MEDIA RELEASE FROM THE REGISTRAR OF COMPANIES
26 APRIL 2006
FOR IMMEDIATE RELEASE

RESULT OF INVESTIGATION INTO MATTERS CONCERNING QUEENS PARK MEWS LIMITED AND DAVID PARKER MP

The Registrar of Companies has announced today that he has accepted the advice of the Auckland Office of the Crown Solicitor, Meredith Connell, that no prosecution action be taken against Mr David Parker MP, or any other director associated with Queens Park Mews Limited.

The decision follows an investigation by the Companies Office arising from allegations of false or misleading documents having been filed with the Companies Office.

The investigation focused on the actions of all directors associated with Queens Park Mews Limited, and was subsequently extended to two related companies – St James Limited and Empire Delux Limited.

The investigation process included examination of various documents, including company annual returns filed with the Companies Office, and included interviewing persons associated with the companies at the relevant time.

At the conclusion of the investigation, the factual findings were referred to the Crown Solicitor for legal advice.

On the question of whether false statements had been made to the Companies Office, the Crown Solicitor has concluded:

> *"there is no basis whatsoever for a prosecution of Mr David Parker for an offence or offences under section 377(1) of the Companies Act of making or authorising the making of a statement in an annual return that is false or misleading knowing it to be false or misleading."*

The Crown Solicitor has also noted in relation to the more minor matters of the maintenance of company records and the late filing of annual returns that the non-compliance identified did not warrant the intervention of the criminal law.

The Registrar has considered and accepted the advice from the Crown Solicitor.

A copy of the opinion of the Crown Solicitor is attached. It is not common practice to provide copies of legally privileged communications. In this case, however, the Registrar is releasing the opinion in light of the complexity of the issues and the public interest considerations.

For further information:
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26 April 2006

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Attention: Shane Keohane

RE: QUEENS PARK MEWS LIMITED, EMPIRE DELUX LIMITED, ST JAMES LIMITED - DAVID WILLIAM PARKER

Thank you for your instructions of 20 April 2006. You have sought my advice as to whether an offence has been committed under the Companies Act 1993 in relation to Queens Park Mews Limited, Empire Delux Limited or St James Limited. You have also sought particular comment on:

- The legal ownership of the 50 shares owned by Mr Russell Ernest Hyslop upon, firstly, the bankruptcy of Mr Hyslop and, secondly, upon the discharge of that bankruptcy, particularly in relation to Queens Park Mews Limited;
- Whether an offence has been committed under the Companies Act 1993, with particular reference to ss189(5), 214(10) and 377(1) of the Act in relation to one or any of the three companies;
- Whether, in the event that an offence may have been committed, any further action should be taken by the Registrar.

Queens Park Mews Limited

Queens Park Mews Limited (QPML) was incorporated under the Companies Act 1955 on 17 March 1994 and was re-registered to become a company under the Companies Act 1993 on 1 July 1997. The month allocated to QPML by the Registrar of Companies as the month during which QPML's annual return must be filed was July. (s214(4) Companies Act 1993)

Upon incorporation there were three shareholders in QPML each holding 50 shares with the total number of shares being 150. The three shareholders were:

- Russell Ernest Hyslop
- David William Parker
- Francis David Parker

The three shareholders were each appointed directors upon incorporation. Mr Hyslop was adjudicated bankrupt on 30 July 1997 in the High Court at Dunedin on a creditor's petition. Mr Hyslop therefore ceased to be a director of QPML on that date by the operation of s151(2)(b) and s157(1)(c) of the Companies Act 1993. Mr David Parker resigned as a director of QPML on 10 October 2005.

The bankruptcy of Mr Hyslop also affected the status of the 50 shares previously owned by him. By the operation of s42(1) of the Insolvency Act 1967 those shares vested in the Official Assignee for the benefit of his creditors. Mr Hyslop was automatically discharged from bankruptcy three years later on 30 July 2000. The shares did not, however, re-vest in Mr Hyslop upon his discharge or at any later stage.

In *Robert Jones Investments Limited v Graeme John Soljan* (unreported, High Court, Wellington Registry, CP 472/88, 9 August 1993) Master JCA Thomson stated at pages 6-7:

> In my view, the fact that a bankrupt is automatically discharged or obtains a Court order of discharge (and whether before or subsequent to the Official Assignee having applied to the Court and obtained a release) does not alter the situation as to his property. Once vested in the Official Assignee under s42, in my view, it remains with him.

Similarly, in *Boardman v Boardman* (unreported, High Court, Auckland Registry, CIV-2003-404-6477, 20 February 2004) Master G Lang stated at paragraph [35]:

> Property vested in the Official Assignee by virtue of s42 does not simply re-vest in the bankrupt upon discharge. It remains vested permanently in the Official Assignee and he alone has the ability to enforce any rights which run with the interest.

During the course of the administration of Mr Hyslop's estate, the Official Assignee gave consideration to disposal of the shares. The Official Assignee wrote to Mr David Parker by letter dated 10 August 1999 stating:

> I reiterate my offer to sell Mr Hyslop's shares to the other shareholders. If I am unable to sell the shares I will formally disclaim them.

This is a reference to a procedure under s78 of the Insolvency Act 1967 which enables the Official Assignee to disclaim liability under any shares owned by a bankrupt by serving notice of disclaimer on the company and filing a copy thereof in the court.

Mr Parker wrote to the Official Assignee by letter dated 27 March 2000 stating:

> Assuming that the Official Assignee is wishing to dispose of the shares, I enclose a share transfer. Please let me know if you require any further information.

It appears however that the share transfer was not signed by the Official Assignee and returned to Mr Parker. There is no record on the Official Assignee's file of its signature and return. The Official Assignee recalls discussing the sale of the shares with Mr Parker and agreeing to consideration of the nominal sum of $1.00 because after conducting the necessary enquiries, he was of the opinion that they held no significant value. The Official Assignee recalls seeing the share transfer form but cannot recall signing it and sending it back to Mr Parker.

Mr Parker also has no recollection of its signature and return. He is of the opinion that the share transfer was not signed and returned to him, otherwise he would have updated the share register and changed the details on QPML's annual return. Nor does it appear that the Official Assignee disclaimed liability for the shares under s78 of the Insolvency Act 1967. It is therefore my view that the 50 shares in QPML originally owned by Mr Hyslop remain vested in the Official Assignee and that Mr Hyslop has had no rights in relation to the shares since he was adjudicated bankrupt on 30 July 1997 even though the annual returns continued to list him as the holder of 50 shares in QPML.

At the date of the Companies Office investigation, the sole remaining director of QPML was Mr Francis Parker. The three listed shareholders were Mr David Parker, Mr Francis Parker and Mr Hyslop, whose shares had, however, been vested by operation of law in the Official Assignee.

Empire Delux Limited

Empire Delux Limited (EDL) was incorporated under the Companies Act 1993 on 20 December 1995. The month allocated to EDL by the Registrar of Companies as the month during which EDL's annual return must be filed was October. (s214(4) Companies Act 1993)

Upon incorporation there were five shareholders in EDL each holding 200 shares with the total number of shares being 1,000. The five shareholders were:

- G.R.S. Developments Limited
- Russell Ernest Hyslop
- David William Parker
- Judith Barbara Wootton
- Susan Ray Wootton

The above four individuals together with Mr Rex Simpson, the majority shareholder in G.R.S. Developments Limited were each appointed directors upon incorporation. Mr Simpson resigned as a director of EDL on 16 October 1996. Mr Hyslop resigned as a director of EDL on 20 January 1997.

As noted above, Mr Hyslop was adjudicated bankrupt on 30 July 1997. His bankruptcy affected the status of the 200 shares previously owned by him. By operation of s42(1) of the Insolvency Act 1967 those shares vested in the Official Assignee for the benefit of his creditors.

My Hyslop was still a bankrupt when EDL went into liquidation on 4 March 1998. As the administrator of Mr Hyslop's estate, the Official Assignee completed a proof of debt in the liquidation of EDL.

At the date of liquidation, Mr David Parker, Ms Judith Wootton and Ms Susan Wootton were listed as directors of EDL and all three were listed as shareholders along with G.R.S. Developments Limited and Mr Russell Hyslop, whose shares had, however, been vested by operation of law in the Official Assignee.

St James Limited

St James Limited (SJL) was incorporated under the Companies Act 1993 on 19 December 1995. The month allocated to SJL by the Registrar of Companies as the month during which SJL's annual return must be filed was September. (s214(4) Companies Act 1993).

Upon incorporation, the sole shareholder holding all 1000 shares in SJL, was Mr David Parker. He was also the sole director. It was Mr Parker's intention that there would be five equal shareholders including Mr Hyslop and all would be directors. However, the business did not succeed as he had hoped and Mr Parker did not complete the transfer of the shares or attend to their appointment as directors, he says to avoid embarrassment to them. Mr Parker believed that he held 80% of the shares in trust for the other intended shareholders and the statutory obligations regarding completing shareholder resolutions and the filing of annual returns were his to discharge.

SJL went into liquidation on 7 May 1997. At the date of liquidation, Mr David Parker was still listed as the sole director and shareholder.

Shareholder resolutions that no auditor be appointed

There is a general requirement in the Companies Act 1993 for companies to appoint an auditor on an annual basis. However a company is, with some exceptions, able to dispense with the requirement to appoint an auditor if there is a unanimous resolution of the shareholders.

Section 196 of the Companies Act 1993 provides in part:

> **196. Appointment of auditors—**
>
> (1) Subject to this section, a company must, at each annual meeting, appoint an auditor to—
>
> (a) Hold office from the conclusion of the meeting until the conclusion of the next annual meeting; and
>
> (b) Audit the financial statements of the company and, if the company is required to complete group financial statements, those group financial statements, for the accounting period next after the meeting.
>
> [(1A) If a company is a public entity as defined in section 4 of the Public Audit Act 2001, the Auditor-General is its auditor in accordance with that Act; and subsection (2) does not apply in respect of that company.]
>
> [(2) A company need not appoint an auditor in accordance with subsection (1) if, at or before the meeting, a unanimous resolution is passed by all the shareholders who would be entitled to vote on that resolution at a meeting of shareholders. Such a resolution ceases to have effect at the commencement of the next annual meeting.]
>
> (3) Nothing in subsection (2) of this section applies to a company—
>
> (a) That is a subsidiary of a company or body corporate incorporated outside New Zealand; or
>
> (b) In which shares that in aggregate carry the right to exercise or control the exercise of 25 percent or more of the voting power at a meeting of the company are held by—
>
> (i) A subsidiary of a company or body corporate incorporated outside New Zealand . . .:
>
> (ii) A company or body corporate incorporated outside New Zealand:
>
> (iii) A person not ordinarily resident in New Zealand; or
>
> (c) That is an issuer within the meaning of section 4 of the Financial Reporting Act 1993.

(i) Queens Park Mews Limited

Eleven annual returns for QPML have been filed with the Companies Office since QPML's incorporation in 1994. In each of them, Mr David Parker has certified or stated (in the case of the annual returns filed electronically since 2001) that a unanimous resolution of the shareholders had been passed that no auditor would be appointed for the ensuing year.

The Companies Office investigation has unearthed an undated resolution that no auditor be appointed for the ensuing year which appears to have been prepared at the time of the incorporation of QPML in 1994. It was signed by all three shareholders, Mr Hyslop, Mr David Parker and Mr Francis Parker.

Neither the original nor a copy of a shareholder resolution that no auditor be appointed for the ensuing year has however been able to be located for either 1995 or 1996. Both Mr David Parker and Mr Francis Parker believe that a shareholder resolution was prepared and signed by all shareholders in respect of both 1995 and 1996. Mr Hyslop does not recall signing any such resolution but accepts that he may well have done so if it had been put in front of him.

Mr Hyslop says that, in December 1996 (after the filing of the 1996 annual return in which Mr Parker certified that the shareholders of QPML has passed a unanimous resolution that no auditor be appointed for the ensuing year) he did make a request of Mr David Parker that all three companies be audited. He says that he made this request in writing for two of the companies but has been unable to produce the original or a copy of it. Whatever Mr Hyslop thought he may have requested in December 1996, his bankruptcy in July 1997 took away his rights as a shareholder of QPML and EDL. If such a request was in fact made, it would not have affected the validity of the unanimous resolution of the shareholders passed on 3 June 1996 not to appoint an auditor for the ensuing year. The next unanimous resolution of the shareholders not to appoint an auditor for the ensuing year was passed on 17 October 1997 with the Official Assignee signing as the owner of the shares previously owned by Mr Hyslop. If Mr Hyslop had not been bankrupt at that time, he could then have refused to sign such a resolution in which case the financial statements of QPML would then have had to have been audited.

Mr Hyslop was adjudicated bankrupt on 30 July 1997. His shares accordingly vested in the Official Assignee pursuant to s42 of the Insolvency Act 1967. In 1997, subsequent to Mr Hyslop's bankruptcy, and in 1998 and 1999, the Official Assignee signed a shareholder resolution that no auditor be appointed for the ensuing year. The resolutions were also signed by the two other shareholders, Mr David Parker and Mr Francis Parker.

Following the return of the resolution signed by the Official Assignee on 29 July 1999, the Official Assignee wrote to Mr Parker on 10 August 1999 stating:

> Please note that the Official Assignee waives the requirement to seek confirmation on a yearly basis that a unanimous resolution was achieved in respect of no Auditor being required for the above company.

The wording of the letter is a little inapt but its intention is tolerably clear. In essence, the Official Assignee advised Mr Parker that he waived the requirement for his approval of future shareholder resolutions that no auditor be appointed. It appears that Mr David Parker had no recollection of this letter when initially questioned by the media following the *Investigate* article. Now that a copy has been shown to Mr Parker he does recall it as it is consistent with his subsequent actions in not seeking the Official Assignee's consent on an annual basis to shareholder resolutions that no auditor be appointed for the ensuing year.

In 2000 and 2001 the task of preparing a shareholder resolution that no auditor be appointed for the ensuing year was delegated by QPML to an accountant Mr Tony Eyre. Mr Eyre recalls preparing a shareholder resolution in 2000 and submitting it to Mr David Parker but neither the original nor a copy of it can be located. The resolution was not forwarded to the Official Assignee for his signature following the Official Assignee's advice of 10 August 1999. In 2001 Mr Eyre again prepared the shareholder resolution and gave it to Mr David Parker to sign and to obtain the signature of the other shareholder, Mr Francis Parker. In preparing the resolution Mr Eyre dated it 12 April 2001 even though it would not have been signed on that date. The shareholder resolution

was signed by Mr David Parker. Mr Francis Parker believes he signed it as does Mr David Parker but only Mr David Parker's signature appears on the copy of the resolution that was located.

In 2002-2005 Mr David Parker prepared the shareholder resolutions that no auditor be appointed for the ensuing year and submitted them to Mr Francis Parker for his signature. In each of the four years 2002, 2003, 2004 and 2005, both Mr David Parker and Mr Francis Parker signed the resolution.

(ii) Empire Delux Limited

Mr David Parker is adamant that at the time of incorporation of EDL he obtained the agreement of all the shareholders not to appoint an auditor for the ensuing year. This is confirmed by another director, Mr Simpson. Mr Hyslop also says "there probably would have been no discontent with that". This is also consistent with the approach taken on the incorporation of QPML in 1994. No copy of the resolution is available but it should be noted that all EDL's records were destroyed by the Official Assignee following EDL's liquidation.

The first annual return for EDL was filed on 29 October 1996 in which Mr David Parker certified that a unanimous resolution of the shareholders had been passed at the time of EDL's incorporation that no auditor be appointed for the ensuing year.

The second (and final) annual return due to be filed in October 1997 was not filed until 12 February 1998. Mr David Parker has again certified that a unanimous resolution of the shareholders had been passed on 10 February 1998 that no auditor be appointed for the ensuing year. At the time, Mr Hyslop was bankrupt and his shares had vested in the Official Assignee. The Official Assignee would have had to sign the shareholder's resolution along with the other four shareholders. The Official Assignee cannot recall signing such a resolution and there is no record of it on Mr Hyslop's bankruptcy file.

Mr David Parker cannot recall the precise circumstances in which the shareholder resolution was signed and cannot refresh his memory as all EDL's records were destroyed by the Official Assignee. He is however adamant that the correct procedure would have been followed. Mr Parker's account is confirmed by the law firm Anderson Lloyd who retained on their computer system a draft copy of a shareholder resolution of EDL containing provision for the signature of the Official Assignee and the other four shareholders. Anderson Lloyd say that his document was "last modified" (most likely produced) on 21 January 1998, approximately three weeks before it is said to have been signed on 10 February 1998.

(iii) St James Limited

As noted above, the sole shareholder in SJL was Mr David Parker although he believed that he held 80% of the shares in trust for the other intended shareholders. The first (and only) annual return for SJL was filed on 5 December 1996, in which Mr David Parker certified that a unanimous resolution of the shareholders had been passed on 14 June 1996 that no auditor be appointed for the ensuing year. Mr David Parker cannot recall whether the shareholders resolution was in writing but believes he would have followed his usual practice which would have meant that the resolution was in writing. He did not seek the agreement of the other four persons for whom he held the shares in trust as he believed that the statutory obligations regarding completing shareholder resolutions and the filing of annual returns were his to discharge. No copy of the resolution is available but again it should be noted that all SJL's records were destroyed by the Official Assignee following SJL's liquidation.

Company Records

The Companies Act 1993, in general, requires company records to be kept at the registered office of QPML. Included among the documents required to be kept are minutes of all meetings and resolutions of shareholders within the last seven years.

S189(1) of the Companies Act 1993 provides:

> **189. Company records—**
>
> (1) Subject to subsection (3) of this section and to section 88 and section 195 of this Act, a company must keep the following documents at its registered office:
>
> (a) The constitution of the company:
>
> (b) Minutes of all meetings and resolutions of shareholders within the last [7] years:
>
> (c) An interests register:
>
> (d) Minutes of all meetings and resolutions of directors and directors' committees within the last [7] years:
>
> (e) Certificates given by directors under this Act within the last [7] years:
>
> (f) The full names and addresses of the current directors:
>
> (g) Copies of all written communications to all shareholders or all holders of the same class of shares during the last [7] years, including annual reports made under section 208 of this Act:
>
> (h) Copies of all financial statements and group financial statements required to be completed by this Act or the Financial Reporting Act 1993 for the last [7] completed accounting periods of the company:
>
> (i) The accounting records required by section 194 of this Act for the current accounting period and for the last [7] completed accounting periods of the company:
>
> (j) The share register.

There was therefore a requirement at the time of the Companies Office investigation in March 2006 that all shareholder resolutions in respect of QPML since March 1999 be kept at the registered office of QPML, the law firm Anderson Lloyd.

Neither the original nor a copy of the shareholder resolution prepared by QPML's accountant Mr Eyre in 2000 has been located. The original of the shareholder resolution prepared by Mr Eyre in 2001 has also not been located. Only a copy with Mr David Parker's signature alone has been kept.

The requirement to keep company records at the office of the company's registered office does not apply to EDL and SJL as these companies are in liquidation and their records have been destroyed by the Official Assignee.

Annual return

Companies are required by the Companies Act 1993 to file an annual return with the Companies Office in the prescribed form and containing specified information.

Section 214 of the Companies Act 1993 provides in part:

> **214. Annual return—**
>
> (1) The board of a company must ensure that there is delivered to the Registrar each year, for registration, during the month allocated to the company for the purpose, an annual return in the prescribed form or in a form the use of which by the company has been approved by the Registrar pursuant to subsection (8) of this section, or as near to it as circumstances allow, and containing as much of the information specified in Schedule 4 to this Act as is prescribed.
>
> (2) The annual return must be dated as at a day within the month during which the return is required to be delivered to the Registrar and the information required to be contained in it must be compiled as at that date.

The prescribed form of the annual return is set out in Schedule 1 to the Companies Act 1993 Regulations 1994 as Form 12. Schedule 4 of the Companies Act 1993 prescribes the information to be contained in an annual return. It requires, in the case of a company which has passed a resolution under s196(2) of the Companies Act 1993 that no auditor be appointed, that the text and date of the resolution be contained in the annual return. The major focus of this investigation has been whether the statements in the annual returns of the three companies that a unanimous resolution of the shareholders had been passed not to appoint an auditor for the ensuing year were false or misleading.

However, as noted above, the month allocated to QPML by the Registrar of Companies as the month during which the company's annual return must be filed was July. The actual date of filing of QPML's annual returns are:

• 1995	31 July 1995	
• 1996	29 August 1996	< 25 working days after the time prescribed;
• 1997	30 October 1997	> 25 working days after the time prescribed;
• 1998	28 August 1998	< 25 working days after the time prescribed;
• 1999	5 August 1999	< 25 working days after the time prescribed;
• 2000	25 August 2000	< 25 working days after the time prescribed;
• 2001	6 September 2001	> 25 working days after the time prescribed;
• 2002	2 September 2002	< 25 working days after the time prescribed;
• 2003	16 July 2003	
• 2004	3 September 2004	< 25 working days after the time prescribed;
• 2005	22 September 2005	>25 working days after the time prescribed;

Two of QPML's annual returns were filed in the month allocated to QPML. The remainder were filed between five days and three months late.

The month allocated to EDL by the Registrar of Companies as the month during which EDL's annual return must be filed was October. The actual date of filing of EDL's annual returns are:

• 1996	31 October 1996	
• 1997	12 February 1998	>25 working days after the time prescribed

One of EDL's two annual returns was filed in the month allocated to EDL. The other was filed over three months late.

The month allocated to SJL by the Registrar of Companies as the month during which SJL's annual return must be field was September. The actual date of filing of SJL's one and only annual return is:

- 1996 5 December 1996 > 25 working days after the time prescribed

It was filed over two months late.

Possible Offences

(i) Company records

As noted above, s189(1) of the Companies Act 1993 sets out requirements for the keeping of company records. S189(1) does not appear to have been complied with in the case of QPML in that the shareholder resolutions in 2000 and 2001 that no auditor be appointed for the ensuing year were not found at the registered office of QPML.

Non-compliance with s189(1) is made an offence under s189(5) of the Companies Act 1993 which provides:

> (5) If a company fails to comply with subsection (1) or subsection (4) of this section,—
>
> (a) The company commits an offence and is liable on conviction to the penalty set out in section 373(2) of this Act:
>
> (b) Every director of the company commits an offence and is liable on conviction to the penalty set out in section 374(2) of this Act.

S374(2) provides for a maximum penalty of $10,000.

It should be noted at the outset that there is a statutory defence for directors under s376(2) of the Companies Act 1993. It provides:

> 376. Defences—
>
> (2) It is a defence to a director charged with an offence in relation to a duty imposed on the company if the director proves that—
>
> (a) The company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
>
> (b) He or she took all reasonable steps to ensure that the company complied with the requirements of this Act; or
>
> (c) In the circumstances he or she could not reasonably have been expected to take steps to ensure that the company complied with the requirements of this Act.

I have noted the non-compliance with s189(1) of the Companies Act 1993 through the failure to keep the shareholder resolutions in 2000 and 2001 at the registered office of QPML.

It is my clear view however, following the Solicitor General guidelines on prosecution, that it would not be in the public interest to prosecute the sole remaining director, Mr Francis Parker under s189(5) of the Companies Act 1993 for the failure to keep the shareholder resolutions in 2000 and 2001 at the registered office of QPML. The purpose of the Solicitor General guidelines is to indicate, in a general way, the bases on which the law officers of the Crown expect decisions to commence and continue prosecutions to be made. The Solicitor General guidelines note that a major consideration is whether, given that an evidential basis for a prosecution exists, the public interest requires the prosecution to proceed. Factors which may arise for consideration in determining whether the public interest requires a prosecution include:

- The seriousness or, conversely, the triviality of the alleged offence ie whether the conduct really warrants the intervention of the criminal law;
- The staleness of the alleged offence;
- The degree of culpability of the alleged offender;
- The availability of any proper alternatives to prosecution;
- Whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- The likely length and expense of the trial;
- The likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

In this case, I am clearly of the view that these factors tip the balance against prosecution. Mr Francis Parker's conduct does not really warrant the intervention of the criminal law.

I have been advised by the Companies Office that it has previously charged one person under s189(5) of the Companies Act 1993 but that this charge was withdrawn before a hearing. It is likely that if Mr Francis Parker was prosecuted under s189(5), he would be discharged without conviction.

(ii) Filing of Annual Return

As noted above, s214(1) and (2) of the Companies Act 1993 sets out the requirements for the filing of annual returns. S214(1) does not appear to have been complied with in that the annual returns have not been filed "during the month allocated to the company for the purpose" in nine of the 11 years between 1995 and the present in the case of QPML. There also appears to have been non-compliance in respect of one annual return each for both EDL and SJL. There has been consequential non-compliance with s214(2) which requires that an annual return be dated as at a day within the month during which the return is required to be filed.

Non-compliance with s214(1) or (2) is made an offence under s214(10) of the Companies Act 1993 which provides:

> (10) If the board of a company fails to comply with subsection (1) or subsection (2) of this section, every director of the company commits an offence and is liable on conviction to the penalty set out in section 374(2) of this Act.

S374(2) provides for a maximum penalty of $10,000.

Two matters should be noted at the outset in relation to s214(10) of the Companies Act 1993. Firstly, there is a statutory time limit of three years in s375(3) of the Companies Act 1993 on any prosecution under s214(10). The only possible offences which are therefore prosecutable relate to the annual returns of QPML filed on 3 September 2004 and 22 September 2005.

Secondly, there is a statutory defence for directors under s376(1) of the Companies Act 1993. It provides:

> **376. Defences—**

(1) It is a defence to a director charged with an offence in relation to a duty imposed on the board of a company if the director proves that—

(a) The board took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or

(b) He or she took all reasonable and proper steps to ensure that the board complied with the requirements of this Act; or

(c) In the circumstances he or she could not reasonably have been expected to take steps to ensure that the board complied with the requirements of this Act.

I have noted the apparent non-compliance with ss214(1) and (2) through the late filing of the annual returns. I am of the view, however, that it is probably inappropriate to consider the use of s214(10) in this case when Parliament has specifically provided a penalty for the late filing of documents in Regulation 6 of the Companies Act 1993 Regulations 1994. Regulation 6 provides:

6. **Penalties for failure to deliver documents to Registrar within prescribed time -**

(1) Subject to subclause (2) of this clause, the amounts specified in Part 2 of Schedule 2 to these regulations shall be payable by way of penalty for failure to deliver a document to the Registrar within the time prescribed by the Act.

(2) If any document is delivered to the Registrar ... after the time specified in the Act in respect of the document, and the Registrar is satisfied that the omission to deliver the document within the time limit was accidental or due to inadvertence, or that it is just and equitable to do so, he or she may remit wholly or partly the fee payable in respect of the late deliver of the document.

Part 2 of Schedule 2 prescribes the amounts payable to the Registrar of Companies by way of penalty for failure to deliver documents within the prescribed time. $25 is the penalty for documents filed not later than 25 working days after the time prescribed while the penalty for documents filed more than 25 working days after the time prescribed is $100.

It is therefore my clear view, following the Solicitor General guidelines on prosecution, that it would not be in the public interest to prosecute either Mr David Parker or Mr Francis Parker for the late filing of the annual returns for QPML in 2004 and 2005.

In this case, I am clearly of the view that the factors outlined above, in particular, the availability of an alternative to prosecution, namely, Regulation 6 of the Companies Act 1993 Regulations 1994, tip the balance against prosecution.

I have been advised by the Companies Office that it has previously charged one person under s214(10) of the Companies Act 1993. That person was convicted and discharged without further penalty. It is likely that if Mr David Parker and Mr Francis Parker were prosecuted under s214(10), they would be discharged without conviction.

(iii) False or misleading nature of statement in annual return

As noted above, the major focus of this investigation has been whether the statements in the annual returns of the three companies that a unanimous resolution of the shareholders had been passed not to appoint an auditor for the ensuing year were false or misleading. The Companies Act 1993 makes it an offence to make false or misleading statements in a document required by the Act. S377(1) of the Companies Act 1993 provides:

377. **False statements—**

(1) Every person who, with respect to a document required by or for the purposes of this Act,—

(a) Makes, or authorises the making of, a statement in it that is false or misleading in a material particular knowing it to be false or misleading; or

(b) Omits, or authorises the omission from it of, any matter knowing that the omission makes the document false or misleading in a material particular—

commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

S373(4) provides for a maximum term of five years imprisonment or a fine not exceeding $200,000. Offences under s377(1) are also triable on an indictment rather than summarily, as is the case of offences under s189(5) and s214(10), which reflects the more serious nature of the offences under s377(1).

The essential elements of the offence which need to be proved beyond reasonable doubt in any prosecution under s377(1) are:

- The prosecution is in respect to a document required by or for the purposes of the Companies Act 1993;
- The defendant made or authorised the making of a statement in it;
- The statement in it is false or misleading in a material particular;
- The defendant knew the statement in it to be false or misleading.

The first two essential elements are clearly able to be proved beyond reasonable doubt. S214 of the Companies Act 1993 requires the filing of an annual return by a company. Mr David Parker also made or authorised the making of a statement in the annual returns for QPML, EDL and SJL that a unanimous resolution of the shareholders had been passed not to appoint an auditor for the ensuing year.

It is my view however that neither of the latter two essential elements are able to be proved even to a prima facie level. The initial resolution drafted at the time of the incorporation of QPML in 1994 was signed by all three shareholders. In respect of the annual returns for QPML in 1995 and 1996 both Mr David Parker and Mr Francis Parker are sure that they signed shareholder resolutions that no auditor be appointed for the ensuing years. Mr Hyslop has no recollection of doing so but concedes he may have done. Although no copies of the resolutions have been kept, the evidence suggests that the resolutions were signed by all three shareholders. The concession by Mr Hyslop that he may have signed such resolutions if they had been placed in front of him is important.

The statement in successive annual returns of QPML since Mr Hyslop's bankruptcy in 1997 that there had been a unanimous resolution of the shareholders that no auditor be appointed for the ensuing year are also not false or misleading. Mr David Parker and Mr Francis Parker had clearly agreed by their signature of the resolution each year. The Official Assignee in his capacity as the legal and beneficial owner of the remaining shares had signed shareholder resolutions to that effect in 1997, 1998 and 1999. By his letter of 10 August 1999 the Official Assignee then purported to waive any future requirement for his specific approval ie the Official Assignee thought he had given an enduring authority to Mr David Parker to enable him to complete shareholder

resolutions in the same terms in future years without the need to obtain specific approval from him on an annual basis.

The statements in the annual returns of QPML filed in 2000, 2001, 2002, 2003, 2004 and 2005 that a unanimous resolution of the shareholders had been passed that no auditor be appointed for the ensuing year are therefore not false or misleading. Mr David Parker and Mr Francis Parker had specifically agreed each year and the Official Assignee had by his letter of 10 August 1999 waived any requirement for his specific agreement for future annual returns.

It is an interesting legal point, although not material to my advice, whether the Official Assignee's purported waiver of the requirement for his approval of future shareholder resolutions that no auditor be appointed in respect of QPML was effective.

A similar question arose in *Mitre 10 (New Zealand) Limited* v *Registrar of Companies* (unreported High Court Auckland Registry CIV 2005-404-4968, 28 October 2005, Harrison J). S211(3) of the Companies Act 1993 provides that, if all shareholders agree, the annual report of a company need not comply with certain specified requirements. One such requirement is the inclusion of a statement of the number of employees who received annual remuneration and other benefits to a value of $100,000 or more. At the time, Mitre 10 (New Zealand) Limited had 97 shareholders each of whom had executed a membership agreement with the company which contained a provision which relevantly provided:

> The Member in its capacity as a shareholder of the Company gives notice that until the Member revokes this notice in writing it does not require any annual report of the Company to state the number of employees ... who ... received remuneration and other benefits in their capacity as employees the value of which was or exceeded $100,000 per annum...

The single question for determination in the case was whether the shareholders' agreement to exclude the statement about employee remuneration from the company's annual report must be given annually or in respect of each report. Harrison J held s211(3) does not require that all shareholders who agree that the company's annual report need not comply with certain provisions in s211(1) must give such agreement annually or in respect of each annual report ie the shareholder agreement was an enduring one that lasted until revocation. A new agreement was not required on an annual basis or in respect of each annual report.

Harrison J was of the opinion that Parliament's omission of a temporal requirement for either the timing or duration of such an agreement was decisive (paragraph [22]).

I am however not sure that this decision is directly applicable to the present case as s196(2) of the Companies Act 1993 contains a temporal requirement for both the timing and the duration of a shareholder resolution. S196(2) of the Companies Act 1993 provides that a unanimous resolution must be passed "at or before the [annual] meeting" and that such a resolution "ceases to have effect at the commencement of the next annual meeting". On the other hand, it could be argued that although a resolution needs to be made annually, there is no reason why a shareholder's vote cannot be recorded in an enduring fashion.

The question whether the Official Assignee's purported waiver of the requirement for his approval of future shareholder resolutions that no auditor be appointed in respect of QPML was effective need not be answered definitively, however, as the offence provision at issue in the Companies Act 1993 requires that the statement be false or misleading. It also requires knowledge of the false or misleading nature of the statement. For the reasons set out above it is my clear view that the statements that a unanimous resolution of the shareholders had been passed not to appoint an auditor for QPML for the ensuing year were not false or misleading. The question of Mr Parker's knowledge of the false or misleading nature of the shareholders does not even arise.

Much the same can be said for the statements in the annual returns for EDL and SJL that a unanimous resolution of the shareholders had been passed not to appoint an auditor for the ensuring year. There was in all probability an initial resolution drafted at the time of the incorporation of EDL which was signed by all the shareholders. Mr Simpson confirms this. Mr Hyslop does not demur. As to the resolution referred to in the second annual return for EDL, Anderson Lloyd has retained a draft of it on their computer system. There is therefore nothing to suggest that it too was not signed by all the shareholders including the Official Assignee on behalf of Mr Hyslop who was by that time bankrupt. Mr Parker has clearly been disadvantaged in proving it affirmatively because the Official Assignee has destroyed all EDL's records.

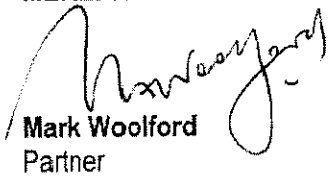
As to SJL, Mr David Parker was the sole shareholder. He alone therefore had to agree that no auditor be appointed for SJL for the ensuing year The only annual return filed for SJL states that a unanimous resolution was passed to that effect on 14 June 1996. There is nothing to suggest that Mr Parker did not follow his normal practice of preparing and signing such a resolution. Mr Parker has no recall but again has clearly been disadvantaged by the destruction of SJL's records.

In respect of both EDL and SJL therefore, there is no evidence that the statements in the annual returns for EDL and SJL that a unanimous resolution of the shareholders had been passed not to appoint an auditor for the ensuing year are false or misleading. Again, the question of Mr Parker's knowledge of the false or misleading nature of the statements does not even arise.

In conclusion, therefore, there is no basis whatsoever for a prosecution of Mr David Parker for an offence or offences under s377(1) of the Companies Act 1993 of making or authorising the making of a statement in an annual return that is false of misleading knowing it to be false or misleading.

Please do not hesitate to contact me if I can be of further assistance.

Yours faithfully
MEREDITH CONNELL



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