



AUCKLAND DISTRICT LAW SOCIETY

Promoting Skill and Integrity in the Law

LAWNEWS

Auckland District Law Society - Issue No. 43//21 November 2008

+ COVER STORY

MANAGING THE RISK IN CHINA

New Zealand businesses needed to register their intellectual property rights in China ahead of time to avoid problems and demonstrate faith in their products, said Baldwins' partner Rosemary Wallis.

Ms Wallis told the ADLS seminar, "Trading with China - Getting it Right", that China had around 1400 million people and was the world's manufacturing powerhouse.

New Zealanders couldn't afford not to go there but they did need to protect themselves, get local help and "put in the hard yards".

She said it was important for New Zealand businesses to register intellectual property rights as soon as they could.

- Continued on page 3.



Photo courtesy: JD Lasica, socialmedia.biz.

Professor Lawrence Lessig of Stanford Law School, and founder of its Center for Internet and Society, who recently delivered a lecture in Auckland. Report page 5.

THIS ISSUE: Notices & new book available - Page 2 + CLE - Page 4 + Kids made 'criminals' by copyright laws - Page 5

+ CASES

Case summaries based on those written for LINX database. Copies of the judgments are available from the ADLS Library & Research Centre documents@adls.org.nz or phone (09) 307 8345

IMMIGRATION APPEAL

Minister of Immigration v Deeb and Deportation Review Tribunal (4 November 2008 – CA 244-07)

Appeal by Minister of Immigration against decision of HC in which it upheld 1st respondent's application for judicial review of a decision of the Deportation Review Tribunal (DRT). DRT had upheld a decision by the Minister to revoke 1st respondent's residence permit – HCJ found DRT had erred in law in dismissing 1st respondent's appeal against revocation of his residence permit – HCJ quashed the decision of DRT and remitted matter to a differently constituted DRT for reconsideration – 1st respondent was a Saudi-Arabian born citizen of Jordan, married to a Kuwaiti born citizen of Canada, who had been granted New Zealand citizenship – appellant had 2 children born in New Zealand, both with New Zealand citizenship – respondent did not disclose in his application for New Zealand residency that he had been charged with certain criminal offences in the United States, including drug offending, and that he had been deported from the United

States – respondent was charged, in New Zealand, with dealing with documents (his application for residency) with intent to defraud – respondent entered guilty plea and was convicted and discharged – in Oct 2004, the Minister of Immigration issued a notice revoking respondent's residence permit – revocation was based on s20(1)(b) and s20A(1)(b) Immigration Act 1987 (the Act), which empowered the Minister to revoke permits procured by false or misleading representation, or concealment of relevant information – the Minister relied on respondent's failure to declare events relating to the United States offences – respondent chose to appeal on humanitarian grounds under s22 of the Act – DRT dismissed his appeal – whether DRT failed to correctly apply relevant provisions of s22; s22(4): "subject to subsection (5) of this section, on any appeal under this section, the Tribunal may confirm or quash the revocation of the residence permit, as it thinks fit", and s22(5): "the Tribunal shall not confirm the revocation of a residence permit under this section if it is satisfied that it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely".

HELD: there was no mandatory order for consideration of separate discretions under s22(4) and s22(5) and DRT was free to deal with them in any order it considered to be appropriate – but they were two different tasks and each must be addressed properly, unless the decision on the first one to be considered,



New Zealand's legal research tool

rendered consideration of the other unnecessary – in both cases criteria set out in s22(6) must be evaluated, and whilst that did not necessitate the repetition of the DRT's views on each one at length, it did require proper evaluation of those factors in relation to each decision – in this case the DRT undertook a full evaluation of the s22(6) criteria in relation to the s22(5) determination, but it was not clear from its decision that it also properly evaluated those factors when it came to s22(4) – there was no burden on a s22 appellant, but an appellant had a responsibility to place before the DRT material which, if accepted, would allow the DRT to exercise its power under s22 of the Act to quash the revocation – DRT did not correctly apply tests set out in s22. Appeal dismissed, except that HC direction that remission of matter to DRT must be dealt with by a differently constituted Tribunal was quashed – cross-appeal allowed in part – decision of HC not to award costs in that Court was quashed and replaced by an order that appellant pay costs on a 2B basis and reasonable disbursements – appellants must also pay 1st respondent's costs for a standard appeal



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+ NOTICES

High Court Rules available

The Law Society store has received copies of the new *High Court Rules* which will come into force on February 1, 2009. The 759 page Volume is available for \$41.85 including GST.

To purchase this book please contact Dan Suci, Law Society Store Manager, tel: (09) 306 5740 or email: thestore@adls.org.nz or go to www.adls.org.nz

Human Rights Panel

Eamon Daly, Deborah Clapshaw, Patsi Davies and Simativa Perese have been reappointed members of the Human Rights Review Tribunal Panel for a period of six months. Terms of appointment are usually for periods of up to five years.

The Human Rights Review Tribunal must be supported by a sufficient panel of members to meet the requirements of the *Human Rights Act 1993* and the short term reappointments have been made to allow the tribunal to continue with business as usual during the post-election period.

+ NEW BOOK

Adams on Criminal Law

The 817 page title *Adams on Criminal Law (2008 Student Edition)* by J. Bruce Robertson and published by Thomson Brookers (2007) is available at the Law Society Store for a recommended retail price of \$76 (excluding GST), discounted to \$68.40 (excluding GST) for practitioners.

For over 40 years *Adams on Criminal Law* has been the authoritative reference for the New Zealand legal community. Since 1996, student editions have been published frequently to provide a distillation of the key areas in the parent work for judges, academics, practitioners and students. This edition continues that tradition of a concise work while maintaining the hallmarks of the substantive volume. The comprehensive introduction to criminal law combines definitive commentary that is a feature

of the Adams approach to criminal law, with the probability and ease of use of a handbook.

In an easy to follow format, this new edition combines the text of the *Crimes Act 1961* with extensive and practical commentary on many key sections. Comprehensive Tables of Cases, Statutes, and Regulations supplement this.

The book continues the high standards set by the previous four editions, making it essential and affordable for students and professional advisers seeking a background text.

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MANAGING THE BUSINESS RISKS IN CHINA

• *Continued from page 1.*

China was a "first to file" jurisdiction, meaning that the entity which applied for trademark or patent registration first would be entitled to it. Ms Wallis said that trade mark applications were filed with the Chinese Trademark Office, with words, designs, alphabet letters, numerals, three-dimensional marks and colour combinations all being registrable.

Ms Wallis said that planning ahead was particularly important in relation to brands as registration took time. By getting an application in the queue, New Zealand firms could, in the short-term, minimise the risk of an opportunistic distributor or business or unrelated third party making a similar application.

Ms Wallis said that retaining control of the intellectual property in New Zealand was important.

Patents in China had a life of 20 years and it usually took between three and five years to achieve registration of an invention patent.

Bell Gully senior associate, Stephen Layburn, said that one of the big factors in the development of China was the continuing migration from country to city, meaning that a burgeoning urban population needed to be fed.

This arguably placed New Zealand in a very favourable position, not only because of the strengths inherent in its rural economy, but also because of food production technologies which might be able to be licensed or developed in China.

"A further point to bear in mind is that, while the melamine scandal is still being played out, the significance of the involvement of regional and central government agencies should

gauging who was likely to be a bad payer and whether that firm was worth the risk.

"Due diligence is vital. In the case of new customers, seek references from third parties and check those references. Sound credit management policies are equally vital. These include all the usual recommendations about managing your exposure to a customer, whether new or existing."

Mr Layburn said that up to 90 per cent of profits from a China-based operation would generally be repatriated to New Zealand, subject to payment of taxes. In relation to dispute resolution, he said that a number of standard provisions appeared to be emerging.

One was to require arbitration through the China International Economic and Trade Arbitration Commission. Foreign entities could also choose



'Perhaps the best advice points to doing your homework before entering into a commercial relationship, managing that relationship throughout its lifetime and, if the worst does happen, exploring the possibilities for arriving at a commercial solution'

Stephen Layburn, Senior Associate, Bell Gully.

"It is a bad idea for a New Zealand business to leave the registration of its rights to its Chinese partner or agree to let the Chinese partner attend to registration. That may be fine while the relationship with the Chinese partner is in good heart. It will not be when there is a falling out."

She said that, with respect to trademarks, it was important not only to register the English language trade mark, but also to register the Chinese equivalent of a brand.

"If a New Zealand business only registers the English version, a local company may well register the Chinese version. Consequently, if the Chinese brand is not protected, it will be difficult for the overseas owner of the English language brand to stop the Chinese brand owner from using the Chinese equivalent."

Ms Wallis said that it could take two years or more from application to registration in China. Firms should also be aware that the Chinese trademark office focused quite strongly on the formalities.

Ms Wallis said that all applicants for trademarks must use Chinese agents. New Zealand companies should also register the company name.

There were three types of patents in China:

1. invention patents,
2. utility patents, and
3. design patents.

not be underestimated. Anecdotal evidence indicates that doing business can often be very bureaucratic, with a seemingly never-ending list of licences, consents and permits to be obtained."

Mr Layburn said that New Zealand firms needed to manage risk to ensure that they were paid for the goods and services they supplied, while importers had to make sure they received what they had bargained for when parting with payment.

"The bottom line in both instances is that enforcement through China's legal system is likely to be difficult and costly. Underpinning this is feedback that, because the Chinese business community often takes a different approach towards contracts and negotiations over the contract price, there are a number of hazards to be avoided, including the risk of a counterparty seeking to renegotiate what was to be a firm price after goods have been ordered or sent."

Mr Layburn said that the two most commonly-used payment methods for export businesses were letters of credit and documents against payment.

Other payment protection methods included trade insurance and the export guarantee scheme operated by the New Zealand Export Credit Office. He said that, as with any overseas market, risk management was often about

off-shore arbitration, with some multinationals opting for arbitration in centres such as Singapore.

Mr Layburn said that the Chinese legal system did not appear to have kept pace with the rate of economic development. Although a great deal of effort was being put into improving matters, problems of cost, delays and inconsistent outcomes in dealings involving commercial disputes suggested that there was a good deal of room for improvement.

Concern had been expressed about a lack of separation between the judiciary and various arms of state. It was also significant that there was an absence of reciprocal enforcement of judgments of foreign courts.

"Perhaps these are issues that will see rapid improvement under the various measures included with the New Zealand-China Free Trade Agreement. However, until there are concrete signs of progress, the best advice points to doing your homework before entering into a commercial relationship, managing that relationship throughout its lifetime, and, if the worst does happen, exploring the possibilities for arriving at a commercial solution."

• **By Catriona MacLennan**

• **Seminar papers are available from the Law Society Store online at www.adls.org.nz**



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Status Hearings Forum

Tuesday 2 December 2008, 4 to 6pm, Ellen Melville Hall

Cost: \$50 plus GST

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Only 40% of status hearings are successful in Auckland! The new client care rules require that lawyers act on the informed instructions of clients – this entails lawyers advising clients of the alternative routes to resolution of disputes. This forum is a must for junior to intermediate criminal lawyers seeking to finesse advocacy skills and utilise status hearings effectively.

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Topics:
Status Hearings - The objectives and why they exist.

Prosecutorial Position

- Police expectations
- Police frustrations
- Working with the police

Lawyer's position

- Dealing with police
- Top tips to getting a better outcome

- Domestic violence situation.
- What is expected of Counsel?

Court

- What is the purpose?
- Where should the focus be?

Chair: Frank Godinet, Barrister and Vice President of ADLS

Speakers:
Sgt McMeeking, Prosecutor
Karen Harding & Maxine Pitch, Barristers
His Honor Judge Stan Thorburn

SPRIG Forum

27 November 2008, 5:30pm onwards,
Chancery Chambers



Cost: \$50 plus GST

Revolutionise the way you work. Software for the small practice

Looking for an affordable desktop solution that provides all you need in one single application?

This session hears from two software providers, ActionStep and WorkFlowMax, and two ADLS practitioners who use the packages on a day to day basis to manage their offices, from time recording through to billing.

Chair: John Holmes, principal

Speakers:
Mike Holloway, Actionstep
Chris Walker, Sole Practitioner
Gavin George, WorkFlowMax
Blair Edwards, Barrister

Conveyancing Pot Pourri 2 of 2008

25 November 2008, Ellerslie Event Centre

Cost: \$125 plus GST



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- Verification standards
- Execution of documents

Execution of Agreements

- Is your contract binding?
- Sale & Purchase Agreement - rectification - Power of Attorney / Trust / Agency

Deposits

- Disbursements of deposits
- GST implications at time of supply (what if title doesn't issue, or if there's a title requisition?)
- Stakeholders

- Unsecured deposits (eg vendor liquidity problems)

Warranties under S&P Agreement (regarding "leaky homes")

- What enquiries can you make to protect a client purchaser?
- Buying a house from a vendor who bought the house
- Notifications on LIM reports
- Enquiries a lawyer must make when clients transfer properties to family trusts or companies.

Unit Titles Update

- Overview of the Bill
- New feature of the new Layered Developments

- New Maintenance regime
- New disclosure requirements
- New Voting procedures and rules
- Ownership and Utility interests
- Other new features as time allows.

Chair:
Colin Lucas, Principal

Speakers:
Don Thomas, Principal, Thomas & Co
Mark Hornabrook, Partner, Hornabrook MacDonald
Susan Pezaro & Kevin Kilgour, Weathertight Homes Tribunal
Tim Jones, Partner, Glaister Ennor

Kids made 'criminals' by copyright laws

Copyright law was an awkward fit in the Digital Age, Professor Lawrence Lessig from Stanford University, told 300 people attending his public lecture entitled, "Keeping culture free: The choices law and technology force us to make about the future of the Internet and the progress of cultures".

Prof Lessig's lecture was jointly hosted by the University of Auckland's Law Faculty, the Legal Research Foundation, and the University of Auckland's Department of Commercial Law.

His presentation demonstrated the stunning audio visual capabilities of the Fisher & Paykel Lecture Theatre where slides with single words were juxtaposed with video clips and sound recordings to bring home the full power of "remix".

Prof Lessig, creator of the Creative Commons Licence and a leading cyber law expert, said that traditionally most uses of works protected by copyright could be accomplished without infringing copyright i.e. a book could be read, lent, sold, and even used as a pillow – all without infringing copyright.

But because each use of a digital work involved the making of a copy, permission must be

sought for almost any use of copyright material in a digital format.

In the United States "fair use" operates, however, its rules are far from certain and most members of the public have no ability to challenge a copyright owner who denies that fair use applies in a given situation.

Prof Lessig discussed the move from people being passive consumers of culture, reading books, going to movies and watching television, to being active participants in our culture, both making and remixing it.

What could only be achieved in the past by a professional with expensive and cumbersome equipment was now possible to anyone with a \$2000 computer and an internet connection.

Prof Lessig observed that anyone under 20 years of age who could not shoot a video, recombine it with other material including a soundtrack and upload the final product to YouTube, was "not normal".

However, due to draconian copyright laws these "normal people" were labelled and treated as criminals.

He said it was not desirable for children in particular to be treated as pirates or criminals for undertaking the fundamental human act of creating and sharing.

Indeed, our culture and its education system was based on taking the words and ideas of others, for example, Shakespeare and other writers and poets. We take the text of these authors and quote, cite, and paraphrase their words and combine them with our own. And so, "Remix is simply the writing of the 21st century".

Prof Lessig did not call for an abolishment of the copyright system, but rather he is a proponent of a scaled back copyright system and believes that copyright still plays an important role in our society and economy. Without copyright Hollywood movies would not be made.

With amateurs who take parts of works and recombine them in a non-commercial way, there is no justification for preventing this use: creativity is being unnecessarily stifled.

• By Alex Sims, Senior Lecturer in the Department of Commercial Law, University of Auckland

+ WILL INQUIRIES













Please refer to deeds clerk.

Please check your records and advise the Society if you hold a will or testamentary disposition for any of the following persons. If you do not reply within three weeks it will be assumed that you do not hold or have never held such a document.

Abel Alan Nathaniel ASHBY, late of 6 Bates Street, Papakura, South Auckland, Aged 35, (died 26'09'2008)
 Norman Keith CURSONS, late of Pavlowia Rest Home, 94 Retreat Road, Christchurch, Single, Aged 69, (died 24'02'2008)
 Ivy Lillian HADFIELD, late of Orongo Rest Home, Park Rise, Campbells Bay, formerly Northcote, Retired, Widow, Aged 94
 Eva Regnhild JENSEN-BOND, aka Eva Regnhild JENSEN, late of 601 Sandringham Road, Mt Albert, Auckland, Retired, Married, Aged 82, (died 04'09'2008)
 Barry James LOY, late of 1/194B Main Highway, Ellerslie, Auckland, Aluminium Expert, Aged 55, (died 22'10'2008)
 Chee Keung LUI, late of 83 Taylor Road, Mangere Bridge, Auckland, Osteopath, Aged 73, (died 28'08'2008)
 John Robert Eric NAYLOR, late of 43 Frank Evans Place, Henderson, Auckland, Beneficiary, Aged 58, (died 12'03'2008)
 Richelda RODRIGUEZA, late of North Shore City, Auckland, Married Woman, Aged 59, (died 17'02'2007)
 Leslie George SMITH, late of Auckland, Sickness Beneficiary, Aged 53, (died 10'06'2008)
 Robert STONE, late of Radius Arran Court, 85 McLeod Road, Auckland, Beneficiary, Single, Aged 61, (died 22'07'2008)
 Maurice Lionel THOMAS, late of Katia, formerly Cable Bay and Kerikeri, Aged 83
 Edith Raymond TUCKEY, late of Radius Arran Court Rest Home, Henderson, Auckland, Aged 91, (died 29'08'2008)
 Don WILKINSON, late of 379 Ararimu Valley Road, Waimauku, Waitakere, Police Officer, Aged 46, (died 11'09'2008)
 Dorothy May WILKINSON, late of New Lynn, Auckland, Widow, Aged 81, (died 23'10'2008)
 Angela Eliza WOLLEY, late of Auckland, Online Marketing Manager, Aged 32, (died 18'10'2008)
 Zoe Pearl WOOD, late of Pakuranga, Auckland, Retired, Age 82, (died 20'10'2008)



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Head of Group Compliance

Unique Compliance Opportunity

In New Zealand's largest listed company we take compliance seriously. With operational separation now in place, lead our compliance approach across the company within this uniquely challenging and changing environment. We're all about being best in class partners to our business, valuing relationships and being team players. Use your credibility and influence across high profile programmes to make sure we're delivering on our obligations and our promise to our key stakeholders.

Based in Auckland or Wellington, this is a pivotal role directly reporting to our Group General Counsel. Work closely and as a peer, with the General Counsel leadership team and across the whole business. Assisted by one direct report, you'll have a broad range of accountabilities to promote, monitor and measure Telecom's compliance with legal obligations, particularly with key legislation that affects Telecom and in relation to our operational separation undertakings.

Your approach to compliance is strategic, professional, efficient and pragmatic as you generate compliance goodwill across Telecom, our Customers and Government. You have a natural value-add capability combined with continual focus on stakeholder and customer requirements. You're most likely a lawyer with 10 years+ PQE, with a compliance, quality assurance and/or auditing background and have had extensive experience in corporate compliance and accountability frameworks. Telco industry experience, an enhanced understanding of the Commerce Act, Telecommunications Act or Fair Trading Act would be an advantage. Having held previous senior compliance roles you're comfortable operating at the Executive level and know how to develop and maintain effective, robust and cohesive compliance programmes and strategies. In the past you've led and driven change to promote a compliance culture which mitigates legal risk while facilitating achievement of business outcomes.

Group Legal sits as part of our Corporate Centre. Our role is to support the success of the Telecom Group and its business units by providing 'governance' and 'centre of excellence' functions to protect and enhance the value of Telecom's assets in the interests of the company and its shareholders. As a group, we're motivated, driven and dedicated to the cause. Variety, complexity and challenge are part of our everyday and something we thrive on.

Unique individual? Apply today.

For more information on this opportunity please visit our website and enter the job code EXE0202B

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MORE POSSIBILITIES THAN YOU IMAGINE

Our word is Law!

Legal Secretary – Corporate

If you're organised, efficient and looking for a role with plenty of client contact, then this senior role has what you're looking for. Working with the Corporate team in one of New Zealand's top tier firms, you will enjoy the collegial and supportive work environment this firm offers.

Legal Secretary – Litigation

Work with one of Auckland's strongest boutique insurance litigation practices. This role will suit if you already have litigation experience, or looking to expand your skills into the area. You will need to have excellent technical skills, plenty of initiative and a personable and approachable style.

Legal Secretary – Part-time

Here's a great part-time opportunity in a top law firm. Working Thursdays and Fridays, you will provide support to the

Litigation team. You will need to have an organised and collegial approach and strong MS Word skills. Part-time roles of this calibre are rare, so don't delay, apply now!

Legal Secretary – Litigation

Join this premier law firm and you will experience work and resources of the highest calibre. As this is a busy role with plenty of variety, you will need to have strong secretarial experience, with a flexible and proactive attitude and great communication skills.

Temps

Become a Law Staff Temp and enjoy variety, flexibility and assignments that fit around your life! Call us if you have legal secretarial experience, top notch technical skills in MS Word and a fast typing speed. Earn up to \$26 per hour + 8% holiday pay!

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We just do it better!

Corporate/Commercial

Work with two expert partners in a boutique practice with top-tier quality clients and big corporate deals, but all the benefits of a small firm including one-on-one mentoring, accelerated development and work/life balance. 2+ years PQE required. Ref: LN7596

Commercial/Property – New Plymouth

Do you want to live in NZ's best town, where you can surf in summer and snow-board in winter? Here's your opportunity! This leading New Plymouth firm offers high quality and challenging work, growth opportunities, a friendly culture AND time to enjoy living!! 2-5 years commercial/property PQE required. Ref: LN7708

Litigation

Don't let your litigation career go stale. This top-tier firm is busy and requires enthusiastic and dedicated solicitors to join their specialist teams. You will work in a collegial and supportive firm which offers plenty of scope to develop your career. Positions available for intermediate and senior solicitors. Ref: LN7461

Property/Commercial - Senior

Are you a senior property/commercial lawyer facing roadblocks on your path to partnership in your current firm? Don't waste any more time. Grab this golden opportunity that has real partnership prospects. Strong technical skills in property, commercial and trust law plus proven management abilities are required. Ref: LN7671

London - Commercial Litigation

If you're used to handling large value, high profile cases and looking for a new challenge join this London City firm. A good mix of experience is preferred, although your work will be largely financial litigation involving multi-nationals, investment banks, financial institutions, transport & energy companies. Ref: LN0810-345

Corporate Counsel

Here's something to celebrate – two chances to work for a flourishing NZ company. If you have between 3 - 7 years quality corporate and commercial law experience, a wide knowledge base, and a proven ability to get close your clients and understand their business, call us to find out more. Ref: LN7591

www.lawstaff.co.nz

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We know time is precious - work with us and you can move jobs without wasting any.

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