BOOK LAUNCH – COMPANY LAW – 24 NOVEMBER 2011

I am greatly honoured to be asked to say a few words at this launch of what I assess to be an important new legal text on the subject of company law.

Because I was once a practitioner of company law – or liked to call myself one – I continue to take a real interest in the subject and I have actually read the whole of the book (something I almost never do with a law book and will not do again in my forthcoming retirement). But I am not prepared to answer comprehension questions – in order to avoid embarrassment. I simply had the feeling that I needed to catch up with company law because in the Supreme Court we so far have seen very little of it. Our critics may of course say that is a good thing.

New Zealand company law has been developing for a long time. The first company law statute, the Joint Stock Companies Act 1860, was modelled, I think, on an English statute of the time and, as you might expect, it was by present standards fairly rudimentary. It had modest aims. The Minister said in moving the second reading that its main object was to enable parties of limited means to associate together for the prosecution of large undertakings. It was only 126 sections long and with its schedules it occupied no more than 40 pages of the 1860 statute book. Of that, 50% was winding-up provisions. By comparison, the current Act has over 400 sections taking up close to 500 pages and only about 25% deals with liquidations; and that includes sections concerning removal of companies from the register. The primary models in 1993 were Canadian rather than UK statutes and thank goodness we did not follow the Australians into their overdrafted complexities.

Interestingly, the 1860 Act said almost nothing about directors except that it did make them liable for paying dividends while the company was insolvent. The subject of directors' duties is not mentioned at all and in fact, as the new book points out, their duties were until the 1993 Act left very largely to developments in the common law.

The successive statutes dealing with company law in 1882, 1903 and 1933 gradually added new ingredients into the mix, for the most part copying statutory developments in England. When I started practising we had the Companies Act 1955, which had attained the grandeur of almost 500 sections but was completely unfit for purpose in the latter part of the 20th Century. Company law was hidebound by policy decisions taken in England in the 19th Century by legislators and judges. I instance the restrictions on the powers of a company, which could be avoided by clever drafters – although it took rather a lot of words to do so – and which worked, if at all, only to promote unfairness for unsuspecting creditors. That got corrected only in 1983 when the Act was amended to give a company the rights, powers and privileges of a natural person unless expressly negated.

Those of you with longer memories will no doubt shudder when I mention the problems caused by the inflexible prohibitions on return of capital to shareholders and on allowing the company to assist with the purchase of its own shares. These were further examples of well-meant restrictions which sometimes had disastrous consequences for the unwary (and their lawyers). Think how much litigation was generated in the 1980s by corporate schemes that fell foul of the "no assistance" rule.

Of course under the 1955 Act there was still the requirement for the registration of charges and the consequence that unregistered charges were void in certain cases. There probably would not have been a law firm of any size or longevity in Auckland, and I daresay in the rest of the country, which had not at some stage suffered the ignominy of having to go to the High Court to apply for an extension of time, and it was too late to do that once insolvency had intervened.

There were all sorts of rather curious restrictions, such as the need to have two shareholders. And shares had to have a par value, which was a cause of endless confusion and has proved to be a quite unnecessary requirement. One of my favourite unnecessary provisions was a section that required all new public companies to have something called a statutory meeting with a statutory report within three months from the date on which they were entitled to commence business. This involved quite a bit of time, trouble and expense and seemed to be a completely pointless exercise.

Fortunately, at or about the time that the Law Commission was first established the Minister of Justice had the good sense to give it a reference on company law, evidently realising that the 1955 Act was past its use-by date. And he had the good sense to appoint Sian Elias and Jack Hodder as Law Commissioners and entrust to them the task of reform. What we got was a radical report (using that term in its best sense) which put forward an entirely new model and got rid of all the unnecessary rules and encrustations. Reading the new book confirmed to me that by and large the 1993 Act has worked well in practice despite some drafting obscurities, many of which were caused by the insistence of the old Department of Justice in changing the Law Commission's draft. In this respect the experience with the legislative process and the practical effect on transactions has paralleled what has happened with the personal

property securities legislation. Mind you, in relation to PPSA, I suspect from what I hear that the Australians are going to have a worse time when they finally get their legislation operative.

I arrived at the Law Commission after it had produced its reports on company law and I had had nothing to do with that work. But I can vividly remember going to the Select Committee with Sir Kenneth Keith to do battle with officials over the draft provisions. Ken and I spent a good part of a day arguing with officials in front of the Select Committee, whose members present had, I suspect, little idea what we were talking about and sat largely silently listening to a debate between the two Law Commissioners and the officials. Parliamentary Counsel would intervene occasionally, usually in our favour, but by lunchtime I was despairing that we could make any progress. But after lunch David Caygill, who had been absent, took his place on the committee and suddenly we made progress because we finally had a member of the audience who understood the problems. But still the result was an unsatisfactory compromise in some respects.

It was a particularly drastic example of the dangers of allowing officials to second-guess carefully thought-out legislative proposals from the Law Commission. I am glad to say that, from my observation, matters proceed rather differently these days and there is a much greater degree of cooperation between the Commission and the Ministry, both in the preparation of the Commission's reports and in their implementation.

So all these memories came back to me as I read the excellent text by Watts, Campbell and Hare (a good name for a law firm). All three are, of course, very well respected for their expertise in commercial law. Professor Peter Watts has an international reputation

as a scholar and writer, and is a current editor of Bowstead. Neil Campbell and Chris Hare are also distinguished academics. Neil is now at the bar and has rapidly made quite a name for himself as an advocate in commercial cases, including appearances in the Supreme Court. Chris, as well as being one of the editors of *Ellinger's Modern Banking Law*, is about to embark on a study of conflicts of laws as they affect banks and was last week awarded a Law Foundation International Research Fellowship this purpose.

The three authors' different styles are well blended in the book. I noticed, however, that Chris is definitely the master of the footnotes. On page 736, 75% of the page is footnotes – one of which cites 31 cases.

I found in the book a very careful analysis of key provisions in the 1993 Act, highlighting problem areas where there is uncertainty, setting out alternative readings and expressing a preference, and often suggesting useful reforms or how a particular reading could avoid or reduce a problem. Counsel and judges will, as a result of the work of the authors, be much better equipped to confront the problems which need to be addressed and will be made aware of the choices open as solutions to the drafting infelicities.

It was comforting nonetheless to find that some controversies with which I had to become acquainted in Jack Northey's classes nearly 50 years ago still are unresolved and I could revisit old friends like *Allan v Gold Reefs of West Africa.* It is good to feel that some things one learnt in law school still have a little relevance.

It did seem to me as I read the text that it is about time that the Law Commission was asked to revisit the Act. It does not need major surgery but, rather, a systematic review of its drafting and its operation now that it has been in force for something like 17½ years. Some of the uncertainties revealed by the authors should be able to be cured by amendments. Whilst in many instances deficiencies have not yet provoked case law, it would be as well to fix the problems before some unfortunate litigants become guinea pigs.

Successive governments have a poor record in implementing law reform – I begin to sound like a scratched record on that subject – but if you want proof just look at the failure to amend the Maritime Transport Act, which would have increased the liability of the owners of the Rena, and look also at the Supreme Court's decision in the Urewera case (*Hamed*) where, despite what some may be saying in public, warnings were given about deficiencies in the law relating to video surveillance as long ago as 1997 and repeated more recently by the Law Commission.

It may be a triumph of hope over experience, but I would like to think that lessons have at last been learnt, and perhaps statutory amendments suggested by the Law Commission arising from the review I am proposing can be implemented with reasonable speed. Company law is a vital component of commercial law and I hardly need to tell you that it is not in New Zealand's interests to have outmoded or obscure commercial law. So, despite my own experiences as a Law Commissioner, I hold a touching faith that some good could come of a review.

In the meantime we have this splendid text, which I believe will rank with any book on the subject of company law you will find in your libraries. I warmly congratulate the three authors and wish them commercial success.

On a personal note, I am pleased to see that they kept away from the subject of receiverships – sales of Blanchard and Gedye are slow enough already. I predict that this book, however, will sell well and I would be surprised if it is not often cited judicially with admiration, both in this country and elsewhere.