

## **PRESENTERS**

### **Kelly Quinn, Barrister, Bankside Chambers, Auckland**

Kelly practises general commercial litigation. He has particular experience and expertise in contractual disputes, company law issues and construction law. His commercial litigation experience has included shareholder and joint venture disputes, disputes concerning the sale and purchase of property and businesses, lease disputes, supply and distribution agreements, transfer pricing, insurance disputes and a wide variety of contractual disputes generally.

In the construction field, Kelly has acted in matters involving the full range of usual construction law issues including defects and warranty claims, wrongful termination of contracts, claims for liquidated damages, variations, and extensions of time, claims arising from disruption and/or prolongation, and the enforcement/defence of claims under performance bonds. He has represented clients in construction disputes involving projects in Hong Kong, India, Japan, China, Vietnam, Thailand and New Zealand.

His regulatory work has included acting for listed companies in defence of disciplinary proceedings brought by the Hong Kong Stock Exchange, and also acting for the Exchange in similar proceedings against listed companies. He has represented most of the major international investment banks (in Hong Kong) in connection with investigations into trading irregularities and other securities regulation issues.

### **Prof Peter Watts, University of Auckland**

Peter Watts' teaching and research interests include agency law, company/corporations law, the law of restitution, the law of personal property, and equity. He has taught courses in the law of obligations, agency law, company law, restitution, company finance law and securities market regulation.

He is the editor of the leading English text, *Bowstead & Reynolds on Agency*, the 19th edition of which is due out in September 2010. He recently published the book *Directors' Powers and Duties* (Wellington, LexisNexis, 2009), Chapter 4 of which is reproduced in this book. He is New Zealand regional editor of the *Restitution Law Review*, an editor of the *Company and Securities Law Bulletin*, joint editor of the *New Zealand Business Law Quarterly*, and Agency law editor of the *Journal of Business Law* (UK). He is also one of the authors of *Morison's Company and Securities Law* and of *Heath & Whale on Insolvency*.

He has advised the New Zealand Law Commission and the Law Commission of England and Wales on a number of private law and commercial law projects. He has served as Acting Dean of the Faculty at Auckland Law School and as a representative of the Professors on the Council of the University. He is currently Associate Dean (Postgraduate) in the Faculty. He also practises as a barrister from Bankside Chambers in Auckland.

## **Acknowledgements**

The chapter on Contracting with Companies, entitled “The Mechanics of Directorial Power”, has been reproduced with the kind permission of LexisNexis, from Peter Watts, *Directors’ Powers and Duties* (LexisNexis, Wellington, 2009).

Kelly Quinn gratefully acknowledges the assistance of Toby Futter, Barrister, in the preparation of chapters 3, 5 and 6.

Cover and text stocks used in this publication are from Forestry Stewardship Council certified mills, manufactured under the environmentally responsible paper manufactured environmental management system ISO 14001, using pulp from well managed forests and other controlled sources.

# CONTENTS

<b>1. INTRODUCTION.....</b>	<b>1</b>
<b>2. CONTRACTING WITH COMPANIES.....</b>	<b>3</b>
<b>3. NOMINEE CONTRACTS .....</b>	<b>77</b>
FORM, EFFECT AND COMMON USE OF NOMINEE CONTRACTS .....	77
UNIDENTIFIED NOMINEES AND THE CONTRACTS (PRIVITY) ACT 1982 .....	78
AVOIDING NOMINEE CONFERRALS/ ENSURING NOMINEE CONFERRALS .....	82
THE RIGHTS OF THE ORIGINAL CONTRACTING PARTIES AFTER NOMINATION .....	83
<b>4. UNDISCLOSED PRINCIPALS.....</b>	<b>85</b>
WHAT IS AN “UNDISCLOSED PRINCIPAL”? .....	85
WHO CAN SUE? .....	86
CASELAW .....	87
<i>Armstrong v Stokes</i> .....	87
<i>Cooke &amp; Sons v Eshelby</i> .....	88
<i>Keighley, Maxsted &amp; Co v Durant</i> .....	88
<i>Said v Butt</i> .....	89
<i>Freeman &amp; Lockyer v Buckhurst Park Properties (Mangal) Limited</i> .....	89
<i>Teheran-Europe Co Limited v ST Belton (Tractors) Limited</i> .....	90
<i>Welsh Development Agency v Export Finance Co Limited</i> .....	91
<i>Siu Yin Kwan v Eastern Insurance Co Limited</i> .....	92
THE SIGNIFICANCE OF PERSONALITY .....	93
ELECTION .....	94
WHICH THEORY WORKS BEST ? .....	95
CONCLUSION .....	96
<b>5. CONTRACTING WITH TRUSTS.....</b>	<b>97</b>
HOW DO TRUSTS CONTRACT?.....	97
THE LIABILITY OF TRUSTEES WHEN CONTRACTING ON BEHALF OF TRUSTS.....	98
CREDITORS’ RIGHTS AGAINST TRUSTEES AND TRUST ASSETS .....	99
“TRADING TRUSTS” – WHAT ARE THEY?.....	101
THE RISKS OF CONTRACTING WITH TRADING TRUSTS .....	102
<i>Misfeasance by directors of a corporate trustee</i> .....	104
<b>6. PARTNERSHIPS.....</b>	<b>107</b>
HOW DO THEY DIFFER FROM COMPANIES? .....	107
CONTRACTING WITH AN UNLIMITED (ORDINARY) PARTNERSHIP .....	107
PARTNER LIABILITY, CREDITOR REMEDIES .....	110
LIMITED PARTNERSHIPS.....	112
<b>APPENDIX 1.....</b>	<b>115</b>
COMPANY LAW PROBLEM .....	115
<b>APPENDIX 2.....</b>	<b>117</b>
FACT SITUATION (AGENCY).....	117
<b>APPENDIX 3.....</b>	<b>119</b>
PRESENTATION NOTES – PROFESSOR PETER WATTS .....	119
INTRODUCTION TO COMPANY CONTRACTING .....	120
A FALLACY ABOUT COMPANY CONTRACTING .....	120
THE BASIC TOOLS OF AGENCY LAW .....	122
ACTUAL AUTHORITY I—THE BASICS.....	122
ACTUAL AUTHORITY II—NO NEED TO PROVE IT UNTIL TRIAL .....	124
ACTUAL AUTHORITY III—SOURCES, WHEN THE PRINCIPAL IS A COMPANY .....	126
ACTUAL AUTHORITY IV—DISHONESTY REMOVES ACTUAL AUTHORITY .....	126

APPARENT AUTHORITY I—THE BASIC ELEMENTS.....	128
APPARENT AUTHORITY II—USUAL, AS AGAINST FACT-SPECIFIC, HOLDINGS OUT .....	128
APPARENT AUTHORITY III—ESTABLISHING A REPRESENTATION AT BOARD LEVEL.....	130
APPARENT AUTHORITY IV—ESTABLISHING A HOLDING OUT BELOW BOARD LEVEL .....	130
APPARENT AUTHORITY V—REPRESENTATION MUST ULTIMATELY BE EXTERNAL TO THE AGENT.....	132
APPARENT AUTHORITY VI—REPRESENTATION MUST BE KNOWN TO O IN ORDER TO BE RELIED UPON ...	132
APPARENT AUTHORITY VII—ABSENCE OF OBVIOUS BENEFIT TO P DOES NOT, BUT PRESENCE OF CONFLICT OF INTEREST CAN, REMOVE APPARENT AUTHORITY .....	132
CONSTRUCTIVE AUTHORITY I— <i>HAMBRO V BURNAND</i> (1904) OR THE DISHONESTY EXCEPTION.....	134
CONSTRUCTIVE AUTHORITY II—AGENT IN POSSESSION OF PROPERTY, OR SIGNED DOCUMENT, WITH LIMITED AUTHORITY TO DISPOSE.....	134
CONSTRUCTIVE AUTHORITY III—THE POWER OF DEEDS .....	134
PRESUMPTIONS OF REGULARITY I—COMMON LAW AND STATUTORY .....	136
PRESUMPTIONS OF REGULARITY II—ACT NOT LIMITED TO PROCEDURAL IRREGULARITIES.....	138
PRESUMPTIONS OF REGULARITY III—TESTS OF KNOWLEDGE OF IRREGULARITY .....	138

*The statements and conclusions contained in this booklet are those of the author(s) only and not those of the New Zealand Law Society. This booklet has been prepared for the purpose of a Continuing Legal Education course. It is not intended to be a comprehensive statement of the law or practice, and should not be relied upon as such. If advice on the law is required, it should be sought on a formal, professional basis.*