

## **Terms of Trade—Are Yours Up to Scratch?**

If you are in business and extend credit to your customers, are your terms of trade adequate to ensure the effective and efficient collection of unpaid accounts?

Your terms of trade need to be effective and work for you. Too often terms of trade are ambiguous and do not adequately provide for personal guarantees, collection costs and security over items sold. If you are wondering whether or not your terms of trade are adequate, here are a few questions for you to consider.

### **Compliance with the PPSR**

The enactment of the Personal Property Securities Act 1999 ("Act") changed the provisions for taking security over personal property as a form of securing payment. Do your terms of trade reflect those changes to comply with the Act? Are you aware that retention of title clauses are no longer effective?

### **Interest on unpaid amounts**

Is it possible to charge interest on unpaid accounts? This must be provided for in your terms of trade, otherwise you are limited to the statutory rate imposed by the Court, which can only be charged after you have obtained a judgment against your customer.

### **Personal guarantees**

Do you have provision for a personal guarantee? Personal guarantees must be in writing, clear and unambiguous and executed in a way that ensures that the person signing realises that he or she is to be held personally liable to pay you if the customer or borrower does not. If the guarantee is not clear or not properly executed it may not be enforceable and you may lose the last opportunity you have to get paid, especially if your customer is a company that has gone into liquidation or has otherwise ceased trading.

### **Recovering costs**

Is it possible to recover your actual costs (including lawyer's fees) of pursuing someone that does not pay? Again you can, but only if you provide for it in your terms of trade. Otherwise you are limited to the amounts set by statute for "costs" in Court proceedings. Those "costs" are low and do not reflect the actual costs incurred in instructing a lawyer to assist in pursuing a reluctant payer.

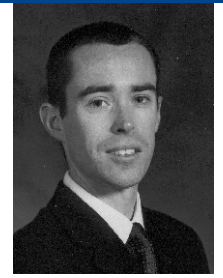
### **Location of court proceedings**

Do you supply to customers who are based out of town or in other centres? If you do, then do you realise that you must issue any Court proceedings against them in the Court nearest to them - unless of course your terms of trade specify that you can issue in any Court which suits you.

### **It's worth the effort of getting them right**

Of course, terms of trade cannot guarantee that you will get paid. However, the better they are the better your prospects will be of obtaining payment of not only the amount owing to you, but also the costs of doing so, as well as interest on the amount outstanding. You may also improve your chances of getting paid if the guarantee provision in your terms of trade is effective and enforceable, as a customer may think twice about not paying.

Your lawyer at Gallaway Cook Allan is the best person to advise you on what should be in your terms of trade and how to best ensure that the terms you trade on are yours, and not those of your customers.



David Smillie, Associate

## What is Intellectual Property?

Intellectual property consists of intangible property assets, such as ideas, concepts, goodwill or trademarks.

A business's intellectual property ("IP") will often comprise of a mix of trademarks (either registered or unregistered), patents (which protect a novel concept or idea and the application of such ideas), copyright (in particular text or drawings), registered designs, business know-how, trade secrets and information such as customer lists.

## Have you identified your IP?

Your business may have a considerable amount of IP that is not being adequately safeguarded or utilised. Assets such as your trademarks, customer lists and general business know-how can be critical to the success or failure of your business by giving you the edge which you need over your competitors.

If you think that you may be seeking outside investment in your business, or that you may look at selling your business in the future, you should be aware that any potential investor or purchaser will want to know:

- What IP the business owns;
- What steps you have taken to protect the IP; and
- How such IP will give your business the edge over your competitors.

You should take steps to identify your intellectual property and ensure it is protected. This could be as simple as having adequate confidentiality agreements in place with your staff and contractors, or may involve obtaining registration of any trademarks, designs or concepts which your business has developed.

This should be done sooner rather than later - once a concept is in the public domain it will not be patentable.

This article will focus on one common type of IP - the trademark. When you think of trademarks, several well known brands will probably jump to mind.

Most businesses will have a trademark or trademarks that they use in the operation of their business. It may be a name, a catchy phrase or a distinctive logo.

## What is a Trademark?

A trademark is a brand or sign that has distinctive qualities. It can be a name, signature, word, colour, logo or even a sound or smell. It must be capable of being represented graphically and distinguishing the goods or services of one person from that of another.

Your business may have a trademark or brand that it is using for which you have not considered obtaining protection for, or hadn't thought could be protected.

## Why register your trademark?

You may consider that registration of your trademark is not relevant to your business. However, a registered trademark means that you are in a better position to enforce your rights against others who may try to use it. Registration prevents a competitor from using or obtaining rights to use a brand or distinctive name which you have developed.

A registered trademark should add to the value of your business and be an asset in any sale.

On the other hand, you run the risk that your brand or even your company name may infringe that of a registered trademark, so a check of the register may be in order.

Registration may not be as costly as you think. The filing fees are not excessive and legal fees for obtaining the registration may be less than you anticipate. If you are interested, please contact David Smillie or the member of the firm with whom you usually deal.

## Why Form A Company?

The law in New Zealand dealing with companies states in its introduction that companies are used as a “means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks.” The limited liability that attaches to the company owners is the basis for dealing with the risk factor in doing business.



John Anderson, Partner

- The shareholders, who provide capital to the company in exchange for shares in the company, benefit from limited liability. Generally shareholders are only liable for the original purchase price of their shares. In comparison, partners in a partnership have unlimited liability for the debts of the partnership.
- The existence of a company is unlimited in time, regardless of the death of any shareholders or directors. This is in contrast to a partnership, where ordinarily the death of a partner brings a partnership to an end.
- Companies are taxed at a flat rate of 33%.
- In general, tax losses cannot be passed to shareholders, however if there is a 49% continuity of ownership, tax losses may be carried forward.
- Income tax paid by a company will create imputation credits which can be attached to dividends paid to shareholders.

## What Are The On-going Responsibilities Of Directors Of A Company?

The day-to-day management of the affairs of a company are undertaken by the directors.

Before deciding to incorporate a company, you need to assess whether you, as a potential director of the company, want to assume the administrative responsibilities associated with company management. These responsibilities are more onerous than those of a sole trader or partner in a partnership and include:

- Keeping minutes of meeting of the board of directors of the company, including records of any board resolutions, and/or shareholders' resolutions passed.
- The obligation to act in good faith and in the best interests of the company in managing the affairs of the company. If a director is found not to have done so, he or she may be held personally liable for his or her actions.
- Maintaining a share register, company records and accounting records.
- Filing an annual company return at the Companies Office each year.
- Notifying the Companies Office of certain actions, such as a change in address, or issue of new shares or a change in directors.
- Filing a tax return on behalf of the company.

## Summary

Whilst operating a business within a company structure may offer many benefits, there are a large number of legal responsibilities as well. It should also be kept in mind that the limited liability advantage is often offset by the fact that a bank or other lender will typically require the personal guarantee of the company shareholders before providing finance.

We recommend that before incorporating a company you speak with John Anderson, or the member of the firm with whom you usually deal, to ensure you are fully aware of all the legal implications involved.

## Introducing new members to our legal team

### Chris Thomsen



After moving from Auckland to Otago to study in 1998, Chris joined the firm in January 2004 and worked as a law clerk prior to attending his legal professionals course. He was admitted to the bar in May of this year. Chris works in the Property

Team primarily dealing with easements, residential conveyancing and wills. Chris also attends the Mosgiel office in a supporting role to Helen Davidson.

### Krista Sim



Krista completed her law degree in early 2004 and joined the firm as a law clerk in April of this year. She has had a varied background in the law, having worked as a legal executive in the areas of residential conveyancing, wills and family trusts,

and more recently as a case officer at the Family Court. Krista works in the Estates and Trusts Team and also assists the Family Team when required. She is currently completing the legal professionals course on a part time basis and will be admitted to the bar when this is completed.

## Otago Festival of the Arts 2004

Galloway Cook Allan are proud to be a sponsor for the 2004 Otago Festival of the Arts. The Festival is Dunedin's major cultural event showcasing a variety of performers from throughout New Zealand and overseas. The Festival promises to be a first-rate celebration of the arts from September 29th to October 9th. There will be thought-provoking theatre, contemporary dance, avant-guard opera, displays of enchanting music, plus much more. We, at Galloway Cook Allan, have aligned ourselves with a quartet of musicians called Chirgilchin. They are from a small Russian village north of West Mongolia and perform a form of atmospheric music called "throat singing", which can best be described as a flute-like sound. Their performance will be on Saturday 9th October at 8.00pm in the Dunedin Town Hall. Their music, combined with special effect lighting and film footage of Mongolia, provided by Natural History New Zealand, will create a truly exotic show. This will be an extraordinary finale to what we envisage will have been an equally extraordinary Festival.

## Galloway Cook Allan Prize

The Galloway Cook Allan prize has been awarded annually since 1992 to the law student at the University of Otago who achieves the best result in the LLB subject, the law of torts. The partners of Galloway Cook Allan were delighted to meet recently with the 2003 recipient of the prize, Simon Peart.

Simon, who is from Dunedin, has recently completed the course requirements for a BA in Philosophy and plans to complete his law degree at the end of next year. Earlier this year, Simon was a member of the five-person Otago team, which won the right to represent New Zealand at the Philip C Jessup International Law Moot Competition held in Washington. Simon provided the partners with some insight into participating in such a prestigious competition, and they in turn were able to congratulate Simon and the other team members on their effort. The New Zealand team finished a very credible 8th place out of the 94 teams entered in the world final.

Simon is developing an interest in litigation and in particular, in the area of International Criminal Law. Simon's main interests outside his University studies are debating, golf and sailing. We wish him well in his chosen career.