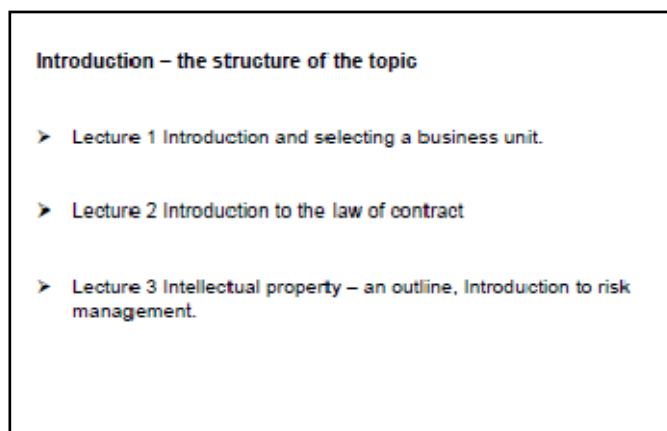
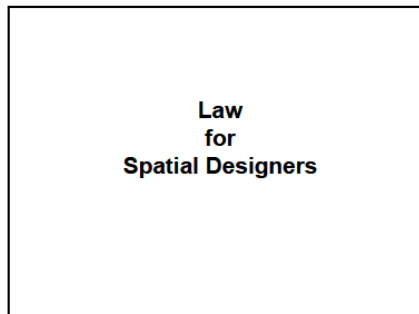


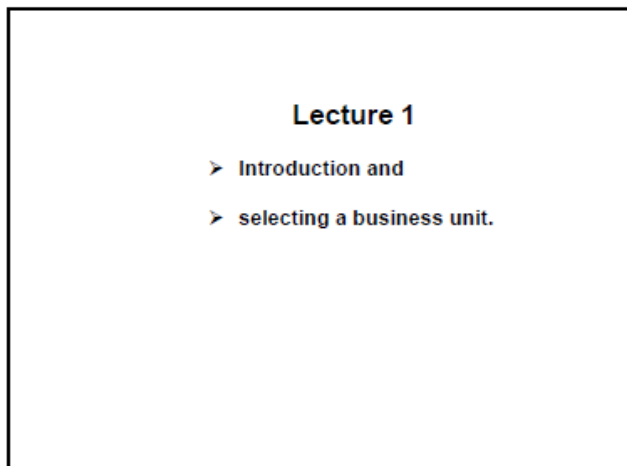
Introduction to law for Spatial Designers – the legal environment of business

Slide 1



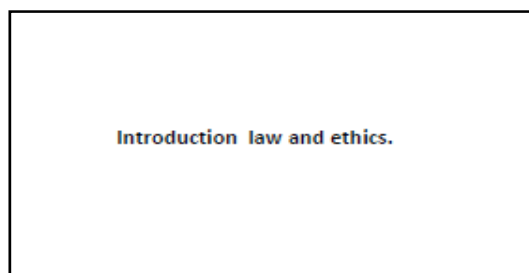
Slide 2 – the structure of the topic

Since this covers a very broad field – the treatment of the subject matter in each case can only be in outline.



Slide 3 Lecture 1

In effect this will be two lectures.



Slide 4 Law and ethics

This will be a very brief treatment.

The nature of law

The problem

The word "law" is a familiar one in very day speech

the meaning it conveys depends on the context in which it is used and the perception of the listener or reader

the study of law and the law itself depends on the accurate use of language to express meaning

within this word of one syllable there is a complex variety of ideas and meanings for which the word may be properly be used as a descriptor

As St Augustine of Hippo said of "time":

"What then is time? If no one asks me I know: if I wish to explain it to one that asks, then I know not."

Slide 5 – the nature of law

What is law

There have been many answers to the question, "What is law?" These answers have frequently been in conflict with each other. St Augustine^{a1} expressed the difficulty exactly when he said with reference to Time, "What then is time? If no one asks me I know: if I wish to explain it to one that asks, then I know not."^{b2}

In the time at our disposal in this course we can not begin even to scratch the surface of the subject. At the most, we can only hope to identify the surface of the subject. If the question of what law is to mean anything when subjected to such a cursory treatment our inquiries must be focussed in some way. This may be compared to the Reverend Thwackum's definition of religion in Fielding's *The History of Tom Jones*

"When I mention religion, I mean the Christian religion; and not only the Christian religion but the Protestant religion; and not only the Protestant religion, but the Church of England."

Lewis Carroll has Humpty Dumpty make much the same point in the more familiar Quotation:

'There's glory for you!'

'I don't know what you mean by "Glory",' Alice said.

'I meant, "there's a nice knock-down argument for you!"'

'But "glory" does not mean "a nice knock-down argument",' Alice objected.

'When I use word,' Humpty Dumpty said in a rather scornful tone, 'It means just what I choose it to mean, —neither more nor less.'

This preoccupation with the exact meaning of words, although not in any way a definition of law, is nevertheless an integral part of the study and indeed the practice of law. We will find that the giving of meanings to words that Parliament, judges and ordinary people have used is part of the craft and mystery of the law.

Identifying the law

While much of the law can be described as rules

Not all rules are rules of law.

Slide 6 – recognition of law

Although not the only description of law – "rules" is a reasonable way of describing law for our purposes.

¹ 354 - 430 AD

² *Confessiones*, xiv. 17

From the Laws of Table Tennis

2.7 A GOOD RETURN

2.7.1 The ball, having been served or returned, shall be struck so that it passes over or around the net assembly and touches the opponent's court, either directly or after touching the net assembly.

Compare with

Every one commits theft if he or she kills any animal that is the property of any other person with intent to steal the carcass, skin, or plumage, or any other part, of the animal.

Which of these two rules are rules of law?

Slide 7 How are laws to be identified?

If laws are seen as rules which we are required to obey and which can be enforced by or through mechanisms provided by the state - how are these rules to be identified from other rules?

a) It is not permitted to make a

forward pass in rugby.

b) You must not assault people with the intention of injuring them.

We would immediately recognise that the first of these rules is not law in the sense we use the term in this class while second is a rule of law. We may have to take a little longer to work out how we know this.

Why?

A rule that has been made by an Act of the Parliament of New Zealand or under a power conferred by and Act of the New Zealand Parliament is law in New Zealand.

But in New Zealand it also the case that:

A principle that has been stated to be law by a judge or judges in the course of deciding a case is also part of the law of New Zealand.

Slide 8 – the source of the rule

The answer lies in the source of the rule:

The second rule is laid down by the Parliament of New Zealand in an Act while the first is not law because it has not been:

- laid down in an Act of the New Zealand Parliament⁴ or
- laid down in a

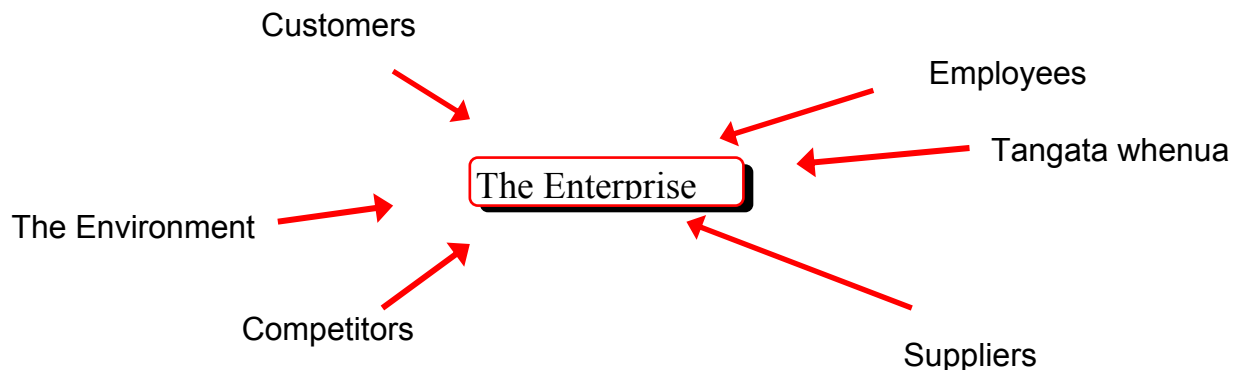
regulation or by law made with authority delegated by an Act of the New Zealand Parliament or

- laid down as law by a judge in a New Zealand Court in the course of delivering judgements.

We cannot examine the question why it is that rules made in these different ways should have the force of law in New Zealand, for the present we will accept that it is so.

The law and a business:

(Note – I have not included the slides for this section (1) because the material they contain mirrors the text below and (2) in the lecture, for reasons of time only a few of the relationships were considered.)



The customer

The most important of the relationships in business.

The key areas of law are: The law of contract, privacy

The significant legislation includes:

Consumer Guarantees Act 1993

Sale of Goods Act 1908

Fair Trading Act 1986

Weights and Measures Act 1987

Auctioneers Act 1928

Door to Door Sales Act 1967

Layby Sales Act 1971

Weights & Measures Act 1987

Unsolicited Goods and Services Act 1975

Credit Contracts and Consumer Finance Act 2003

Credit (Repossession) Act 1997

Personal Property Securities Act 1999

Privacy Act 1993

Health & Safety in Employment Act 1992

(There is currently a Consumer Law Reform Bill before the House)

The Supplier

In this relationship the business operator becomes the customer

The key areas of law are:

The law of contract, the law of personal property, and the significant legislation includes:

Contractual Remedies Act 1979
Sale of Goods Act 1908
Fair Trading Act 1986
Credit Contracts and Consumer Finance Act 2003
Personal Properties Securities Act 1999

Employees

The employees of a business are vital part of the business. Their interaction with the customers and the extent to which they believe in quality will naturally go a long way towards determining the success or failure of the business.

The key areas of law are: *Contract, employment, human rights, safety and revenue*

The significant legislation includes:

Employment Relationships Act 2000
Equal Pay Act 1972
Holidays Act 2003
Minimum Wage Act 1983
Parental Leave and Employment Protection Act 1987
Wages Protection Act 1983
Accident Compensation Act 2001
Health and Safety in Employment Act 1992
Human Rights Act 1993
Income Tax Act 2007

Competitors

Clearly the relationship with competitors may be crucial for a business. Even in a free market there are restrictions on just how vigorous competition is allowed to be.

The key areas of law here are: Competition law and *intellectual property*.

The significant statutes are:

Fair Trading Act 1986
Commerce Act 1986
Copyright Act 1994
Trademarks Act 2002
Patents Act 1953 (There is a new Patents Bill in the process of being passed by Parliament)

Environment

The protection of the environment is now a well recognised duty on everyone.

The key legislation includes

The Resource Management Act 1991
The Building Act 2004

Climate Change Response Act 2002
The Conservation Act 1987
The Marine Pollution Act 1974

The Marine Mammals Protection Act 1978
The Maritime Transport Act 1994

Tangata whenua

In an increasing number of ways businesses are required to acknowledge the special position of the original inhabitants of New Zealand and the Tiriti o Waitangi which established the relationship between the original inhabitants and the incomers or pakeha.

Treaty issues are a comparatively new but increasingly important branch of the law.

The statutes which bear on this include:

Treaty of Waitangi Act 1975

Conservation Act 1987

Te Ture Te Reo Maori (Maori Language Act) 1987

Resource Management Act 1991

Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

Te Ture Whenua Maori (Maori Land Act) 1993

Fisheries Act 1996

Trade Marks Act 2002

Marine and Coastal Area (Takutai Moana) Act 2011

For spatial designers the key issue is the resolution of the WAI 262 claim for recognition of Māori intellectual property in cultural artefacts and designs and in indigenous flora and fauna. This has recently been reported on by the Waitangi Tribunal.

(A Digression) Protection of the intellectual property of the Māori people and the WAI 262 Claim.

Intellectual property and Māori's right over their culture and its artefacts

The term English term "intellectual property" makes it clear that the concept is based on ownership whereas the relationship of Māori to their taonga is that of "kaitiaki" which is not easily translated since it encompasses more than one concept. Guardian is the usual translation but the word is also used for "trustee" which, in English law implies the concept of ownership, but ownership for the benefit of others.

At issue is the question of whether the current regulatory regime for intellectual property adequately provides for the legitimate aspirations of the Māori people to protect their culture and its artefacts.

The domestic position

Almost from the first contacts with non Māori especially Europeans, visitors to New Zealand have sought souvenirs to commemorate their visits. At first these consisted of actual cultural objects often of very great significance and their acquisition was often by legally dubious means. Items such as waka huia (carved boxes), kahu (cloaks of various materials such as feathers, flax and animal skins including dog and seal) and clubs of wood, bone or greenstone were in great demand. Infamously such souvenirs included preserved tattooed heads. In the case of the latter the changing attitudes to human remains especially those of ancestors of living populations has

meant that it has been possible to obtain repatriation of of such objects from overseas collections.³

Other issues include the sale of souvenirs which are facsimiles of Māori cultural artefacts such as hei-tiki which have mass produced in moulded plastic in an overseas country rather than, as they should be, carved from pounamu – greenstone (a form of jade) by a carver who understood and respected the cultural significance of the object and the particular design or form which it emulated. The most the regulatory authorities can do currently is to ensure that their sale is in conformity with the *Fair Trading Act 1986* and in particular that country of origin is clearly and accurately stated.

Te Runanga O Toa Rangatira Incorporated v Prokiwi International Limited⁴

This was an unsuccessful attempt on behalf of Ngāti Toa⁵ to register as trademarks key words and phrases from what is the best known haka⁶ known as Ka Mate. – to whit – ka mate (will it be death); upane kaupane (up one step, then another.); whiti te ra (into the sun); ka ora (will it be life).⁷ The registration was opposed by Prokiwi International Ltd, a manufacturer and seller of New Zealand souvenirs. Among these, currently,⁸ is an apron with the words of the haka (both Māori and English) under a silver fern and outline of a rugby player. **Held:** the application to register the phrases as trademarks was declined. Although it was accepted that the words were capable of constituting a registrable trademark and that Ngāti Toa were the owners of the claimed trade mark – the marks did not have a distinctive character.⁹

“ [50] I consider that, if the opposed marks were registered, honest traders would effectively be hindered in using the haka Ka Mate in relation to New Zealand themed merchandise and commercial sporting events in New Zealand because they would be uncertain whether they were exposed to infringement proceedings:”

The international dimension

It is trite to say that intellectual capital has to be seen in global rather than just a national context. The Tribunal recognised that New Zealand has international obligations in the area of intellectual property such as those derived from its signature of the *TRIPS Agreement*.¹⁰ While the current ability for Māori to protect their intellectual taonga in New Zealand is by no means adequate, it is almost non-existent in the case exploitation by individuals and organisations overseas. The Lego™ website Bionicle™ is an example. The story is set on fictional island where the characters and settings have a Polynesian based names including Māori names. These include the Toa¹¹ who appear to be a band of heroes including one Tahu. Originally the game also included Tohunga which in Māori can mean a skilled or expert

³ It may be noted that this issue is not one peculiar to the Māori people, those cultures which practiced mummification including those from ancient Egypt, South America and China are now questioning the right of overseas collections to retain these human remains. (There is also the issue with artefacts of particular significance such as the Elgin Marbles, which Greece wishes the British Museum to returned to Athens and the Parthenon from which they originally came.

⁴ [2012] NZIPOTM 14

⁵ The haka was composed by Te Rauparaha a chief of Ngāti Toa – the story of its composition is an established part of the oral tradition of Ngāti Toa and also Ngāti Tuwharetoa in whose territory the story of its composition took place.

⁶ Because it has been performed by the All Blacks before test matches

⁷ The translations are based on the expert testimony of Dr Kāretu.

⁸ <http://www.kiwisouvenirs.com/apron-haka-1742.html>

⁹ *Trade Marks Act 2002* s18(1)(b)

¹⁰ Trade Related aspects of Intellectual Property rights.

¹¹ One meaning the Māori word is brave, while Tahu can mean fire.

practitioner including in spiritual matters. However following strong protests from Māori representatives in New Zealand, a visit by representatives of the Lego™ Group to New Zealand, the use of the word Tohunga was discontinued.¹² It should be noted that there was no legal remedy available to Māori to prevent the exploitation of what were seen as cultural artefacts. As noted above this is an issue of worldwide interest. The World Intellectual Property Organisation (WIPO) has produced a document – *The Protection of Traditional Knowledge: Draft Articles*¹³ an earlier version of which was referred to by the Waitangi Tribunal.¹⁴

The Report on the Wai 262 claim

The WAI 262 claim was first filed with the Tribunal on 9th October 1991. While it was with the Tribunal significant changes were made in the field of intellectual property some of which took some, at least, of Māori concerns into account¹⁵ while others did not. According to the executive summary in the report the WAI 262 claim was concerned with “who, (if anyone) owns or controls Māori culture and identity.”¹⁶ The claim covered 3 areas

1. Mātauranga Māori – the world view of Māori which includes traditional culture and knowledge including rongoā Māori – traditional Māori healing and need for its transmission to later generations.
2. Taonga works – the physical expression of traditional artistic and cultural expression – these would include cloaks and carved objects including structures such as the carved house Te Hau ki Tūranga¹⁷ which is held at Te Papa or waita whether of ancient or recent composition. In its report the Tribunal also recognised a sub category – that of *taonga derived* works which incorporate elements of Māori cultural artefacts but are not themselves taonga – an example given was that of the koru based design which Air New Zealand uses.
3. Taonga species¹⁸ - the indigenous flora and fauna and the natural environment of New Zealand.

The width or scope of the claim is enormous as is shown by range of the different groups and individuals who made submissions.¹⁹ That being so in a text of this nature only the briefest of summaries of the recommendations can be made. In the Introduction²⁰ the Tribunal states with respect to taonga works and taonga derived works:

In a nutshell, therefore, we have reached three conclusions:

¹² This action by Lego™ would be in conformity with the Lego values which include “Going the extra mile for other people, not because we have to – but because it feels right and because we care.”

¹³ WIPO/GRTKF/IC21/4 : January 18 2012. @
http://www.wipo.int/meetings/en/details.jsp?meeting_id=25019

¹⁴ p42

¹⁵ E.g. the *Trade Marks Act 2003*.

¹⁶ WAI 262 Report 2011 Executive Summary – Introduction p18

¹⁷ Of Rongowhakaata iwi

¹⁸ The terms taonga works and taonga species are terms coined by the Tribunal.

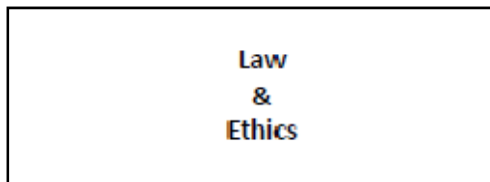
¹⁹ See Appendix 1 1.4.4 p728

²⁰ @p47

- Whether the work in question is a taonga work or a taonga-derived work, Māori are entitled to prevent offensive and derogatory public uses of it.
- if the work in question is a taonga work, then the kaitiakitanga relationship that comes with it justifies more extensive rights in Treaty terms. These would include the right to be consulted and, where appropriate, to give consent to the commercial use of such works.
- Māori are also entitled to prevent offensive and derogatory public uses of mātauranga Māori.

Among the suggested examples of what might constitute offensive or derogatory treatment of a taonga work the report includes the words of *Kamate kamate* being reproduced on a dinner plate since the association of taonga with food would generally be offensive to Māori. The reproduction of the haka *Kamate Kamate* on an apron as has been done by Prokiwi International Ltd as outlined above must be very close to being deliberately provocative if not offensive.

Slide 14 Law and ethics



Ethics and Morals

Ethics are defined as “a system of accepted beliefs which control behaviour, esp. such a system based on morals”

Morality is defined as “a personal or social set of standards for good or bad behaviour and character, or the quality of being right, honest or acceptable.”

Slide 15 Ethics and morals defined

Ethics are defined as

‘system of accepted beliefs which control behaviour, esp. such a system based on morals’²¹

Morality is defined as

‘a personal or social set of standards for good or bad behaviour and character, or the quality of being right, honest or acceptable.’²²

The key difference is that ethics refers to a systemised set of standards which general implies an academic or intellectual analysis of the more diffuse precepts which constitute a society’s morality.

In most cases the words are synonymous, i.e. they can be used interchangeably. However when talking of the standards which may, or may not govern the conduct of business, the term ethics is more generally used since it generally implies a system of beliefs and standards.

²¹ Cambridge International Dictionary of English Online <http://dictionary.cambridge.org>

²² *ibid*

Internal and external ethical standards

Ethical standards may be internal:

‘Do I feel good about doing or not doing this?’

or they may be external

‘What will people think if they discover I done or not done this?’

Slide 16 Internal and external ethical standards

Ethical standards may be internal:

‘Do I feel good about doing or not doing this?’

or they may be external

‘What will people think if they discover I done or not done

this?’

The distinction is not an absolute one since feeling good or bad about one’s act or omission may depend in part on one’s perception of society’s likely attitude.

Law and ethics

Legal standards are usually objective

Unconscionable bargain
overreaching – taking an unfair advantage

Dubious, an spatial designer visits Bill and Betty Pathetic, who are elderly neighbours, and persuades them that their property really could do with a “facelift” and that in allowing Dubious to redesign and redecorate the property would add “tens of thousands” to the value of the property. Bill and Betty have been retired for some years and have lost touch with the business world and property values in particular, and so Dubious is able to persuade them to sign a cost+ agreement. After some 2 months of incredible inconvenience and upheaval the job is finished and Dubious presents his bill for \$25,000. Bill and Betty are really upset as they had no idea it would cost so much, they do not like the new look, and the age, style and location of their property mean that there is no real increase in the value of property resulting from the redecoration.

Slide 17 Legal standards

Law does not in theory depend on subjective interpretations. Whether an act or omission is or is not contrary to law may be determined objectively. While there may room for debate as in the interpretation of legislation or the application of a legal principle to the facts, the debate may be resolved by

objective criteria.

However, there are areas where a degree of subjectivity is inevitable. In the case of unconscionable bargain the court will have to decide whether there has been an ‘overreaching, the taking of an unfair advantage’ which does involve an element of subjectivity on the part of the judge in relation to particular facts of the case.

Dubious, an spatial designer visits Bill and Betty Pathetic, who are elderly neighbours, and persuades them that their property really could do with a “facelift” and that in allowing Dubious to redesign and redecorate the property would add “tens of thousands” to the value of the property. Bill and Betty have been retired for some years and have lost touch with the business world and property values in particular, and so Dubious is able to persuade them to sign a cost+ agreement. After some 2 months of incredible inconvenience and upheaval the job is finished and Dubious presents his bill for \$25,000. Bill and Betty are really upset as they had no idea it would cost so much, they do not like the new look, and the age, style and location of their property mean that there is no real increase in the value of property resulting from the redecoration.

Law and ethics for designers – the DINZ code of ethics
Introduction
Compliance
Responsibility to the public
Responsibility to clients
Conflicts of interest.
<i>Devious, is a real estate agent. Credulous employs her to sell a house on Credulous's behalf. As part of the service Devious recommends the price at which to offer the house which is \$200,000. Devious approached Credulous with an offer from Slither to purchase for \$190,000. On the advice of Devious that this is best price they are likely to get, Credulous accepts the offer and Devious receives the appropriate commission. Credulous then discovers that Slither had promised Devious \$5,000 if she could persuade Credulous to accept the offer of \$190,000. This would be a secret commission and both Devious and Slither would have committed an offence under the Secret Commissions Act.</i>

Slide 18 Law and ethics for designers – the DINZ code of ethics

The following is a very brief commentary from the legal perspective on the current DINZ code of ethics.

As a professional body DINZ is of course free to impose any ethical standard on its members that it sees fit, provided the standard or rule does not infringe the law. This last would not

appear to be a problem in the case of the DINZ code of ethics.

1. Introduction

In essence this section makes it clear that membership of DINZ requires adherence to the code of ethics as part of the contract between DINZ and its members.

2. Compliance

This provides for the process in event a breach of the code is alleged. The member about who a complaint is made is entitled to have the complaint dealt with in accordance with procedure.

All officers and bodies – the committee and the council – must not only adhere to the process laid down but must also ensure that the proceedings are conducted in accordance with natural justice, this includes according the parties the right to put their case before an unbiased tribunal. The parties are normally entitled to be given reasons for any decision made in the course of such proceedings.

3. RESPONSIBILITY TO THE PUBLIC

3.2. is generally a requirement backed by law. Thus the use of harmful products such as lead based paints and asbestos are controlled by law. This control may either be exercised through the general law such as the Asbestos Regulations or through local authority requirements for building permits or resource consent.

3.5. while perhaps taking a somewhat extreme position the provision is not greatly different from the duty to take care not to harm those who it is reasonably foreseeable might be harmed by our acts or omissions.

4. RESPONSIBILITY TO CLIENTS

In many ways the ethical statements under 4. could be seen as standards of best practice for operating a business. However a number of the statements raise the issue of conflicts of interest

It is perhaps beyond what the law requires to say that where a price is quoted for a job the designer cannot make a profit on materials supplied. In many industries it is the practice to purchase materials with trade discounts and charge out for them with a mark up. Generally the client could not purchase the materials themselves at the discounted price and the contractor is perhaps justified in recouping the costs of

storage, transport and employment of capital. The Institute is free to declare such a practice unethical and members are bound thereby, but the practice is not in itself unlawful.

The *Secret Commissions Act 1910* to which reference is made was designed to prevent bribery or corruption especially in the public service but also in commerce.

The principle on which the Act works is simple – If I employ someone to do a job for me – then I am entitled to expect that the person will use their best efforts on my behalf and not receive payment from “the other side” since that would suggest that my best interests are very likely compromised thereby.

Devious, is a real estate agent. Credulous employs her to sell a house on Credulous’s behalf. As part of the service Devious recommends the price at which to offer the house which is \$200,000. Devious approached Credulous with an offer from Slither to purchase for \$190,000. On the advice of Devious that this is best price they are likely to get, Credulous accepts the offer and Devious receives the appropriate commission. Credulous then discovers that Slither had promised Devious \$5,000 if she could persuade Credulous to accept the offer of \$190,000. This would be a secret commission and both Devious and Slither would have committed an offence under the Secret Commissions Act.

How would this apply to an spatial designer?

Much would turn on what it was the designer contracted to do. If the task of the designer was to advise on the best design solution and the products and services necessary to best achieve that solution, then the client is entitled to have disinterested advice rather than advice based on what is most profitable for the designer. If the client knows that the advice being given is based on a degree of self interest in that the designer has made known any pre-existing relationship or interest then the client cannot really complain. It would be best that there interests or relationships are declared in the beginning, i.e. on the quote form, contract or whatever document is being used to create the designer/client relationship.

If I employ an spatial designer to redesign the interior of my house and then undertake the necessary work in return for a fixed price then it is difficult to see how the conflict of interest arises. If the spatial designer chooses to cut corners, employ second rate contractors in order to maximize profits – it is not an issue of secret commissions but of shoddy workmanship for which in these circumstances the spatial designer would be answerable to the client.

5. RESPONSIBILITY TO OTHER DESIGNERS

It is this aspect of codes of ethics of professional bodies that can run foul of the law. It is very easy for such provisions to be anti competitive and thus contrary to the *Commerce Act 1986*.

That is not the case here. The provisions very properly flag areas where a designer must be aware of the rights of fellow designers. These include where the client is seeking to replace the original designer for project. In such a case care is needed to

make sure that the rights of the original designer are respected especially in the field of intellectual property.

6. RESPONSIBILITY TO THE PROFESSION:

This merely restates the position under 4 when advising clients.

SELECTING A BUSINESS UNIT : The options and their characteristics

Selecting the form of Business Organization

Slide 1

The law recognises a number of different forms of organisation which may be involved in business activities.

The Legal Characteristics of the different types of business structure

Slide 2 The Sole Trader

The Sole Trader

The sole trader

- The owner is trading on their own account.
- The sole trader is the legal owner of all the assets of the business.
- The sole trader can sue and be sued in their own name.
- The profits of the business are the personal income of the sole trader for tax purposes.
- The sole trader is personally liable for all the debts of the business.
- There is no distinction between the assets of the business and the personal assets of the sole trader.

Slide 3 the characteristics of a sole trader

Since a sole trader is simply a natural person who is in business on their own their characteristics are much the same as those of persons who are not in business except of course the need to comply with the revenue and safety legislation.

Capacity

Capacity is of course that of natural persons. In the case of minors under the age of 18 persons dealing with them in the course of the minor's business

would need to exercise great care

The advantages of being a sole trader

- ★ Simplicity of formation.
- ★ Reduced compliance costs in operation.
- ★ Closing down the business is a simple process.
- ★ The sole trader does not have to rely on partners or fellow directors to be competent and honest.
- ★ The sole trader is their own boss.

Slide 4 – the advantages

The chief advantage is that of simplicity in both formation and operation.

The disadvantages of being a sole trader

- ★ The lack of protection for personal assets in event of the business failing.
- ★ Difficulty in raising finance except by mortgaging or charging personal assets.
- ★ The sole trader is "on his/her own" and could lack support.
- ★ Limited ability to expand should the business prove successful.

Slide 5 – the disadvantages**Legal Obligations of the proprietor**

As a sole trader the customer is answerable to the extent of all their assets for debts incurred by the business.

The Partnership**Slide 6 The Partnership**

Formerly confined largely to the professions and service industries. The compliance requirements for the 1993 companies legislation extended the fields in which this form of business unit may be seen to be appropriate

The partnership

- ★ The relationship which subsists between persons carrying on a business in common with a view to profit.
- ★ The partnership may sue and be sued in the name of the partnership.
- ★ The partners are personally liable for all partnership debts.
- ★ The partnership assets and liabilities are distinguished from those the partners for accounting purposes.
- ★ The partnership is liable for the actions of partners in contract and in tort.

Slide 7 Definition

s4 Partnership Act "The relationship that subsists between two or more persons carrying on a business in common with a view to profit."

Trading Partnerships

These are distinguished from non-trading partnerships that is professional partnerships. (Trading and non-trading is not used here in the accounting sense).

Trading partnerships confer on the

partners the authority to accept bills of exchange drawn on the partnership.

Professional Partnerships

Lawyers, accountants, doctors and the like. Since they are not engaged in trade there is no implied authority to accept bills of exchange on behalf of the firm. Professional partnerships are more likely to be required to keep trust accounts which impose special duties on both banker and customer.

Designers are more likely to be seen as professional partnerships rather trading – one way of looking at the question is to see whether the partnership is a provider of services or is it a provider of goods. Professional partnerships are concerned with the provision of services whereas trading partnerships tend to deal in goods.

The advantages of a partnership

- * The partners can provide mutual support and assistance.
- * There are no formalities required for the formation of a partnership.
- * For some professions where limited liability is not an option the partnership is the only alternative to a sole trader.

Slide 8 – advantages

Formation

Unlike registered companies no special formalities are required. Indeed some partnerships can come as complete surprise to the partners since they did not intend to form a partnership. If two or more people carry on a business in common with a view to profit then they will be partners²³.

Although a partnership can be created without any formalities, it is not a recipe for success. A partnership agreement is essential for any business partnership and the costs of having one drawn up by a lawyer are well worth it. The legal and other costs involved in unravelling the affairs of partnerships that fail where there is no agreement are potentially catastrophic.

The Agreement

The contents of a partnership agreement will obviously depend to a large extent on the nature of the partnership concerned, however some common elements exist for which provision would need to be made in any agreement²⁴.

The names of the partners

That they wish to be partners on the following terms

The Business -

What the partnership is formed to do. This not binding in that the partners cannot change the business undertaken though it may have some bearing on questions arising under s8. But it must be noted that third parties are in no way affected by the terms of the agreement unless they have actual notice of its terms.

Term -

²³ *Aldridge v Patterson* (1914) 33 NZLR 997

²⁴ Based on *Goodall Coveyancing Precedents* Butterworths

How long is the partnership to last? If no term is stated then the partnership is said to be "at will" and will continue until dissolved by due notice. If the partnership is for a fixed term and continues beyond that term then without a fresh agreement it continues as a partnership at will.²⁵

Firm name -

This may become a valuable asset – it may well be a good idea to make provision for the use of the firm name after the partnership has come to an end.

Banking -

Although the basis of the partnership must be trust in each other the question of banking should be sorted out in the agreement. It should include - the identity of the bank, the types of accounts (though this may need to be changed) and the signing authorities (who can sign cheques, procedures for drawing cheques - number of signatures required).

Capital -

This is a vital provision especially where the contributions of the partners differ in kind. On dissolution this is a major area of possible dispute and care taken at this point in the agreement could save a great deal in time, money and anguish. Where premises are involved, which belong to one partner it should be clearly stated whether the premises are partnership property and form part of the owner's capital contribution or whether the premises remain the personal property of the partner in which case the contribution the partnership's use of them represent would be in the nature of a lease or licence.

Intellectual property

It is vital that any partnership or other business organisation that is concerned with designs has a very clear and hopefully unambiguous statement on the ownership of the intellectual property. Generally intellectual property created in the course of the partnership's business would be partnership property. In the event of the partnership coming to an end or a partner leaving the partnership there would need to be provision for the future ownership and use of intellectual property developed in partnership.

Profits & Losses -

In the absence of a provision here the Act will apply²⁶ It should of course be noted that any provision here cannot limit the partner's liability against third parties.

Books of Account

Although as noted above trust is everything in a partnership it is vital that the obligation to keep books of account together with rights of access are established.

Accounts and divisions of profits -

This is important and again the Act will apply without a provision for this question

Weekly salary -

Sometimes referred as drawings and is usually set against the partner's share of the profits. However it is possible for the partners to agree that one or more partners do receive a salary which is charged to the outgoings of the firm.

Holidays -

Although self employed a partner is not their own boss²⁷ and the timing of holidays may well be a significant matter for the operation of the business

²⁵ s30(1)

²⁶ s27(a)

²⁷ a word chosen in preference to the gender specific master or mistress

Duties -

While not binding it is a good idea to establish proper spheres of influence in advance. Without express notice they are not binding on third parties.

Powers -

As with duties

Remedies for breach -

In the absence of any specified remedies for breach the provisions of the Partnership Act will apply

*Terminations and options to purchase**Winding up: bidding at auction*

These last two provisions are there to obviate the problems of partners dealing with partnership property for their own benefit, which arise out of the general duty of good faith which is required between partners. This is dealt with in lecture 3.

*Signatures and witnesses***The disadvantages of a partnership**

- * The partners remain personally liable for the debts of the partnership.
- * The partnership and the partners can be destroyed by dishonesty or incompetence of one of the partners.
- * Compared with the sole trader the partner is not their own boss.
- * The interest in the partnership is not easily realisable.

Slide 9 – the disadvantages**Capacity**

Generally the capacity to be a partner is co-extensive with the capacity to contract. Where the partnership was set up as an income splitting device it was doubted that children as young 4 years old had the capacity to be partners.

Authority of Partners

Under s8 *Partnership Act 1908* the firm will be bound by acts of a partner which would be usual acts for carrying out the normal business of the partnership unless the third party either knew of the limitation on the partner's authority or did not know or believe them to be a partner.

The liability of Partners

The liability of partners for debts of the partnership is without limit. Unless the contract provides otherwise, the liability of the partners in contract is joint whereas in the case of tortious acts the liability is joint and several.

In summary

The key requirement for forming a partnership is that the partners are able to trust each other. This does not just mean being certain that your partners will disappear with the assets but that they will not make foolish decisions at least, not without consulting you and any other partners. This also applies to closely held companies.

The Limited partnership

Introduction This is a partnership formed under the Limited Partnership Act 2008

Formation Greater formality is required. There must be a written partnership agreement under s9 with the minimum contents specified in s10

Legal Personality Under s11 the limited partnership is a separate legal person distinct from the general partners and the limited partners.

Legal Implications for the Limited and Managing Partners

- Under s31 limited partners who do not participate in the management of the limited partnership are not liable for the debts and liabilities of the limited partnership.
- The liability of the general partners is unlimited.
- If the limited partners take any part in the business of the firm, they become liable as general partners under s30.

Slide 10 The Limited Partnership

This is a partnership formed under the *Limited Partnership Act 2008*.

Definition

A Limited partnership is one registered at under s51 of the *Limited Partnership Act*.

Formation

Greater formality is required. There must be a written partnership agreement under s9 with the minimum contents specified in s10.

Legal Personality

Under s11 the limited partnership

is a separate legal person distinct from the general partners and the limited partners.

Legal Implications for the Special and Managing Partners

Under s31 limited partners who do not participate in the management of the limited partnership are not liable for the debts and liabilities of the limited partnership. The liability of the general partners is unlimited. It should be noted that the limited partnership would normally have a limited liability company as the sole general partner. If the limited partners take any part in the business of the firm, they become liable as general partners under s30.

The Registered Company

Slide 11 Companies registered under the Companies Act 1993

Capacity

s16(1) A company registered under the 1993 Act shall have full capacity to carry on or undertake any business activity or do any act or enter into any transaction and in order for this to be possible, shall have full rights, powers and privileges

s16(2) The constitution of a company may only restrict the capacity, rights, powers or privileges.

s17(1) No action or transfer of property by a company shall be invalid merely because the company lacked the necessary capacity, right or power.

s17(2) s17(1) does not preclude actions by shareholders or other person entitled by the constitution of the company from taking action under the Act to enforce compliance with the constitution. Such actions, if successful, would not prejudice the rights of third parties who had acquired rights against the company.

The registered company

- ▶ Companies are created by registration under the Companies Act 1993.
- ▶ A company must have
 - ▶ one or more shareholders;
 - ▶ one or more directors.
- ▶ A registered company is a legal person separate and distinct from that of its shareholders, thus:
 - ▶ The assets of the company do not belong to the shareholders.
 - ▶ The debts of the company cannot be recovered directly from the shareholders.
- ▶ Unless its constitution provides otherwise the liability of shareholders is limited the amount they have subscribed, or agreed to subscribe, for their shares.

Slide 12 Characteristics

The Separate legal personality

A registered company is legal entity or person separate and distinct from that of its proprietors. This means that the debts of the company are not the debts of the shareholders²⁸. The corollary of this is that the property of the company, including the contents of the till, are not the property of shareholders. This is a point that is often overlooked by the proprietors of companies operating small businesses.

The Register of Companies

Because a company comes into existence by virtue of its registration, there is of necessity a public register of companies held at the Companies Office. The register enables the bank to determine that the company is registered i.e. that it exists, who its directors and who its members were at date of the last annual return. In the case of larger companies that are reporting entities under the *Financial Reporting Act 1993* further financial information is available. Also at the Companies Office is held the Register of Charges so that it is possible to see most of the extent to which the company has charged its assets with repayment of its debts.

The advantages of the registered company for the small business operation

- ▶ Limited liability gives the shareholders protection for their personal assets.
- ▶ Although there is no real reason why it should be so, raising of finance may be easier for a company than for an unincorporated business.
- ▶ Shares in a company are easier to issue and transfer so that
 - ▶ Fresh capital is easier to raise;
 - ▶ A shareholder's interest is more easily realised.
- ▶ The company structure provides a more effective platform for expansion.

Slide 13 – the advantages of a registered company

Note that if company has to borrow money – the lender, especially if it is a bank will require the directors to personally guarantee the debt.

The disadvantages of the registered company *for the small business operation*

- ▶ Formalities and costs relating to formation.
- ▶ Increased compliance costs in operation.
- ▶ Significant formalities and costs in winding up a company.
- ▶ Susceptible to loss of control through transfers of shares.
- ▶ The director or directors are accountable for their actions to:
 - ▶ The shareholders;
 - ▶ The Registrar of Companies;
 - ▶ The liquidator.

Slide 14 – the disadvantages

The chief disadvantage of incorporation is complexity – both in formation and in operation. Where the business is not capital intensive – i.e. does not require large amounts of money to get underway or operate, the additional complexity may well be outweighed by the advantages of limited liability.

Qualifying companies

This distinction belongs not to company law but to taxation law. Under s 8B3 of the Income Tax Act 2004 this is a company that is:

- ▶ a New Zealand company not a foreign company and
- ▶ has no more than 5 shareholders or is a flat-owning company and
- ▶ does not derive more than \$10,000 from foreign income excluding dividends and after allowing for certain deductions and
- ▶ has elected to become a qualifying company with the agreement of all directors and shareholders.

Slide 15 Qualifying companies

This removes one disadvantage of the company as the vehicle for a small business. Normal companies are taxed on their profits, and then when after tax profits are distributed to shareholders as dividends – the dividends are taxable as income in the hands of the shareholders.²⁹

Other Organizations

Slide 16 other organisations

Only one organisation is dealt with here since it is the most relevant for spatial designers.

The incorporated society

1. Incorporated by registration.
2. Minimum of 15 members.
3. Cannot make a profit for its members.
4. Can only act in accordance with its rules, i.e.
 - i. Can only do those things which for purposes specified in its rules;
 - ii. Can only make contracts in the manner prescribed by its rules.
5. Generally used for sporting, cultural and social purposes and for trade unions.

Slide 17 the Incorporated society

This is not included as possible structure for a business offering spatial design services – but as a note of caution if you have an incorporated society as a customer. Before committing yourself or your business to providing services for an incorporated society, you should check its rules at <http://www.societies.govt.nz/cms>

²⁹ There are imputation credits which counteract what is otherwise being taxed twice, but if a small business meets the criteria for a qualifying company – it is a much simpler system.

The reasons for forming a company - a comparative table

	Sole Trader	Partnership	Company
Definition	One person operating alone ³⁰ Business is not a separate legal entity Can carry out any legal activity	An association of 2 or more persons carrying on a business in common with a view to profit ³¹ . Not a separate legal entity Can carry out any legal activity ³²	Registered under the Companies Acts Has a legal entity separate from its member(s) May carry out any legal activity ³³
Formation	No legal formalities required to set up other than those connected with taxation	As for sole trader, a partnership agreement is desirable, an agreement is required for husband/wife partnerships for tax purposes. Relationships between partners governed by 1908 Act in the absence of agreement	Application for incorporation must be in form prescribed by the 1993 Act. If the company has no constitution relationship of members/directors/company governed by the Act. Formed by issue of Certificate of Incorporation issued by Registrar of Companies.
Number of Members	One	Two or more	One or more
Management of the Business	By self	By partners subject to the agreement if any	By Director(s) in the main - management responsibilities of directors and members defined by the Act and constitution if any
Liability of members	The sole trader is liable in full for own actions in the business	Partners liable for all acts of partners, and any person held out by the partnership as a partner, for carrying on the business of the partnership in the usual way	Company bound by acts of the directors and any person held out by the company as having the necessary authority
Liability for wrongful acts of employees	All employers are vicariously liable for wrongful acts of employees done in the course of their employment ³⁴		

³⁰ A sole trader may employ staff but is in sole charge of the operation

³¹ s4 *Partnership Act 1908*

³² some types of partnership are limited in their activities by law e.g. Lawyers may not form partnerships with accountants or other non-lawyers

³³ There are some activities such as that of an auditor that may not be carried on by a company

³⁴ In the case of companies, if the employee is sufficiently senior the act of the employee may be seen as the act of the company itself

	Sole Trader	Partnership	Company
Legal Proceedings	Is sued personally ³⁵	Partnership may sue and be sued in the firm's name. Partners may be sued individually ³⁶	Company may sue and be sued in its own name.
Raising Finance	Is personally liable for all debts of the business. May give the securities for loans, mortgages and charges of real personal property, if a dealer may give security over stock-in-trade If guarantee required would need to be given by third party. Under the <i>Personal Property Securities Act 1999</i> there is no real difference in the ability of any of the three types of business to give security.	The Partners are liable personally for all debts of the firm. Partnership may give securities as for sole traders	Shareholders are not personally liable for the debts of the company ³⁷ . But in the case of smaller companies the directors and principal shareholders will usually be required to give personal guarantees. May give securities as in the case of sole traders and partnerships and in addition may give a floating charge over the whole or part of the company's undertaking. All charges are required to be registered the <i>Personal Property Securities Act 1999</i> this distinction between companies and unincorporated business organisation has largely lost its significance and the legal regime governing the process of providing security for credit is now activity based rather than entity based.
Raising Finance from the Public	All undertakings of whatever nature that raise finance from the public must comply with the provisions of the <i>Securities Act 1978</i>		
Effect of Insolvency	Governed by the <i>Insolvency Act 2006</i> . Sole trader adjudicated bankrupt. Business and personal assets not distinguished ³⁸ . Personal creditors and business creditors rank equally ³⁹	Also governed by the <i>Insolvency Act</i> Partnership may be adjudicated bankrupt as may individual partners. Creditors of the firm have first call on the partnership assets if there is a deficiency then firm's creditors can seek payment from the personal assets of the	Liquidation under the <i>Companies Act</i> . Company is a separate entity and shareholders only liable for the amount, if any payable on their shares. However directors and shareholders who participate in management of the company may be required to contribute if their misfeasance has

³⁵ High Court Rules **R80**: Where the sole trader is trading under the name of a business then the may be sued in the name of that business. The sole trader may not sue in the business name.

³⁶ High Court Rules **R79** It is advisable when suing a partnership to join all the partners in the actnon

³⁷ But see "Effect of Insolvency" below

³⁸ Subject to the claim of bankrupt's spouse under the *Relationships Property Act 1976*

³⁹ except that in all insolvencies whether sole trader, partnership or company, employees have preference for wages, holiday pay etc

	Sole Trader	Partnership	Company
		partners after the personal creditors of the partner have been paid from the partner's personal assets.	caused the company's difficulties or if they have acted improperly. Rather than liquidation a company may be placed in voluntary administration under Part 15A of the <i>Companies Act 1993</i>
Continuity of the Business	Only so long as the sole trader continues in the business ⁴⁰	Under the <i>Partnership Act</i> the death or retirement of a partner results in the dissolution of the partnership, but in practice professional partnership agreements provide for continuation of the partnership despite changes in the membership	Company exists independently of the members, death or incapacity does not effect the existence of the company. In the event of shareholder results in shares being transferred to personal representative
Transfer of Interest	By sale and assignment. Provision must be made for creditors of the original owner who remains liable in the absence of novation.	Partner cannot transfer interest without consent of other partners. Creditors of the old firm must agree to substitute new partner for old (Novation) Outgoing partner must give notice and ensure that they are not still held out by the firm as a partner or their liability will continue	By sale of shares - listed companies no restriction, closely held companies may restrict the transferability of shares.
New Members	Not applicable unless the Sole trader forms a partnership	In theory old partnership is dissolved and new partnership formed but as noted above most professional partnerships provide for <i>de facto</i> if not <i>de iure</i> continuity. Unless otherwise agreed with outgoing, continuing and new partners and the creditors, new partners will not be liable for pre-existing debts	Either by a shareholder transferring shares or by the company issuing new shares. Where partly paid shares are transferred the transferor shareholder can retain a potential liability in the event of the company being wound up for up to 12 months.
Property on dissolution	After payment of all claims the surplus remains the property of the sole trader	After payment of partnership debts, surplus property shared among the partners according to the Agreement or failing an agreement the <i>Partnership Act</i>	Once all debts have been paid the property is distributed among the shareholders in accordance with their shareholding and rights attaching thereto

⁴⁰ The business may be sold as a going concern, but legally it would be new undertaking

	Sole Trader	Partnership	Company
Records required	Required to keep records such as will satisfy the IRD. It is an offence to operate a business without proper accounting records if the business operator is adjudicated bankrupt ⁴¹	As in the case of Sole traders. There are special requirements where the firm is required to operate a trust account	Must keep sufficient records such as will enable the company's financial position to be determined at any time ⁴²
Audit	No requirement unless sole trader is a practitioner required to keep a trust account or their profession otherwise requires, audit requirements determined by the relevant legislative provisions, or the sole trader is an "issuer" as defined in s4 <i>Financial Reporting Act 1993</i> ⁴³	As for sole trader, the partnership agreement may require the accounts to be audited	Companies that are more than 25% overseas owned or are "issuers" as defined in s4 <i>Financial Reporting Act 1993</i> must appoint an auditor other companies need not appoint an auditor if <i>all</i> the shareholders so resolve ⁴⁴
Disclosure of Financial Information other than to IRD	Unless sole trader an "issuer" no disclosure required	As for sole trader	The Name, Registered Office, Directors, Register of Shareholders, Register of Charges and the Constitution, if any, are public documents. All companies must file an annual return ⁴⁵ . All companies must supply a copy of the Annual Report to shareholders. Disclosure of financial information depends on whether the company is a "reporting entity" or an exempt company. All companies are required to keep an "Interests Register" in which the personal interests of the directors in any dealings with or by the company are to be recorded. The register is available to shareholders.
Profit Sharing	All profits credited to the owner	Profits must be shared among the partners equally (under the Act) or in accordance with the agreement or as the partners so decide	Profits may be retained or distributed to shareholders as recommended by the board in accordance with individual shareholdings and the rights attaching thereto

⁴¹ *Insolvency Act 2006* ss429 – 432

⁴² *Companies Act 1993* s194

⁴³ s15

⁴⁴ *Companies Act 1993* s196

⁴⁵ *Companies Act 1993* s214

	Sole Trader	Partnership	Company
Tax Rates	Personal tax rates	Personal tax rates	Company tax rates Note that a company with less than five members (a qualifying company) may be treated for tax purposes as a partnership esp. in relation to tax losses ⁴⁶ .
Private Income	Added to business income for tax purposes	Added to share of partnership income for tax purposes	Shareholder taxed on private income, imputation applies to dividends
Employing Relatives	Approval from IRD required to allow claim for wages paid to spouse/family. In bankruptcy wages owing spouse of the bankrupt are a deferred debt.	Partnership with spouse, written partnership agreement required and approval from IRD required to allow claim for wages paid to spouse/family	No restrictions provided payments are reasonable and Interest Register is completed where applicable

⁴⁶ Part H Subpart G *Income Tax Act 1994*