



ADLSI

Independent Voice of Law

LAWNEWS THIS ISSUE:

Fighting over writing – getting construction contracts right
The sky’s the limit – hop on board the “cloud”
Get your head in the game – how attitude affects your legal practice

LAWNEWS

ISSUE 29 29 AUGUST 2014

www.adls.org.nz

+ Construction law, dispute resolution

THE “WRITE FIGHT” – DISPUTE RESOLUTION & CONSTRUCTION CONTRACTS

By Janine Stewart, Partner, and Emma Kurtovich, Solicitor, Minter Ellison Rudd Watts

Traditional dispute resolution routes through the courts can be rigid, time consuming and expensive. It is little wonder then that there is an increasing focus on alternative dispute resolution procedures such as arbitration, dispute resolution boards (DRBs) and mediation.

The effectiveness of these procedures in resolving disputes will depend on their suitability for project, the relationship between the parties, and the suite of related dispute resolution clauses which may otherwise impact on the rights and liabilities of the parties.

This article will address:

- issues to consider at the outset when drafting dispute resolution clauses, including conditions precedent, liability caps, limitation clauses and consolidation clauses;
- the pros and cons of different dispute resolution forums including the courts, arbitration and DRBs; and
- the value of clauses that require the parties to negotiate or mediate prior to proceeding to a dispute resolution forum.



Retiring District Court Judge Gittos is pictured here at his final sitting in the Auckland District Court on Friday 15 August 2014. For more on this occasion, please turn to page 6.

Dispute resolution clauses should be considered at the outset of a project

It goes without saying that dispute resolution clauses should be considered at the outset of the project when the parties can objectively assess what is best for the project.

Conditions precedent

In standard form and tailored construction contracts, it is relatively common to include conditions precedent for claims and subsequent disputes. A requirement that notice must be given within a specific period is a common condition precedent to a claim under the contract and/or proceeding to a specified dispute resolution forum. For example, clause 20.1 of the FIDIC silver book states that notice of any claim must be given:

“As soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.”

The clause goes on to state that: “If the

Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment and the Employer shall be discharged from all liability in connection with the Claim.”

This is a true condition precedent clause that prevents a party from bringing a claim if the specified process is not followed. As such, it can be contrasted with clauses that, if not followed by the contractor:

- will create a ground for set off by the principal to the extent that it can demonstrate and quantify prejudice (for example stage 2 of the dispute process under clause 20.1 of the FIDIC Silver Book); and
- do not prevent the assessor of the claim from nevertheless granting the claim (for example, clause 10.3.2 of clause NZS 3910:2013).

The benefit of true conditions precedent clauses

Continued on page 2

THE “WRITE FIGHT” – DISPUTE RESOLUTION & CONSTRUCTION CONTRACTS

Continued from page 1

is that they provide certainty of notice and process and the ability to argue that a claim is barred if it is notified “out of time”. See for example *H & H Contractors Ltd v Leighton Contractors Pty Ltd* [2013] NZHC 2225 where Elias J upheld that the wording of a clause that imposed a 15 working day notice period was clear and unambiguous and that, as a result: “A party to the contract may not make a claim against the other party unless it complies with the contractual procedures and time frames.”

However, feedback from some contractors is that strict notice periods are impractical given the day to day issues on a construction site, and that these clauses are often not followed in any event. As such, and in light of the seemingly harsh consequences which may result, contractors may prefer to include clauses that result in a claim for set off due to prejudice if notice periods are not followed.

Liability caps and time limitation clauses

In considering future liability, a key issue for the parties to consider is whether there is a time and/or dollar value at which liability should be capped. A monetary cap is not uncommon and is contained in the IPENZ conditions of contract for consultancy services and clause 17.6 of the FIDIC contracts.

There is a perception that the liability cap mirrors the amount of insurance that the contractor/consultant holds for the project, but this is not necessarily the case. There is also a tendency for the liability cap to be tied to the amount that the contractor/consultant has been paid to undertake the work as opposed to the value of the project. The combined effect is that the liability cap may not afford the principal sufficient protection from damage, but this must be balanced against the potential increased contract cost of securing a higher liability cap.

Parties are also at liberty to impose a contractual limitation period – which normally decreases the statutory period within which parties may bring a claim. Principals may benefit from a lower contract price due to the certainty this provides contractors. However, depending on the nature of the project, decreasing limitation periods is a risky business when it comes to latent defects.

Consolidation Clauses

It is important that dispute resolution clauses



Janine Stewart

across contracts with various consultants and contractors are consistent. For example, all contracts should state that dispute resolution will be by way of arbitration or High Court proceeding. Further, the principal should carefully consider whether to include an express clause in all contracts that all parties to those contracts agree to have any dispute relating to the project heard in one forum.

The best forum for dispute resolution will depend on the nature of the project

Historically, parties to a dispute have looked towards dispute resolution forums including court, arbitration and adjudication. However, there is now an increased awareness and use of other forums such as DRBs.

Court proceedings

Court proceedings are often viewed as a default form of dispute resolution and, as such, most parties will have a basic understanding of how the system works. That being said, there are numerous disadvantages of court proceedings including time and cost, damaged relationships and lack of confidentiality.

Arbitration

Arbitration has the advantage of being confidential and allows the parties increased control over the proceedings. It also allows for disputes to be heard in a timelier manner than is often the case with court proceedings.

Adjudication

Regardless of the agreed forum for dispute resolution, the parties are still subject to



Emma Kurtovich

adjudication (with limited exceptions). Pursuant to section 25(1) of the *Construction Contracts Act 2002* (CCA), any party to a construction contract has the right to refer a dispute to adjudication, even if the dispute is the subject of court or tribunal proceedings. Although the above forums and procedures can run alongside adjudication, the adjudication is likely to be determined at a much earlier stage.

Dispute Resolution Boards or DRBs

Unlike the dispute forums outlined above, DRBs may have a place in preventing the escalation of disputes. DRBs are common place in standard FIDIC contracts but FIDIC is not widely used in New Zealand. The market here commonly opts for NZS 3910 and related forms. However, due to the success of DRBs in addressing project disputes before they escalate to arbitration, the New Zealand market is beginning to see the incorporation of DRBs into standard form contracts such as NZS 3910:2013.

DRBs can take many forms and determinations may be binding or non-binding depending on the terms of the contract. FIDIC allows parties to pursue arbitration if they are not satisfied with the DRB's decision. However, in many cases the parties will be satisfied with an independent determination unless the quantum of the dispute, and/or principles in issue, require further action.

DRBs usually consist of one or three members with expertise in the project area. These members should be independent and impartial

Continued on page 7

LAWNEWS

LAW NEWS is an official publication of Auckland District Law Society Inc. (ADLSI).

Editor: Lisa Clark

Publisher: Auckland District Law Society Inc.

Editorial and contributor enquiries: Lisa Clark, phone (09) 303 5270 or email lisa.clark@adls.org.nz

Advertising enquiries: Chris Merlini, phone 021 371 302 or email chris@mediacell.co.nz

All mail for the editorial department to: Auckland District Law Society Inc., Level 4, Chancery Chambers, 2 Chancery Street, Auckland 1010, PO Box 58, Shortland Street, DX CP24001, Auckland 1140. www.adls.org.nz

Law News is published weekly (with the exception of a small period over the Christmas holiday break) and is available free of charge to members of ADLSI, and

available by subscription to non-members for \$130 plus GST per year. If you wish to subscribe please email reception@adls.org.nz

©COPYRIGHT. Material from this newsletter must not be reproduced in whole or part without permission. *Law News* is published by Auckland District Law Society Inc., 2 Chancery Street, Auckland.

Getting on the cloud

By *Arran Hunt, Solicitor, MacDonald Lewis Law*

Following on from our special issue on "Technology & Law" (Law News Issue 25, 1 August 2014), Arran Hunt explores some further issues lawyers and law firms should be thinking about in relation to their use of technology. Last week he discussed issues around emails and Document Management Systems; here he considers how your firm can "get on the cloud". Look out for his tips on "virtualising your practice" and "bringing your own device" in upcoming issues.

The "cloud" is a current buzz word, but most people will not understand how to use it and even fewer would know how it works. To give you an idea, this article looks at two simple aspects of cloud usage – "Voice Over Internet Protocol" (VOIP) and backups.

The cloud is made up of large servers hosted in datacentres around the world that are connected through the internet. These are used as an extension or replacement for local computer hardware. Forget the catchphrases, anagrams and lingo – the cloud is about replacing a local piece of hardware with an online service.

Several of the advantages of moving to the cloud are covered below, but before looking at those we should get something else out of the way immediately – the question of cost. Moving anything to the cloud should rarely be done as a cost-saving measure. At present there is no great reduction in IT costs in moving to the cloud, and there may not be for some time yet. However, there are still a number of reasons to consider the move.

There are several terms that we should define so that the information below is easier to understand. In this article, when reference is made to a "PC" or "desktop", it means the primary machine on which a user performs his or her work, whether it is a PC that stays at the desk or a laptop that the user takes home. "Office server" means the server, or servers, that you have in your office. "Hosting server" means a server owned and operated by a cloud operator at its datacentre.

Internet Connections

Your internet connection is paramount to any move into the cloud. What your firm needs will be largely dependent on the number of users you have and how many of the new technologies you would like to embrace.

Below is a quick breakdown of the more standard internet connections available:

- *Dial up*: With WiFi and 3G available almost everywhere, there is no reason for dial up to be used, even when out of the office.
- *ADSL*: ADSL is available throughout most of New Zealand and uses the copper network. It allows for reasonably fast download speeds (how fast you receive data) but provides for slow upload speeds



Arran Hunt

Never store the backup and original of your electronic files at the same location or even in buildings in close proximity (Christchurch has shown how easily an entire area can be blocked off from access).

(how fast you send data), meaning it is best suited to home use and not a work environment where large emails may be sent.

- *VDSL*: Similar technology to ADSL, VDSL operates over a copper line, but provides greater download speeds and, more importantly, greater upload speeds. With this a small firm could use all of the cloud technologies over the one connection. Its use is limited to people closer to the exchange, so it is not as widely available, but is a better alternative to ADSL if UFB is not available.
- *UFB*: This should be the first stop for all but the largest firms (who will use other sources of fibre), if it is available. As an example of speed, ADSL has best case speed ratings of approximately 1/20 (being 1 megabit per second upload and 20 megabit per second download). UFB starts at 10/30 and 50/100 is also available, with 200/200 being planned. However, as it is over fibre and not copper, it will not come with a copper phone line, so you will need to look at VOIP phones plus fax and alarm systems that can work over non-copper connections.

For a small boutique office or a sole practitioner, an ADSL connection should be enough to handle several staff, but if VDSL (or preferably UFB) is available, then the move is worth the additional cost. As noted above, some fax machines and alarm systems can only be used with an old copper phone line. However, faxes can now be received by a VOIP service and sent via email,

while alarms can increasingly be updated with 3G connections, allowing them to function even without phone or internet service.

Voice Over Internet Protocol or "VOIP"

Advantages

- Reduced cost
- Increased functionality (such as conference calling)
- Accessible through PC & Smartphone

Disadvantages

- Reliant on an internet connection

Voice Over Internet Protocol or "VOIP" will be the first step that most firms will take into the cloud, as it is the simplest to implement and, in most cases, will have little impact on how a firm operates. It is, however, one area in which a firm can save considerable costs.

VOIP works by routing incoming and outgoing phone calls through a hosting server housed by your VOIP provider. Your firm will then have phones that will plug into your network and connect to the VOIP server over the internet. From the perspective of the end user, the VOIP system can operate exactly like the old PABX systems which firms have had for so long – a phone call is received, it is answered, it can be transferred etc.

The advantage of VOIP is the added features available by virtue of being provided over a network. A user's phone is not tied to any particular phone jack, but can instead be used in any network point, allowing someone using a boardroom for an office for a particularly large matter, to have his or her phone with them. To take that further, the phone could be taken home if a lawyer was looking to work from home for a few days, or from the beach house. While there, the phone would still have the exact same functionality – receiving calls, making calls (showing your firm's phone number as the outgoing number) and transferring calls. Phones can be set up in different cities and in different countries, but would still be making local calls from the area in which your firm is based, and calls to colleagues would be free.

If a staff member is out of the office, he or she can run software that can connect to the VOIP server from his or her smartphone, providing all of the same functionality as the desk phone but using 3G, 4G or WiFi. For support staff, there is software for PCs that allows them to answer the phone, using the same headset they use to take dictation, by pushing a key on their keyboard. Essentially, VOIP removes the need to be tied to a desk or even a particular phone.

As it is based over the internet, you will need a steady and reliable internet connection. An ADSL connection should be suitable for six to eight concurrent calls. However, ADSL is more restricted in sending data than receiving data. If you have more than two to three staff, you should look at separate ADSL connections for

Continued on page 10

Optimal attitudes – you are what you think

By *Emily Morrow, Executive Consultant*

Mahatma Gandhi once said, “Man often becomes what he believes himself to be. If I keep on saying to myself that I cannot do a certain thing, it is possible that I may end by really becoming incapable of doing it. On the contrary, if I have the belief that I can do it, I shall shortly acquire the capacity to do it even if I may not have it at the beginning.”

His insightful comment likely preceded the development of cognitive behavioural psychological theory. Cognitive behavioural theory is based on the notion that changing maladaptive thinking leads to change in effect, attitudes and behaviour. What you think begins to crystallise into your attitudes and those attitudes begin to manifest themselves through your behaviour. I think of attitudes as clusters of repetitive thoughts. If your thinking and attitudes are unrealistic, dysfunctional or otherwise problematic, then your behaviour will likely be the same.

Fortunately, our thoughts and our attitudes are not cast in stone. They are ephemeral and endlessly malleable. One can challenge one's thought patterns and beliefs, replace errors in thinking with more realistic attitudes, decrease emotional distress and self-defeating behaviour and function at an enhanced level. I experience clients doing this all the time with great success. It is the basis of much of what I do, and it is real.

The most high-functioning lawyers I know have articulated attitudes which they believe contribute to their success. I think of these as “attitudinal epiphanies” and I make a mental note of them when I hear them. They are real gems – they are not adages or quips but instead succinct statements of a critical mindset. They are simultaneously immensely wise and simple. They are memorable. They have impacted the way I think and behave and I thought they might be of interest to others. Hence this article.

“I seek to cultivate appreciation and eradicate entitlement in myself”

In many professional satisfaction surveys, lawyers rank low in their reported overall enjoyment of their work. Many lawyers are unhappy practising law. Several years ago, friends of mine did some very interesting research regarding what correlates with personal and professional happiness. They found that people who frequently express appreciation are subjectively happier, have lower stress-related cortisol levels and higher IGA levels (associated with a high functioning immune system), than those who do not. When people express appreciation to someone else or are themselves appreciated, their cortisol level predictably drops and their IGA level rises. Conversely, thinking or acting as though one is entitled to certain results typically causes higher stress levels and generalised dissatisfaction. If you are fortunate enough to be a lawyer, there are no doubt many opportunities to be appreciative of your own good fortune and to express appreciation to others. Choosing to focus on appreciation



A partner in a large firm heard that several key staff members were leaving the firm. The partner identified several ways to “use” the crisis. Despite being unable to forestall the exodus, she got the firm to move in quite a different direction. She had converted a major challenge into a real opportunity.

rather than entitlement has a psychological and physiological impact – even small acts of appreciation make a difference.

“No’ is just the beginning of the conversation”

The person who made this comment was not suggesting that one should be stubborn and inflexible when confronted with the answer “no”. Instead, what she meant was that frequently when someone says “no”, she takes it as a signal that she needs to pay closer attention and open new options. It is about “creative tenacity”. She shared the following anecdote with me. Some years ago, she responded to an advertisement about renting an apartment, only to learn the unit was already let. In the photographs of the unit on Trade Me, she noticed there was a little dog sitting on one of the lounges. After receiving a pleasant email from the landlord advising the unit was no longer available, she replied by thanking him profusely and enquiring about the dog who looked much like her own dog. This led to a lively email correspondence between the two of them. Although she did not then get the unit, three months later when it again became available, the landlord remembered her, contacted her and offered her the unit. She

accepted with alacrity. “No” was, indeed, just the beginning of the conversation.

“You need to be your own best advocate”

A lawyer with whom I worked was diagnosed with cancer and had many conversations with his physicians about treatment options. His wife was an oncologist, and he might naturally have deferred to her judgement and recommendations and those of his treating physicians. However, he quickly realised that no one, including his physicians and knowledgeable and loving wife, could always be relied on to advocate for what mattered most to him. It is not that they did not want the best outcomes for him. It is that no one could better understand what he needed than he, himself. He chose to be his own best advocate while going through the treatment process and this impacted how he felt and his medical outcomes. I think this is true in all aspects of life. You cannot rely on someone else to be your own best advocate. If at all possible, be your own best advocate.

“Good luck is never fortuitous”

The April 2014 issue of *The Atlantic Magazine* contained an interesting article entitled “The Confidence Gap”. The authors (two very successful professional women) suggested that women are often less self-assured than men, and that confidence matters as much as competence in being successful. Even the most capable women they interviewed believed their success resulted in large part from “good luck”, rather than from intelligence, hard work and determination. When I hear a similar comment, I often say, “Excuse me, but I beg to differ with you. You made your own good luck and now I would suggest you enjoy it and congratulate yourself on having done so.” Frequently after a moment of reflection, clients will turn to me and say, “You know, you’re right.” Regardless of your gender, if you find yourself thinking your good luck is fortuitous, please think again.

“Never waste a great crisis”

A partner in a large firm had been unsuccessfully trying to influence her colleagues about a personnel issue. Subsequently, she heard informally that several key staff members were growing increasingly discontented about that same issue. The employees thereafter announced they were leaving the firm to work for a competitor, predictably creating some upheaval within the firm. The partner contacted me to discuss the situation and during our conversation said, “This is a great crisis and I don’t want to waste it.” She identified several ways to “use” the crisis, either to encourage her partners to accommodate the employees, or, if they were unwilling to do so, to urge them to consider other options. Despite being exceptionally adept at capitalising on the crisis, she was unable to forestall the employee exodus, but got the firm to move in quite a different direction in the future. She had converted a major challenge into a real opportunity.

Continued on page 10

CBA annual conference and dinner

The Criminal Bar Association of New Zealand (CBA) celebrated its 30th anniversary with a Bar dinner on 16 August 2014, at which two of its most senior members, Peter Williams QC and Michael Harte, were honoured. The dinner, attended by 330 CBA members, judges, prosecutors, politicians, colleagues and family and friends of Mr Williams QC and Mr Harte, was a huge success.

The dinner coincided with the annual CBA conference which was held at the University of Auckland and attended by 270 delegates from throughout New Zealand. Both events were the largest in the history of the CBA.

The Rt Hon Sir Anand Satyanand was the keynote speaker. He acknowledged the illustrious careers of the honoured guests, their service to the profession, and recalled cases he had been involved in with both. Sir Anand acknowledged the contribution and leadership both had made to the profession.

Peter Williams QC and His Honour Judge Andrew Becroft, who spoke on behalf of Michael Harte, rekindled memories of a bygone era in the law.

The president of the CBA, Tony Bouchier, acknowledged the vision of Peter Williams QC (as the first president of the CBA) which saw the organisation being set up to promote fellowship and mutual support for those practising, or interested in, criminal law.

Mr Bouchier acknowledged the challenges to collegiality nowadays and stressed the importance of getting together in informal contexts to learn and socialise, such as conferences and Bar dinners. He observed that feedback had shown that the weekend's events had gone some way in rekindling those original aims of the CBA.

Mr Bouchier also acknowledged the ongoing support of ADLSI and the University of Auckland for their partnerships in holding the weekend's celebratory events and the important part they played in ensuring its success. 



Elizabeth Lander, Heeni Phillips, Peter Williams QC, the Hon Dover Samuels and Nancy Fong-Anae



(from left to right in foreground) His Honour Judge Andrew Becroft, Michael Harte and Helen Harte



CBA president Tony Bouchier



Annabel Maxwell-Scott, Graeme Newell and Julie-Anne Kincade



Member Benefits Programme

A range of preferential offers, available to ADLSI members, from carefully selected partners.

To view the latest offers visit www.adls.org.nz



Final sitting of Judge Gittos

The final sitting of Judge Gittos was held on Friday 15 August 2014 in Courtroom 7 at the Auckland District Court. The respect in which this popular judge was held was evident in the tributes paid to him by Christine Gordon QC (Acting Crown Solicitor), Brian Keene QC (President of ADLSI) and Tony Bouchier (President of the Criminal Bar Association).

ADLSI President Brian Keene QC described first encountering the top provincial litigation partner, who would one day become a judge, while himself just a “boy in the library” at his own firm.

“In practice you were always considerate and thoughtful on the client’s behalf. You were a thinker who started any examination of a problem by directing your focus to its solution. I can never remember you widening the scope of a dispute – rather you laid out its jigsaw and proceeded to solve it to the client’s best advantage.”

In reflecting on Judge Gittos’ service as a judge, Mr Keene QC noted the importance of the District Court, dealing as it does with the vast majority of the public’s needs for recourse to the Courts.



ADLSI President Brian Keene QC was amongst the speakers



Judge Gittos, flanked by Chief District Court Judge Doogue and Her Honour Judge Kiernan

“Lawyers like you naturally attract the attention of the powers that be; it was no surprise to find your name turning up in 1994 as a judicial appointment. I congratulated you, [but] in truth congratulations should have been made to those

who made the appointment.”

Judge Gittos’ services to the law were recently acknowledged in his receipt of the Queen’s Service Order.

+ *ADLSI event*

Annual Golf Tournament

Golfers of all levels are invited to the Annual ADLSI Golf Tournament on Monday 20 October 2014.



Join us for an 18 hole round at the picturesque North Shore Golf Club in Albany, Auckland. Play is in fours, so enter as a single entrant or get a group together. Practitioners are welcome to invite their clients.

Compete for the prestigious Hailsham Shield (four-ball, best-ball, stableford), plus there will be prizes up for grabs for best stableford, best gross score, closest to the pin and longest drive. Following the round, refreshments and prizegiving will be held in the clubhouse.

Date: Monday, 20 October 2014

Time: Arrival by 12.15pm for 1.00pm shotgun start

Venue: North Shore Golf Club, 51 Appleby Road, Albany, Auckland

Tickets: \$53.00 + GST (\$60.95 incl GST) per person for ADLSI members & members of the judiciary;
\$70.00 + GST (\$80.50 incl GST) per person for non-members & their clients

To register your team, or to register as a single entrant (we will put you in a four), please visit www.adls.org.nz; alternatively contact adls.events@adls.org.nz or 09 303 5287. Spaces are limited, so register before 29 September 2014 to secure your spot.

ADLSI’s standard cancellation policy applies for this event.

ADLSI Golf Tournament proudly sponsored by:

Gittrap

Group

MARSH

Prizes sponsored by:

Barfoot & Thompson

+ *New book*

Brookers Employment Law Handbook 2014

Consolidated to 1 July 2014, *Brookers Employment Law Handbook 2014* brings together in one volume the key legislation relevant to the area of employment law.

This is an essential reference for legal practitioners, academics and students. With handy thumb tabs, a comprehensive subject index and alphabetical list of legislation, this portable and convenient handbook ensures quick and easy access to the information you need.



Price: \$88.00 plus GST (\$101.20 incl. GST)*

Price for ADLSI members: \$79.20 plus GST (\$91.08 incl. GST)*

(*+ Postage and packaging)

To purchase this book please visit www.adls.org.nz or contact the ADLSI bookstore by phone: 09 306 5740, fax: 09 306 5741 or email: thestore@adls.org.nz.

Standing room only for inaugural John Haigh QC Memorial Moot

The recent final of the inaugural John Haigh QC Memorial Moot attracted a capacity crowd to Courtroom 1 at the Auckland High Court where two teams debated a point of criminal law.

Former Governor-General and Distinguished Fellow of the Auckland Law School, the Rt Hon Sir Anand Satyanand, opened the proceedings and paid tribute to John Haigh QC, the leading barrister in whose memory the competition was named.

The moot problem, written by Senior Lecturer at the Law School, Kris Gledhill, focussed on the issue of direct corporate and employee liability for manslaughter. The issue of direct liability for corporations is unclear under the *Crimes Act 1961* which, although it appears to require a human perpetrator, was adopted before the concept of corporate liability was fully accepted by the law.

The policy issue addressed by the students was: "When should corporations or their employees be liable for gross negligence causing death?" An expert opinion was given by Isaac Hikaka of Lee Salmon Long. The two teams, comprising Mitchell Baker and Michael Greenop (appellants) and Tiaan Nelson and Matt Buddler (respondents), dealt with intense questioning from the panel of three judges, Justices Harrison, Moore, and Toogood.

Sue Haigh presented a shield to the winners, Tiaan Nelson and Matt Buddler. She said the



Moot winners Tiaan Nelson and Matt Buddler with moot judges Justices Toogood, Harrison and Moore

Haigh family was grateful and proud that the Law School had chosen to honour a dearly loved husband and father.

A fund to endow the John Haigh QC Memorial Moot has been established by the class of 1970, of which Mr Haigh QC was a member, with the intention of making it an annual event and a lasting tribute to an esteemed colleague. The competition provides a valuable opportunity for third-year and above law students to develop and enhance their advocacy skills.

Anyone wanting to make a donation to the memorial fund can contact Catherine Davies on 022 396 4661 or Catherine.davies@auckland.ac.nz. ac.nz or go to www.givingtoauckland.org.nz. 



Sue Haigh with Tiaan Nelson and Matt Buddler

Continued from page 2, "The 'write fight' – dispute resolution & construction contracts"

(although they may be nominated by the parties to the construction contract).

The key differences between a DRB and other forms of dispute resolution are that DRBs are often involved from the project's outset, provided with contract information, updated on progress, attend regular meetings and attend site visits. It is for these reasons, and because the board members are highly qualified individuals with expertise and experience in the nature of project being undertaken, that DRBs may actually assist in the avoidance of formal disputes. DRBs can facilitate effective communication between the parties and assist in the resolution of contentious issues before they escalate.

The involvement of a DRB from the outset of the project will obviously have an impact on cost. This cost is often shared equally between the parties but, unlike other forms of dispute resolution, will be incurred regardless of whether a dispute escalates. It is for this reason that DRBs are most frequently used on high value and technical projects such as the HVDC Pole 3 Project and Sydney's desalination plant.

One of the key issues with the use of DRBs in New Zealand is the lack of suitably qualified and

experienced industry professionals available to become board members. A potential answer to this, at least in the short term, may be to bring in experts from offshore.

The construction contract may also require the parties to negotiate or mediate prior to proceeding to a dispute resolution forum

At the outset, parties should consider whether they should include a "compulsory mediation" clause or other form of compulsory negotiation clause prior to either party pursuing a dispute in any of the above forums. Such clauses can be a condition precedent to pursuing a dispute, see *Emirates Trading Agency Plc v Prime Mineral Exports Private Ltd* [2014] EWHC 2014 (Comm).

Parties with a long-term relationship tend to be more open to compulsory mediation clauses. Mediation or formal discussion (particularly at an early stage) allows the parties to flush out the issues between them, and gauge the opposing parties' likely approach to the dispute if it does not settle. It also gives the parties the opportunity to negotiate in the hope of avoiding significant legal fees, an adverse outcome, and damage to the relationship, in the event that the dispute escalates.

However, such clauses can be abused. For example, a party may rely on a compulsory mediation clause where there is no real intent to meaningfully engage. This will delay/prevent the claimant from bringing its claim in circumstances where there is no hope for a negotiated outcome. Ultimately, before including compulsory mediation or discussion clauses in a construction contract, the parties should carefully consider the nature of the project, the depth and history of the relationship between the parties, and the likelihood of embarking on future projects together.

Conclusion

There is no "one size fits all" for a dispute resolution clause. Parties are well advised to spend time up front considering disputes that may arise as well as the dispute resolution clauses that best suit the nature of the project and their relationship. Failing to consider these matters at the outset may well result in the parties incurring additional time and cost pursuing a process that is unsuitable and ineffective in resolving the real issues between them. 



ADLSI | CPD

Experts in accessible relevant legal learning

Content	Presenters	Cost
<p>Saturday, 8 November 2014 9am – 5pm Venue: Auckland</p> <p>6.75 CPD HOURS</p> <p>Running An Effective Jury Trial Jury trials require a specific set of advocacy skills. Given the serious nature of cases heard by a jury, “getting it wrong” can have significant implications for the accused – and for defence counsel. Preparation and presentation are the key.</p> <p>During this intensive, and in a collaborative environment, attendees will receive guidance on jury trial advocacy skills, through presentations, demonstrations and commentary, from four highly experienced and well-regarded presenters. Attendees will also receive useful materials which will reinforce the practical application of the content.</p> <p>Who should attend? Defence counsel who are new to jury trials and those who have done up to 5 of them.</p> <p>This intensive meets Ministry of Justice requirements as an equivalent course for Criminal Provider Approval Level 2.</p>	<p>His Honour Judge McNaughton Paul Dacre QC Marie Dyhrberg QC Steve Bonnar QC</p>	<p>SUPERSAVER Receive a further 10% off the early bird rate if booked and paid by 29 August 2014</p> <p>Members: \$265.50 + GST (\$305.33 incl.GST)</p> <p>Non-members: \$355.50 + GST (\$408.83 incl.GST)</p> <p>EARLY BIRD Ends 24 October</p> <p>Members: \$295.00 + GST (\$339.25 incl.GST)</p> <p>Non-members: \$395.00+ GST (\$454.25 incl.GST)</p>
<p>Tuesday, 2 September 2014 12pm – 1pm Venue: At your desk or on your portable device</p> <p>1 CPD HOUR</p> <p>Commercial Law Series: Navigating Shareholder Disputes Understanding litigation risk when dealing with shareholder disputes is essential. Getting it right at the negotiation stage can save your client time, money and other adverse fallout. The first webinar in this successful series will cover the statutory remedies available to shareholders and developments in recent case law.</p> <p>Learning Outcomes</p> <ul style="list-style-type: none"> Gain practical insight into dealing with some issues which arise in the pre-litigation context. Gain an overview of derivative actions and actions by ‘prejudiced shareholders’. Learn how to deal with 50/50 shareholder deadlocks. Develop an awareness of the overlap with other areas of law such as relationship property and employment. <p>Who should attend? Intermediate to senior commercial lawyers and in-house counsel. Accountants, especially those who provide services for smaller companies, may also benefit from this webinar.</p>	<p>Rebecca Edwards Barrister, Bankside Chambers</p>	<p>Members: \$75.00 + GST (\$86.25 incl.GST)</p> <p>Non-members: \$95.00 + GST (\$109.25 incl.GST)</p>

Calendar of
UPCOMING
CPD
ACTIVITIES

Wills and Estates: Issues Arising After the Will-Maker’s Death (2 CPD hours)

Tuesday, 9 September 2014, 4pm – 6.15pm **Venue:** Auckland Central (Live video streaming now available)

Presenters: Alison Gilbert, Special Counsel, Brookfields and Stephen McCarthy, Barrister

Introducing the New ADLSI Mortgagee Sale Forms (1 CPD hour)

Wednesday, 10 September 2014, 12pm – 1pm **Venue:** At your desk or on your portable device

Presenter: Jonathan Flaws, Principal, Sanderson Weir (and drafter of the forms)

Upcoming CPD Activities

To register online – www.adls.org.nz/cpd

EMAIL: cpd@adls.org.nz

PHONE: 09 303 5278

FAX: 09 309 3726

PO Box 58, Shortland Street,
Auckland 1140, DX CP24001

Content	Presenters	Cost
<p>Thursday, 25 September 2014 4pm – 6.15pm Venue: Auckland Central (<i>Live video streaming now available</i>)</p> <p>2 CPD HOURS</p> <p>Current Relationship Property Issues in Economic Disparity and Trusts: The Lust for Inequality Happily ever after doesn't apply to all relationships. When dissolution looms, how does a claim of economic disparity and/or the presence of a trust affect the splitting of property? Our highly experienced presenters and chair will help you keep informed and up to date about these red-hot topics.</p> <p>Learning Outcomes</p> <ul style="list-style-type: none"> • Develop a better understanding of the policy underlying s 15 of the Property (Relationships) Act 1976. • Gain greater knowledge about trusts, including types and rules, and in particular developments in the interface between family property and trust law. • Become updated on differing views, recent case law and unresolved issues. <p>Who should attend? Family lawyers and general practitioners with at least some experience in relationship property cases. Accountants would also benefit from attending.</p>	<p>Jane Hunter Barrister, Southern Cross Chambers</p> <p>Mark Vickerman Barrister, O'Connell Chambers</p> <p>Chair: Anne Hinton QC</p>	<p>Members: \$125.00 + GST (\$143.75 incl.GST)</p> <p>Non-members: \$180.00 + GST (\$207.00 incl.GST)</p>
<p>Wednesday, 22 October 2014 12pm – 1pm Venue: At your desk or on your portable device</p> <p>1 CPD HOUR</p> <p>Excel for Lawyers – A Survival Guide Excel, for some an enigma wrapped up in gridlines and columns. For those in the know, it's a useful tool that marshals complex sets of data, displays information graphically, analyses billing, and creates a case status or workload database, amongst many other things.</p> <p>Learning Outcomes</p> <ul style="list-style-type: none"> • Find out when and how to use Excel to best effect. • Become familiar with the layout of the Excel screen and key Excel terminology • Learn basic skills and tips and tricks to start a spreadsheet from scratch: entering data, understanding the different types of data, formatting and simple formulas. • Learn basic skills and tips and tricks to manage an existing spreadsheet - viewing, navigation, sorting, filtering, printing and simple edits including amending data and inserting/deleting cells, rows, columns and sheets. • Get a taster of some more advanced Excel features: conditional formatting, pivot tables and graphs. • Discover keyboard shortcuts to help you use Excel more efficiently. <p>Who should attend? Lawyers, legal executives, practice managers and support staff. This webinar will refer to Excel 2010 and is designed for beginners, although those needing a refresher would also benefit from attending this introduction.</p>	<p>Sally Rapatu Project Support/ Technology Learning Advisor, Simpson Grierson</p>	<p>Members: \$75.00 + GST (\$86.25 incl.GST)</p> <p>Non-members: \$95.00 + GST (\$109.25 incl.GST)</p>

Calendar of
UPCOMING
CPD
ACTIVITIES

Property Law Pot Pourri II (2 CPD hours) Tuesday, 16 September 2014, 4pm – 6.15pm **Venue:** Ellerslie Event Centre, Auckland (*Live video streaming now available*) **Presenters:** Carolyn Cameron, Partner, Burton & Co; Des Wood, Barrister and Kimberley Knox, Associate, Pidgeon Law

Criminal Law Pot Pourri 2014 (2 CPD hours) Thursday, 16 October 2014, 4pm – 6.15pm **Venue:** Jury Assembly Area, Auckland District Court (*Live video streaming now available*) **Presenters:** Marie Dyhrberg QC; Lapa Laubscher, Barrister; Robert Hesketh, Barrister and Maria Mortimer, Barrister

your VOIP and email/general internet use, as a staff member sending a large email will overload the connection and make the sound on a VOIP call cut out. There is network hardware that can be installed to help reduce this occurrence, but a second connection is the preferred solution. If faster connections are available, such as VDSL or UFB, then only one connection should be required (depending on the size of your office) and can be obtained at prices that are only slightly more than a single ADSL connection.

Backup

Advantages

- Backup secured in secure datacentre
- Backup encrypted
- No need to remember to change backup device
- No chance of theft of backup device while in transit

Disadvantages

- Reliant on an internet connection

Unless you run a purely paper office (which firms of all sizes should be moving away from rapidly), you should be creating a backup of your electronic matter files on a regular basis. The frequency of backups may vary depending on practice size, but it should be at least daily (although with the speed and price of modern drives there is no reason that files could not be replicated on the backup device in real-time). Typically, these backups will be taken to another location on a drive or tape each day so that, in case of a disaster at one location, your files are not lost. Never store the backup and original at the same location or even in buildings in close proximity (Christchurch has shown how easily an entire area can be blocked off from access). Backups can also provide security against human actions, whether it is accidental deletions or the actions of disgruntled employees.

Online backups remove the need to carry storage devices in and out of your premises each day, and can provide a real-time backup to multiple locations. As a firm based on the Auckland city fringe, we are looking at a real-time backup to a North Shore location (providing nearby physical access if required), and a second nightly backup to Hamilton (protecting against an Auckland-wide disaster).

Conclusion

As a rule of thumb, it is always worth talking to a number of providers. Some providers will oversell their capabilities, most specifically the number of users that a particular internet connection will be able to sustain, so it is better to err on the side of caution. You should also look at providers who are based in New Zealand with data centres in New Zealand, so there will be no confusion over the law that applies and physical access to data storage should be easy to obtain. For more on the contractual terms around hosting, see the article on "Data centre terms and conditions" by Andrew Easterbrook, which featured in *Law News*' special "Technology & Law" Issue (Issue 25, 1 August 2014).

If you have any questions regarding anything in this article, please feel free to contact the writer at arran@mllaw.co.nz. 

Insolvency Specialists • Litigation Support
Forensic Accounting • Business Valuations

 Gerry Rea Partners
CHARTERED ACCOUNTANTS | RESTRUCTURING | INSOLVENCY & LITIGATION



Call Paul Sargison, John Leonard
Simon Dalton or Matt Kemp

Telephone 09 377 3099
www.gerryrea.co.nz

"When all else fails, declare victory and walk off the field"

When you do not get your way (which happens to even the most successful lawyers), you have an attitudinal choice. You can be grumpy, surly, unhappy and generally unpleasant to be around, or you can be upbeat, reassuring, cheerful, optimistic and inspiring. The former may be briefly satisfying, and the latter may not change the objective outcome. However, the tone you set through your attitude and consequent behaviour will impact the thinking of those around you.

For example, Bill, a young lawyer, had tried to get the partner to whom he reported to change the way this partner reviewed Bill's work. The partner was disorganised and haphazard, and Bill found it difficult to understand document revisions and to learn from his work experiences. After failed efforts to improve the situation, Bill said, "I know I will never change him and his work style. So, I have decided to thank him profusely for the wonderful opportunity to work with him, and then refocus my energy on trying to work with a different partner." Bill needed to make a change, but he wanted to do so in a positive way. He was busily declaring victory and getting ready to walk off that field.

"No matter how wrong the client is, the client is always right"

I do not mean by the above that you should always do what your client wants or instructs you to do. Indeed, it is incumbent on you, as a lawyer, to exercise independent professional judgement. Instead, this comment describes an attitude that can inform your client service ethic. I certainly realise clients can be exceedingly difficult and frustrating, but because they pay your bill (or potentially do so), I have found that "high touch" customer service is worth the effort. If your team and you bring this attitude to even your most annoying client interactions, your service quality will be enhanced and the client will calm down a bit. I have used this technique to "tame" even the most challenging and "entitled" clients over the years. You do what you need to do to get the job done right the first time, but you keep reminding yourself and the client that, of course, he or she is always right.

"Always leave 'em wanting more"

This quote is generally attributed to P.T. Barnum, one of the founders of the famous Barnum and Bailey Circus. However, a client mentioned it in connection with his decision to leave his law practice at the height of his career at age 50. His partners strongly urged him to stay, but he was ready to move on to his next professional iteration. He said, "Sure, I could stay on and practice for another 10 or 15 years and leave when I begin to feel less engaged and less effective. However, that is not my style. I want to leave at the height of my game. I want everyone to say fabulous things about me when my name comes up in conversation. I want to leave them wanting more. In that way, I will never risk overstaying my welcome." This is his approach to most things in life, and it infuses everything he does with an attitude of joy, self-confidence and optimism. In fact, it is kind of infectious when you are around him.

Conclusion

So, I suggest these attitudinal offerings for your reading pleasure. If one or more particularly resonates with you, think about it, refine it as you see fit, and then consistently remind yourself to incorporate it into your conscious thinking when appropriate. I predict that, after a while, you will find your thinking becoming more closely aligned with those attitudes. No doubt, thereafter your behaviour will begin to modify and align as well. Gandhi was on to something.

Emily Morrow, BA (Hons), JD (Hons, Juris Doctor), was a lawyer and senior partner with a large firm in Vermont, where she built a premier trusts, estates and tax practice. Having lived and worked in Sydney and Vermont, Emily now resides in Auckland and provides tailored consulting services for lawyers, barristers, in-house counsel, law firms and barristers' chambers, focusing on non-technical skills that correlate with professional success; business development, communication, delegation, self presentation, leadership, team building/management and the like. She can be reached at www.emilymorrow.com. 

ROOFTOP TERRACE WINTER WARMER DEAL

The Rooftop Terrace at Chancery Chambers has stunning views of the Sky Tower and CBD and is the perfect venue for mid-winter parties, after work drinks, cocktail functions and winter weddings. The Winter Warmer Deal includes use of the outdoor patio heaters, blankets, outdoor furniture, security guard and cleaning.



ADLSI

Independent Voice of Law

The ADLSI Winter Warmer Deal offer is available from 16 June 2014 – 3 November 2014. Please enquire now for full details and pricing at venue@adls.org.nz or phone (09) 303 5270. Conditions apply.

SPCA[®]
AUCKLAND

For information about creating a legacy for the animals contact Bob Kerridge on 09 256 7306 or bob.kerridge@spca.org.nz



**Locum
Available**

All inquiries to djgateslocum@gmail.com or 0274760215

Etude Classique

Legal Gowns

We have been making fine gowns for legal and academic professionals in New Zealand for more than 15 years.

- Barrister's gowns
- QC gowns
- Bar jackets
- Made to measure
- A range of fabrics available

Contact Paul Fielder CEng FBS

(09) 522 5241

(021) 57 55 11

paul@etudeclassique.co.nz

**Chambers to rent in
Auckland CBD**
Durham Street Chambers
Level 4, 2 Durham St East

Chamber Room available to rent in Criminal Law Chambers. Chambers includes meeting room, kitchen, toilet and central waiting room.

For inquires please contact Louise Brown on 0272535732

NICHE



Senior Solicitor – Public Law

As the local authority for New Zealand's largest city, Auckland Council is passionate about shaping Auckland into the world's most liveable city.

This is a newly created role for a senior lawyer with broad public law experience to join their legal services group. As a member of a highly performing team, you will play a crucial role in the provision of high quality and technically robust legal advice to Auckland Council on a wide range of public law issues including governance, compliance and numerous legislative processes.

To succeed in this role you will possess:

- Minimum of 7 years relevant post admission experience including at least 4 years public and administrative law experience
- A passion for local government together with experience or understanding of working within a complex organisation
- A collaborative, pragmatic and relationship based work style
- Innovative thinking, a goal-driven approach and a cheerful "can-do" attitude

Interesting work, leadership opportunity and the chance to be actively involved in critical issues affecting Auckland - what are you waiting for?

Applications close: 5pm Wednesday 3 September

For more information contact Kathryn Cross or Ben Traynor at Niche Recruiting Specialists on 09 377 2248 or submit your CV and cover letter in strictest confidence to: ben.traynor@nicherecruitment.co.nz.

WILL INQUIRIES LAW NEWS

The no-hassle way to source missing wills for **\$80.50 (GST Included)**

Email to: reception@adls.org.nz

Post to: Auckland District Law Society Inc.,

PO Box 58, Shortland Street, DX CP24001, Auckland 1140

Fax to: 09 309 3726

For enquiries phone: 09 303 5270

+ Wills

Please refer to deeds clerk. Please check your records and advise ADLSI 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.

Susan Mary DUNLEAVY, late of 35 Onetangi Road, Onetangi, Waiheke Island (previously 48 Leamington Road, Westmere, Auckland), Aged 62 (Died 15'05'2014)

Jean MACGROUCUTT, late of Aranui Rest Home, 19 Woodward Road, Mt Albert, Auckland (previously 43 Edmonton Road, Onehunga, Auckland), Aged 83 (Died 16'08'2014)

Kiha Patricia MIKA, late of 3 Ambury Place, Mangere Bridge, Auckland, Pensioner, Aged 69 (Died 21'02'2014)

Faailoa NEE NEE aka Faailoa TIMU, late of 19 Alexander Street, Kingsland, Auckland, Manager, Aged 51 (Died 04'06'2014)

Akapusi PAONGO, late of 27 McCulloch Avenue, Mt Wellington, Auckland, Aged 58 (Died 05'08'2014)

Antony David VERCOE, late of 17 Reidy Place, Pukekohe, Serious Fraud Office Investigator, Aged 43 (Died 16'08'2014)

LAW

— postgraduate study —

INFORMATION EVENING

Tuesday 16 September 2014, 6pm

STAFF COMMON ROOM
LEVEL 4, 9 EDEN CRESCENT
AUCKLAND CITY

The University of Auckland offers a high calibre of teaching and research supervision experience.

In 2015 we are excited to welcome 13 renowned international experts to teach a range of courses for our postgraduate programmes.

Find out more by meeting members of the Faculty at our information evening on 16 September at the Auckland Law School.

*for more information
and to register visit:*

[www.law.auckland.ac.nz/
information-evening](http://www.law.auckland.ac.nz/information-evening)



 THE UNIVERSITY
OF AUCKLAND
FACULTY OF LAW

NICHE



Legal Counsel

Having operated in New Zealand since the 1960's, New Zealand Steel is the country's sole producer of flat rolled steel products for the building, construction, manufacturing and agricultural industries. Part of Bluescope Steel, NZ Steel enjoys all the associated benefits of being aligned with this global ASX listed company which has operations in seventeen countries worldwide. This is an exciting opportunity for an experienced commercial lawyer to move into a strategic in-house role and work for New Zealand's main steel producer.

This is a newly created role for a sole charge lawyer based in Glenbrook (45 minutes from Auckland CBD). Reporting into the Australian senior legal team, you will provide commercially focussed legal advice and services to New Zealand Steel. To be considered for the role you must be able to demonstrate the following:

- A minimum of five years' PQE
- Demonstrated ability to build strong internal relationships and engage commercially with business leaders
- Sound knowledge of and experience in applying relevant commercial laws including contract and competition law
- Ability to work autonomously and identify key issues and risks that require management or escalation
- Ability to influence others and clearly explain and advocate legal positions to non-lawyers
- Commercial, straightforward and non-legalistic approach and excellent interpersonal, communication and drafting skills

If you are looking for an exciting role within a highly reputable, opportunity filled organisation please apply now or contact Ben Traynor or Kathryn Cross on 09 375 0147 or at ben.traynor@nicherecruitment.co.nz for a confidential discussion.



General Counsel

- An ever changing, fast paced, fabulous work environment!
- An attractive remuneration package with generous benefits.
- A fantastic career move that will allow a balanced lifestyle!

Here is your opportunity to join one of the world's leading brands and one of New Zealand's largest Quick Service Restaurant providers. McDonald's is renowned for its high profile, its reputation as an employer of choice, and its strong involvement with Ronald McDonald House Charities and the community.

About the role:

A rare opportunity has arisen for a General Counsel to join. Reporting to the Corporate Vice President and General Counsel Asia Pacific Middle East and Africa, this role is Auckland based with a high degree of autonomy, and one direct report.

This is a generalist commercial in-house position, and due to the senior nature of the work, you will have a wide variety of responsibilities, including:

- Providing strategic and tactical direction, guidance and support on all legal matters to the Country Management Team and the NZ business in the areas of finance, development, human resources, marketing, communications, IT, operations, supply chain, franchising and workplace safety.
- Ensuring legal compliance and governance.
- Negotiating and drafting commercial contracts.
- Liaising with external counsel.
- Brand protection.

The person for the role:

You will be an experienced and professional in-house lawyer, who is commercially astute and pragmatic. You have at least 12 years' PQE and have broad corporate/commercial experience, gained both in-house and in private practice. A background working in the FMCG or QSR industries would be a definite advantage for the role, as would some commercial property experience.

You are a self-starter, who is proactive, positive, with a passion for law and business. You are a team player who has the ability to work independently, with strong initiative and problem solving skills. You have exceptional interpersonal and communication skills, the ability to build strong business relationships, and have the confidence to deal with people at all levels of the organisation, both internally and externally. You must be flexible and adaptable to a fast paced and changing environment and have solid technological skills with proficiency in Microsoft Word. Some international travel is involved.

In return, McDonald's offers an attractive package and balanced lifestyle where work/life balance is supported and encouraged.

Are you the one?

If you are interested in the role, then please contact Jackie Mulligan or Juanita Davis by emailing jackie.mulligan@mckenzieellis.co.nz or juanita.davis@mckenzieellis.co.nz and attach your CV in Word format. A full job description is available upon request.

