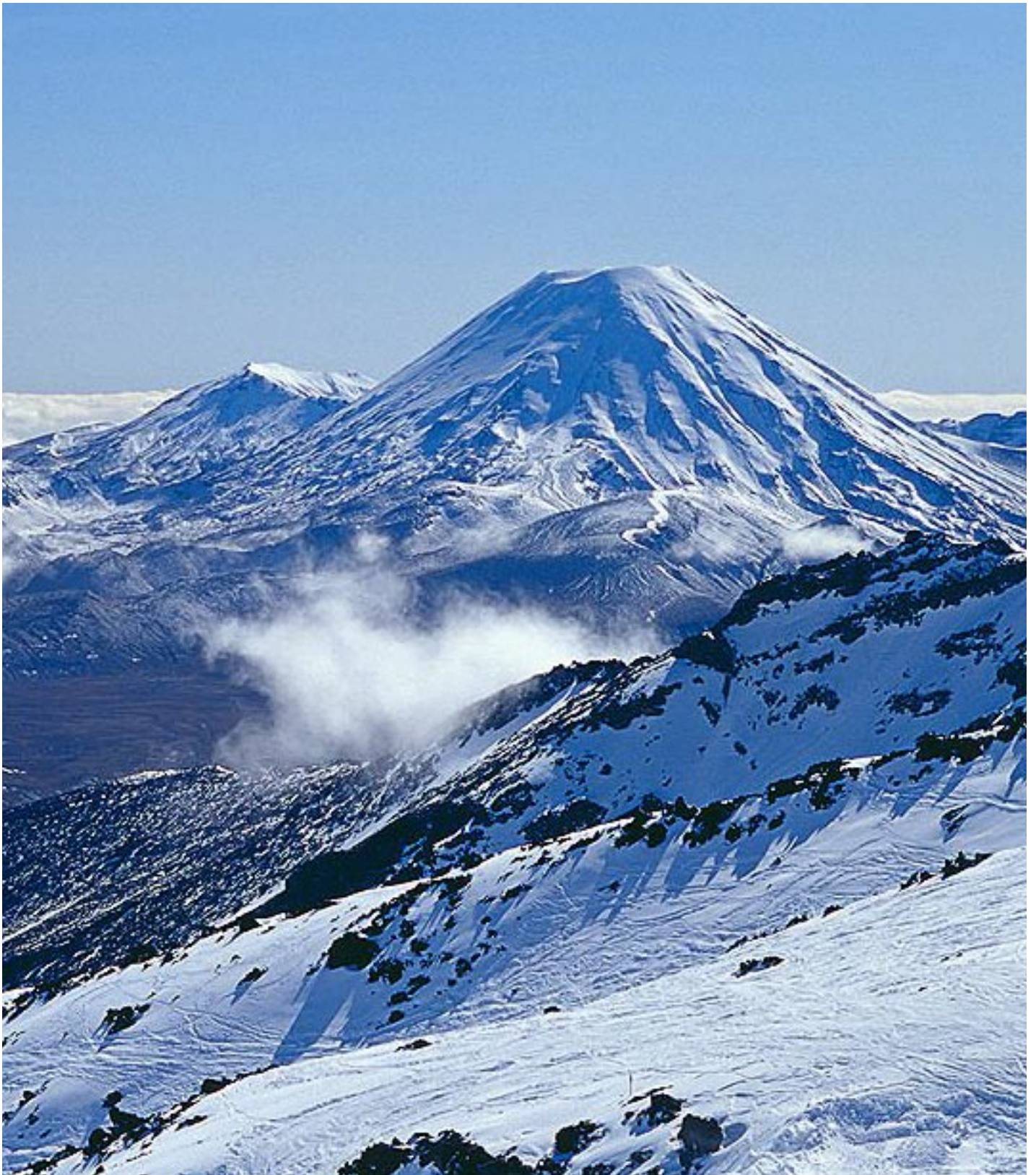
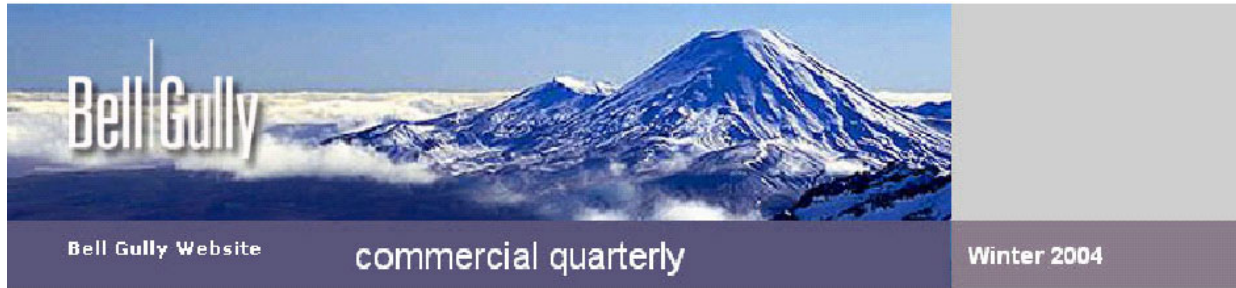


WINTER 2004

Bell Gully





**Welcome to the first issue of *Commercial Quarterly*, Bell Gully's digest of current commercial law issues that may impact your business and trading operations.**

A companion publication, *Regulator Report*, covers developments in the corporate and regulatory sector (New Zealand and Australian exchanges, securities commissions, and takeovers and competition regulators). *Regulator Report* is available online at [www.bellgully.com/publications](http://www.bellgully.com/publications).

Each quarter, we will summarise recent issues and preview upcoming developments under the following headings:

- In the courts**
- In the journals**
- Legislation/In Parliament**
- Recent developments**
- Bell Gully news**
- Useful Web links**



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For more information on any of the cases, articles and features in *Commercial Quarterly*, please email [Rachel Gowing](mailto:Rachel.Gowing@bellgully.com) or call on 64 9 916 8825.

*Disclaimer: this publication is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters dealt with in this publication.*

## In the courts

### Reckless trading - company directors found guilty

In two recent cases, the High Court has found company directors guilty of reckless trading.

### "New Zealand Made" is not necessarily "made" in New Zealand

When marketing a product as "New Zealand Made" and deciding if the product merits such a label, where is the dividing line to be drawn amongst products not wholly manufactured and sourced in New Zealand, but that are substantially connected with New Zealand?

### Possession is nine-tenths of the law: court finds that possession can override ownership

In the first decision under the Personal Property Securities Act, the High Court has found that a lessor of goods can lose ownership of those goods if a third party holding a registered security interest over the lessee's property enforces that security interest.

*A summary of the timing and information requirements for registering security interests of lessors at the PPSR is set out at the end of this case summary.*

### Duty to take reasonable care to perform a contract

The Court of Appeal considered whether New Zealand law recognises a duty in tort to take reasonable care to perform a contract and decided that it does not.

### What constitutes an "offer to the public" for the purposes of the Securities Act?

The court has rejected an argument that an offer of a debt security was not an offer to the public because the investors were all participants in a joint venture.

### Change of trustees triggers pre-emptive rights

The High Court has decided that a change of shareholder trustees constituted a change in legal ownership of the shares, which triggered rights of pre-emption for other shareholders.

### Pre-incorporation contracts, ratification and OIC consent

This case concerned a dispute about the cancellation of a contract, claimed by the plaintiff to have been justified on the basis that Overseas Investment Commission (OIC) consent was not obtained. The defendant argued that OIC consent was not required after a New Zealand incorporated company was nominated as purchaser.

### Misuse of confidential information in a contractual context

The Court of Appeal has decided that "there is no legal or evidential onus on a person in possession of confidential information as a result of a contractual relationship to satisfy the court that it has not misused that confidential information".

### When is a transaction not in the ordinary course of business?

The High Court at Hamilton has decided that because the relevant payment was only made by the company in response to the abnormal financial difficulties it found itself in, it was voidable on application of the liquidator and was ordered to be returned.

### Court of Appeal confirms existence of tort of breach of privacy

In *Hosking v Runting*, a majority in the Court of Appeal has confirmed the existence of the tort of breach of privacy in New Zealand.

## In the courts

### Reckless trading - company directors found guilty

*In two recent cases, the High Court has found company directors guilty of reckless trading. In the first case<sup>1</sup>, the court decided that a company director was liable for reckless trading under the Companies Act 1993 when he risked creditors funds while the company was facing insolvency. The court determined that the factors set out below amounted to the taking of illegitimate business risks.*

Taking into consideration academic and judicial authorities on the reckless trading sections of the Companies Acts 1955 and 1993, the court concluded that the reckless trading provisions are only targeted at the taking of illegitimate business risks. Factors relevant to determining whether a business risk is legitimate include:

- "whether the risk was fully understood by those whose funds were in peril;
- where a company is insolvent or on the edge of insolvency, the persons primarily interested are the creditors not the shareholders;
- while there is no duty to cease trading as soon as a company becomes balance sheet insolvent, the tolerance of continuing trading is generally a matter of months; and
- whether the conduct of the director was in accordance with orthodox commercial practice".

The court's decision was influenced in this case by the fact that risks were taken with the money of trade creditors who were not notified of the risks, the company continued in this situation for a number of years, and there was limited observance of orthodox practices such as board papers, matching performance against forecasts, ensuring decisions were implemented and recording proceedings in minutes.

In the court's view, the directors did not follow the course that can be expected where a company faces insolvency - that is, determining the cause of insolvency and establishing a strategy for salvaging the situation.

*In the second case, the court confirmed that reckless trading will only be found where illegitimate business risks have been taken. The court also considered whether proper accounting records had been kept in compliance with the company's financial reporting obligations.*

In this case<sup>2</sup>, a company failed to make provision in its financial statements for a debt of over \$1 million in unpaid excise duty assessed by Customs in 1992 (which the company disputed). Instead, the director's report attached to the company's financial statements from 1992 to 1996 noted that the company disputed the assessment. In 1997 the company recorded in its financial statements the debt assessed in 1992 as a contingent liability and mentioned a further audit carried out by Customs in 1997. An accountant gave evidence that the amounts assessed as owing in 1992 and 1997 should have been treated as actual, rather than contingent, liabilities.

The court decided that although it was not necessary to show the amount of the debt in the 1992 financial statements, because Customs' letter in 1993 contemplated that subsequent correspondence might alter the amount owing, the company should have made provision in its financial statements for the disputed debt. That disclosure should have been made even if the company was correct in treating the liability as contingent.

The court noted that in deciding whether a business risk is legitimate, the length of time the company traded while insolvent and whether the director's conduct was in accordance with orthodox commercial practice are relevant factors.

In the court's view, it had been reckless for the company to continue trading from early 1994, which allowed a few months for the director to initiate some action.

<sup>1</sup> *Re South Pacific Shipping Ltd (In Liq), Traveller & Anor v Lower*, High Court, 12 February 2004

<sup>2</sup> *Cellar House Ltd (in liq) Walker v Allen*, High Court, Wellington 19-22 August, 15-17 October 2003; 18 March 2004

## In the courts

### "New Zealand Made" is not necessarily "made" in New Zealand

*When marketing a product as "New Zealand Made" and deciding if the product merits such a label, where is the dividing line to be drawn amongst products not wholly manufactured and sourced in New Zealand, but that are substantially connected with New Zealand?*

In this case<sup>1</sup> the High Court assessed the claim by Carter Holt Harvey Limited (**CHHL**) that its competitor in the New Zealand toilet paper market, CottonSoft, was misrepresenting CottonSoft toilet paper brands by marketing and packaging them as being made in New Zealand.

CHHL claimed that CottonSoft were in breach of sections 13(j) and 9 of the Fair Trading Act 1986 (the **Act**) on the grounds that, in contrast to CHHL's procurement and manufacturing process, CottonSoft toilet papers were not wholly made in New Zealand.

Section 13(j) prohibits false or misleading representations as to the origin of goods. Section 9 deals generally with misleading and deceptive conduct in trade.

It was agreed between the parties that CottonSoft imported raw tissue for its toilet paper. A key part of CottonSoft's defence rested on the argument that the significant portion of the manufacturing process, that which produces a recognisable and valuable consumer product as its outcome, occurred in New Zealand.

In deciding the matter, the court steered away from the debate as to whether the origin of raw materials was determinative and instead considered the question of where a product could properly be said to be manufactured, produced or made.

The court determined that the point in the manufacturing process at which the product gained its distinctive, though not necessarily final, characteristics was crucial. Because the final toilet paper could not properly be said to be wholly manufactured in New Zealand, the claim to that effect was considered to be misleading and deceptive conduct under the Act.

<sup>1</sup> *CHHL v CottonSoft Ltd* (2004) 8 NZBLC 104,067

## In the courts

### Possession is nine-tenths of the law: court finds that possession can override ownership

*In the first decision under the Personal Property Securities Act 1999 (the **PPSA**), the High Court has found that a lessor of goods can lose ownership of those goods if a third party holding a registered security interest over the lessee's property enforces that security interest.*

The decision will surprise many leasing companies, who might have assumed they could not lose ownership of goods simply by leasing them. This case makes it clear that this can occur even where there are provisions in the lease preventing the lessee from charging the goods or using the goods as collateral.

Before the advent of the PPSA, only the true owner of goods could pass title to them, except in limited circumstances.

In this case<sup>1</sup>, NDG Pine Limited (**NDG**) leased five portable buildings from Portacom New Zealand Limited (**Portacom**).

No lease period was specified - under the PPSA, a lease that lasts longer than a year or is for an indefinite term is deemed to be a "security interest" and can be registered on the PPSR.

In addition, the lease terms and conditions acknowledged that the interest was registerable - but Portacom failed to register its interest.

Problems arose when NDG defaulted on its obligations to The Hongkong and Shanghai Banking Corporation Limited (**HSBC**). HSBC had lent significant funds to NDG and held a debenture over all of NDG's assets. The default led to the appointment of a receiver of NDG's assets.

A dispute then arose over who had priority to the portable buildings: was it HSBC or did Portacom retain ownership of the buildings?

The court considered the provisions of the PPSA and cases decided under the equivalent Canadian legislation and found that a lessee of goods may grant a security interest in goods - even though it does not own them. The dispute as to who had priority in the buildings was therefore determined under the PPSA's priority rules. Crucially, as HSBC had registered its interest on the PPSR and Portacom had not, HSBC had priority and its receivers had the right to sell the buildings and for HSBC to retain the proceeds.

Portacom's lawyers also argued that the terms used in the debenture granted in favour of the bank were not wide enough to cover the interest created by the PPSA, as the debenture was in a form used prior to the implementation of the PPSA and did not use the definition of "all present and after acquired property" referred to in the PPSA.

However, the court decided that, although the exact style in the PPSA had not been used, it was clear that the charging clause was wide enough to cover the leased goods. This is good news for banks and others who have been granted debentures prior to the passing of the PPSA and have not had them updated to reflect the PPSA's provisions.

However, the decision only relates to the specific wording of the debenture in this case. It is quite possible that the wording in another charging clause may not be wide enough to obtain an interest in leased goods not owned by the debtor.

The moral of this story is that the decision would have been entirely different if Portacom had simply registered its interest under the leases when the buildings were leased. This is a very straightforward task and requires payment of a \$3 fee. Leasing companies should review their leases and any other

arrangements where third parties take possession of goods that the leasing companies own to ensure that they have protected their interests.

Owners should register their interest on the PPSR as soon as possible in order to maximise the chances they will retain priority and ownership, and to prevent a lessee or person with possession granting a prior ranking security interest to a third party.

*Murray Tinge*, a senior associate with Bell Gully, represented Ferrier Hodgson, the receivers of NDG, in the case described in this summary.

A summary of the timing and information requirements for registering security interests of lessors at the PPSR follows.

**PPSA REGISTRATION - A BRIEF GUIDE TO THE RULES**

**Timing of registration**

The general priority rule under the PPSA is "first to register wins".

However, the interest of a lessor of goods under a lease for a term of more than one year (which includes leases for an indefinite term) falls within the definition of "purchase money security interest", which has a better priority than prior registered general security interests, if the interest is registered within the following time frames:

Nature of collateral	Timing for registration
<p><b>Inventory</b></p> <p>Goods that are:</p> <ul style="list-style-type: none"> <li>• Held by a person for sale or lease, or that have been leased by that person as lessor; or</li> <li>• To be provided or have been provided under a contract for services; or</li> <li>• Raw materials or work in progress; or</li> <li>• Materials used or consumed in a business</li> </ul>	<p>Prior to, or at the time, the debtor takes possession of the collateral</p>
<p>Collateral other than inventory or intangibles</p>	<p>Not later than 10 working days after the day on which the debtor obtained possession of the collateral</p>
<p>Intangibles</p>	<p>Not later than 10 working days after the day on which the security interest in the intangible attached</p>

Accordingly, if a lessor ensures that registration has properly been completed before the goods are supplied to the lessee, it should have a purchase money security interest that will defeat the interest in the leased goods of a prior registered secured party.

**Information required to register**

In order to register a security interest in your favour on the PPSR you will need to have:

- registered as a secured party group; and
- collected the following information<sup>2</sup> about your debtor:
  - \*Full name(s) (by reference to the Companies Office, for companies, or to a passport, driver's licence or similar, for individuals)
  - \*Date of birth (for individuals)
  - E-mail address
  - Fax
  - Contact telephone
  - Contact address
  - \*Full name of person acting on behalf of debtor
  - \*Contact address of person acting on behalf of debtor

Please feel free to contact [Rachel Gowing](mailto:rachel.gowing@bellgully.com) (rachel.gowing@bellgully.com or 09 916 8825) if you would like more information on how to register.

Alternatively, visit the Ministry of Economic Development's website at [www.med.govt.nz](http://www.med.govt.nz) for training materials for using the PPSR.

<sup>1</sup> *Graham and Gibson and Ors v Portacom New Zealand Limited* (High Court, Auckland, CIV 2003-404-5577, 17 March 2004, Rodney Hansen J)

<sup>2</sup> Only those details marked with an asterisk are mandatory - the other information is optional.

## In the courts

### Duty to take reasonable care to perform a contract

*The Court of Appeal has considered whether New Zealand law recognises a duty in tort to take reasonable care to perform a contract and decided that it does not.*

The case<sup>1</sup> centred around a contract for the construction of a co-generation plant at Carter Holt Harvey Limited's (**CHHL**) Kinleith Mill between CHHL and the predecessor organisation to Genesis Power Limited (**GPL**). Based on the alleged defectiveness of the plant, CHHL claimed against GPL, in contract, and against GPL's subcontractor, Rolls-Royce New Zealand Limited (**RRNZL**), in negligence.

The court considered whether it was just and reasonable that a duty to take reasonable care to perform a contract be recognised in such a case. In answering this broad question the court looked to:

- the nature of the relationship between the parties; and
- wider policy considerations negating or strengthening the existence of a duty in a particular class of case.

#### Proximity

The court assessed the plaintiff's claim to compensation for avoidable harm in light of the defendant's claim to be protected from undue restrictions on its freedom and from an undue burden of legal responsibility. Major factors taken into account by the court included the:

- foreseeability of harm;
- degree of vulnerability of the plaintiff in the circumstances;
- existence of other remedies to the plaintiff;
- nature of loss complained of; and
- statutory and contractual background.

The court found a high degree of foreseeability that a lack of reasonable care on RRNZL's part would occasion a specific type of damage to CHHL. This finding interlinked with the direct and close relationship between the parties resulting from previous contractual arrangements and dealings. The fact that the arrangement between CHHL and RRNZL was not by way of direct contract, but by way of subcontract despite the fact that RRNZL was in reality the only contractor, was highlighted by the court. In any case, the court decided that this was not an example of disparity in negotiating power or commercially naïve participants.

#### Policy

The court emphasised commercial certainty as the overriding policy consideration and referred to the well-established principle that contracting parties should be left to the bargain they negotiate and pay for to as great an extent as possible - all the more so when considering commercially shrewd contracting parties.

<sup>1</sup> *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* CA259/02 (CA, 23/6/2004)

## In the courts

### What constitutes an "offer to the public" for the purposes of the Securities Act?

*The court has rejected an argument that an offer of a debt security was not an offer to the public because the investors were all participants in a joint venture.*

In this case<sup>1</sup>, a company received over \$1 million from 25 investors. The funds were deposited into a United States bank account and subsequently disappeared.

When the company was placed into liquidation, the liquidators brought proceedings on behalf of six of the investors to try to recover their investment from the directors, arguing that the company offered securities to members of the public in breach of the Securities Act 1978.

The defendant counter-argued that:

- the investment was not an offer of securities because the investors were participants in a joint venture with the company; and
- if the offer was of securities, it was not made to members of the public.

Rejecting these arguments and finding a breach by the defendant of the Securities Act, the court noted that:

- there was no joint venture - the risk taken by the investors was not shared by the company;
- there was a debtor/creditor relationship between the company and the investors - the investment was a debt security;
- the investors were all asked to participate in the venture and this constituted an offer; and
- despite the fact that the investors heard about the venture by word of mouth, approached the directors of the company themselves and were told that the investment was not open to the public generally, the offer was made to the public because the investors did not fall within the exceptions in the Securities Act.

Summary judgment was granted against the defendant.

<sup>1</sup> *Parsons & Kenaly v Archer* (High Court, Tauranga, CIV 2003-470-395, 26 February 2004, Master Lang)

## In the courts

### Change of trustees triggers pre-emptive rights

*The High Court has decided<sup>1</sup> that a change of shareholder trustees constituted a change in legal ownership of the shares, which triggered rights of pre-emption for other shareholders.*

The company in question was an unlisted company with two shareholders, one of which was a family trust whose shares were registered in the names of the trustees.

The company's constitution required shareholders intending to transfer shares to give a transfer notice in writing to the Board, or the Board could give such a notice if the shareholder had failed to do so, following which all specified shares had to be offered to the other shareholders.

The trustees applied for a declaration by the High Court that the pre-emptive rights in the constitution did not apply when there was a change of trustees, but no change in the beneficial ownership of the shares, arguing that the constitution's requirement for notice was confined to proposed transfers by way of sale and not transfers from one trustee to another for nominal consideration.

The court determined that the key issue was the meaning of "transfer" in the constitution and the intention of those who had drawn it up and decided that a "transfer" of shares in this case referred to a transfer of legal title to the shares, as distinct from any change in beneficial interests. Accordingly, trustee shareholders intending to transfer shares from one trustee to another had to give a transfer notice to the board, and any such notice triggered rights of pre-emption.

This decision turned on the specific wording of the company's constitution, but the ruling will be important for all companies with trustee shareholders and constitutions containing pre-emptive rights.

<sup>1</sup> *Ord v Calan Healthcare Properties Limited* (2004) 9 NZCLC 263,465.

## In the courts

### Pre-incorporation contracts, ratification and OIC consent

*This case<sup>1</sup> concerned a dispute about the cancellation of a contract, claimed by the plaintiff to have been justified on the basis that Overseas Investment Commission (OIC) consent was not obtained. The defendant argued that OIC consent was not required after a New Zealand incorporated company was nominated as purchaser.*

The contract was for the sale of land which was expected to be made freehold under a tenure review process, and recorded that OIC consent was required to be obtained within a specified period after completion of the review. The review was more protracted than anticipated, and during that time a substantial rise in the value of the land meant that the purchaser was keen to complete the contract, and the vendor was keen to avoid the contract.

The overseas purchaser transferred shares in a New Zealand company to two New Zealand citizens six months after signing the contract, and then exercised his right to appoint the company as his nominee under the contract. The vendor was informed that OIC consent was not being sought as it was no longer necessary, given that the purchaser's nominee company was now under New Zealand ownership.

The main issues addressed by the court included:

- pre-incorporation contracts and their ratification;
- the requirement for OIC consent where a contract has expressed such consent to be a requirement, but where changed circumstances indicate that such consent is no longer required; and
- a share arrangement scheme alleged to be in the nature of a sham or designed to circumvent the OIC regulations.

#### Ratification of pre-incorporation contracts

The court considered whether the company, incorporated six months after signing the contract, was a party to the agreement by ratification. At the time the contract was signed, the company was not contemplated by the purchaser as the entity to take the benefit of the contract.

The court decided that a specific or ascertainable company must be in mind, that, upon its incorporation, ratifies the contract within a reasonable time. Here, the company was later incorporated for a separate purpose.

Although this finding determined the matter, the court went on to consider whether the company could be said validly to have ratified the contract, with reference to section 182 of the Companies Act 1993, and determined:

- The appropriateness of the 'conscious act' test, under which the process of ratification by a company could be evidenced by either a formal decision, or other conduct plainly indicating the intention of the company to adopt and perform the pre-incorporation contract.
- There is strong doubt that evidence of ratification by writing would be required.
- Ratification should occur within a reasonable period of time after incorporation, having regard to the circumstances.

## **Requirement for OIC consent**

The court assessed the facts and circumstances leading up to the contract, including the negotiations and renegotiations, the personal involvement of the purchaser, and the underlying nature of the share transfer arrangements which were claimed by the purchaser to have removed the need for OIC consent. The court looked to the "reality of the situation" and was satisfied that the purchaser remained the controlling and funding hand of the company. The court held that no change to the requirement for OIC consent was brought about, and that this term of the contract remained in place and unsatisfied, justifying the vendor's cancellation.

<sup>1</sup> *Taylor v Todd & Ors* (HC, Dunedin CIV-2003-412-000607 Apr 30, 2004, Panckhurst J)

## In the courts

### Misuse of confidential information in a contractual context

*In this case<sup>1</sup>, the Court of Appeal decided that "there is no legal or evidential onus on a person in possession of confidential information as a result of a contractual relationship to satisfy the court that it has not misused that confidential information".*

Bomac was a licence holder and seller of animal remedy products for Norbrook. Norbrook claimed that Bomac had misused confidential information made available to Bomac as part of that relationship.

The Court of Appeal agreed with the High Court that the relationship between Norbrook and Bomac did not give rise to fiduciary obligations and noted that in order to determine whether confidential information has been misused unconsciously, the court will look at whether the coincidences between the confidential information and the confidant's behaviour are too strong to permit any other explanation.

<sup>1</sup> *Norbrook Laboratories Ltd v Bomac Laboratories Ltd* CA 273/02, 05/04/04

## In the courts

### When is a transaction not in the ordinary course of business?

*The High Court at Hamilton has decided<sup>1</sup> that because the relevant payment was only made by the company in response to the abnormal financial difficulties it found itself in, it was voidable on application of the liquidator and was ordered to be returned.*

Four days before the shareholders resolved to appoint a liquidator, Waikato Dive Centre paid to its lessor arrears of rental amounting to almost \$40,000. The payment was made as a condition to the lessor agreeing that the Dive Centre could assign its lease.

The court decided that it was clear that the payment was only made because the lessor was able to withhold consent to assignment of the lease, and so the payment was not made in the ordinary course of business.

The significance of whether the payment was made in the ordinary course of business is that in terms of section 292 of the Companies Act 1993, even where the primary grounds for voidability are met, the transaction will still not be voidable if the payment was made in the ordinary course of business.

<sup>1</sup>*Takanini Rentors Limited v Waikato Dive Centre Limited*, High Court, Hamilton, CIV 2003-419-1637

## In the courts

### Court of Appeal confirms existence of tort of breach of privacy

*In Hosking v Runting*<sup>1</sup>, a majority in the Court of Appeal has confirmed the existence of the tort of breach of privacy in New Zealand.

In a long awaited judgment, Gault P and Blanchard and Tipping JJ held that there are two fundamental requirements for a claim to be successfully brought for interference with privacy, namely:

- The existence of facts in respect of which there is a reasonable expectation of privacy; and
- Publicity given to those facts that would be considered highly offensive to an objective reasonable person.

The majority was at pains to stress that it was not attempting to prescribe all the boundaries of the cause of action in the case before it and that the cause of action will evolve through future decisions "as courts assess the nature and impact of particular circumstances".

However, in strong dissenting judgments both Keith and Anderson JJ strongly criticised the recognition of the tort as unnecessary and an unwelcome encroachment on the right of freedom of expression, Anderson J going so far as to say:

*"Freedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by [the New Zealand Bill of Rights] are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot. In my view, the development of modern communications media, including for example the world wide web, has given historically unprecedented exposure of and accountability for injustices, undemocratic practices and the despoliation of human rights. A new limitation on freedom of expression requires, in my respectful view, greater justification than that a reasonable person would be wounded in their feelings by the publication of true information of a personal nature which does not have the quality of legally recognised confidentiality."*

<sup>1</sup> *Hosking v Runting & Ors* (2004) 7 HRNZ 301

## In the journals

### [Penalty regime under the Securities Markets Act 1988](#)

The penalties imposed by the Court in the case considered in this article are interpreted by the author as "a signal that breaches of the Securities Markets Act will be severely punished". The case, he says, "perhaps marks, at last, an approach which offers real disincentives to parties considering illegitimate trading practices."

### [Obligations of issuers of securities](#)

The Securities Commission considers offers that do not, for the purposes of the Securities Act, constitute "offers to the public".

### [Phoenix companies and the corporate veil](#)

This article considers a fundamental company law concept - that of separate corporate personality and the problem with what are known as "Phoenix Companies", which arise where owners and managers of failing companies leave their business and start up again under a different corporate guise.

### [Developing corporate governance principles for New Zealand](#)

This article outlines developments in New Zealand on the issue of corporate governance, in light of international debate over corporate failure and the differing approaches taken in the United States, the United Kingdom and Australia.

### [Reflections on some practical issues which have arisen under New Zealand's Personal Property Securities Act and some lessons for Australia](#)

A focus on some issues in the Personal Property Securities Act that have given rise to practical difficulties.

## In the journals

### Penalty regime under the Securities Markets Act 1988

**Duncan Webb, *New Zealand Business Law Quarterly*, February 2004**

*In the case described in this article<sup>1</sup>, a group of concerned Richmond shareholders successfully took action against PPCS for breach of its disclosure obligations under the Securities Markets Act. The penalties imposed by the Court in this case are interpreted by Duncan Webb "as a signal that breaches of the Securities Markets Act will be severely punished". The case, he says, "perhaps marks, at last, an approach which offers real disincentives to parties considering illegitimate trading practices."*

The author concludes that this case sets boundaries for orders under the Securities Markets Act. Orders must be confined to shares that are tainted by the breach complained of, but will not be confined to stripping a wrongdoer of the gain achieved by that wrongdoing. An example may be made of a wrongdoer and a penalty may be increased in order to demonstrate to investors that appropriate market discipline exists and that there will be a "no tolerance" approach to breaches.

<sup>1</sup> *PPCS Ltd v Richmond Ltd & Anor* (CA 253-02, 17 December 2003, Gault P, Blanchard & Glazebrook JJ)

## In the journals

### Obligations of issuers of securities

#### ***The Bulletin, January 2004***

*In this article, the Securities Commission considers offers that do not, for the purposes of the Securities Act 1978, constitute "offers to the public".*

In particular, it notes that:

- in the Commission's experience, situations that do not constitute offers of securities to the public are interpreted too broadly - in particular:
  - the exception for "habitual investors" only applies to persons who invest money in the course of their business. A person who simply invests regularly will not qualify by that fact alone; and
  - in relation to the exception for relatives or close business associates of the issuer, "close business associate" means the person receiving the offer should be on intimate business terms with the person making the offer; and
- in general, the evidential burden rests on issuers to show that one of the exceptions to the Securities Act applies.

## In the journals

### Phoenix companies and the corporate veil

**Simon McArley, *Company and Securities Law Bulletin*, June 2004**

*This article considers a fundamental company law concept - that of separate corporate personality and the problem with what are known as "Phoenix Companies", which arise where owners and managers of failing companies leave their business and start up again under a different corporate guise. The increasing regularity with which Phoenix Companies are employed has called for modifications to the principles of limited liability to allow redress for creditors.*

The article outlines the latest attempt by the Government to deal with the issue, in the form of clause 442 of the draft Insolvency Law Reform Bill. This clause will introduce amendments to the Companies Act 1993 to place a five year restriction on a director of a failed company being involved in a Phoenix Company.

However, the proposed amendment is confined to companies that use or trade under a name substantially similar to the failed company, so its practical application may be limited. Moreover, the proposed remedy is to hold directors and managers liable for the debts of the Phoenix Company, which is criticised for not protecting the creditors of the original company.

The article also summarises other sections of the Companies Act that provide targeted remedies, and looks at two recently decided cases that demonstrate that the legislation can in fact be used effectively in its existing form to provide remedies to creditors.

## In the journals

### **Developing corporate governance principles for New Zealand**

**Giora Shapira, *Company and Securities Law Journal*, June 2004**

*This article outlines developments in New Zealand on the issue of corporate governance, in light of international debate over corporate failure and the differing approaches taken in the United States, the United Kingdom and Australia.*

The article highlights steps taken by the Institute of Chartered Accountants and the Securities Commission. The Institute produced a report on corporate reporting, and concluded that there was no evidence of widespread poor corporate governance in New Zealand. The Securities Commission's report outlined a similar view.

Also noted are amendments to the NZX Listing Rules that are intended to provide a framework for increased accountability and transparency, and therefore encourage investor confidence in listed companies. There are two categories of changes:

- amendments to the listing rules that outline minimum requirements; and
- corporate governance principles that issuers have discretion to adopt or not.

The Securities Commission's nine key corporate governance principles are also outlined, which were influenced by a variety of sources including OECD principles, the Sarbanes Oxley Act in the United States, the United Kingdom Higgs Report and the principles developed by the ASX Corporate Governance Council.

## In the journals

### **Reflections on some practical issues which have arisen under New Zealand's Personal Property Securities Act and some lessons for Australia**

**Michael Gedye, *Journal of Banking and Financial Law and Practice*, Volume 15, 2004**

*This article, first presented as a conference paper at the 20th Annual Banking and Financial Services Law and Practice Conference in Queenstown in August 2003, focuses on issues in the Personal Property Securities Act that have given rise to practical difficulties.*

In particular, the article comments on issues encountered with:

- the collateral description requirements;
- errors that invalidate financing statements;
- the enforcement regime;
- the meaning of "ordinary course of business"; and
- the preferential creditor regime.

## Legislation/In Parliament

### [Business Law Reform Bill passed](#)

The Business Law Reform Bill was passed on 6 April. This is important legislation that amends a number of New Zealand's core commercial statutes (including the Companies Act, the Securities Act and the PPSA).

### [Significant reform of New Zealand's insolvency laws proposed](#)

The Ministry of Economic Development has released a draft Insolvency Law Reform Bill and a discussion document relating to it. These two documents are the result of a general review of insolvency law that began in 1999.

### [Securities trading law reform](#)

The Government is currently carrying out the third step in its four step programme, which has been in place since 2000, of reform relating to securities law. This programme is designed to improve the confidence of domestic and international investors in the New Zealand markets.

### [Changes to Overseas Investment Act](#)

Following a review of New Zealand's overseas investment regime, the Government has announced a range of changes to the Overseas Investment Act and Regulations.

### [Review of the Financial Reporting Act](#)

The Ministry of Economic Development has released a discussion document entitled *"Who should be subject to financial reporting requirements?"*

### [Review of financial information in offer documents](#)

The Securities Commission has released a draft practice note about the application of accounting standards in relation to investment statements and prospectuses.

### ["Arrangement" or "understanding" to have wider meaning in the context of the Securities Markets Act](#)

Later this year, the Government is expected to introduce a number of reforms to insider trading, market manipulation, penalties and remedies in the Securities Trading Bill, which will amend the Securities Markets Act 1988.

## Legislation/In Parliament

### Business Law Reform Bill passed

*The Business Law Reform Bill was passed on 6 April, earlier than expected.*

Commerce Minister Hon Margaret Wilson welcomed the passing of the Bill, which amended 13 business law statutes.

*"The passing of the Bill is part of the government's commitment to ensuring New Zealand has up-to-date and modern business law to support growth and innovation, by providing certainty to business and keeping compliance costs as low as possible. Taken together, the amendments have a significant and positive impact on the body of law under which businesses must operate in a rapidly changing global environment,"* Margaret Wilson said.

Margaret Wilson stated that the Bill was the result of close and on-going consultation with the business community and addresses what the business community has indicated were some of its concerns with business related legislation.

A summary of some of the major changes introduced by the Business Law Reform Bill is outlined below:

#### **Companies Amendment Act (No 2) 2004**

There are two important changes introduced by this Amendment Act.

##### **Financial assistance provisions**

The Amendment Act amends the application of the solvency test in the financial assistance provisions of the Companies Act 1993. This effectively brings the "entitled persons" procedure for approving financial assistance into line with the section 76 procedure.

##### **Definition of "major transaction"**

There is an amendment to the definition of "major transaction" to expressly include contingent liabilities, and guidelines are provided for determining the value of such contingent liabilities. Directors must have regard to all the circumstances that they know, or ought to know, will affect the value of a contingent liability, and may take into account the likelihood of the contingency occurring. This is an improvement on the existing section that, arguably, required contingent liabilities to be valued at their face value.

#### **Distress and Replevin Amendment Act 2004**

This Amendment Act clarifies that a landlord can distrain for rent against chattels that are subject to a security interest (as defined in the Personal Property Securities Act 1999). These chattels are deemed to be the property of the tenant or person in possession of the land for the purposes of the Distress and Replevin Act 1908. There are two exceptions to this rule:

- Motor vehicles; and
- Chattels that are the property of a tenant (or person in possession of the land), if the tenant is a company or a society incorporated under the Incorporated Societies Act 1908.

#### **Financial Reporting Amendment Act 2004**

This amends the Financial Reporting Act 1993 to ensure that statements prepared by a reporting issuer or company that contain prospective, summary or interim financial information comply with applicable

financial reporting standards. This is in addition to any financial statements that are prepared at balance date or at the end of the financial year.

## **Personal Property Securities Amendment Act 2004**

### **Priority in respect of accounts receivable**

This amendment clarifies the uncertainty around the ability of factoring companies to obtain priority over accounts receivable in some situations. The new section makes it clear that a factoring company can obtain priority over discounted accounts receivables provided it registers a financing statement within the appropriate time frames.

### **Rights of assignee of an account receivable**

A further change is the clarification of the rights of an assignee of an account receivable or chattel paper. In practice, this is an extremely important issue as it will determine who prevails between a bank exercising rights of set-off in relation to a deposit and a bank with a first ranking security interest in the deposit.

## **Securities Amendment Act 2004**

There are several important changes to the Securities Act 1978 introduced by this Amendment Act:

### **Pre-offer advertisements**

Issuers may now place advertisements seeking expressions of interest in offers of securities without having to comply with the provisions of the Securities Act. There are a number of conditions placed on such advertisements, which are aimed at ensuring that members of the public understand that the advertisement does not amount to an offer.

### **Wealthy or experienced investor exemption**

The Amendment Act provides a disclosure exemption from the requirement to prepare an investment statement and prospectus in respect of offers made solely to investors who are wealthy or experienced. An investor is defined as "wealthy" if an independent chartered accountant certifies that the investor has either:

- net assets of at least \$2,000,000; or
- had an annual gross income of at least \$200,000 for each of the last two financial years.

A person is an experienced investor if an independent financial service provider determines that the person is able to assess:

- the merits of the offer;
- the value of the security;
- the risks involved in accepting the offer;
- that person's own information needs; and
- the adequacy of the information given by the person making the offer.

There is also a disclosure exemption where the minimum subscription price of the security is at least \$500,000.

### **Superannuation scheme exemption**

The Amendment Act exempts employer superannuation schemes from prospectus requirements.

### **Power of courts to grant relief in respect of void or voidable allotments**

One of the key issues addressed by the legislation is that of void allotments. A supplementary order paper in relation to this and certain Australian Registered Managed Investment Schemes was issued in October last year.

The Securities Act is now amended to permit courts to grant relief in respect of contravention of certain provisions in the Act. Such relief may be granted upon the application of the issuer, if the contravention has not materially prejudiced the interests of the subscriber, or where the Court considers it just and equitable to do so.

### **Other Acts amended by the passing of the Business Law Reform Bill**

The other Amendment Acts that have been passed consequent to the passing of the Business Law Reform Bill are:

- Building Societies Amendment Act 2004
- Commerce Amendment Act 2004
- Co-operative Companies Amendment Act 2004
- Friendly Societies and Credit Unions Amendment Act 2004
- Life Insurance Amendment Act 2004
- Securities Markets Amendment Act 2004
- Superannuation Schemes Amendment Act 2004
- Unit Trusts Amendment Act 2004

The changes introduced by these Acts are mainly procedural or regulatory in nature. Although persons dealing with Unit Trust should be aware of the thousand-fold increase of the fine for issuing or offering an interest in a Unit Trust in contravention of the provisions of the Unit Trusts Act 1960.

## Legislation/In Parliament

### Significant reform of New Zealand's insolvency laws proposed

#### Background

*The Ministry of Economic Development (MED) has released a draft Insolvency Law Reform Bill (the **Bill**) and a discussion document relating to that Bill. These two documents are the result of a general review of insolvency law that began in 1999.*

Most of the policy decisions surrounding the reform have already been made by the Government and have been publicised. The MED's intention in circulating the Bill is, therefore, not to re-open the policy debate. Rather, its intention is to get feedback on the detail of the proposed legislation. Also, while the Government's intention was not to fundamentally change New Zealand's insolvency law, the proposed legislation certainly goes beyond minor amendments.

#### Two parts to the Bill

Very broadly, the Bill is in two parts. The first part is a complete re-write of the Insolvency Act 1967, which governs the bankruptcy of individuals. The second part makes a number of changes to the various insolvency regimes applicable to companies, as set out in the Companies Act 1993. It also introduces a new insolvency regime – voluntary administration.

This article deals solely with the new voluntary administration regime, on the basis that it is likely to be the aspect of the Bill of most interest to New Zealand companies.

#### Voluntary administration

##### Background

Currently, the only rehabilitative insolvency regime for viable companies is the compromise regime in Part XIV of the Companies Act. For a number of reasons (including, in particular, the need to obtain creditor consent), this has proved to be a difficult regime to apply in practice. The Government's view is that there should be an alternative regime that encourages business rehabilitation. In keeping with the continuing harmonisation of trans-Tasman business laws, the Government has settled on the voluntary administration model adopted by Australia in 1992.

The existing corporate insolvency regimes (compromises, liquidation, receivership and statutory management) will remain. No doubt, some will be disappointed by the retention of statutory management. Even though it has been used sparingly since its introduction 15 years ago, the fact that it exists on the statute books, and the fact that it is able to extinguish the most fundamental of creditor's rights, has made it (and, to a degree, New Zealand) unpopular with financial institutions.

##### Commencement of administration

The administration of a company begins when an administrator is appointed by:

- board resolution; or
- a liquidator; or
- a chargeholder having a charge over all, or substantially all, of the company's property where that charge has become enforceable; or
- the High Court, on the application of a creditor, a liquidator or the Registrar of Companies.

## **Consequences of administration**

The appointment of an administrator has three main consequences. First, it vests control of the company's business in the administrator. Secondly, it triggers obligations on the administrator to hold various creditors' meetings to try to seek a consensus on the future of the company. Thirdly, it imposes a stay on certain creditor actions (similar to the moratorium imposed in a statutory management). This third aspect is outlined further below.

While a company remains in administration, in the absence of administrator consent or a court order:

- a transaction or dealing that affects the company's property is void;
- a person may not enforce a charge over the company's property (subject to the exceptions referred to below);
- the owner or lessor of property occupied or used by the company may not repossess that property (unless repossession began prior to the commencement of the administration); and
- court proceedings against the company may not begin or continue.

Furthermore, in the absence of a court order, a person may not enforce a guarantee given in respect of the company's liabilities by a director or their spouse or relative.

The general prohibition on the exercise of secured creditor rights does not apply to:

- a chargeholder having a charge over all, or substantially all, of the company's property who begins enforcing the charge no later than the tenth working day after the commencement of the administration; or
- any chargeholder who begins enforcing its charge prior to the commencement of the administration.

## **End of administration**

Administration is intended to be a relatively short-term measure that (by and large) freezes the company's financial position while the administrator and the creditors negotiate the company's future. The Bill prescribes a tight timetable for that negotiation process, which may be as short as 20 working days.

The administration of a company ends either when the negotiations have been successful (in which case, a "deed of company arrangement" is entered into) or when the statutory timeframe expires without resolution. Other steps, such as the appointment of a liquidator, can also end an administration.

## Legislation/In Parliament

### Securities trading law reform

*The Government is currently carrying out the third step in its four step programme, which has been in place since 2000, of reform relating to securities law. This programme is designed to improve the confidence of domestic and international investors in the New Zealand markets.*

The third step in the programme has involved the review of securities trading law which has resulted in six papers, focusing on specific aspects of securities trading law, which are to form the Securities Trading Law Reform Bill (the **Bill**). The Bill is expected to be introduced to the House of Representatives in October 2004 after targeted consultation has taken place.

Key recommendations contained in the six papers are that the Bill will:

- "strengthen the law relating to insider trading;
- introduce comprehensive prohibitions on market manipulation;
- increase the range and size of penalties and remedies available for breaches of securities trading law;
- amend the way in which securities trading law applies to certain financial products and entities;
- improve the law relating to substantial security holder disclosure; and
- improve the quality of disclosure and enforcement under the Investment Advisers (Disclosure) Act 1996. Policy decisions on investment advisers have already been agreed in principle".

Once the third step in the programme is completed, the Government will commence the final part of the four stage programme, which is to review the Securities Act 1978. The review will consider:

- amendments to the regulation of securities offerings;
- whether there should be licensing of financial intermediaries;
- reviews of the Unit Trusts Act;
- contributory mortgages provisions; and
- any other securities law issues that are necessary for consistent and cohesive securities laws.

## Legislation/In Parliament

### Changes to Overseas Investment Act

*Following a review of New Zealand's overseas investment regime, the Government has announced a range of changes to the Overseas Investment Act and Regulations.*

The main changes are:

- the disestablishment of the Overseas Investment Commission, to be replaced by a dedicated unit within Land Information New Zealand;
- the threshold for business acquisitions requiring approval is to be raised from \$50 million to \$100 million;
- changes to the information to be included in applications for land acquisition approval; and
- purchases of land with an unimproved value of more than \$10 million will no longer require consent, where the land is not subject to approval for any other reason (this change is expected to affect only CBD land).

The changes are expected to be included in legislation to be passed before the end of the year and to come into force by 1 July 2005.

Visit the New Zealand Government website at [www.beehive.govt.nz](http://www.beehive.govt.nz) for a full copy of the Cabinet press release.

## Legislation/In Parliament

### Review of the Financial Reporting Act

*The Ministry of Economic Development has released a discussion document entitled "Who should be subject to financial reporting requirements?"*

The discussion document, for which submissions closed on 14 May, sought to establish who should be subject to financial reporting requirements. The document also examined the specific needs of New Zealand companies and the users of their reports, with particular emphasis on eliminating unnecessary compliance costs, particularly for small and medium enterprises.

Electronic copies of the document are available from the [Ministry of Economic Development website](http://www.med.govt.nz) at [www.med.govt.nz](http://www.med.govt.nz).

## Legislation/In Parliament

### **Review of financial information in offer documents**

*As a result of the adoption of international financial reporting over coming years, questions have arisen about how prospective financial information should be presented in offer documents during the transition period.*

The Securities Commission has released a draft practice note about the application of accounting standards in relation to investment statements and prospectuses.

[Click here](#) for a copy of the draft practice note.

## Legislation/In Parliament

### **"Arrangement" or "understanding" to have wider meaning in the context of the Securities Markets Act**

*Later this year, the Government is expected to introduce a number of reforms to insider trading, market manipulation, penalties and remedies in the Securities Trading Bill, which will amend the Securities Markets Act 1988 (the **Act**).*

An amendment to the "relevant interest" provision in section 5 of the Act will extend the meaning of "arrangement" or "understanding" to include a situation where parties act in concert. This will clarify whether a party has a disclosure obligation as a "substantial security holder" under the Act.

The proposed change is interesting in light of the recent Court of Appeal decision in *Perry Corporation v Ithaca (Custodians) Limited*<sup>1</sup>. In that case, Perry sold shares in Rubicon to two banks in exchange for equity swaps. It was argued that the banks had held the swaps under an arrangement or understanding and that Perry should have disclosed them.

However, the court rejected that argument on the basis that Perry's actions could be explained by the realities of the market, and decided that an arrangement or understanding under section 5 could describe something less than a formal contract, but required consensus as to what needs to be done and some form of communication.

<sup>1</sup> (2003) 9 NZCLC 263,386

## Recent developments

### [Corporate governance principles for New Zealand](#)

The Securities Commission has published a report entitled "*Corporate Governance in New Zealand - Principles and Guidelines*".

### [Clarification of directors' and officers' disclosure regime](#)

Bell Gully has welcomed the Securities Commission's clarification of the application of the new disclosure regime for directors and officers of publicly listed companies, which came into force on 3 May.

### [New merger and acquisitions guidelines](#)

At the end of last year, the Commerce Commission released a publication entitled "Merger and Acquisitions Guidelines". These guidelines clarify how to apply the substantial lessening of competition threshold under the mergers and acquisitions provisions of the Commerce Act 1986.

### [Changes to Accounting Standards](#)

With the support of the Financial Reporting Standards Board, the Accounting Standards Review Board has decided that New Zealand should move to full adoption of international financial reporting standards (IFRS).

### [Proposal for mutual recognition of securities offers](#)

Hon Margaret Wilson has released a joint discussion paper on the trans-Tasman mutual recognition of offers of securities and managed investment scheme interests with Ross Cameron, the Australian Parliamentary Secretary to the Treasurer.

### [Changes to Companies Office filing procedures and fees](#)

A summary of changes to fees and procedures for filing online at the Companies Office.

## Recent developments

### Corporate governance principles for New Zealand

*The Securities Commission has published a report entitled "Corporate Governance in New Zealand - Principles and Guidelines".*

The report followed extensive public consultation last year. In the report, the Commission developed principles for good corporate governance in New Zealand.

Jane Diplock, the Commission Chairperson, commented that *"there was strong support for the concept of a principles-based approach to corporate governance, and the final document is in line with the public views that came from the consultation process"*.

The principles focus strongly on reporting and disclosure of corporate governance structures and processes, as well as on reporting of financial and other material matters.

The document includes guidelines to assist entities with achieving each principle.

Corporate governance practices and research from relevant overseas jurisdictions were also taken into account in drafting the principles in order to bring New Zealand into line with best practices overseas.

The Commission's principles do not impose mandatory obligations on issuers of securities. Rather, the Commission encourages entities to adopt and report against these principles and, when poor corporate governance is identified, the Commission intends to report publicly on it.

## Recent developments

### Clarification of directors' and officers' disclosure regime

*Bell Gully has welcomed the Securities Commission's clarification of the application of the new disclosure regime for directors and officers of publicly listed companies, which came into force on 3 May.*

In a practice note released in April, the Securities Commission suggested that the disclosure regime is aimed at employees of publicly listed companies with responsibility for making decisions that are significant to the financial standing and conduct of the company.

*"The Commission has adopted a sensible and workable approach to the issue and focused on the disclosure regime's main objective: enhancing the efficiency of the market by providing valued information to investors on a timely basis,"* said Bell Gully Partner [Peter Castle](#).

*"We are also pleased that many of the issues raised in Bell Gully's submission to the Commission in February have been considered and addressed by this new advice and that the approach taken by the Commission is broadly consistent with the approach suggested in our [February newsletter](#) (available at [www.bellgully.com/publications](http://www.bellgully.com/publications)).*

*"Market comment in the last few weeks has tended to focus on the breadth of the concept of "officer" in the disclosure regime. Some commentators have suggested that, in any particular issuer, scores of employees would be required to make disclosures under this new regime.*

*"In our view, this approach to the regime has never been supported by the text of the proposed legislation or by the underlying policy of the regime, and may have contributed to some complaints levied at the regime.*

*"Our view has always been that the underlying policy meant that the new regime would affect only a very limited class of employees, even in New Zealand's largest issuers. We are pleased that this view is now supported by the Commission's published practice note.*

*"Coupled with practical exemptions that avoid double-reporting and needless detail, the new regime should achieve its aims without needlessly increasing the compliance workload of most companies,"* he said.

The practice note is available online at [www.sec-com.govt.nz](http://www.sec-com.govt.nz) and Bell Gully is preparing further analysis and guidance on this issue. Background information on the disclosure regime is available from Bell Gully's earlier newsletters.

## Recent developments

### **New merger and acquisitions guidelines**

*At the end of last year, the Commerce Commission released a publication entitled "Merger and Acquisitions Guidelines". These guidelines clarify how to apply the substantial lessening of competition threshold under the mergers and acquisitions provisions of the Commerce Act 1986.*

The Commerce Act prohibits acquisitions likely to result in substantial lessening of competition unless the applicant has been granted authorisation by the Commerce Commission.

Visit the Commerce Commission website at [www.comcom.govt.nz](http://www.comcom.govt.nz) for a copy of the guidelines.

## Recent developments

### Changes to Accounting Standards

*With the support of the Financial Reporting Standards Board, the Accounting Standards Review Board has decided that New Zealand should move to full adoption of international financial reporting standards (IFRS).*

The timetable for implementation requires full compliance by 2007, with voluntary compliance from 2005.

The adoption of IFRS will significantly affect the way in which accounts are prepared, particularly in relation to the treatment of deferred tax and financial instruments - including derivatives, business combinations and pensions.

Commerce Minister Margaret Wilson has announced that the accounting standards Committee Foundation has agreed to allow free use of IFRS in New Zealand.

For more information on the standards, visit the ICANZ website at [www.icanz.co.nz](http://www.icanz.co.nz).

## Recent developments

### **Proposal for mutual recognition of securities offers**

*Margaret Wilson has released a joint discussion paper on the trans-Tasman mutual recognition of offers of securities and managed investment scheme interests with Ross Cameron, the Australian Parliamentary Secretary to the Treasurer.*

The proposal is to allow issuers to offer securities in both Australia and New Zealand, using the same offer documents and offer structure, by removing regulatory barriers to trans-Tasman securities offerings. The proposal is part of a move towards greater co-ordination of business law between Australia and New Zealand with a view to achieving a more integrated financial market.

A copy of the discussion paper can be downloaded from the Ministry of Economic Development website at [www.med.govt.nz](http://www.med.govt.nz).

## Recent developments

### Changes to Companies Office filing procedures and fees

#### Online costs

Online filing costs have been reduced. The \$15.00 charge for filing an annual return online was eliminated from 1 July. The Companies Office has advised that almost 300,000 companies will benefit from this change, as 87% of companies file online.

The following fee reductions for online services were also effective on 1 July:

- Company searches now cost \$1.00 (reduced from \$2.00).
- PPSR registration is now \$3.00 (reduced from \$5.00).
- Searching the PPSR by financing statement number is now \$1.00 (reduced from \$1.50).
- Searching the PPSR by any other category is now \$1.00 (reduced from \$3.00).

#### Online filing

Other changes include a requirement to authenticate the person filing a return, the ability to change the month the annual return is due for the following year, and additional information about obligations under the Financial Reporting Act 1993.

#### Online share parcel service

Since 1 July, it is now possible to update company share parcels online at any time of the year. This is an optional service that will enable a company to keep accurate and up-to-date information for the searching public.

#### Collection of share parcel details

Effective from 1 July, a full list of shareholdings is required when filing an annual return (except for listed companies), not just the top 10 shareholdings as previously required.

For more details about the changes, visit the Companies Office website at [www.companies.govt.nz](http://www.companies.govt.nz).

## Bell Gully news

### [IFLR and Asiamoney awards for Bell Gully](#)

Bell Gully has received awards from leading financial magazines *IFLR* and *Asiamoney*.

### [Final chapter in New Zealand equity swaps case?](#)

On 9 March, in a decision that ended an 18-month legal dispute, New Zealand's highest court refused to hear a final appeal against the Court of Appeal decision in *Perry Corporation v Ithaca (Custodians) Ltd*.

### [Updated version of \*Derivatives Law in New Zealand\* available](#)

An updated version of Bell Gully's *Derivatives Law in New Zealand* is now available.

### [The Holidays Act 2003: don't leave it too late](#)

The Holidays Act 2003 came into force on 1 April 2004, and is intended to promote balance between work and other aspects of employees' lives and to provide employees with minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave.

## Bell Gully news

### ***IFLR and Asiamoney awards for Bell Gully***

*Bell Gully has received awards from leading financial magazines IFLR and Asiamoney.*

The firm was named New Zealand Law Firm of the Year by the *International Financial Law Review (IFLR)* and was recognised as Legal Adviser on *Asiamoney's* M&A Deal of the Year 2003 at the magazine's Australian Awards.

Chairman [Matthew Cockram](#) accepted the *IFLR* award at an official ceremony in Hong Kong on 11 March. The award was made on the strength of Bell Gully's major corporate work in 2003.

"We are delighted to join a distinguished list of international award winners this year," said Matthew. "This award is the result of a lot of hard and smart work by what I believe is the leading commercial legal team in the country."

*IFLR* is published by *Euromoney's* Legal Media Group. It is the world's leading magazine for in-house counsel and practitioners in the financial markets. The magazine's annual awards are designed to reward legal innovation in the region last year across all areas of corporate finance. Read more at [www.iflr.com](http://www.iflr.com).

Bell Gully received the *Asiamoney* award for its role in working in conjunction with the internal legal team at ANZ in advising ANZ on its acquisition of the National Bank of New Zealand from Lloyds TSB. Bell Gully was the only New Zealand law firm to feature in the awards.

Bell Gully partner [Peter Castle](#) received the award on the firm's behalf at an awards ceremony in Sydney in February, along with Australian law firm Blake Dawson Waldron, which also received an award for its work on the deal.

"We were delighted to be the only New Zealand law firm to receive an award from *Asiamoney* this year. It reflects well on Bell Gully's ability to work in partnership with leading Australian and New Zealand companies and law firms on complex Trans-Tasman deals," Peter said.

*Asiamoney* magazine is one of the leading commentators on finance, banking, investment and treasury matters in the Asia-Pacific region.

### Final chapter in New Zealand equity swaps case?

*On 9 March, in a decision that ended an 18-month legal dispute, New Zealand's highest court refused to hear a final appeal against the Court of Appeal decision in Perry Corporation v Ithaca (Custodians) Ltd.*

The background to this case, and the judgments of the High Court and the Court of Appeal, have been the subject of previous newsletters, [New Zealand Court orders share forfeiture in equity swap case](#) and [New Zealand Court Of Appeal recognises "market reality" in overturning lower court decision](#) (both available online at [www.bellgully.com/publications](http://www.bellgully.com/publications)).

However, while the matter is at an end between the parties, the legal issue at the heart of the dispute looks set to continue with the Government confirming a law change. These developments are discussed in full in our [newsletter](#).

### Updated version of *Derivatives Law in New Zealand* available

*An updated version of Bell Gully's Derivatives Law in New Zealand is now available.*

Bell Gully first published *Derivatives Law in New Zealand* in May 1999, shortly after the enactment of New Zealand's netting legislation.

Since then, there have been many legislative and judicial developments that, while not necessarily targeted at derivatives, could affect derivatives activity in New Zealand. For example:

- the Personal Property Securities Act 1999 has introduced a new regime governing security interests in personal property, which may apply to credit support arrangements as well as repo and securities lending transactions;
- recent amendments to the Securities Markets Act 1988 regulate the operation of a futures market or a futures exchange in New Zealand;
- the Court of Appeal in *Perry Corporation v Ithaca (Custodians) Limited* considered the application of New Zealand's substantial security holder disclosure regime to cash-settled equity swaps;
- recent amendments to the Reserve Bank of New Zealand Act 1989 introduce a new netting regime, which applies to "designated payment systems";
- the Gambling Act 2003, which comes into force on 1 Winter 2004, will introduce more uncertainty over whether derivatives are "gambling" (and, therefore, illegal); and
- the Public Finance (State Sector Management) Bill, once enacted and in force, will substantially change the law relating to the capacity of Crown entities to enter into derivative transactions.

The updated version of *Derivatives Law in New Zealand* incorporates all these changes, among others.

*Derivatives Law in New Zealand* is available [online](http://www.bellgully.com/publications) at [www.bellgully.com/publications](http://www.bellgully.com/publications) and hard copies can be requested by emailing [nicky.boughtwood@bellgully.com](mailto:nicky.boughtwood@bellgully.com).

### The Holidays Act 2003: don't leave it too late

*The Holidays Act 2003 came into force on 1 April 2004, and is intended to promote balance between work and other aspects of employees' lives and to provide employees with minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave.*

Employers should have adjusted their systems by now to ensure recording compliance with the new legislation and should be making plans to bring existing employment agreements into line no later than 1 April 2005.

This article outlines the major changes brought in by the new Act and answers some frequently asked questions by employers.

#### Annual holidays

The Act retains the current provision of three weeks' paid annual holidays for all employees. However, from 1 April 2007, employees will be entitled to four weeks' annual leave.

Annual holidays are to be paid at the greater of the *ordinary weekly pay* at the time that the holiday is taken or the employee's *average weekly earnings* over the 12-month period before the annual holiday is taken. Payment is calculated on earnings up to the end of the pay period immediately preceding the holiday.

*Ordinary weekly pay* includes: regular allowances, regular productivity or incentive based payments (including commission or piece rates), the cash value of board or lodgings, and regular overtime.

*Average weekly earnings* are determined by calculating gross earnings over the 12 months prior to the end of the last payroll period before the annual holiday is taken, and dividing that figure by 52. Gross earnings include salary and wages, allowances, holiday and public holiday pay, sick and bereavement leave taken, overtime, productivity or performance payments, commission or piece rates, payment for annual and public holidays, the cash value of board and lodgings supplied, and any amount compulsorily paid by the employer under ACC and any other payments required under the terms of the employment agreement. It does not include discretionary payments.

#### Public holidays

The Act retains the same 11 public holidays as the Holidays Act 1981 but proposes different payment terms for those public holidays.

Under the new legislation, an employer must pay an employee at the rate of time and a half if the employee works for any part of a public holiday.

Also, if an employee works on a public holiday that would otherwise be a working day for that employee, then the employee is entitled to another day's holiday - called an "alternative holiday". If an employee is on call on a public holiday - and being on call restricts the employee's freedom of action to such an extent that, for all practical purposes, the employee had not had a holiday - then the employee is entitled to an alternative holiday.

*Relevant daily pay* is used to calculate payment for public holidays, alternative holidays, sick and bereavement leave. *Relevant daily pay* includes productivity or incentive payments (including commission or piece rates) if those payments would have been received if the employee had worked on those days.

## **Sick leave and bereavement leave**

The new Act provides a minimum total of five days per year that can be taken for sick leave. An employee, after the completion of six months' continuous employment, will be eligible for sick leave.

The Act also allows an employee to carry over sick leave of up to 15 days into the next year, up to a maximum of 20 days.

An employer may require an employee to produce proof of sickness or injury for sick leave taken if the leave taken is for three or more consecutive days, whether or not the days are working days for the employee.

The Act allows that an employer must provide an employee with three days' bereavement leave upon the death of a person listed in the Act as a close family member.

In addition, one day's bereavement leave must be provided to employees on the death of any other person not specifically listed in the Act, where the employer accepts that the employee suffered a bereavement as a result of the death.

The Act lists relevant factors an employer should take into account, including the closeness of the association between the employee and the deceased person, whether the employee has responsibility for funeral arrangements, and whether the employee has any cultural responsibilities in relation to the death.

## **Tighter record-keeping required**

The Act imposes stricter obligations on employers to keep detailed holiday and leave records (the number of categories of information that employers are required to record has increased from seven to 16).

In line with the philosophy behind other recent employment legislation, the Act says that an employer must inform the employee about his or her holiday entitlements when the employee enters into an employment agreement. An employer must inform new employees about their entitlements under the Act, and that more information is available from their union (if they are a member) or the Department of Labour.

All existing employment agreements must be amended to reflect the Act's changes by 1 April 2005, or when they are next amended or earlier.

## **Enforcement of penalties**

Penalties for offences under the Act will increase significantly, with penalties of up to \$5,000 if the employer is an individual and up to \$10,000 if the employer is a company or a corporate body.

## **Frequently asked questions**

### **What do I do with an employee who has accumulated a significant amount of annual leave?**

If you and the employee cannot reach agreement on when annual leave will be taken, the Act allows an employer to direct an employee to take leave with not less than 14 days' notice.

### **Can I require an employee to work on a public holiday?**

You can only require an employee to work on a public holiday if their employment agreement provides for it.

### **How do I manage the distinction between people who decide to come in to work on a public holiday and those who are directed to?**

To avoid employees unilaterally deciding to work on a public holiday in order to reap the associated benefits under the new legislation, you should require employees to obtain written authorisation to work on a public holiday.

*Disclaimer: this publication is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters dealt with in this publication*

**If an employee is scheduled to be at work on a public holiday but is sick, what are the pay/time off obligations?**

In this situation, the employee would still receive the relevant daily pay and an alternative day's leave.

**Conclusion**

The new Act introduces substantial changes to current practice and it is essential that employers review their procedures, agreements and systems to ensure compliance - especially given the hefty increases in penalties.

**Advice and information**

Bell Gully's Employment Team can advise you on all types of employment issues, including the new Holidays Act 2003. Contact the team at the numbers below for more information.

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## Useful Web links

### New Zealand government

- [Inland Revenue Department \[www.ird.govt.nz\]](http://www.ird.govt.nz)
- [Ministry of Economic Development \[www.med.govt.nz\]](http://www.med.govt.nz)
- [Ministry of Foreign Affairs and Trade \[www.mfat.govt.nz\]](http://www.mfat.govt.nz)
- [Ministry of Labour \[www.dol.govt.nz\]](http://www.dol.govt.nz)
- [New Zealand Government \[www.govt.nz\]](http://www.govt.nz)
- [NZ Government E-Commerce Information \[www.ecommerce.govt.nz\]](http://www.ecommerce.govt.nz)
- [NZ Treasury \[www.treasury.govt.nz\]](http://www.treasury.govt.nz)
- [New Zealand Trade and Enterprise \[www.nzte.govt.nz\]](http://www.nzte.govt.nz)
- [Office of the Clerk of the House of Representatives \[www.clerk.parliament.govt.nz\]](http://www.clerk.parliament.govt.nz)
- [Parliamentary Counsel Office \[www.pco.parliament.govt.nz\]](http://www.pco.parliament.govt.nz)
- [Statistics New Zealand \[www.stats.govt.nz\]](http://www.stats.govt.nz)

### New Zealand regulatory agencies and organisations

- [Commerce Commission \[www.comcom.govt.nz\]](http://www.comcom.govt.nz)
- [The Companies Office \[www.companies.govt.nz\]](http://www.companies.govt.nz)
- [NZ Law Commission \[www.lawcom.govt.nz\]](http://www.lawcom.govt.nz)
- [Office of the Ombudsmen \[www.ombudsmen.govt.nz\]](http://www.ombudsmen.govt.nz)
- [Securities Commission \[www.sec-com.govt.nz\]](http://www.sec-com.govt.nz)
- [Takeovers Panel \[www.takeovers.govt.nz\]](http://www.takeovers.govt.nz)
- [NZ Stock Exchange \[www.nzx.com\]](http://www.nzx.com)

### New Zealand commercial sites

- [CLANZ \[www.clanz.org\]](http://www.clanz.org)
- [Institute of Chartered Accountants \[www.icanz.co.nz\]](http://www.icanz.co.nz)
- [Institute of Directors in New Zealand \[www.iod.govt.nz\]](http://www.iod.govt.nz)
- [NZ Bankers' Association \[www.nzba.org.nz\]](http://www.nzba.org.nz)
- [NZ Business Roundtable \[www.nzbr.org.nz\]](http://www.nzbr.org.nz)
- [NZ Institute of Economic Research \[www.nzier.org.nz\]](http://www.nzier.org.nz)

### Australian sites

- [Australian Financial Markets Association \[www.afma.com.au\]](http://www.afma.com.au)
- [Australian Securities and Investment Commission \[www.asic.gov.au\]](http://www.asic.gov.au)
- [Australian Stock Exchange \[www.asx.com.au\]](http://www.asx.com.au)

### International sites

- [NASDAQ \[www.nasdaq.com\]](http://www.nasdaq.com)
- [New York Stock Exchange \[www.nyse.com\]](http://www.nyse.com)
- [United States Securities and Exchange Commission \[www.sec.gov\]](http://www.sec.gov)