KnightColdicutt
BARRISTERS & SOLICITORS

SMALL PRINT

spring 2009

As you will see from the Knight Coldicutt clients and projects featured in this recession-busting issue of ***Small Print***, there is a great deal happening, particularly for business entrepreneurs who are capitalising on opportunities in the current economic downturn.

We hope you enjoy the articles but, before we launch into them, we are delighted to announce two key changes at Knight Coldicutt: John Heimsath has become a partner and Angela Hansen has been promoted to Senior Associate. We congratulate John and Angela, whose profiles can be read on page 8.

We would also like to bring our fixed fee arrangements to your attention. Although we have been quoting conveyancing and refinancing transactions on this basis for many years, we are now offering fixed fees on many other transactions. So if you are negotiating a lease, buying a commercial building or even trying to get rid of a tenant, we are happy to negotiate a fee for a specified scope of work and stand by it regardless of how much time the job takes (unless World War Something breaks out!). As with any commercial transaction, if the job changes we will discuss it with you in advance and renegotiate the fee. It's time for lawyers to shift the emphasis away from six-minute units (although our regulators still require us to record time), and give clients more certainty around costs. So ask for a fixed fee and we will do our best to oblige. ●

features

regulars

The truth about Orakei

Once upon a time – when times were good – Knight Coldicutt client Redwood Group purchased some neglected but beautifully positioned land in Orakei with a vision to turn it into a development fit for many up-and-coming yuppies. Story by Jacqueline Klisser.

Being a prudent and responsible developer, Redwood Group applied to the now-expanding Auckland City Council for consent to develop the old motel site. This was necessary as this scrappy piece of wasteland (until now) was also a headland between the suburbs of Remuera and Orakei. Of course many of the surrounding neighbours who did not own land on the water's edge or live in modern, well-constructed apartments and didn't want others to be able to either, were interested in the outcome of the consent process. An opposition group was born and, after 24 months of negotiations, a significantly compromised project was granted resource consent.

Meanwhile, during the fiasco (another word for the Resource Consent process), the market changed and selling expensive leasehold units on prime Auckland land had turned into an ugly frog. To break the spell of bad luck, Redwood Group decided to buy the adjoining land – Jacobsen's site. It was freehold and, although not integrated, both developments were designed to complement the other: one in a higher price bracket than the other.

Once again the local neighbourhood rallied, collected signatures and the second project ended up in the Environment Court (Redwood Group lost the first round). Although the land was more intensively

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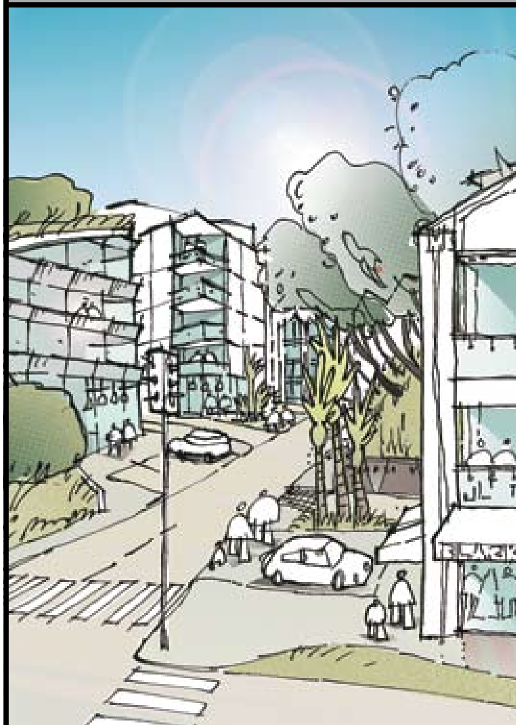

Auckland +64 9 309 2999
Wellington +64 4 801 8400
Email kc@kclaw.co.nz

>> THE TRUTH ABOUT ORAKEI CONTINUED

zoned than Redwood Group required and had been in a state of disrepair for years, the farcical Resource Management Act allowed objectors to use their democratic right of opposition to delay developers.

Luckily for Redwood Group (and for the purposes of providing a happy ending for my story), the Environment Court ruled sensibly. On that positive note, Redwood Group purchased yet another piece of land – Kings Plant Barn site.

But let's backtrack to the time prior to the Environment Court granting consent for the second development. The Council came along, had a look and introduced the concept of master planning, not only for the Redwood Group sites, but also for land owned by the Council.

Redwood Group's consultants rallied round and devised a plan to realign the road and develop the northern and southern sides of Orakei Road, allowing a small community to blossom. This newly created village would consist of commercial, retail and residential areas serviced by restaurants, cafés, entertainment facilities, car parks and a tree-lined main street.

Just imagine the surprise when the plan was presented. The objectors had smelled victory on both resource consent applications in which they had been able to persuade the developer to reduce the number of units. But the Council suggested an increase in the number of units and the amount of land to be developed. Once again, the neighbourhood voiced their opposition.

Mayor John Banks intervened, believing that a planned community must be better than a haphazard one. He supported the notion of the Council instigating changes to the District Plan to facilitate the development of a comprehensive master plan. The amendment to the District Plan provides that a developer who owns the site in future must develop it in a cohesive and comprehensive way that satisfies the neighbourhood's objectives.

The Mayor set up a working party with various members of the community, objectors, architects and town planners. They met regularly and debated the issues, some of which could not be resolved.

Enter a handsome prince in the guise of Andrew Patterson, an esteemed architect of international standing who, together with the developer, developed a new idea in four days and magically united the working party, Mayor, neighbourhood opposition group, Council officials and the developer. The concept (a relatively complicated one) was explained and endorsed at a public meeting, subject to some reservations regarding traffic. The Council resolved to implement a plan change around the Patterson concept.

That is the five-year story of Orakei that has, to date, involved some $2.5 million of consulting fees and accrued some $18 million in interest. By the time development commences, three economic cycles will have been traversed – boom, bust and boom – and countless millions of dollars spent barking up the wrong trees! But the result is win-win-win. The neighbourhood wins because the effects of the changes have been neutralised as far as is possible and a really exciting concept has evolved. The Council wins because it will be able to increase living intensity in an area that is one train stop from downtown Auckland. Orakei is set to showcase a highly desirable and comprehensive new concept in master planning involving an incredibly important seven-hectare headland very close to the city centre. And then there's the patient, persistent developer who will eventually win as the land will be rezoned for this futuristic housing project.

This is the current story of Orakei Point, an ambitious new housing project undertaken by Redwood Group and Equinox Group in a joint venture. The scheme involves some 600 apartments, offices, retail shops and car parking, with over 40% of the site vested in the Council for parkland. The most magical feature has to be the recreated volcanic cone shielding the development from the busy Orakei Road and prevailing southerly winds. The development includes waterfront plazas and piazzas, beach and cliff-front apartments, an enclosed train station, a mini-supermarket, cafés and restaurants – a mini Viaduct in Remuera.

With the removal of the sewer pipe, it is envisaged that day trippers will be able to visit in small craft at high tide. In an attempt to resolve traffic and parking congestion, residents will have the ability to rent Smart Cars or battery cars, which will hopefully attract one-car families and couples who work adjacent to Auckland's rail network. ●

Contact Kerry Knight if you would like more information.
P 09 306 1100 E kerry@kclaw.co.nz

Market options – Victoria Park Market

David Henderson of Kitchener Group can be described as the least vanilla of Knight Coldicutt's clients. In fact, he is Valrhona chocolate with a hint of chilli and overtones of something decidedly outrageous and unexpected. One can never quite pinpoint who David is. When you think you've got it, he'll prove you wrong but in the best sort of way. That's what makes him so very interesting. That's also why interviewing him for *Small Print* took two dinners and several coffees and I am still not entirely convinced that I have the appropriate information for this article. I do, however, have some good ideas for a book about one of Auckland's most colourful characters. That might have to wait.

What I do understand is that David is the very man that we, as Aucklanders, want to have in charge of giving the 'old madam', Victoria Park Market, a facelift. David has a passion for history * (as anyone who has ever had the pleasure of his company will know) hence his empathy for this iconic piece of Category 1 protected real estate which belongs to Kitchener Group.

David explains that the past success of Victoria Park Market (as a market that is) rested on the fact that there was little or no competing place for weekend shopping when it was resurrected in the 1980s. But retail trading has changed and Victoria Park Market needs to find another way to define itself as a destination.

Before the recession, David's vision was to turn the market into a high street shopping precinct of sorts with exclusive apartments on the eastern end and a large underground car park. But now, taking a more conservative approach, the market will be refurbished in two stages. The success of the first stage will dictate when the second stage will come to fruition.

The success of the Nike store (to which my bank statements reflect I have very generously contributed), restaurants like La Zeppa, Rikka and boutique shops along Drake street indicate that the area is ripe for more sophisticated retail experiences and exciting restaurants, bars and cafés of a similar calibre. Six to eight restaurants and bars are planned for this area so you and I can alternate from dining at the Viaduct to 'Dining on Drake'.

In October 2009, Stage One will commence at the western end of the market (for those without GPS that's the end closest to the motorway). Two new buildings, planned for completion around April 2010, will accommodate existing and new tenants. Other buildings will be refurbished at this time. The historic old chimney requires strengthening and a facelift. Kitchener Group is working closely with Auckland City Council and the Historic Places Trust to ensure that the refurbishment is empathetic.

Before the completion of Stage One, we can expect to see a 'produce market' on the ground floor of the existing car park; this is not surprising as another of David's passions is fine food and, like any connoisseur, he understands that it begins with fine produce. David thinks nothing of throwing a dinner party for two dozen people, sourcing the best produce from small suppliers around town and cooking everything himself. Should you go to his place for dinner, don't forget to admire the flower arrangements. Chances are he selected and arranged the flowers himself (I told you he was a dark horse!).

Stage Two of the Victoria Park Market refurbishment will be on the 'runway' which is the big concrete slab in the centre of the market. There will be three levels of service providers such as doctors, beauticians and hairdressers. Restaurants will be located on the top level.

The success of this will be a team effort, David says. In particular, he acknowledges the contribution of Knight Coldicutt, architects Paul Brown from Clark Brown, Stuart George from Buller George, Martin Green of Green Group, Dave Pierson who is the Heritage Architect, Auckland City Council, Westpac, Ron Macrae of Construct Management and, of course, all the Kitchener Group staff. For more information, especially if you want to lease a shop, go to www.kitchenergroup.co.nz or call Sarah Prenter on 021 950 639.

By Jacqueline Klisser

* Sadly David's passion for history is not selective. He tells me that Victoria Park Market was originally a waste depot and incinerator complex. Completed around the end of World War 1, it accommodated the fallout of the 1919 influenza epidemic as a makeshift crematorium. The incinerator and 38-metre chimney, once known as 'the Destructor', burnt all the rubbish from the greater Auckland area before shipping it to Rangitoto. The stables actually housed the horses that pulled the city's rubbish carts…. More information than we need on one of our favourite destinations!

Phone home! The Digital Island story

The success of Digital Island was born from its ability to simplify what the rest of the telecommunications industry insists on presenting in a complicated and confusing way – it's almost as though they're scared to let us understand how it all works.


L–R BLAIR STEWART, STU COWDELL, GLEN LARSEN

But not Digital Island. Transparency is key. From their products to their prices, they make it easy for their customers. Have a look at the customer references on www.digitalisland.co.nz. By the way, I found only three acronyms amongst their website material, all of which were clearly explained!

Digital Island was founded in 2004 by its three directors, Blair Stewart, Glen Larsen and Stuart (Stu) Cowdell, to provide telecommunications services and advice to small and medium-sized businesses in New Zealand. Proudly 100% Kiwi owned and operated, Digital Island is obviously going places fast. Blair, Glen and Stu seized the opportunity to make significant improvements to a telecommunications industry they felt had limited competition, poor service and over-inflated prices. The recognition they have already received is impressive – Deloitte Fast 50 Award for New Zealand's Fastest-Growing Telco & ISP in 2007, New Zealand's Fastest-Growing Technology Business award in 2008, and 6th overall Technology Business award in 2007 and 2008.

Digital Island had more cause to celebrate in March 2009 when it struck a deal with Telecom Wholesale to add mobile phone services to its existing voice and data products as a Mobile Virtual Network Operator (MVNO). Knight Coldicutt was delighted to assist Digital Island with the legal work.

MVNO is a European and American concept that is new to the New Zealand market and Digital Island is leading the way. The reseller agreement allows Digital Island to onsell mobile products and services under its own branding without having to build a physical network at a cost of hundreds of millions of dollars. While the arrangement won't initially include Telecom's newly launched 3G mobile network (W-CDMA) – Telecom is withholding competitive access to it until 2011, Digital Island recognises the benefits of using the quality, wide-coverage, existing voice and data CDMA network to improve competition by reducing costs to phone users. They anticipate cutting mobile costs by about 20%. Meanwhile, the plan is to migrate Digital Island customers to the new W-CDMA network within the next 18 months.

Digital Island uses its own number range but with number portability can simply and easily accommodate customers bringing Telecom or Vodafone numbers across to the new service. Digital Island sells a range of handsets from Blackberry, Samsung, Sanyo and Nokia. The new mobile services are sold, serviced and billed directly by Digital Island so there is no downside to customers. Digital Island is a full suite provider which offers outstanding levels of service, simple pricing, simple reporting, dedicated local support and they "can normally lower a customer's bill by at least 25%". Sourcing their services from the largest service providers means that customers receive the best products for less. If that sounds too good to be true, you need to give them a go.

Take a look at the profiles of Blair, Glen and Stu at www.digitalisland.co.nz and it all makes sense – a colossal amount of experience in New Zealand and in European operations during OEs that ought to be published. That they founded Digital Island only five years ago and have taken it to impressive heights in such a short space of time is not in the least surprising. ●

They anticipate cutting mobile costs by about 20%

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Hell comes home to founders

The founders of Hell Pizza chain are back where they belong. Former owners of the New Zealand franchise bought it back from Tasman Pacific Food Group (TPF) – New Zealand Burger King franchise holder – after selling it to them less than three years ago.

HELL

Stu McMullin, Callum Davies and Warren Powell (Otis) took the helm of Hell again in May 2009 to shift the brand back to its quirky roots after what can only be described as an unwelcome move towards a run-of-the mill product with a dwindling ability to differentiate itself in the eyes of increasingly disgruntled franchisees and customers.

McMullin, Davies and Powell sold the New Zealand business, which they founded in 1996, to TPF in December 2006. But they retained the international rights and diverted their energy (of which there is a great deal) into building the brand overseas. Since then they have opened six stores in Brisbane with nine more to follow, two in London and one in Dublin. Another is due to be opened in Vancouver this year.

Says the trio, the time was right for a buyback of the New Zealand franchise and the success of the overseas expansion freed up capital for this to happen. Hell has a network of 61 stores around New Zealand and McMullin, Davies and Powell are excited about heading the business back towards the fun and personalised original image of the brand. While they expect some consolidation, their focus will be on brand consistency rather than on the number of outlets. What they had in New Zealand prior to the sale and injected into new stores overseas is bound to resurface here.

Despite the recession, they are confident that customers are willing to pay more for pizza as long as the product and brand experience stack up. Their priority is to ensure that customers have their needs met at store level and then they plan to introduce new items including a 'super gourmet' pizza range selling for around $20. It was never the intention to limit the menu to pizzas so other products such as mussels and lamb shanks will be introduced.

The first Hell pizza outlet opened in Kelburn in Wellington in 1996. With a menu and branding themed on the seven deadly sins, a penchant for provocative marketing campaigns and a large measure of fun, they grew to 66 stores nationwide within ten years. And who could forget the distribution of condoms as part of the 'lust' pizza promotion: controversial yet very successful. Many of the franchisees are happy to see the trio back in Hell. We suggest you find your nearest branch quickly and watch the progress unfold. ●

L–R STU MCMULLIN, CALLUM DAVIES, WARREN POWELL

The time was right for a buyback of the New Zealand franchise

Estate planning – why bother?

You don't have to be Bernard Madoff to be reminded to check your trust structures these days. Trusts won't protect Bernard's assets given his appalling criminal conduct, but all over New Zealand (and the world) trusts are coming into their own protecting trust assets from being claimed by judgment creditors in more customary commercial failures. Assets held in trusts are protected for the benefit of future generations of affected families. A carefully thought out estate plan is crucial insurance against circumstances like those being faced by thousands of people knocked over by the credit crisis and the recession.

So what is a trust and why is it effective to ring-fence assets from unintended liabilities?

The concept of a trust dates back to the Middle Ages. A Knight wanting to look after his assets while at war would transfer the legal ownership of his estate to a friend on the basis that it would be transferred back to him upon his return. This empowered the transferee to manage the estate effectively and to enforce the rights of the estate against all parties.

The law of trusts has accordingly been developing for hundreds of years. Created, used and administered properly, a modern discretionary trust will withstand attack from claimants against the property of the settlor or beneficiaries of the trust. However, careful planning is required to make sure that the trust can stand up to scrutiny. The transfer of assets to the trust needs to be structured to minimise the time it takes to transfer value to the trust without falling foul of tax laws and laws designed to protect against unlawful schemes to avoid creditors.

If you are in business on your own account, a director of a company or otherwise exposed to possible personal liability through guarantees or other commitments, we suggest you think about establishing an estate plan to protect your assets for the benefit of you and your family for years to come. Just like insurance, you can't buy the cover after the damage is done. ●

John Heimsath, Partner
P 09 306 1102 **E** john@kclaw.co.nz

Venture capital – still there for the well prepared

There's little doubt that the economic downturn has resulted in a general slowdown in the New Zealand venture capital market with traditional venture capital investors, particularly private individuals who may have invested across a range of investment products, preferring cash and fixed-interest investments while they wait and see where the economic crisis is heading.

However, in the local market, while the investors might not be there for more marginal or unproven investments, we are still seeing good deals being done and an appetite for new business opportunities which provide a realistic growth opportunity for existing businesses and/or investors.

In terms of business or ideas with a global scope, the reality has always been that the New Zealand venture capital market, and amounts available to be invested by way of venture capital, are small compared to what is able to be sourced internationally. For a small country such as New Zealand, which is a long way from the major international markets, the solution (and particularly so in the current environment) will often be a combination of local investors and international related industry players to work together to get a new idea or business to market through provision of a mix of cash and services.

Three examples of such arrangements from our stable of clients are:

- We are working with a client who has a product with potential mass appeal in the global building market. The client has limited working capital available through friendly local investors and New Zealand Government support but did not have the capital necessary to build prototypes and to complete market validation. However, they have been introduced to, and are now working with, an international manufacturing company which is providing and funding prototype manufacture and market testing on the basis that they consider the product is likely to be successful and require mass production; the company wants to have the first rights to manufacture and distribute the product if and when it comes to market.
- We have a client with a new product which has significant potential in the retail world and, in particular, with respect to the way in which retailers and customers interact. Local venture capital is funding the prototypes and initial market validation work. Capital to fund production and product to market will be provided through partnerships with large retail businesses in each market with the international investor's interest in the product and associated revenues being limited to that particular market.
- On the other side of the venture capital transaction, we have acted for a US sales and marketing software company which has been distributing a New Zealand software product. The US company has taken a convertible note in the New Zealand company to provide venture capital to its proven supplier and as a precursor to an equity position. This type of convertible loan structure has been common to a number of recent transactions.

New Zealand businesses and their leaders are acknowledged globally for their resourcefulness, innovation and adaptability. While raising venture capital in the current market is undoubtedly difficult, with a good product or business, clear thinking and a good team, the chances of raising the funding necessary to get to market are much enhanced. Speak to our Commercial team if you need assistance raising venture capital. ●

Michael Alexander, Partner
P 09 306 1893 **E** michael@kclaw.co.nz

John Heimsath, Partner
P 09 306 1102 **E** john@kclaw.co.nz

Sports clubs as charities

Is your sports club registered as a charity? Be it a football, basketball, rugby, swimming or golf club, or any non-profit organisation, there are advantages to being registered as a charity.

The Charities Act 2005 permits non-profit organisations incorporated under the Incorporated Societies Act 1908 to register as charities and benefit from the following:

- Exemption from income tax and gift duty on gifts. If the charity holds a resident withholding tax certificate of exemption, the exemption will continue to apply.
- Detailed information listed on the Charities Register. Potential donors, supporters and funders can look at the Register before making decisions about offering support.
- Displaying the charity's registration number on promotional and identification material as proof of registered charitable status.
- Improved public confidence in the organisation due to its registration as a charity.

How to register as a charity

The registration process involves ensuring that the objectives of the club embodied in its constitution meet the requirements for a charity. This may involve working with the Charities Commission on the form of the constitution. Once registered as a charity, the organisation is required to submit annual returns to the Charities Commission, including financial statements. It will not be required to register financial statements with the Registrar of Incorporated Societies.

Review your leases

As part of the preparation of an application to become a charity, it is prudent to review the lease of premises which, in most cases, is held from the local City Council. Many organisations overlook lease renewals and updates should changes be made to the building they occupy. With the impending amalgamation of City Councils in Auckland and the possibility that records may be lost during that process, we encourage organisations to review their leases. Some City Councils in Auckland are requesting updates on their charitable status as they consider that the provision of rent-free premises may constitute a taxable gift if the organisations are not registered charities.

Other things to look out for

- Sporting organisations, in particular, should be aware that it is possible for individual teams within the club to have their names protected by trademark.
- It would be worthwhile to review all contracts with third parties e.g. sporting clubs who make payments to players.
- Liquor licences should also be reviewed to ensure compliance.

We are keen to assist non-profit organisations and sports clubs to gain the benefits of being registered as charitable entities. Tony Gore (soccer enthusiast, former player, coach and administrator) has registered several sports clubs as charities so is very familiar with the requirements. Contact Tony for a free, no-obligation discussion. ●

Tony Gore, Partner
P 09 306 1130 E tony@kclaw.co.nz

There are advantages to being registered as a charity

Knightwatch

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SPRING 2009 CHANGES

Our congratulations to John Heimsath who, although not new to the firm, joined the partnership on 1 September 2009. We also congratulate Angela Hansen on her promotion to Senior Associate and head of the litigation team.

If you have not had the pleasure of working with John and Angela over the past year, we look forward to introducing you to them.

Angela Hansen BA LLB

Senior Associate, Litigation / Dispute Resolution
P 09 306 1115 **E** angela@kclaw.co.nz

Angela was admitted to the bar in 2002. She joined Knight Coldicutt in 2008 and enjoys working in all areas of civil and commercial litigation. She has also developed a considerable employment law practice advising many of the firm's corporate clients on frequent changes in employment law in recent times, as well as restructuring, redundancy and personal grievance issues. She thrives on the challenge of identifying and presenting practical, effective solutions. Angela is of Ngapuhi descent.

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John Heimsath LLB (Hons)

Partner, Commercial
P 09 306 1102 **M** 021 707 734 **E** john@kclaw.co.nz

John launched his career in a large Auckland law firm, after which he lived in London for four years doing principally commercial legal work. This ranged from working for a boutique firm off Fleet Street to working in the oil and gas industry on projects throughout Europe, the Middle East and North Africa.

John returned to New Zealand in 1992 to take up a position as commercial partner of an Auckland firm until 2002. Since then, he has had his own practice and been a director of an international property development business working on projects in New Zealand, USA and Europe. John's experience is broad ranging. He has undertaken commercial transactions ranging from tens of thousands through to hundreds of millions of dollars. He is a problem-solver and a lateral thinker with a wealth of experience to draw on from over 20 years in practice.

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