsimile: 09-309 0902 or  
09-309 9648

Email: [enquiry@jacksonrussell.co.nz](mailto:enquiry@jacksonrussell.co.nz)

Website: [www.jacksonrussell.co.nz](http://www.jacksonrussell.co.nz)

### PARTNERS

Glenn Finnigan [gfinnigan@jacksonrussell.co.nz](mailto:gfinnigan@jacksonrussell.co.nz)

Richard Hawk [rhawk@jacksonrussell.co.nz](mailto:rhawk@jacksonrussell.co.nz)

Chris Hubbert [chubberr@jacksonrussell.co.nz](mailto:chubberr@jacksonrussell.co.nz)

Darryl King [dking@jacksonrussell.co.nz](mailto:dking@jacksonrussell.co.nz)

Richard Norris [rnorris@jacksonrussell.co.nz](mailto:rnorris@jacksonrussell.co.nz)

Marcus Rudkin [mrudkin@jacksonrussell.co.nz](mailto:mrudkin@jacksonrussell.co.nz)

Mark Sullivan [msullivan@jacksonrussell.co.nz](mailto:msullivan@jacksonrussell.co.nz)

Richard Wilson [rwilson@jacksonrussell.co.nz](mailto:rwilson@jacksonrussell.co.nz)

### ASSOCIATES

Catherine Lintott [clintott@jacksonrussell.co.nz](mailto:clintott@jacksonrussell.co.nz)

Greg King [gking@jacksonrussell.co.nz](mailto:gking@jacksonrussell.co.nz)

Caroline Harris [charris@jacksonrussell.co.nz](mailto:charris@jacksonrussell.co.nz)

Zandra Wackenier [zwackenier@jacksonrussell.co.nz](mailto:zwackenier@jacksonrussell.co.nz)

Kim McDonald (on parental leave)

### SOLICITORS

Kylee Jacobsen [kjacobsen@jacksonrussell.co.nz](mailto:kjacobsen@jacksonrussell.co.nz)

Louise Reed [lreed@jacksonrussell.co.nz](mailto:lreed@jacksonrussell.co.nz)

Simon Davies-Colley [sdaviescolley@jacksonrussell.co.nz](mailto:sdaviescolley@jacksonrussell.co.nz)

Amy Williamson [awilliamson@jacksonrussell.co.nz](mailto:awilliamson@jacksonrussell.co.nz)

Kelly Seabourne [kseabourne@jacksonrussell.co.nz](mailto:kseabourne@jacksonrussell.co.nz)

### LEGAL EXECUTIVES

Nikola Matich [nmatich@jacksonrussell.co.nz](mailto:nmatich@jacksonrussell.co.nz)

Jennifer Edwards (on parental leave)

### TAX ACCOUNTANT

Owen Williams [owilliams@jacksonrussell.co.nz](mailto:owilliams@jacksonrussell.co.nz)

### CUSTOMER PARKING



We have free car parks available for use when visiting our offices.

Entry from Bankside St.