

# Headlines

winter issue 09

**MANAGING RISK**

**ARTS  
SPONSORSHIP  
UPDATE**

**POLICING YOUR  
TRADEMARK**

**SOFTWARE  
AS A SERVICE**





Welcome to the Winter 2009 edition of HHeadlines, Hesketh Henry's magazine for clients and friends of the firm. This is part of a suite of publications including eZines aimed at specific audiences and articles published on our website ([www.heskethhenry.co.nz](http://www.heskethhenry.co.nz)), along with regular appearances in the media.

Our primary goal with these publications is to provide useful information on a broad range of topics and the services we offer to assist our clients in managing risk, completing transactions and solving problems.

Despite the current economic climate, we remain confident about the long term future. We are therefore continuing our support of the arts and the community. We were the principal sponsors of The Auckland Art Fair and this year's event, held in early May once again proved to be a great success with the participation of 40 leading art galleries from New Zealand and Australia, featuring the work of an outstanding selection of artists. Congratulations to Jennifer Buckley and Deborah White and their team for once again organising an event which served as a great platform for showcasing galleries and the work of artists from this part of the world.

In the last issue we featured a review of NZ Sculpture OnShore, an event organised by Friends of Women's Refuge that we are proud to have been involved in as principal sponsor for a number of years. The last exhibition raised \$150,000 for the benefit of New Zealand Women's Refuges.



HESKETH HENRY  
The Art of Law

HHeadlines is produced by Hesketh Henry Publications. Editorial enquiries should be made to Philip Hayhoe on 375 8739 or [philip.hayhoe@heskethhenry.co.nz](mailto:philip.hayhoe@heskethhenry.co.nz). For more information go to [www.heskethhenry.co.nz](http://www.heskethhenry.co.nz)

We recently hosted an event featuring the presentation of a cheque for that amount at our offices in the presence of the Prime Minister, the Right Honourable John Key, the Minister of Women's Affairs, Pansy Wong and other distinguished guests. The Prime Minister addressed the audience and commended all those involved in the event emphasising the valuable work undertaken by New Zealand Women's Refuges. At Hesketh Henry we firmly believe that long term business success requires a strong commitment to the community in which we operate. The public display of outstanding New Zealand contemporary art in a spectacular setting such as Fort Takapuna and the support that it provides for a very worthwhile cause is a powerful combination that underlines that commitment.

In this issue we have articles on various topics including trade mark protection, voluntary administration, trust structures, and matters to consider when outsourcing IT. We also profile our newest partner, Patrick McPherson of our Litigation and Dispute Resolution team.

I hope you will enjoy reading this edition of HHeadlines. As always, we look forward to working with you during the course of the year.



Erich Bachmann  
Managing Partner



Opening night, Auckland Art Fair



Patrick McPherson, Partner



Prime Minister John Key, NCIWR CEO Heather Henare & Erich Bachmann



DRINK

Coca

# POLICING YOUR TRADEMARK

By **Liesl Knox**, Senior Associate,  
and **Rebecca Peacocke**, Solicitor,  
Corporate and Commercial Team







# Coca-Cola

Given the extensive costs involved in designing and marketing a new product it is always a good idea to ensure that the brand/logo has been registered as a trademark.

Trademarks exist in perpetuity, making the value of a good brand or logo extremely valuable, if properly protected. The Nike 'SWOOSH' mark, for example, was originally created in 1972 by a freelance designer for US\$35. The mark was registered shortly afterwards and is now estimated to be valued in the tens of millions. Much of that value has of course been built up by having good products, but had the 'SWOOSH' mark not been registered, how many Nike styled products would be in the market place today?

Registering a trademark in New Zealand is a relatively straightforward process. It is also a critical process for a business that wants to equip itself with the legal right to prevent others from using the same or similar marks. Such rights, however, can be easily eroded if business owners fail to analyse exactly what they are endeavouring to protect and how to put in place a watching brief for the future.

Key to every trademark registration is to consider exactly how the product will be marketed. Do words and images make up the mark? Are they capable of being registered separately (as well as together)? What plans does the marketing department have for the product? Might it include a distinctive strap-line such as 'The Real Thing'?

*Continued over page*

## POLICING THE TRADEMARK, CONT

All these components are critical in ensuring that every aspect of the brand is protected by registration.

A business can easily find itself with a mark that does not protect what it initially intended. The Coca-Cola Company registered the mark 'Coca-Cola' in the late 1800's. The view at the time was that the registration of 'Coca-Cola' was sufficient to protect the product. It was not long before a variety of competitor colas entered the market and more than a century later the international market place has been the stage of what has become known as the 'Cola Wars'. The Coca-Cola Company appears to have learnt a valuable lesson and now has numerous trademark registrations around the world ranging from the names of everyday soft drinks and strap-lines to the image of the classic Coca-Cola bottle and the dynamic ribbon device (the white wave line).

Despite the fact that a business is granted exclusive rights on the registration of a trademark, that in itself should not lull a business into a false sense of security. It is not unheard of for a third party to apply for the registration of a mark which is the same or similar to that of an existing owner. Should such an application be successful the value of the original mark may be eroded by the public being confused by similar brands.

In a recent case, New Zealand Milk Brands Limited<sup>1</sup> ("NZ Milk Brands"), the owner of the trademark 'ANCHOR' was successful in overturning a decision of the Assistant Commissioner of Trademarks. The Assistant Commissioner had previously rejected

NZ Milk Brands opposition to the registration of the mark 'ANGKOR' by an Indonesian company. The High Court held that the marks were sufficiently similar to confuse and deceive and overturned the Assistant Commissioner's ruling. The Court found that although the marks were conceptually different to the fully informed (ANCHOR, the strength of the sea; and ANGKOR, relating to Cambodian temples), to the uninformed there were insufficient differences to distinguish them, denying the Indonesian company's ability to register the mark in New Zealand.

This case is a great result for NZ Milk Brands. What is really impressive however, is that NZ Milk Brands obviously knew the value of the investment it has made in its trademark and in the goodwill of the brand. If NZ Milk Brands did not have some form of watching brief over its trademark, it is possible that the application for ANGKOR would have continued unopposed.

It is important to protect such a valuable asset once registered by monitoring other applications by third parties. The Trademarks Act 2002 allows three months from the time of advertising acceptance within which to lodge an opposition. Once this period has lapsed the mark will be registered and although this does not close off other avenues such as court action the process becomes significantly more costly and time consuming.

Conversely, if a registered trademark owner detects an application which it believes may, if registered, impinge on

its rights during the opposition stage, it may lodge an opposition with the Commissioner of Trademarks. Oppositions are written submissions and there is no filing fee.

To help clients avoid finding themselves in a position where the value of their mark may potentially be eroded by the registration of a similar mark, we offer a trademark watching service. This service comprises a short monthly report based on parameters identified after consultation with the client. The aim is to keep clients abreast of trademark registrations which may affect their mark and the brand they have developed.

If you are interested in this service or require more information please contact **Liesl Knox**, Senior Associate 09 375 8756 or email [liesl.knox@heskethhenry.co.nz](mailto:liesl.knox@heskethhenry.co.nz) or **Rebecca Peacocke**, Solicitor 09 375 8782, [rebecca.peacocke@heskethhenry.co.nz](mailto:rebecca.peacocke@heskethhenry.co.nz) 

<sup>1</sup> New Zealand Milk Brands Limited v NV Sumatra Tobacco Trading Co (HC, 28/11/2008)









By **Mary Joy Simpson**,  
Senior Associate, & **Loren Gerbich**,  
Solicitor, Private Client Team



# TRUSTS. AS SAFE AS HOUSES?

THIS IS A GOOD STORY,  
POSSIBLY NOT A BED TIME STORY  
... BUT ONE WITH A MORAL.



Once upon a time there was a jeweller, Mr Lightbody. His company, Capro Three Limited ("Capro") owed a lot of money to its biggest supplier, Regal Castings Limited ("Regal").

To provide support to Mr Lightbody, Regal restructured Capro's debt into a term loan agreement repayable in monthly instalments. Mr Lightbody accepted personal liability for Capro's indebtedness to Regal. Even though Regal was aware that the home he owned jointly with his wife was his only substantial asset, Regal did not request security over the home.

Some three years later, with \$220,000 owing under the Regal term loan and \$90,000 owing to Regal for further supplies, Mr Lightbody transferred his interest in the home to a trust. He was a trustee of the trust, along with his wife and their lawyer. Mr Lightbody and his wife were beneficiaries and kept on living in the home, enjoying it just as they had before.

The transfer of the home was structured as follows:

- the trust bought the home from Mr and Mrs Lightbody for current market value;
- if IRD questioned the purchase price, the price could be adjusted;
- the purchase price was not paid immediately by the trust but was recorded as a debt owed by the trustees to Mr Lightbody and his wife;
- the debt was to be repaid in seven years, Mr Lightbody could, and his wife could not, ask for early repayment;
- on the same day as they transferred their home Mr and Mrs Lightbody each forgave \$27,000 of the debt.

Mr Lightbody did not advise Regal of the transfer of the home to the trust.

After the gifting programme had been completed the jewellery company Capro went into liquidation owing Regal \$15,358.57 under the term loan agreement and \$149,324.00 for further supplies. There were no funds in Capro to meet the debts.

Regal pursued Mr Lightbody for the debt and he was adjudicated bankrupt.

Regal applied to the High Court for an order for the transfer of the property to be set aside. Regal did not challenge Mrs Lightbody's transfer to the trust as she had no liability to Regal, but requested that the 50% owned by Mr Lightbody be transferred to the Official Assignee in his bankruptcy.

The High Court and the Court of Appeal ruled that the transfer could not be challenged and the home was safe in the trust.

Regal appealed to the Supreme Court and was successful.

Referring to law and cases dating back to the Elizabethan era, the Supreme Court held that when property is alienated without proper payment by a person who is insolvent, the transfer will be voidable by the disadvantaged creditor. The alienation amounts to, what is known in legal terms, as an alienation with 'intent to defraud'.

The Court acknowledged there had been no 'fraud' in the transaction. But the transaction exposed Regal to significant risk of non-payment and therefore Mr Lightbody must be taken to have intended to hinder, delay or defeat the claim of Regal.

The Supreme Court held that, following transfer of his interest in the home, Mr Lightbody was insolvent. He did not have enough money to pay the Regal debts. It did not matter that the Regal debts were debts of Capro. Mr Lightbody had guaranteed the debts and therefore the Regal debts had

to be taken into account when assessing whether Mr Lightbody was solvent.

The Supreme Court held that there had not been proper payment for the home as the debt back was not repayable for seven years and there was a gift of \$27,000. Some members of the Court held that as Mr Lightbody intended to completely gift the purchase price, that meant the transfer was a transfer for insufficient payment.

The trustees argued that they had taken title to the home in good faith and therefore could not be forced to transfer half the home back to Mr Lightbody. The Supreme Court disagreed and said that as Mr Lightbody was one of these trustees then the trustees had the same knowledge as Mr Lightbody.

The statute law applying to gifts of property by an insolvent person has been clarified by the Property Law Act 2007. Gifts made by an insolvent person after 31 December 2007 will be set aside. The result under the new law would therefore be the same for Mr Lightbody. Regal can challenge and claw back the transferred asset into Mr Lightbody's personal property pool.

The moral of the story is that you should undertake structuring at the appropriate time. If Mr Lightbody had transferred the home to a trust before there were significant debts for which he was personally responsible, the transaction could not have been undone by the Supreme Court. A trust can sometimes seem an unnecessary expense when first establishing a business, but that may be the very best time to create one.

Now is a great time to make sure your personal structuring is in order. Our Private Client team are experts in this area and would be happy to field your queries. Phone **Mary Joy Simpson** on +64 9 375 8776 or **Loren Gerbich** on +64 9 375 8694. **HH**

# THE HESKETH HENRY AUCKLAND ART FAIR VERNISSAGE



Erich Bachmann & Jennifer Buckley



Georgie Knight, Greta Knight & Mary Joy Simpson



Linda Sturgess, Evan Veza, Justin Cox, Chris Ryan & Monique Surges







John Banks, Jennifer Buckley, Deborah White & Erich Bachmann

Sina Greenwood, Anthony Hosking, Genevieve & Sean Lynch



Cathryn Davey, Bryce Davey, Kylie Dalton & Mike Bradley



The third Auckland Art Fair was held recently at the Auckland Viaduct and once again it was a very successful event. Over 12,000 visitors came to enjoy the work of over 600 artists represented by 30 New Zealand and 10 Australian art galleries.

Since its inauguration the Auckland Art Fair has gone from strength to strength and is now a keynote event in the Australasian arts calendar.

Hesketh Henry was delighted to once again be the principal sponsor for this event. Erich Bachmann commented "This event is a magnificent showcase of contemporary art and provides both the public and the seasoned collector with a comprehensive picture of the current status of the art world.

The firm also sponsored the highly successful Hesketh Henry Auckland Art Fair Vernissage, with the 750 people attending the first to see the many hundreds of works on display.

Art Fair Director Jennifer Buckley said "We are thrilled with the success of the event and there were sales, smiles and queues, and many visitors left having bought art. We are grateful to Hesketh Henry and our other sponsors, as without them there would have been no Art Fair". **HH**



# **VOLUNTARY ADMINISTRATION**

**A NEW TOOL FOR STRUGGLING  
BUSINESSES**



## Hesketh Henry has just acted on the first significant case in New Zealand regarding the voluntary administration provisions under the Companies Act 1993.

The Companies Amendment Act 2006 came into force on 1 November 2007. It introduced for the first time in New Zealand the new process, known as 'voluntary administration', which is based on an Australian model.

Voluntary administration is about trying to save a company that is trading profitably or has a profitable core business, but has debts that make it insolvent. It is highly relevant to the situation many businesses are facing in current economic times.

Voluntary administration places a troubled company in the hands of an Administrator. One of the main purposes of voluntary administration is to provide a 'breathing space' or moratorium where the company is free from creditor enforcement action and legal proceedings so the Administrator can assess and investigate the company's situation, continue to run the business if appropriate and put together a proposal for the company's future.

This proposal is known as a Deed of Company Arrangement (DOCA). It must be agreed by both the creditors and the company's board of directors.

Typically this will provide for creditors to receive a percentage of their total debt over a period of time. The creditors are prevented from taking any action against the company except as allowed for by the DOCA. Strict time

limits apply to the moratorium, and if agreement cannot be reached over the DOCA, the company must go into liquidation.

To pass the DOCA:

- (a) a majority in number of creditors must vote in favour (e.g. 20 creditors in total then 11 must vote in favour); and
- (b) 75% in value of the debts must vote in favour (e.g. if the company has \$2 million in debts, \$1.5 million in value must vote in favour).

However, if you get (a) or (b) but not both then the Administrator has a casting vote so can decide whether to let the DOCA pass or not.

If the DOCA passes, the period of administration comes to an end and the company will move into a new phase, that of a company under a DOCA, and the Administrator will become (in most cases) the Deed Administrator. The Deed Administrator is only responsible for enforcing the DOCA and does not have total control of the company.

The moratorium commences from the time of appointment of the Administrator and prevents court proceedings against the company other than with the consent of the Administrator or the permission of the court. With certain limited exceptions, it also prevents other forms of execution and the enforcement of rights by owners and lessors of property. The moratorium lasts for the duration of the voluntary administration.

In late 2008 Hesketh Henry acted for the Administrator appointed by the shareholders of Jones Publishing in one of the first cases to go before the court. After the shareholders

By **Robert Berry**, Partner, Commercial Property Team, and **Patrick McPherson**, Partner, Litigation & Dispute Resolution Team.

*Continued over page*

## VOLUNTARY ADMINISTRATION, CONT

had appointed the Administrator, a creditor, Maxim Group Ltd, attempted to injunct Jones Publishing for alleged breach of copyright. The injunction was successfully resisted by Hesketh Henry on behalf of Jones Publishing.

The central issue in Jones Publishing was whether the court should grant permission for Maxim to continue its proceedings against Jones Publishing. Damian Grant and Stephen Khov, the appointed Administrators from Waterstone Group, had declined permission meaning Maxim could only proceed with its legal proceedings if the court gave its permission. At the time the court had never before been asked to give its permission under the new legislation.

Although there were no New Zealand cases on voluntary administration, some Australian cases indicated that the courts should only grant permission for a creditor to commence or continue with proceedings, once a company was in voluntary administration, in 'exceptional circumstances'.

'Exceptional circumstances' could apply where a creditor has a strong case that the company is infringing the creditor's rights whilst in administration, and include ongoing breaches of intellectual property rights, serious contract breaches and fraudulent activity occurring whilst the company is in administration.

Hesketh Henry argued that the Australian line of thinking should be adopted in New Zealand. We argued that the purpose of the voluntary administration legislation was to allow

a company in difficulty breathing space to allow the Administrator time to consider the options and try to avoid the company going into liquidation – an outcome that often results in job losses, the business being closed, and unsecured creditors receiving little, if anything, in payment of the debt they are owed.

After hearing submissions the court declined Maxim permission to continue with its proceedings while the company was in voluntary administration. The judgment noted that the circumstances in which the court would grant permission were limited, and that the court would not grant permission to allow a creditor to put themselves in a better position than other creditors. This is particularly so where an unsecured creditor wants to take action to limit its potential losses and leverage itself into the position of a secured creditor. The court ruled that if the Maxim proceedings were to continue they would interfere with the DOCA proposed by the Administrators, which was for the benefit of all creditors and not just one. Maxim's request that the court order the Administrator to pay into trust an amount equivalent to Maxim's claimed losses was also declined. The court stated that to do this would defeat the intent of the DOCA and elevate Maxim to the position of a secured creditor to the detriment of all other creditors (secured and unsecured).

The court judgment has the effect of confirming the voluntary administration

process as an interim step or a middle path between continuing to trade when all is lost, or immediate liquidation. The period of protection it offers is important in allowing companies that can be saved some breathing space for the creditors to work out the best path forward. It is a time pressure process. The Administrators are required to act quickly and the creditors must cooperate and work within the process. The courts will, therefore, not permit proceedings against a company in voluntary administration to be commenced or continued unless there are exceptional circumstances.


Partner Robert Berry says "We have assisted many companies through the financial minefield of insolvency and this new tool is of great help in getting businesses back on their feet."

"If your business is facing questions of solvency and the ability to continue to trade it is important to act early, and quickly. Hesketh Henry can assist you in deciding what process to adopt and how best to implement it. Voluntary administration may be the right process for you."

Contact the Hesketh Henry Insolvency Team partners:

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## IS VOLUNTARY ADMINISTRATION RIGHT FOR YOUR COMPANY?

### THE FIVE PHASES OF A VOLUNTARY ADMINISTRATION

#### 1. Appointment of an Administrator

The appointment of an Administrator is commenced by a resolution of the board of directors of a company (although it can be done by the courts or a creditor in some cases).

#### 2. Initial Creditors meetings

A meeting of creditors is convened within eight working days after appointment of the Administrator.

The purpose of this initial meeting is to confirm, or change, the Administrator.

#### 3. Ongoing Administration

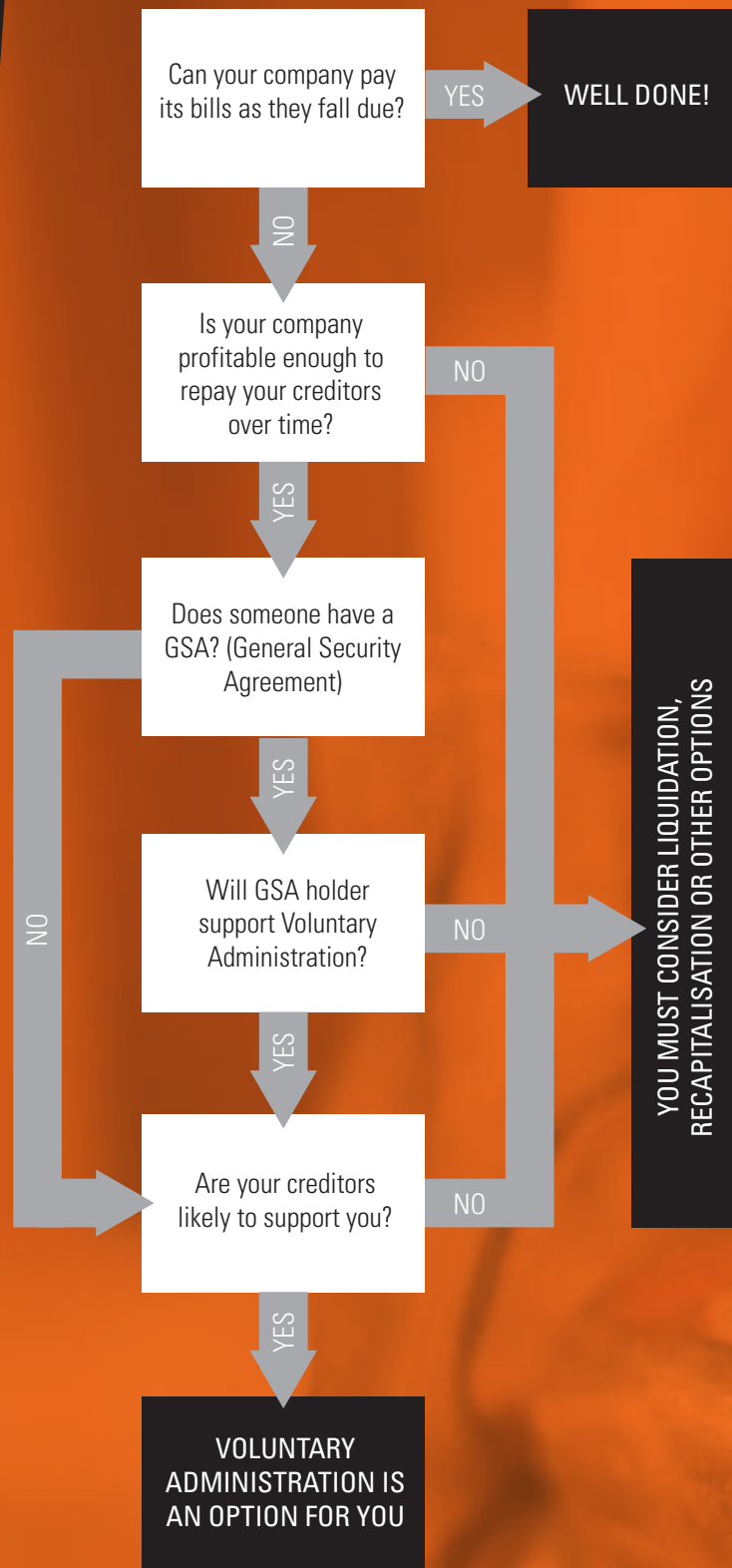
As the Administrator comes to grips with the issues facing the company, he or she can continue to run the business as a going concern.

#### 4. Watershed Creditors' Meeting

Twenty five days after the appointment of the Administrator, the Administrator must present to a second creditors' meeting a proposal for the restructure of the company (The Deed of Company Agreement or DOCA), or a recommendation for the liquidation of the company.

#### 5. DOCA or liquidation

The board of directors has fifteen days to consent to the DOCA, at which time the company moves from being in voluntary administration to being governed by the Deed. The Deed is administered by the Deed Administrator and expires at a set time or once events specified in the Deed have occurred (eg. repayment of company's debt, after ninety days, etc.).



# PATRICK MCPHERSON NAMED PARTNER



Hesketh Henry has named litigation specialist Patrick McPherson as a partner. Making the announcement, Managing Partner Erich Bachmann praised Patrick for the outstanding contribution he has made to the firm in his three year tenure.

"Patrick is a very good lawyer whose skills are highly valued by both clients and colleagues. We are very pleased to have him on board as a partner," said Erich.

Patrick specialises in commercial and public law litigation, and has a strong record of success. His areas of expertise include contract and company law, injunctions, administrative and regulatory law, gambling law, property disputes and negligence actions.

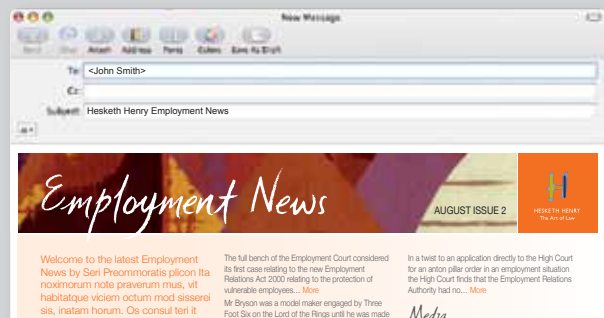
"It's important to get alongside your clients, understand their business and objectives and be proactive in protecting their interests" said Patrick. "Building on the strengths of the case with sound legal knowledge and a strategic, persuasive approach is often the difference between success and failure.

"I look forward to being a partner and continuing to work with one of the best litigation teams in the country," he added. **HH**

## E-ZINES ON THE RISE

An enthusiastic response to our regular Employment Law e-zine on topical issues will see the publication of similar electronic communications for the Corporate and Commercial, Commercial Property and Private Client teams in the not too distant future.

If you are interested in receiving any of our e-zines, which are a simple way to keep up to date with issues which may affect you and your business, please go to our website and register online. **HH**





# RISK MANAGEMENT- KEY TO SURVIVAL

Hesketh Henry's Litigation and Disputes Resolution team is publishing a guide giving tips on how to manage risk through the economic downturn.



The guide, titled "The Art of Survival" gives an overview of the key areas that make companies more vulnerable to problems when times are tough.

Litigation expert, Patrick McPherson, believes the guide will be a timely reminder for business people to conduct a "health check" of their operations and act early if a problem arises.

"When things are rosy, people tend to adopt a 'she'll be right' attitude to things like reading the fine print of a contract. But when times get tough and businesses need to make changes, they find out that they can't because they didn't pay enough attention to what they were signing," Patrick explained.

"The Art of Survival gives extremely helpful insights into staying in business in these hard economic times. After all, just one legal oversight could make a company vulnerable to avoidable risk," he added

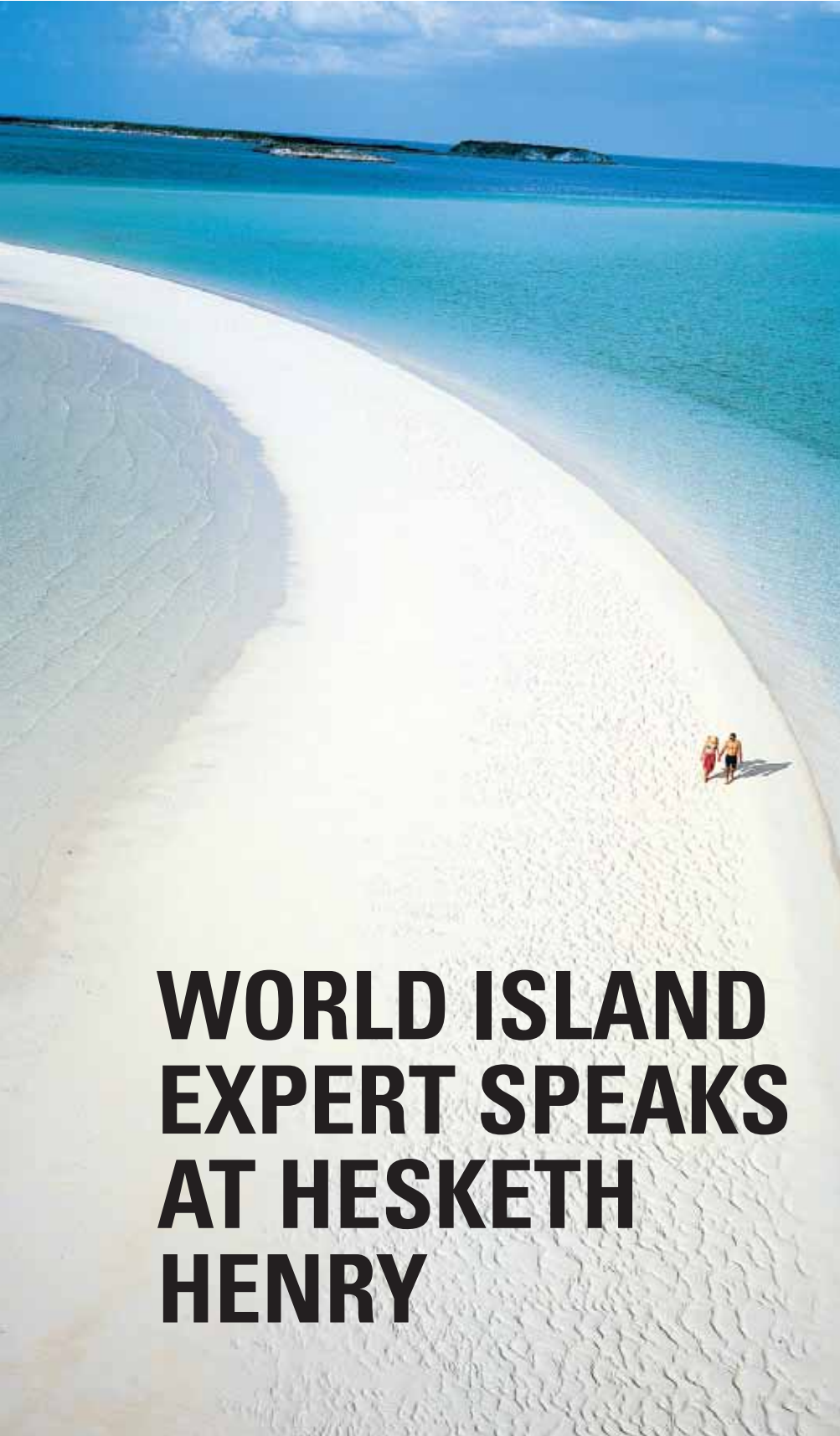
"Every company needs to ensure the legal validity of everything they do in business, from start to finish."

The guide highlights some of the warning signs a business should look out for and what they can do to better manage the risk. Topics include employment issues, contracts, what to do at the point that a significant dispute first appears likely, as well as guidance on insolvency and liquidation.

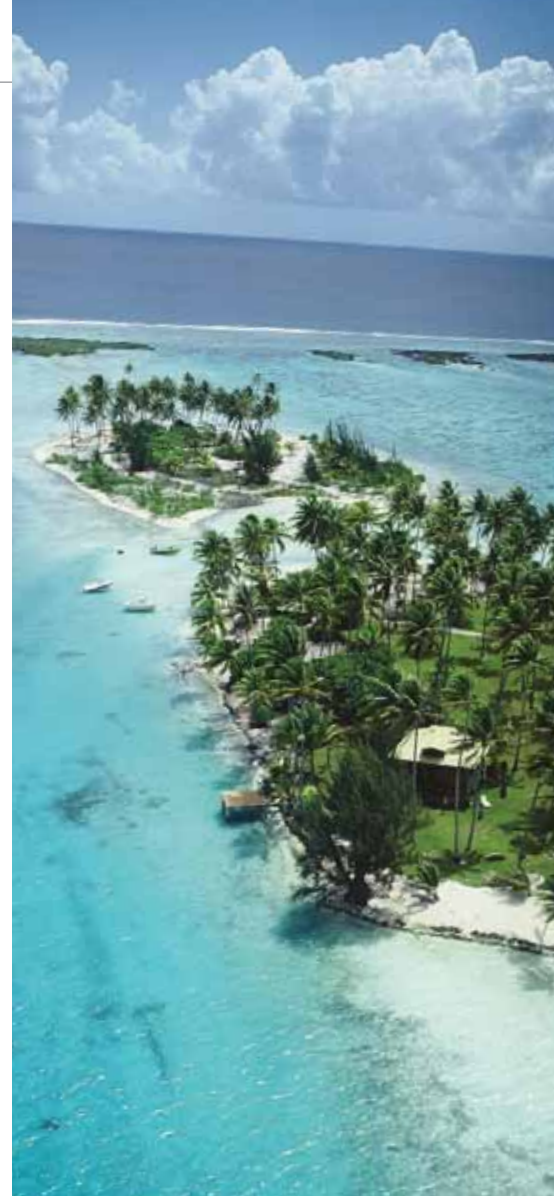
Hesketh Henry's Litigation team believes the publication of the guide will help companies head off difficulties before they become real threats to prosperity or survival.

"For too long, litigation has been positioned as the ambulance at the bottom of the cliff. People need advice in order to stay at the top," concluded Patrick.

For more information call **Patrick McPherson** on +64 9 375 8735 or **Alan Sherlock** on +64 9 375 8713. **HH**

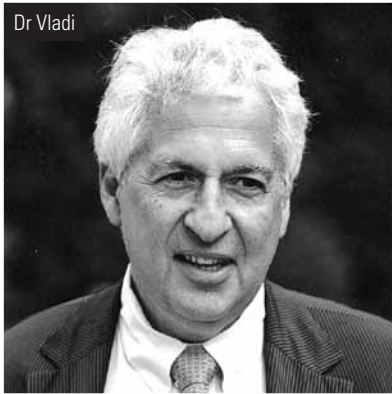


# WORLD ISLAND EXPERT SPEAKS AT HESKETH HENRY

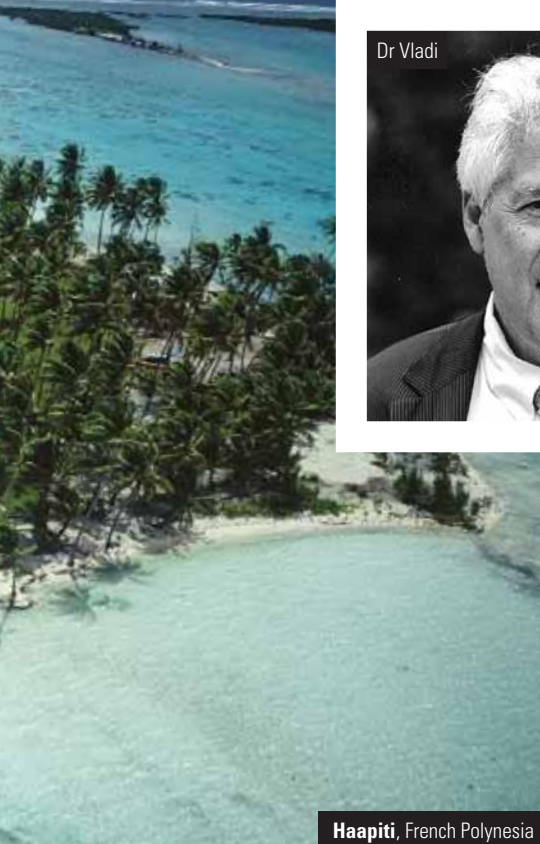


A who's who of New Zealand's real estate industry gained insights into the lives of the rich and famous at a special Hesketh Henry function, recently.





Dr Vladi

**Haapiti**, French Polynesia**Motu Tane**, Bora Bora

One of the firm's clients, Dr Farhad Vladi, president of Vladi Private Islands, the world's largest broker of luxury private islands and a significant investor in New Zealand commercial property, spoke to the select gathering on his experiences over 20 years of being involved in the sale of more than 2000 islands.

The large audience was treated to a whirlwind tour of some of the world's most beautiful islands including those owned by Virgin boss, Sir Richard Branson, former Beatle, Sir Paul McCartney, the Onassis family and New Zealand's own Douglas Myers.

Owing an island, however, was not all glamour, Dr Vladi revealed.

Everything from local council laws and building regulations to the control of mosquito populations had to be taken into account by potential owners.

The proximity of medical and other essential services also often played a part in the purchase decision, he explained.

To make the most of island life and overcome many of the obstacles, Dr Vladi and his team have designed a sustainable living programme which makes owners self-sufficient.

The world is divided into three zones; temperate, sub-tropical and tropical and separate programmes have been developed according to where in the world the islands are located. Island buyers are advised on what they should grow, how to produce solar energy and manage water resources and even the kind of animals they will need to raise to survive without any contact with the mainland.

But while Dr Vladi has visited many of the world's most spectacular islands he confessed his favourite was Forsyth Island in New Zealand's Marlborough Sounds, which he bought about 20 years ago.

Dr Vladi spoke of his determination to work with the Department of Conservation and The Queen Elizabeth II Trust to return the island back to native bush, much of which was removed when the island was a working farm.

For more information please visit <http://www.privateislandsonline.com> **HH**

Businesses are constantly looking to improve the cost effectiveness of their IT systems, especially in these trying economic times. As part of that process, some businesses look to rationalise their software licensing and support costs by moving to a SaaS (software as a service) supplier or some other similar outsourcing model.

# SOFTWARE AS A SERVICE AND OTHER IT OUTSOURCING MODELS



SaaS involves accessing the agreed software via the internet, usually on a 'real time' basis. This is distinct from more traditional software licensing where an object code version of the software is installed on servers or other equipment operated by the customer.

Depending on the circumstances, the type of software and the supplier's pricing, the SaaS model can be more cost effective as customers can sign up to pay for only what they use, when they use it. The costs associated with variable numbers of users can also be a benefit. In contrast, the more traditional licensing models are often structured around an enterprise wide pricing model, or a 'per unit of equipment' pricing model, or an agreed number of users model, with each involving a degree of cost redundancy. Even if there are actual or perceived financial gains from making this switch there are also some risks depending on the nature of the software and how it's used.

### What are the risks?

With SaaS, there are more likely risks related to data security, retention and retrieval, as well as privacy, disaster recovery and business continuity. These risks arise because the customer's data (possibly including third party data) is often loaded onto and stored on the supplier's remote servers, possibly offshore somewhere. The customer may know little about the location or security of its data, or how it can access that data (other than by standard internet access). Consider the following scenarios:


- You discover that your outsource service provider has gone into liquidation and that all of your business critical data is currently stored on servers located somewhere in Asia. You are unable to access the software / service due to the liquidation and the liquidator is not returning your calls. Without your business critical data, or software to use it with, your business becomes strangled.
- You recover your data, only to find that the time it will take to purchase new software and 'go live' using that software after likely data conversion or migration issues, is months (and at considerable cost) – again your business becomes 'strangled'.
- You discover that your service provider (based offshore somewhere) has far from best practice data security systems and processes and that your data has been leaked or otherwise accessed, possibly by a key competitor.

It's obvious that any of these scenarios would have potentially devastating consequences for most businesses.

### How can these risks be mitigated?

These risks can be mitigated by a combination of the following:

- Thorough technical and process related analysis of the proposed outsourcing, both pre and post contract signing. This will, amongst other things, involve the review of your disaster recovery plan and your data security and maintenance plan.
- In the circumstances, it may be prudent to require the service provider to provide regular back-ups of data in an agreed form so that you can store that data in your possession 'ready to use' if required. The type and form of those data back-ups might also be discussed with a fall back service provider.
- You may also agree a 'quick' transition plan with that service provider if required.
- Ensuring that the contract with your service provider effectively covers these issues off, allowing for any offshore jurisdictional legal issues as may be required.

For more information, call Sean Lynch on +64 9 375 8722 or email [sean.lynch@heskethenry.co.nz](mailto:sean.lynch@heskethenry.co.nz) 

## EMPLOYMENT ISSUES – USEFUL ARTICLES FOR EMPLOYERS AND BUSINESS OWNERS

Hesketh Henry's employment team regularly publishes an eZine which addresses topical issues relating to employment legislation and significant cases, and provides comments on employment matters reported in the media. These eZines are released every six to eight weeks and are current and relevant.

If you wish to subscribe to the newsletter, please go to: <http://www.heskethhenry.co.nz/mailings/index.html>  
The lead paragraphs and internet addresses for a selection of employment articles are shown below.

### Minimising Risk when Restructuring

With increasing numbers of businesses expected to reduce staff in the coming year, it is important to keep in mind employers' obligations when restructuring.

A recent case in the Employment Court has reaffirmed the importance of consultation in any situation which may affect the continuation of an employee's employment. For more information, go to: <http://www.heskethhenry.co.nz/mailings/Feb09Employment/article1.html>

### Trials in the Workplace

Trial periods are common in many avenues of life. They are a valuable means of improving the chances that all parties are satisfied with their transaction. The Government hopes that The Employment Relations Amendment Act 2008 will strengthen this concept in the employment context.







From 1 March 2009 small businesses are able to take on new employees for trial periods lasting up to 90 days. The Government views this amendment as a way to increase job opportunities by encouraging smaller employers to take a 'no risk' approach to employing people who may not otherwise be offered a job. For more information, go to: <http://www.heskethhenry.co.nz/mailings/Feb09Employment/article2.html>

#### Health and Safety fines finally start to bite

Health and Safety fines have really been in the news recently, with a series of major prosecutions and sentencing decisions. All of the decisions confirm the expectation that fines imposed under the Health and Safety in Employment Act 1992 will increase significantly. For more information, go to: <http://www.heskethhenry.co.nz/mailings/Apr09Employment/article1.html>

#### Tax relief available for redundancy compensation

As more and more employers are making the tough decision to implement restructuring proposals and disestablish employees roles, do not forget to inform redundant employees that a redundancy payment can attract a tax rebate. For more information, go to: <http://www.heskethhenry.co.nz/mailings/Apr09Employment/article2.html>

#### Clean Slate

A recent NZ Herald report about the criminal record of a Ministry of Social Development employee highlights some of the misunderstandings that still surround the Criminal Records (Clean Slate) Act 2004. For the full story go to: <http://www.heskethhenry.co.nz/mailings/Apr09Employment/article4.html>

#### Employers Faced with New Technology

Technology is fast evolving in the workplace and it is prudent for employers and employees alike to keep up to speed with the ins and outs of employment and the world wide web.

One example of new technology impacting on employment is Facebook, a social networking website which was founded in 2004 by Mark Zuckerberg, who was at that time a student at Harvard University. Increasingly, such sites are reviewed by potential employers and can have a real influence on their decision. For more information, go to: <http://www.heskethhenry.co.nz/mailings/Apr09Employment/article7.html>

For assistance with any employment related matters, call **Jim Roberts**, Partner, Litigation & Dispute Resolution Team, +64 9 375 8723, or email [jim.roberts@heskethhenry.co.nz](mailto:jim.roberts@heskethhenry.co.nz) **HH**

# NZ SCULPTURE ONSHORE RAISES \$150,000 FOR WOMEN'S REFUGES

Hesketh Henry recently hosted Prime Minister John Key at the presentation of a cheque for \$150,000 to Women's Refuges. The funds were raised by the Hesketh Henry sponsored NZ Sculpture OnShore exhibition held at Devonport last November. The cheque was presented to National Collective of NZ Women's Refuges Chief Executive Heather Henare.



North Shore Deputy Mayor, Julia Parfitt & Prime Minister John Key



Prime Minister John Key with the Friends of Woman's Refuge committee



Heather Henare & Leanne Sumpter

