

18

6 OF 1975
No. of 1975

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

SIDNEY BOYD ASHTON First Appellant

- and -

JOHN WORRALL WHEELANS Second Appellant

- and -

COMMISSIONER OF INLAND Respondent
REVENUE

RECORD OF PROCEEDINGS

LINKLATERS & PAINES
Barrington House,
59-67 Gresham Street,
LONDON, EC2V 7JA
Solicitors for the
Appellants

ALLEN & OVERY,
9, Cheapside,
LONDON, EC2V 6AD.
Solicitors for the
Respondent.

IN THE PRIVY COUNCIL

No. _____ of 1975

B E T W E E N :

SIDNEY BOYD ASHTON

First Appellant

- and -

JOHN WORRALL WHEELANS

Second Appellant

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COMMISSIONER OF INLAND
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RECORD OF PROCEEDINGS

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1. All exhibits attached to the Case Stated in the Supreme Court of John Worrall Wheelans. All such exhibits are identical with those exhibits annexed to the Case Stated in the Supreme Court of Sidney Boyd Ashton.
2. Notice of Motion for conditional leave to appeal to Her Majesty in Council (Ashton and Wheelans v. Commissioner of Inland Revenue).

(v)

LIST OF DOCUMENTS OMITTED FROM THE RECORD

3. Order of Court of Appeal giving conditional leave to Appeal to Her Majesty in Council (Ashton and Wheelans v. Commissioner of Inland Revenue)
4. Notice of Motion for final leave to appeal to Her Majesty in Council (Ashton and Wheelans v. Commissioner of Inland Revenue).
5. Affidavit of Peter Robin Kyle in support of Motion for final leave to appeal to Her Majesty in Council.

IN THE PRIVY COUNCIL

No. of 1975

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

SIDNEY BOYD ASHTON First Appellant

- and -

JOHN WORRALL WHEELANS Second Appellant

- and -

COMMISSIONER OF
INLAND REVENUE Respondent

RECORD OF PROCEEDINGS

No. 1

CASE STATED (ASHTON v. COMMISSIONER
OF INLAND REVENUE)

In the Supreme
Court of New
Zealand

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

No. 1

Case Stated
(Ashton v. C.I.R.)

3 August 1972

BETWEEN SIDNEY BOYD ASHTON
of Christchurch,
Chartered
Accountant

OBJECTOR

A N D THE COMMISSIONER
OF INLAND REVENUE

COMMISSIONER

C A S E S T A T E D

pursuant to section 32 of the Land and
Income Tax Act, 1954.

1. AT all material times the Objector

In the Supreme
Court of New
Zealand

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No. 1

Case Stated
(Ashton v.C.I.R.)

3 August 1972
(continued)

resided at Christchurch. For some years up to 31 October 1965 he was in practice as a public accountant in partnership with one John Worrall Wheelans under the firm name of Ashton and Wheelans. Since that date he has carried on practice in partnership with the said John Worrall Wheelans and one Derek Robert Hegan under the firm name of Ashton, Wheelans and Hegan (hereinafter referred to as "the partnership").

10

2. BY deed dated the 26th day of November 1965, the said John Worrall Wheelans created a trust (hereinafter referred to as "the Ashton Trust") for the benefit of the wife children and grandchildren of the Objector and certain other persons. The Trustees of the said trust were the said John Worrall Wheelans and Geoffrey Charles Pitt Beadel of Christchurch, Solicitor. A copy of the said deed is annexed hereto and marked "A".

20

3. BY deed also dated the 26th day of November 1965, the Objector created a trust (hereinafter referred to as "the Wheelans Trust") for the benefit of the wife children and grandchildren of the said John Worrall Wheelans and certain other persons. The trustees of the said trust were the Objector and the said Geoffrey Charles Pitt Beadel. A copy of the said deed is annexed hereto and marked "A1".

30

4. ON the said 26th day of October 1965 CRESTA FINANCE LIMITED, WARWICK CREDITS LIMITED, WESTBURN INVESTMENTS LIMITED and WORCESTER HOLDINGS LIMITED (hereinafter called "the four finance companies") by separate letters of appointment signed by their Secretary the said John Worrall Wheelans appointed the Objector, the said John Worrall Wheelans and the said Geoffrey Charles Pitt Beadel, to act in the capacity of accountants for the four finance companies. The appointment of the said John Worrall Wheelans and Geoffrey Charles Pitt Beadel was in their capacity as trustees of the

40

Ashton Trust and the appointment of the Objector and the said Geoffrey Charles Pitt Beadel was in their capacities as trustees of the Wheelans Trust. Copies of the said letters are annexed hereto and marked respectively "B", "B1", "B2" and "B3".

In the Supreme
Court of
New Zealand

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No. 1

Case Stated
(Ashton v.C.I.R.)

3 August 1972
(continued)

10 5. BY letter dated the 27th day of October 1965 solicitors acting for the said John Worrall Wheelans, Geoffrey Charles Pitt Beadel and the Objector requested the partnership to act professionally in the capacity of Public Accountants and carry out on behalf of their clients the accountancy work required by the four finance companies. A copy of such letter is annexed hereto and marked "C". The partnership accepted appointment by letter dated the 29th day of October 1965 a copy of which is annexed hereto and marked "C1".

20

6. IN furnishing a return of income to the Commissioner for income tax purposes it was declared on behalf of the partnership that the income derived during the year ended on the 31st day of March 1967, was £10,479. 16. 8., allocated as follows:

Objector	£3,659.12.11.
John Worrall	
Wheelans	£3,659.18.10.
30 Derek Robert	
Hegan	£3,159.18.11.

A copy of the financial statement furnished in support of the said return is annexed hereto and marked "D".

40 7. IN furnishing a return of income to the Commissioner for income tax purposes it was declared by the said John Worrall Wheelans as a Trustee of the Ashton Trust that the assessable income derived during the year ended on the 31st day of March 1967, was £2,111. 12. 2. A copy of the financial statements furnished in support of the said return is annexed hereto and marked "E".

In the Supreme
Court of New
Zealand

No. 1

Case Stated
(Ashton v.C.I.R.)

3 August 1972
(continued)

8. IN furnishing a return of income of the Wheelans Trust to the Commissioner for income tax purposes it was declared by the Objector that the income derived during the year ended on the 31st day of March, 1967, was £2,105. 5. 1. A copy of the financial statements furnished in support of the said return is annexed hereto and marked "F".

9. THE Commissioner considered that the arrangements between the respective Trustees of the Ashton and Wheelans Trusts of the one part and the Objector and the said John Worrall Wheelans of the other part were void by virtue of the provisions of section 108 of the Land and Income Tax Act 1954. Accordingly the Commissioner adjusted the income returned by the partnership in respect of the year ended on the 31st day of March 1967, as follows:

Income Returned	£10,479.16. 8.	20
Add income returned by Trustees of Ashton Trust	2,111.12. 2.	
Income returned by Trustees of Wheelans Trust	<u>2,105. 5. 1.</u>	
Amended income	<u>£14,696.13.11.</u>	

allocated as follows:

Objector	£ 5,771.11. 1.
John Worrall Wheelans	£ 5,765. 3.11.
Derek Robert Hegan	£ 3,159.18.11.

10. SUBSEQUENTLY the Commissioner made an amended assessment of the amount on which in his judgment income tax ought to be levied on the Objector in respect of the year ended on the 31st day of March 1967, and the amount of such tax for that year. Included in the said assessment was the allocation of partnership income referred to in the previous paragraph hereof.

11. THE Objector objected to the said assessment referred to in the previous paragraph hereof on the grounds set forth in his solicitors' letter dated the 28th day

of November, 1968, a copy whereof is annexed and marked "G". In disallowing the said objection the Commissioner also considered the letter dated the 6th day of June 1968, from the Trustees' solicitors a copy whereof is annexed hereto and marked "G1".

In the Supreme
Court of New
Zealand

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No. 1

Case Stated
(Ashton v.C.I.R.)

3 August 1972
(continued)

10

12. UPON such objection being disallowed the Commissioner was required to state this case.

13. THE Objector contends:

- (a) That section 108 of the Land and Income Tax Act 1954 has no application to any of the transactions referred to in paragraphs 2 to 5 hereof;
- (b) That if section 108 applies to the transactions or any of them (which is denied) the result is not to increase in any way the assessable income of the Objector.

20

14. THE Commissioner contends that the contracts agreements and arrangements referred to in paragraphs 2 to 5 hereof inclusive between the Objector, the trustees and other parties are absolutely void by virtue of the provisions of section 108 of the Land and Income Tax Act 1954.

30

15. THE question for the determination of this Honourable Court is whether the Commissioner acted incorrectly in making the allocation of partnership income referred to in paragraph 9 hereof for the purposes of making the assessment referred to in paragraph 10 hereof and, if so, then in what respects should such assessment be amended.

Dated at Wellington this third day of
August 1972.

T.M. HUNT

40

Chief Deputy Commissioner
of Inland Revenue

In the Supreme
Court of New
Zealand

"A" DEED OF TRUST - J.W. Wheelans
Settlor

No. 2

"A"

"A" Deed of
Trust -
J.W. Wheelans
Settlor
26 November
1965

THIS DEED made this 26th day of November
One thousand nine hundred and sixty five
BETWEEN JOHN WORRALL WHEELANS of
Christchurch Public Accountant (herein-
after called "the Settlor") of the one
part AND GEOFFREY CHARLES PITT BEADEL
a Solicitor and the said JOHN WORRALL
WHEELANS both of Christchurch (herein-
after together with the trustee or
trustees hereof for the time being
referred to as and included in the term
"the Trustees") of the other part

10

WHEREAS the Settlor is desirous of making
provision for the following persons that is
to say:

FIRSTLY for JANE ELIZABETH ASHTON wife
of Sidney Boyd Ashton of Christchurch
Public Accountant AND for any other
person who may for the time being be the
legal wife or widow of the said Sidney
Boyd Ashton (hereinafter called "the
wife")

20

SECONDLY for the three children of the
said Sidney Boyd Ashton namely JOANNE
FRANCES ASHTON CATHERINE JANE ASHTON
and SUSAN RUTH ASHTON (hereinafter
referred to as "the Children")

30

AND THIRDLY for such other issue of the
said Sidney Boyd Ashton as may be born
to or adopted by him during the
continuance of the trusts hereby created
(hereinafter referred to as "the Unborn
Children")

AND FOURTHLY for such of the issue of
the Children or Unborn Children who may
hereafter during the continuance of
the trusts hereby created be born to or

40

adopted by the Children or the Unborn Children (hereinafter referred to as "the Grandchildren")

In the Supreme Court of New Zealand

AND FIFTHLY for such persons as may for the time being be the legal husband or wife of either the Children, the Unborn Children or the Grandchildren or any of them (hereinafter referred to as "the Husbands and Wives")

No. 2

"A" Deed of Trust -
J.W. Wheelans
Settlor

10 AND WHEREAS in pursuance of such desire the Settlor has concurrently herewith paid to the Trustees the sum of ONE POUND (£1.0.0) to be held by the Trustees on the trusts hereinafter declared and together with the powers hereinafter expressly or by implication vested in the Trustees

26 November
1965
(continued)

20 NOW THEREFORE THIS DEED WITNESSETH FIRSTLY that it is hereby agreed and declared between the Settlor and the Trustees that the Trustees shall hold the said sum of £1.0.0 paid to them by the Settlor together with any other property whether real or personal and where-soever situate which may hereafter be paid or transferred to the Trustees or otherwise acquired by them upon the like trusts from the Settlor or from any other person or persons and together also with any capital or other accretions thereto and the investments for the time being representing the same (hereinafter called "the Trust Fund") upon the following trusts that is to say:

30

(A) In respect of the income of the Trust Fund arising in each financial year the Trustees may at their discretion pay appropriate or apply the same or any part thereof to or for any of the following purposes or to any one or more of such purposes to the exclusion of the others of them that is to say:

- 40
- (i) The personal support, benefit maintenance or general advancement in life of the Wife
 - (ii) The maintenance, personal support, education benefit or advancement in

In the Supreme
Court of New
Zealand

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No. 2

"A" Deed of
Trust -
J.N. Wheelans
Settlor

26 November
1965
(continued)

life of such of the Children Unborn
Children Grandchildren or Husbands and
Wives as shall for the time being be
living or of any one or more of such
Children Unborn Children Grandchildren
or Husbands and Wives alone to the
exclusion of the other or others of
them and either equally or unequally
between them

- (iii) For any capital purposes authorised 10
by this Deed and without limiting the
generality of such powers for the
purpose of the purchase or other
acquisition of any land or other
real or personal property as herein
authorised or in the reduction or
repayment of any debt owing by the
Trustees to any person in respect
of the trust property or in or towards 20
the purchase of life insurance
policies or the payment of premiums
under such policies in accordance with
the powers hereinafter referred
to or in or towards any other purpose
for which capital monies may be
lawfully applied pursuant to the
provisions of this Deed
- (iv) The accumulation of such income to 30
the intent that the same shall be
added to and form part of the
capital of the Trust Fund and shall
follow the destination thereof and
be applied at any time for any of
the purposes for which the capital
of the Trust Fund may be lawfully
applied pursuant to the provisions
of this Deed
- (B) SUBJECT in all respects to the wide
discretionary powers hereby vested in the
Trustees AND in default of the exercise of 40
such powers or to the extent to which the
same are not so exercised by the Trustees
THEN the income of the Trust Fund arising
in each financial year shall be held by
the Trustees UPON TRUST for such of the
Children or Unborn Children as shall be

living at the end of that financial year and if more than one then equally between them.

In the Supreme Court of New Zealand

10 PROVIDED ALWAYS that if any of the Children or Unborn Children shall have died before the date of distribution and shall have left children living at the end of any financial year then such children shall take and if more than one then equally between them per stirpes the share of income to which his her or their parent would have become entitled (in default of or subject to the exercise of the discretionary powers of the Trustees) had such Child or Unborn Child been living at the end of that financial year

No. 2
"A" Deed of Trust -
J.W. Wheelans
Settlor
26 November
1965
(continued)

20 (C) To hold the capital of the Trust Fund from and after the date of distribution for such one or more of the Children Unborn Children Grandchildren or Husbands and Wives as the Trustees may in their sole and unfettered discretion by deed appoint and any such appointment may be for the benefit of any one or more of such persons to the exclusion of the other or others of them and either equally or unequally between them

30 PROVIDED ALWAYS that subject in all respects to the wide discretionary powers hereby vested in the Trustees AND in default of the exercise of such powers or the extent to which the same are not so exercised by the Trustees THEN the Trustees shall stand possessed of the capital of the Trust Fund from and after the date of distribution for such one or more of the Children or Unborn Children as shall be living at the date of distribution and if more than one then

40 equally between them as tenants in common PROVIDED FURTHER that (subject as aforesaid to the exercise by the Trustees of the discretionary power vested in them) if any of the Children or Unborn Children shall have died before the date of distribution then such children shall take and if more than one then equally between them per stirpes and as tenants in common the

In the Supreme Court of New Zealand.

share in the capital of the Trust Fund to which his her or their parent would have been entitled if living at the date of distribution

No. 2

"A" Deed of Trust - J.W. Wheelans Settlor

26 November 1965 (continued)

AND THIS DEED WITNESSETH SECONDLY that for the purposes of the trusts hereinbefore declared the following provisions shall apply:

(a) The words "financial year" herein referred to shall mean the period which ends on the 31st day of March in every year commencing with the period which ends on the 31st day of March next following the date hereof 10

(b) The financial accounts prepared by the Trustees in respect of the income of the Trust Fund for each financial year shall be final and binding on the Trustees to the extent that such accounts disclose the payment appropriation or application of the income of that financial year AND such accounts may not thereafter be amended varied or rescinded by the Trustees unless any manifest error shall be disclosed therein TO THE INTENT that the income so paid appropriated or applied shall as from the end of the financial year referred to in the accounts be indefeasably vested in and the absolute property of the person or several persons shown to be entitled thereto in accordance with such accounts 20 30

(c) That the date of distribution hereinbefore referred to shall be the 31st day of March in the year Two thousand and forty five or such earlier date as the Trustees may at their sole discretion nominate

AND THIS DEED WITNESSETH THIRDLY that the Trustees shall have the following powers discretions and authorities (in addition to those vested in them by law) and that the same may be exercised by the Trustees at their sole discretion from time to time and 40

at several times both in relation to the Trust Fund as hereinbefore defined as well as in relation to any real or personal property for the time being held or retained by the Trustees on trust for any or all of the Wife the Children the Unborn Children or the Grandchildren pursuant to this Deed whether such real or personal property shall have been so held or retained by the Trustees on account of the minority or incapacity of the persons beneficially entitled thereto or for any other reason AND such real or personal property so held or retained by the Trustees shall unless inconsistent with the context be deemed to be included in the expression "the Trust Fund" in relation to the following powers discretions and authorities of the Trustees that is to say:

- 20 1. TO invest the Trust Fund or such part thereof as the Trustees may think fit in any of the modes of investment for the time being authorised by the law of New Zealand for the investment of trust funds, upon contributory mortgage of freehold land in New Zealand, or in the purchase of shares in or in unsecured deposit with any Building Society (permanent or terminating) incorporated under the Building Societies Act, 1908 or
- 30 any other Act for the time being in force AND including the further power to invest upon or in debentures or debenture stock, guaranteed preference or ordinary shares or stock issued or guaranteed by any Company incorporated under Royal Charter or by Special Act or under any general Act or Acts of the Imperial Parliament or of the Legislature of any British Colony or Dominion or member state of the British Commonwealth
- 40 of Nations or any dependency or of any province or constituent state thereof and whether bearing any liability for uncalled capital or not

2. TO accept or take up any bonus shares or other rights or benefits issued or given by any company in which the Trustees as such may be interested and without prejudice to

In the Supreme
Court of New
Zealand

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No. 2

"A" Deed of
Trust -
J.W. Wheelans
Settlor

26 November
1965
(continued)

In the Supreme
Court of New
Zealand

—
No. 2

"A" Deed of
Trust -
J.W. Wheelans
Settlor

26 November
1965

(continued)

the generality of clause 12 hereof to determine whether such bonus shares are income or capital for the purposes of these presents notwithstanding the decision of the Company therein and every such determination of the Trustees shall be final and binding upon all persons beneficially interested hereunder

3. TO apply any part or parts of the Trust Fund from time to time in the purchase or acquisition of any land of freehold or leasehold tenure in New Zealand. 10

4. TO acquire any business or businesses which may seem to the Trustees to be of benefit to the Trust Fund and to carry on the same either alone or in partnership with any person or persons for the benefit of the Trust Fund during such period as the Trustees think fit and in particular but without limiting the generality of the foregoing the Trustees shall be fully empowered and authorised to engage in and carry on the business of finance agents and lenders of money either personally or as agents accountants or secretaries for Companies or other persons engaged in any such business or businesses and whether acting therein under any contract of service or other lawful arrangement whatsoever AND for such purposes as aforesaid or any of them the Trustees shall be further empowered to employ and use such part of the Trust Fund as capital in such business or businesses with power from time to time to increase or reduce such capital to the intent that the Trustees shall at all times have the fullest discretionary power in all matters relating to the management of such business or businesses or partnership business as if they were the absolute proprietors thereof but the actual conduct or management thereof may be delegated to any managers public accountants solicitors or other persons as may be appointed by the Trustees (including any one or more of their own number) and the Trustees may pay and allow such rates of remuneration as are usual for work of that nature (and where 20 30 40

any such deglation has been made in favour of the Trustees or either or any of them then the provisions of Clause 20 hereof shall apply to the remuneration so paid or allowed to the Trustees AND this Deed further witnesseth that the Trustees shall be fully indemnified out of the Trust Fund in respect of all losses or liabilities sustained or incurred in carrying on or otherwise in relation to any such business or businesses whether in partnership or otherwise which the Trustees are hereby authorised to carry on or in relation to any act deed or thing performed by the Trustees in pursuance of the powers hereby vested in them

In the Supreme
Court of New
Zealand

No. 2

"A" Deed of
Trust -
J.W. Wheelans
Settlor

26 November
1965
(continued)

5. TO appropriate and set aside out of the Trust Fund the whole or any parts thereof as they shall in their absolute discretion think fit in or towards the purchase or acquisition of any policy or policies of life insurance which may be or become vested in the Trustees on the life or lives of any person or persons including their own lives and the Trustees may thereafter keep up and maintain such policy or policies on foot until the maturity thereof or surrender sell or otherwise realise the same at will AND the proceeds of such policy or policies by whatever means realised by the Trustees shall form part of the trust fund and be applied as herein provided

6. TO advance any part of the Trust Fund to any person or persons Company or Corporation including any person beneficially entitled hereunder but not including the Settlor and any advances so made shall be at the sole discretion of the Trustees both as to the payment or non-payment of interest or as to the rate thereof if the same is payable or as to the terms of repayment and generally as to the extent if any of the security for any such advances

7. TO sell all or any part of the real or personal property comprising the Trust Fund to any person firm or corporation including the Trustee or Trustees for the time being or

leasing and subleasing may be exercised in favour of any one or more of the persons beneficially entitled hereto to the exclusion of the other or others of them

In the Supreme
Court of New
Zealand

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No. 2

10 10. FOR any of the purposes of the trusts herein declared to borrow moneys upon the security of any real or personal property forming part of the Trust Fund or any part thereof at such rates of interest and upon such terms as to repayment and in general as the Trustees shall think fit and no person or persons lending moneys on any mortgage or other security purporting to be given under this power shall be in any way concerned to see that such moneys are required for the purposes of the trusts herein declared nor that this power has in all respects been properly exercised by the Trustees

"A" Deed of
Trust -
J.W. Wheelans
Settlor

26 November
1965
(continued)

20 11. IN respect of any Company in which the Trustees may hold any interest on behalf of the Trust Fund to exercise (in addition to any other powers hereby conferred) all or any of the following powers:

30 (a) To act as Director or Directors of any such Company as aforesaid either alone or in conjunction with others and to receive and retain without being liable to account for the same any Directors' fees or other remuneration payable to them as such Directors

40 (b) To provide out of the Trust Fund further capital for such Company either by way of advances loans (with or without security) deposit on current account or otherwise or by guarantees (with or without security) or by taking up shares or further shares in such Company or in such other manner and on such terms as the Trustees may think fit

In the Supreme Court of New Zealand

No. 2

"A" Deed of Trust - J.W. Wheelans Settlor

26 November 1965 (continued)

(c) To concur on such terms as the Trustees think fit in the winding up reconstruction or amalgamation of such Company or in the modification of the Regulations thereof, and to concur in the modification of or to surrender any of the rights attaching to all or any of its shares, and to exercise in such manner as the Trustees think fit all and any powers which by the Regulations of such Company are vested in the Trustees as Director or Directors or members thereof or otherwise, and on any winding up reconstruction or amalgamation to accept fully paid or partly paid shares or debentures or other interests in or securities of any Company as the consideration or part of the consideration for such winding up reconstruction or amalgamation, and generally to act in relation to such Company in such manner as the Trustees think best calculated to benefit the Trust Fund

10
20

12. TO determine generally and from time to time that portion of the Trust Fund which shall represent income and that portion thereof which shall represent capital and every such determination shall be absolutely binding on all persons beneficially interested hereunder and the full and unrestricted power hereby conferred shall include power to write off against income in accordance with usual Accountancy practice depreciation upon buildings and other assets forming part of the Trust Fund to establish any depreciation or sinking fund as the Trustees shall consider expedient AND FURTHER to determine in such manner as the Trustees shall consider equitable that portion of the income of the Trust Fund from time to time received by the Trustees which shall in their opinion have resulted from any real or personal property for the time being held or retained by the Trustees on trust for the Wife the Children the Unborn Children

30
40

the Grandchildren or the Husbands or Wives or any of them where such real or personal property has not been specifically segregated or set aside by the Trustees for the person or persons beneficially entitled thereto but has (in accordance with the powers herein contained) remained combined with other real and personal property held on trust by the Trustees pursuant to this Deed

In the Supreme Court of New Zealand

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"A" Deed of Trust -
J.W. Wheelans
Settlor

10 13. TO retain in the hands of the Trustees any or all real or personal property received by them in their capacity as Trustees and any investments for the time being representing the same without segregating or partitioning the same to any one or more of the persons beneficially entitled for the time being to an indefeasible share in such real or personal property and investments OR IN THE
20 ALTERNATIVE at the discretion of the Trustees at any time or times to appropriate and allot any real or personal property forming part of the Trust Fund or any undivided interest in such property in or towards satisfaction of the shares of any person or persons (whether sui juris or not) under the trusts hereinbefore contained and to charge any such property interest or share with such sums by way of equality of partition as the Trustees may think fit and
30 for such purpose to fix the value of any real or personal property or interest therein so appropriated and the value of any other property forming part of the Trust Fund as they think fit AND to transfer to any such beneficiary upon his or her becoming absolutely entitled thereto the property or interest therein so appropriated and allotted subject to such mortgages or charges and on such conditions as the Trustees shall
40 consider necessary PROVIDED ALWAYS that any property or interest therein so appropriated or allotted shall until the same is transferred to some person absolutely entitled thereto remain subject (so far as the nature of the property and circumstances will permit) to all of the powers by these presents conferred upon the Trustees as if no such appropriation or allotment had taken place and may be dealt with by the Trustees accordingly

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14. FROM time to time at the discretion of the Trustees to vary and transpose the investments of any part of the Trust Fund into or for others of a nature hereby authorised

15. AT any time prior to the date of distribution the Trustees shall be empowered to pay or apply for the maintenance personal support education welfare or benefit or advancement in life of the Wife the Children the Unborn Children the Grandchildren or the Husbands and Wives or of any other person for the time being entitled to any interest in the Trust Fund (whether or not such person shall have attained the age of twenty one years and whether the interest to which that person is entitled is vested or contingent) or to any one or more of such persons to the exclusion of the other or others entitled thereto such sum or sums from time to time out of the capital or unappropriated income of the Trust Fund as the Trustees shall in their absolute discretion consider necessary or expedient in the interests and welfare of the person or persons on whose behalf the same is made and any such payments by the Trustees from time to time shall be absolutely final and binding upon all persons beneficially interested hereunder PROVIDED ALWAYS that where the person on whose behalf such payments as aforesaid are made by the Trustees is for the time being under the age of twenty one years then the Trustees shall instead of themselves applying such monies be empowered to pay the same or any part thereof to any guardian or guardians of the infant person other than the Settlor without seeing to the further application thereof. 10
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16. IN respect of the income of the Trust Fund which has been appropriated in accordance with the provisions of this Deed and which is the absolute property of any person who is not for the time being sui juris then the Trustees shall be further empowered at their discretion from time to time to pay or apply the whole or any part

thereof for the maintenance personal support
 education welfare benefit or advancement in
 life of such person AND instead of themselves
 applying such monies the Trustees may pay
 or apply the same or any part thereof to
 any guardian or guardians for the time being
 of such person other than the Settlor without
 being bound to see to the application thereof
 10 PROVIDED ALWAYS that the powers hereby
 conferred on the Trustees may be exercised
 by them either independently from or
 together with the powers conferred on the
 Trustees by the preceding clause thereof

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17. TO promote form or concur in any steps
 or proceedings which may be taken to promote
 or form a Company for the purpose of
 purchasing or acquiring any undertaking
 business or assets which or an interest in
 20 which forms part of the Trust Fund or the
 undertaking business or assets of any Company
 in which the Trustees may hold shares AND
 to sell and transfer such undertaking business
 or assets or the interest of the Trust Fund
 therein or any other business or property
 forming part of the Trust Fund to any company
 or the trustees for any Company proposed to
 be formed AND to carry out and complete any
 scheme or arrangement for the amalgamation
 of the said undertaking business or assets
 30 or the interest of the Trust Fund therein
 or any other business or property forming
 part of the Trust Fund with any Company
 or the trustees for any Company proposed to
 be formed AND to carry out and complete any
 scheme or arrangement for the amalgamation
 of the said undertaking business or assets
 with the undertaking business and assets of
 any other Company or Companies on such
 terms and as to the price or consideration
 40 being received in cash or in shares or stock
 (ordinary preferred or deferred and fully paid
 or partly contributory) or in debentures or
 debenture stock of the purchasing Company or
 partly in one way and partly in another and
 generally upon such terms and conditions
 as the Trustees shall think fit with power
 to allow time for payment of the whole or part
 of any cash consideration whether with or
 without taking security therefor AND the

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the Trustees may take such shares stock debentures or debenture stock having such rights and privileges and subject to such obligations as the Trustees may think fit and may retain the same as authorised investments for so long as the Trustees shall think fit

18. TO invest any monies forming part of the Trust Fund by purchasing any part of the estate of the said Sidney Boyd Ashton from the executors of his will or trustees of his estate whether or not such executors or trustees are the same persons as the Trustees hereof and any property so purchased shall be an authorised investment of that part of the Trust Fund so applied 10

19. TO make such outlay as the Trustees may from time to time deem expedient in subdividing or developing any real or personal property forming part of the Trust Fund or in carrying out any repairs alterations additions and improvements thereto and generally to employ surveyors builders architects land agents or contractors to prepare plans, make roads, lay drains and do all such other acts, deeds and things as the Trustees may consider necessary or desirable in carrying out the foregoing powers or any of them and to charge all moneys so expended by the Trustees either to the capital or the income of the Trust Fund as the Trustees shall think proper 20 30

20. THE Trustees may at their uncontrolled discretion instead of acting personally herein employ and pay any person firm company or corporation to do any act of whatever nature relating to the trusts hereof including the receipt and payment of money without being liable for any loss incurred thereby AND without prejudice to the generality of the foregoing the Trustee or Trustees for the time being hereof who may be either a Public Accountant or a Solicitor shall be entitled to charge and be paid for his or their professional and other services time and trouble in and about the execution of the trusts hereby declared 40

as they or either of them would have been entitled to charge and be paid had he or they not been Trustees hereunder and whether in the ordinary course of their profession or business or not and although not of a nature requiring the employment of a Solicitor or Public Accountant

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10 21. THE Trustees or either of them may appoint another person or Company to act as attorney or attorneys for such Trustee or Trustees in New Zealand and elsewhere for all or any of the purposes of these presents and at any time or times and for any period and any such appointments so made may be revoked and remade from time to time

20 AND THIS DEED WITNESSETH LASTLY that although two Trustees have been originally appointed under this Deed the number of Trustees hereunder may at any time be increased so that they shall for the time being be not less than two nor more than four and the power to increase the number of trustees hereunder or to fill the vacancy caused by any Trustee for the time being dying or being unfit unable or unwilling to act as Trustee hereunder, shall be exercisable by :

- 30 (a) The said Sidney Boyd Ashton of Christchurch Public Accountant so long as he shall be able and willing to make any appointments as may be required
- 40 (b) If and so long as the said Sidney Boyd Ashton shall be either unable or unwilling to make such appointments as may be required then the Wife shall be empowered to make such appointments as may be required hereunder
- (c) If and so long as neither the said Sidney Boyd Ashton nor the Wife shall be either able or willing to make such appointments as may be

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required hereunder then the Trustees
or continuing Trustee or Trustees
of the personal representatives of
the last surviving Trustee shall be
so empowered to make such
appointments as may be required
hereunder

(d) If and so long as there shall be no
person able willing and qualified to
make any appointment required for 10
the purposes of this Deed then the
power to make such appointment
shall be vested in the President
for the time being of the Canterbury
District Law Society in the
Dominion of New Zealand

IN WITNESS whereof these presents have been
executed the day and year first hereinbefore
written

SIGNED by the said)
JOHN WORRALL WHEELANS) J.W. Wheelans 20
in the presence of :)

K.L. Heney
Solicitor
Christchurch

SIGNED by the said)
GEOFFREY CHARLES PITT)
BEADEL in the) G.C.P. Beadel
presence of:)

K.L. Heney 30
Solicitor
Christchurch

No. 3

"A1" DEED OF TRUST - S.B. Ashton
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"A1"

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of Trust -
S.B. Ashton
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10 THIS DEED made this 26th day of November One thousand nine hundred and sixty five BETWEEN SIDNEY BOYD ASHTON of Christchurch Public Accountant (hereinafter called "the Settlor") of the one part AND GEOFFREY CHARLES PITT BEADEL a Solicitor and the said SIDNEY BOYD ASHTON both of Christchurch (hereinafter together with the trustee or trustees hereof for the time being referred to as and included in the term "the Trustees") of the other part

WHEREAS the Settlor is desirous of making provision for the following persons that is to say:

20 FIRSTLY for ELIZABETH ANNE WHEELANS wife of John Worrall Wheelans of Christchurch Public Accountant AND for any other person who may for the time being be the legal wife or widow of the said John Worrall Wheelans (hereinafter called "the Wife")

SECONDLY for the four children of the said John Worrall Wheelans namely JOHY ANTHONY WHEELANS PHILIP LAWRENCE WHEELANS RICHARD STUART WHEELANS and SIMON DAVID WHEELANS (hereinafter referred to as "the Children")

30 AND THIRDLY for such other issue of the said John Worrall Wheelans as may be born to or adopted by him during the continuance of the trusts hereby created (hereinafter referred to as "the Unborn Children")

40 AND FOURTHLY for such of the issue of the Children or Unborn Children who may hereafter during the continuance of the trusts hereby created be born to or adopted by the Children or the Unborn Children (hereinafter referred to as "the Grandchildren")

AND FIFTHLY for such persons as may for

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the time being be the legal husband or wife of either the Children, the Unborn Children or the Grandchildren or any of them (hereinafter referred to as "the Husbands and Wives")

AND WHEREAS in pursuance of such desire the settlor has concurrently herewith paid to the Trustees the sum of ONE POUND (£1. 0. 0) to be held by the Trustees on the trusts hereinafter declared and together with the powers herein- 10
after expressly or by implication vested in the Trustees

NOW THEREFORE THIS DEED WITNESSETH FIRSTLY that it is hereby agreed and declared between the Settlor and the Trustees that the Trustees shall hold the said sum of \$1. 0. 0 paid to them by the Settlor together with any other property whether real or personal and where-soever situate which may hereafter be paid or transferred to the Trustees or otherwise 20
acquired by them upon the like trusts from the Settlor or from any other person or persons and together also with any capital or other accretions thereto and the investments for the time being representing the same (hereinafter called "the Trust Fund") upon the following trusts that is to say:

(A) In respect of the income of the Trust Fund arising in each financial year 30
the Trustees may at their discretion pay appropriate or apply the same or any part thereof to or for any of the following purposes or to any one or more of such purposes to the exclusion of the others of them that is to say:

- (i) The personal support, benefit maintenance or general advancement in life of the Wife
- (ii) The maintenance, personal support, 40
education benefit or advancement in life of such of the Children Unborn Children Grandchildren or Husbands and Wives as shall for the time being be living or of

any one or more of such Children Unborn Children Grandchildren or Husbands and Wives alone to the exclusion of the other or others of them and either equally or unequally between them

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10 (iii) For any capital purposes authorised by this Deed and without limiting the generality of such powers for the purpose of the purchase or other acquisition of any land or other real or personal property as herein authorised or in the reduction or repayment of any debt owing by the Trustees to any person in respect of the trust property or in or towards the purchase of life insurance policies or the payment of premiums under such policies in accordance with the powers hereinafter referred to or in or towards any other purpose for which capital monies may be lawfully applied pursuant to the provisions of this Deed

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30 (iv) The accumulation of such income to the intent that the same shall be added to and form part of the capital of the Trust Fund and shall follow the destination thereof and be applied at any time for any of the purposes for which the capital of the Trust Fund may be lawfully applied pursuant to the provisions of this Deed

40 (B) SUBJECT in all respects to the wide discretionary powers hereby vested in the Trustees AND in default of the exercise of such powers or to the extent to which the same are not so exercised by the Trustees THEN the income of the Trust Fund arising in each financial year shall be held by the Trustees UPON TRUST for such of the Children or Unborn Children as shall be living at the end of that financial year and if more than one then equally between them

PROVIDED ALWAYS that if any of the Children or Unborn Children shall have died before

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the date of distribution and shall have left children living at the end of any financial year then such children shall take and if more than one then equally between them per stirpes the share of income to which his her or their parent would have become entitled (in default of or subject to the exercise of the discretionary powers of the Trustees) had such Child or Unborn Child been living at the end of that financial year

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(C) To hold the capital of the Trust Fund from and after the date of distribution for such one or more of the Children Unborn Children Grandchildren or Husbands and Wives as the Trustees may in their sole and unfettered discretion by deed appoint and any such appointment may be for the benefit of any one or more of such persons to the exclusion of the other or others of them and either equally or unequally between them PROVIDED ALWAYS that subject in all respects to the wide discretionary powers hereby vested in the Trustees AND in default of the exercise of such powers or the extent to which the same are not so exercised by the Trustees THEN the Trustees shall stand possessed of the capital of the Trust Fund from and after the date of distribution for such one or more of the Children or Unborn Children as shall be living at the date of distribution and if more than one then equally between them as tenants in common PROVIDED FURTHER that (subject as aforesaid to the exercise by the Trustees of the discretionary power vested in them) if any of the Children or Unborn Children shall have died before the date of distribution leaving children living at the date of distribution then such children shall take and if more than one then equally between them per stirpes and as tenants in common the share in the capital of the Trust Fund to which his her or their parent would have been entitled if living at the date of distribution

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AND THIS DEED WITNESSETH SECONDLY that for the purposes of the trusts hereinbefore declared the following provisions shall apply:

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(a) The words "financial year" herein referred to shall mean the period which ends on the 31st day of March in every year commencing with the period which ends on the 31st day of March next following the date hereof

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(b) The financial accounts prepared by the Trustees in respect of the income of the Trust Fund for each financial year shall be final and binding on the Trustees to the extent that such accounts disclose the payment appropriation or application of the income of that financial year AND such accounts may not thereafter be amended varied or rescinded by the Trustees unless any manifest error shall be disclosed therein TO THE INTENT that the income so paid appropriated or applied shall as from the end of the financial year referred to in the accounts be indefeasably vested in and the absolute property of the person or several persons shown to be entitled thereto in accordance with such accounts

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(c) That the date of distribution hereinbefore referred to shall be the 31st day of March in the year Two thousand and forty five or such earlier date as the Trustees may at their sole discretion nominate

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AND THIS DEED WITNESSETH THIRDLY that the Trustees shall have the following powers discretions and authorities (in addition to those vested in them by law) and that the same may be exercised by the Trustees at their sole discretion from time to time and at several times both in relation to the Trust Fund as hereinbefore defined as well as in relation to any real or personal property for the time being held or retained by the Trustees on trust for any or all of the Wife the Children the Unborn Children or the Grandchildren pursuant to this Deed whether

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such real or personal property shall have been so held or retained by the Trustees on account of the minority or incapacity of the persons beneficially entitled thereto or for any other reason AND such real or personal property so held or retained by the Trustees shall unless inconsistent with the context be deemed to be included in the expression "the Trust Fund" in relation to the following powers discretions and authorities of the Trustees that is to say: 10

1. TO invest the Trust Fund or such part thereof as the Trustees may think fit in any of the modes of investment for the time being authorised by the law of New Zealand for the investment of trust funds, upon contributory mortgage of freehold land in New Zealand, or in the purchase of shares in or on unsecured deposit with any Building Society (permanent or terminating) 20
incorporated under the Building Societies Act, 1908 or any other Act for the time being in force AND including the further power to invest upon or in debentures or debenture stock, guaranteed preference or ordinary shares or stock issued or guaranteed by any Company incorporated under Royal Charter or by Special Act or under any general Act or Acts of the Imperial Parliament or of the Legislature of any 30
British Colony or Dominion or member state of the British Commonwealth of Nations or any dependency or of any province or constituent state thereof and whether bearing any liability for uncalled capital or not

2. TO accept or take up any bonus shares or other rights or benefits issued or given by any company in which the Trustees as such may be interested and without 40
prejudice to the generality of clause 12 hereof to determine whether such bonus shares are income or capital for the purposes of these presents notwithstanding the decision of the Company therein and every such determination of the Trustees shall be final and binding upon all persons beneficially interested hereunder

3. TO apply any part or parts of the Trust Fund from time to time in the purchase or acquisition of any land of freehold or leasehold tenure in New Zealand

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10 4. TO acquire any business or businesses which may seem to the Trustees to be of benefit to the Trust Fund and to carry on the same either alone or in partnership with any person or persons for the benefit of the Trust Fund during such period as the Trustees think fit and in particular but without limiting the generality of the foregoing the Trustees shall be fully empowered and authorised to engage in and carry on the business of finance agents and lenders of money either personally or as agents accountants or secretaries for Companies or other persons engaged in any such business or businesses and whether acting therein

20 under any contract of service or other lawful arrangement whatsoever AND for such purposes as aforesaid or any of them the Trustees shall be further empowered to employ and use such part of the Trust Fund as capital in such business or businesses with power from time to time to increase or reduce such capital to the intent that the Trustees shall at all times have the fullest discretionary power in all matters

30 relating to the management of such business or businesses or partnership business as if they were the absolute proprietors thereof but the actual conduct or management thereof may be delegated to any managers public accountants solicitors or other persons as may be appointed by the Trustees (including any one or more of their own number) and the Trustees may pay and allow such rates of remuneration as are usual for work of

40 that nature (and where any such delegation has been made in favour of the Trustees or either or any of them then the provisions of Clause 20 hereof shall apply to the remuneration so paid or allowed to the Trustees) AND this Deed further witnesseth that the Trustees shall be fully indemnified out of the Trust Fund in respect of all losses or liabilities

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sustained or incurred in carrying on or otherwise in relation to any such business or businesses whether in partnership or otherwise which the Trustees are hereby authorised to carry on or in relation to any act deed or thing performed by the Trustees in pursuance of the powers hereby vested in them

5. TO appropriate and set aside out of the Trust Fund the whole or any parts thereof as they shall in their absolute discretion think fit in or towards the purchase or acquisition of any policy or policies of life insurance which may be or become vested in the Trustees on the life or lives of any person or persons including their own lives and the Trustees may thereafter keep up and maintain such policy or policies on foot until the maturity thereof or surrender sell or otherwise realise the same at will AND the proceeds of such policy or policies by whatever means realised by the Trustees shall form part of the trust fund and be applied as herein provided

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6. TO advance any part of the Trust Fund to any person or persons Company or Corporation including any person beneficially entitled hereunder but not including the Settlor and any advances so made shall be at the sole discretion of the Trustees both as to the payment or non-payment of interest or as to the rate thereof if the same is payable or as to the terms of repayment and generally as to the extent if any of the security for any such advances

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7. TO sell all or any part of the real or personal property comprising the Trust Fund to any person firm or corporation including the Trustee or Trustees for the time being or either or any of them or to any one or more of the persons beneficially entitled hereunder to the exclusion of the other or others of them either by public auction or private contract or in such manner and subject to such terms and conditions including the granting of options to

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purchase as the Trustees shall in their absolute discretion think fit with power to allow the whole or any part of the purchase money to remain on mortgage of the property sold with further power should the purchaser be a limited liability company or a trustee for the same to accept either in full or in part satisfaction of the purchase money such preferred or ordinary shares whether wholly or partially paid up or wholly contributory debentures debenture stock bonds or other securities of such Company as the Trustees shall think fit

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8. TO allow any property or investment coming into the hands of the Trustees to remain in its existing form notwithstanding that it may be of a hazardous wasting or speculative nature and for such period or periods or indefinitely as the Trustees think fit without being responsible for any loss or diminution incurred thereby AND so long as such real or personal property is so retained by the Trustees they shall be empowered to pay out of the Trust Fund such amounts as they think proper for payment of calls on shares or otherwise for the benefit of the Trust Fund and of such real or personal property so retained by the Trustees AND to act generally in relation thereto as if they were the absolute owners thereof

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9. TO let or sublet any real personal or leasehold property or any plant chattels or livestock forming part of the Trust Fund or any part or parts thereof from year to year or for any term of years at such rent and subject to such covenants and conditions as the Trustees shall think fit and to accept surrenders of leases thereof and to relet AND such powers of leasing and subleasing may be exercised in favour of any one or more of the persons beneficially entitled hereto to the exclusion of the other or others of them

10. FOR any of the purposes of the trusts herein declared to borrow moneys upon the security of any real or personal property

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forming part of the Trust Fund or any part thereof at such rates of interest and upon such terms as to repayment and in general as the Trustees shall think fit and no person or persons lending moneys on any mortgage or other security purporting to be given under this power shall be in any way concerned to see that such moneys are required for the purposes of the trusts herein declared nor that this power has in all respects been properly exercised by the Trustees 10

11. IN respect of any Company in which the Trustees may hold any interest on behalf of the Trust Fund to exercise (in addition to any other powers hereby conferred) all or any of the following powers:

- (a) To act as Director or Directors of any such Company as aforesaid either alone or in conjunction with others and to receive and retain without being liable to account for the same any Directors' fees or other remuneration payable to them as such Directors 20
- (b) To provide out of the Trust Fund further capital for such Company either by way of advances loans (with or without security) deposit on current account or otherwise or by guarantees (with or without security) or by taking up shares or further shares in such Company or in such other manner and on such terms as the Trustees may think fit 30
- (c) To concur on such terms as the Trustees think fit in the winding up reconstruction or amalgamation of such Company or in the modification of the Regulations thereof, and to concur in the modification of or to surrender any of the rights attaching to all or any of its shares, and to exercise in such manner as the Trustees think fit all and any powers which by the Regulations of 40

such Company are vested in the Trustees as Director or Directors or members thereof or otherwise, and on any winding up reconstruction or amalgamation to accept fully paid or partly paid shares or debentures or other interests in or securities of any Company as the consideration or part of the consideration for such winding up reconstruction or amalgamation, and generally to act in relation to such Company in such manner as the Trustees think best calculated to benefit the Trust Fund

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12. TO determine generally and from time to time that portion of the Trust Fund which shall represent income and that portion thereof which shall represent capital and every such determination shall be absolutely binding on all persons beneficially interested hereunder and the full and unrestricted power hereby conferred shall include power to write off against income in accordance with usual Accountancy practice depreciation upon buildings and other assets forming part of the Trust Fund to establish any depreciation or sinking fund as the Trustees shall consider expedient AND FURTHER to determine in such manner as the Trustees shall consider equitable that portion of the income of the Trust Fund from time to time received by the Trustees which shall in their opinion have resulted from any real or personal property for the time being held or retained by the Trustees on trust for the Wife the Children the Unborn Children the Grandchildren or the Husbands or Wives or any of them where such real or personal property has not been specifically segregated or set aside by the Trustees for the person or persons beneficially entitled thereto but has (in accordance with the powers herein contained) remained combined with other real and personal property held on trust by the Trustees pursuant to this Deed

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13. TO retain in the hands of the Trustees any or all real or personal property received by them in their capacity as Trustees and any investments for the time being representing the same without segregating or partitioning the same to any one or more of the persons beneficially entitled for the time being to an indefeasible share in such real or personal property and investments OR IN THE ALTERNATIVE at the discretion of the Trustees at any time or times to appropriate and allot any real or personal property forming part of the Trust Fund or any undivided interest in such property in or towards satisfaction of the shares of any person or persons (whether sui juris or not) under the trusts hereinbefore contained and to charge any such property interest or share with such sums by way of equality of partition as the Trustees may think fit and for such purpose to fix the value of any real or personal property or interest therein so appropriated and the value of any other property forming part of the Trust Fund as they think fit AND every such valuation appropriation and allotment shall be final and binding on all persons beneficially interested in the Trust Fund AND to transfer to any such beneficiary upon his or her becoming absolutely entitled thereto the property or interest therein so appropriated and allotted subject to such mortgages or charges and on such conditions as the Trustees shall consider necessary PROVIDED ALWAYS that any property or interest therein so appropriated or allotted shall until the same is transferred to some person absolutely entitled thereto remain subject (so far as the nature of the property and circumstances will permit) to all of the powers by these presents conferred upon the Trustees as if no such appropriation or allotment had taken place and may be dealt with by the Trustees accordingly

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14. FROM time to time at the discretion of the Trustees to vary and transpose the investments of any part of the Trust Fund into or for others of a nature hereby authorised

15. AT any time prior to the date of distribution the Trustees shall be empowered to pay or apply for the maintenance personal support education welfare or benefit or advancement in life of the Wife the Children the Unborn Children the Grandchildren or the Husbands and Wives or of any other person for the time being entitled to any interest in the Trust Fund (whether or not such person shall have attained the age of twenty one years and whether the interest to which that person is entitled is vested or contingent) or to any one or more of such persons to the exclusion of the other or others entitled thereto such sum or sums from time to time out of the capital or unappropriated income of the Trust Fund as the Trustees shall in their absolute discretion consider necessary or expedient in the interests and welfare of the person or persons on whose behalf the same is made and any such payments by the Trustees from time to time shall be absolutely final and binding upon all persons beneficially interested hereunder PROVIDED ALWAYS that where the person on whose behalf such payments as aforesaid are made by the Trustees is for the time being under the age of twenty one years then the Trustees shall instead of themselves applying such monies be empowered to pay the same or any part thereof to any guardian or guardians of the infant person other than the Settlor without seeing to the further application thereof

16. IN respect of the income of the Trust Fund which has been appropriated in accordance with the provisions of this Deed and which is the absolute property of any person who is not for the time being sui juris then the Trustees shall be further empowered at their discretion from time to time to pay or apply the whole or any part thereof for the maintenance personal support education welfare benefit or advancement in life of such person AND instead of themselves applying such monies the Trustees may pay or apply the same or any part thereof to any guardian or

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(continued)

guardians for the time being of such person other than the Settlor without being bound to see to the application thereof PROVIDED ALWAYS that the powers hereby conferred on the Trustees may be exercised by them either independently from or together with the powers conferred on the Trustees by the preceding clause hereof

17. TO promote form or concur in any steps or proceedings which may be taken to promote or form a Company for the purpose of purchasing or acquiring any undertaking business or assets which or an interest in which forms part of the Trust Fund or the undertaking business or assets of any Company in which the Trustees may hold shares AND to sell and transfer such undertaking business or assets or the interest of the Trust Fund therein or any other business or property forming part of the Trust Fund to any company or the trustees for any Company proposed to be formed AND to carry out and complete any scheme or arrangement for the amalgamation of the said undertaking business or assets or the interest of the Trust Fund therein or any other business or property forming part of the Trust Fund with any Company or the trustees for any Company proposed to be formed AND to carry out and complete any scheme or arrangement for the amalgamation of the said undertaking business or assets with the undertaking business and assets of any other Company or Companies on such terms and as to the price or consideration being received in cash or in shares or stock (ordinary preferred or deferred and fully paid or partly contributory) or in debentures or debenture stock of the purchasing Company or partly in one way and partly in another and generally upon such terms and conditions as the Trustees shall think fit with power to allow time for payment of the whole or part of any cash consideration whether with or without taking security therefor AND the Trustees may take such shares stock

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20
30
40

debentures or debenture stock having such rights and privileges and subject to such obligations as the Trustees may think fit and may retain the same as authorised investments for so long as the Trustees shall think fit.

In the Supreme
Court of New
Zealand

—
No. 3

10 18. TO invest any monies forming part of the Trust Fund by purchasing any part of the estate of the said John Worrall Wheelans from the executors of his will or trustees of his estate whether or not such executors or trustees are the same persons as the Trustees hereof and any property so purchased shall be an authorised investment of that part of the Trust Fund so applied

"A1" Deed of
Trust -
S.B. Ashton
Settlor

26 November
1965
(continued)

20 19. TO make such outlay as the Trustees may from time to time deem expedient in subdividing or developing any real or personal property forming part of the Trust Fund or in carrying out any repairs alterations additions and improvements thereto and generally to employ surveyors builders architects land agents or contractors to prepare plans, make roads, lay drains and do all such other acts, deeds and things as the Trustees may consider necessary or desirable in carrying out the foregoing powers or any of them and to charge all moneys so expended by the Trustees either
30 to the capital or the income of the Trust Fund as the Trustees shall think proper

40 20. THE Trustees may at their uncontrolled discretion instead of acting personally herein employ and pay any person firm company or corporation to do any act of whatever nature relating to the trusts hereof including the receipt and payment of money without being liable for any loss incurred thereby AND without prejudice to the generality of the foregoing the Trustee or Trustees for the time being hereof who may be either a Public Accountant or a Solicitor shall be entitled to charge and be paid for his or their professional and other services time and trouble in and about the execution

In the Supreme
Court of New
Zealand

No. 3

"A1" Deed of
Trust -
S.B. Ashton
Settlor

26 November
1965
(continued)

of the trusts hereby declared as they or either of them would have been entitled to charge and be paid had he or they not been Trustees hereunder and whether in the ordinary course of their profession or business or not and although not of a nature requiring the employment of a Solicitor or Public Accountant

21. THE Trustees or either of them may appoint another person or Company to act as attorney or attorneys for such Trustee or Trustees in New Zealand and elsewhere for all or any of the purposes of these presents and at any time or times and for any period and any such appointments so made may be revoked and remade from time to time 10

AND THIS DEED WITNESSETH LASTLY that although two Trustees have been originally appointed under this Deed the number of Trustees hereunder may at any time be increased so that they shall for the time being be not less than two nor more than four and the power to increase the number of Trustees hereunder or to fill the vacancy caused by any Trustee for the time being dying or being unfit unable or unwilling to act as Trustee hereunder, shall be exercisable by : 20

(a) The said John Worrall Wheelans of Christchurch Public Accountant so long as he shall be able and willing to make any appointments as may be required 30

(b) If and so long as the said John Worrall Wheelans shall be either unable or unwilling to make such appointments as may be required then the Wife shall be empowered to make such appointments as may be required hereunder 40

(c) If and so long as neither the said John Worrall Wheelans nor the Wife

shall be either able or willing to make such appointments as may be required hereunder then the Trustees or continuing Trustee or Trustees or the personal representatives of the last surviving Trustee shall be so empowered to make such appointments as may be required hereunder

In the Supreme Court of New Zealand

No. 3

"A1" Deed of Trust -
S.B. Ashton
Settlor

26 November
1965
(continued)

10 (d) If and so long as there shall be no person able willing and qualified to make any appointment required for the purposes of this Deed then the power to make such appointment shall be vested in the President for the time being of the Canterbury District Law Society in the Dominion of New Zealand

20 IN WITNESS whereof these presents have been executed the day and year first hereinbefore written

SIGNED by the said)
SIDNEY BOYD ASHTON) S.B. Ashton
in the presence of:)

K.L. Heney
Solicitor
Christchurch

30 SIGNED by the said)
GEOFFREY CHARLES PITT)
BEADEL in the) G.C.P. Beadel
presence of :)

K.L. Heney
Solicitor
Christchurch

40.

In the Supreme
Court of New
Zealand

No. 4

"B" LETTER FROM CRESTA FINANCE LTD
TO ASHTON, WHEELANS AND BEADEL

No. 4

"B"

Letter from Cresta
Finance Ltd. to
Ashton Wheelans
& Beadel

CRESTA FINANCE LIMITED

Christchurch

26 October 1965

26th October, 1965

Messrs Ashton, Wheelans & Beadel,
C/- Saunders, Heney & Beadel,
Solicitors,
CHRISTCHURCH

10

Dear Sirs,

I am instructed by my Company's directors to confirm your appointment to act for the Company in the capacity of accountants in its business as a finance company in the lending and advancing of money.

I would also like to confirm the arrangement for your remuneration which was verbally discussed and agreed to between us. This is, that you are entitled to retain all office charges which you recover on the preparation of documents together with a charge to be made directly on this Company of 1½% of all monies advanced or disbursed by the Company and 1½% of all monies by way of principal and interest which the Company receives on the repayment of loans.

20

My directors also record that they have been advised by you that you intend to delegate your obligations to this Company to a firm of Public Accountants namely Messrs Ashton Wheelans & Hegan 254 Oxford Terrace, Christchurch and they agree fully with such delegation, but it must be understood that any further or other delegation, is subject to my Directors prior approval

30

In the Supreme
Court of New
Zealand

No. 5

"B1" Letter
from Warwick
Credits Ltd.
to Ashton
Wheelans &
Beadel
26 October
1965
(continued)

by the Company and 1½% of all monies by way of principal and interest which the Company receives on the repayment of loans.

My directors also record that they have been advised by you that you intend to delegate your obligations to this Company to a firm of Public Accountants namely Messrs Ashton, Wheelans & Hegan 254 Oxford Terrace, Christchurch and they agree fully with such delegation, but it must be understood that any further or other delegation is subject to my Directors prior approval.

10

As I think you already know, your appointment, by this Company is "at the Company's pleasure" and is accordingly revocable at any time.

Yours faithfully,
WARWICK CREDITS LIMITED

20

J.W. Wheelans

Secretary

In the Supreme
Court of New
Zealand

No. 6

"B2" Letter
from Westburn
Investments Ltd.
to Ashton
Wheelans & Beadel
26 October
1965

No. 6

"B2" LETTER FROM WESTBURN INVESTMENTS
LTD TO ASHTON, WHEELANS & BEADEL

"B2"

WESTBURN INVESTMENTS LIMITED

Christchurch

26th October, 1965

Messrs Ashton, Wheelans & Beadel,
C/- Saunders, Heney & Beadel,
Solicitors,
CHRISTCHURCH

30

Dear Sirs,

I am instructed by my Company's directors to confirm your appointment to

act for the Company in the capacity of accountants in its business as a finance company in the lending and advancing of money.

In the Supreme
Court of New
Zealand

—
No. 6

"E2" Letter
from Westburn
Investments Ltd.
to Ashton
Wheelans &
Beadel

26 October
1965
(continued)

10 I would also like to confirm the arrangement for your remuneration which was verbally discussed and agreed to between us. This is, that you are entitled to retain all office charges which you recover on the preparation of documents together with a charge to be made directly on this Company of $1\frac{1}{2}\%$ of all monies advanced or disbursed by the Company and $1\frac{1}{2}\%$ of all monies by way of principal and interest which the Company receives on the repayment of loans.

20 My directors also record that they have been advised by you that you intend to delegate your obligations to this Company to a firm of Public Accountants namely Messrs Ashton, Wheelans & Hegan, 254 Oxford Terrace, Christchurch and they agree fully with such delegation, but it must be understood that any further or other delegation is subject to my Directors prior approval.

As I think you already know, your appointment, by this Company is "at the Company's pleasure and is accordingly revocable at any time.

30

Yours faithfully,
WESTBURN INVESTMENTS LIMITED

J.W. Wheelans

Secretary

In the Supreme
Court of New
Zealand

No. 7

"B3" LETTER FROM WORCESTER HOLDINGS
LTD TO ASHTON, WHEELANS & BEADEL

No. 7

"B3"

"B3" Letter
from Worcester
Holdings Ltd.
to Ashton
Wheelans & Beadel

WORCESTER HOLDINGS LIMITED

Christchurch

26th October, 1965

26 October
1965

Messrs Ashton, Wheelans & Beadel,
C/- Saunders, Heney & Beadel,
Solicitors,
CHRISTCHURCH

10

Dear Sirs,

I am instructed by my Company's directors
to confirm your appointment to act for the
Company in the capacity of accountants in its
business as a finance company in the lending
and advancing of money.

I would also like to confirm the
arrangement for your remuneration which was
verbally discussed and agreed to between us.
That is, you will be paid by the Company at
the rate of £2. 2. 0 for each advance made by
the Company together with 3% on all monies
paid to the Company by way of principal and
interest repayments of loans.

20

My directors also record that they have
been advised by you that you intend to
delegate your obligations to the Company to a
firm of Public Accountants namely, Messrs
Ashton Wheelans & Hegan 254 Oxford Terrace,
Christchurch and they agree fully with such
delegation, but it must be understood that
any further or other delegation is subject to
my Directors prior approval.

30

As I think you already know, your
appointment, by this Company is "at the
Company's pleasure" and is accordingly
revocable at any time.

Yours faithfully,
WORCESTER HOLDINGS LIMITED
per J.W. Wheelans
Secretary

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45.

No. 8

"C" LETTER FROM SAUNDERS, HENEY & BEADEL
TO ASHTON, WHEELANS AND HEGAN

"C"

SAUNDERS, HENEY & BEADEL
Barristers & Solicitors

Christchurch

27th October 1965

In the Supreme
Court of New
Zealand

No. 8

"C" Letter
from Saunders
Heny & Beadel
to Ashton
Wheelans & Hegan

27 October
1965

10 Messrs Ashton, Wheelans and Hegan,
Public Accountants
P.O. Box 2153,
CHRISTCHURCH

Dear Sirs,

20 We are acting for Messrs S.B. Ashton, J.W.
Wheelans and G.C.P. Beadel who have accepted
an appointment by certain companies, to
carry out the accountancy work for these
companies in connection with their finance
and lending activities. We now confirm
our verbal request to you to act professionally
in the capacity of Public Accountants for
our clients in carrying out the work required
by these Companies. The Companies concerned
have all agreed to our making this approach
to you, and their names and the suggested
remuneration payable to you, are as follows:

30 Warwick Credits) 1½% on loans or advances
Limited) made and 1½% on all
Cresta Finance) monies received in
Limited) repayment of loans
Westburn Investments) or advances
Limited)
Worcester Holdings 3% on all monies
Limited received in repayment
of the principal or
interest under loans
or advances

It is of course understood that the rates
of remuneration suggested would be subject

In the Supreme Court of New Zealand

to any requirements of the N.Z. Society of Accountants in this respect.

No. 8

"C" Letter from Saunders Heney & Beadel to Ashton Wheelans & Hegan

27 October

1965

(continued)

Our clients are acting for the four Companies mentioned, as Trustees under certain Deeds of Trust recently completed, but the Company have in each case been made aware of the circumstances.

We should be glad if you would kindly confirm your acceptance, both of the above appointment as well as the remuneration suggested

10

Yours faithfully,
SAUNDERS HENEY & BEADEL

Per: K.L. Heney

In the Supreme Court of New Zealand

No. 9

"C1" LETTER FROM ASHTON WHEELANS & HEGAN TO SAUNDERS HENEY & BEADEL

No. 9

"C1" Letter from Ashton Wheelans & Hegan to Saunders Heney & Beadel

29 October 1965

ASHTON WHEELANS & HEGAN
Public Accountants

20

29th October, 1965.

Messrs. Saunders Heney & Beadel,
Barristers & Solicitors,
P.O. Box 18,
CHRISTCHURCH.

Dear Sirs,

re: S.B. Ashton
J.W. Wheelans &
G.C. Beadel

30

We acknowledge your letter of 27th October, 1965 confirming your verbal instructions for us to act for the above named in connection with the following

47.

companies, namely

Warwick Credits Limited
Cresta Finance Limited
Westburn Investments Limited
Worcester Holdings Limited.

We confirm our acceptance of the above appointment as well as the remuneration as set out in your letter.

Yours faithfully,
ASHTON WHEELANS & HEGAN

Per:

In the Supreme
Court of New
Zealand

—
No. 9

"C1" Letter
from Ashton
Wheelans &
Hegan to
Saunders Heney
& Beadel

29 October
1965
(continued)

"D"
ASHTON, WHEELANS AND HEGAN
BALANCE SHEET
AS AT 31ST MARCH 1967

CURRENT LIABILITIES:

Creditors	872.15. 2
Australia & New Zealand Bank Limited	<u>1130. 5.11</u>

CAPITAL ACCOUNTS:

S.B. Ashton: Balance 1.4.66	3408. 7. 9
Plus Net Profit	<u>3659.18.11</u>
	7068. 6. 8
Less Drawings	<u>3281. 6. 0</u>
J.W. Wheelans: Balance 1.4.66	3408. 7. 9
Plus Net Profit	<u>3659.18.10</u>
	7068. 6. 7
Less Drawings	<u>3281. 6. 0</u>
D.R. Hegan: Balance 1.4.66	3408. 7. 9
Plus Net Profit	<u>3159.18.11</u>
	6568. 6. 8
Less Drawings	<u>2781. 6. 0</u>

2003. 1. 1

3787. 0. 8

3787. 0. 7

3787. 0. 8

13364. 3. 0

CURRENT ASSETS:

Cash on Hand	48. 0. 0
Debtors	770. 6. 6
Rent Owing	45. 0. 0
Work in Progress	<u>36.11. 6</u>

899.18. 0

FIXED ASSETS:

Furniture & Office Equipment	368. 0. 0
Plus Additions	<u>231.17. 6</u>
	599.17. 6
Less Depreciation	<u>119.17. 6</u>
	480. 0. 0
Leasehold Partitions:	
Oxford Terrace	1256. 1.10
Less Depreciation	<u>251. 1.10</u>
	<u>1005. 0. 0</u>

1485. 0. 0

INVESTMENT:

Northern Building Society	179. 5. 0
Goodwill	<u>10800. 0. 0</u>

13364. 3. 0

PROFIT AND LOSS ACCOUNT
FOR THE YEAR ENDED 31ST MARCH 1967

General Office Expenses	410.14. 2
Interest	65. 9. 9
Insurance	81. 6. 7
Printing and Stationery	190. 1. 8
Rent	1906.19. 4
Travelling Expenses	50. 0. 0
Repairs	94. 8. 8
Subscriptions	51. 0. 0
Telephone	221. 0. 8
Wages and Staff Expenses	3338. 0. 7
Advertising	20.14. 2
Disbursements	560. 0.11
Cleaning	221. 8. 0
Power	186.18.11
Depreciation	<u>370.19. 4</u>
	7769. 2. 9
NET PROFIT — S.B. Ashton	3659.18.11
J.W. Wheelans	3659.18.10
D.R. Hegan	<u>3159.18.11</u>
	10479.16. 8

18248.19. 5

Fees	10066. 4. 0
Finance Income	6326. 3.11
Commissions — Fire and Accident	1483.11. 6
— Life	57. 0. 0
Rent Received	<u>316. 0. 0</u>

18248.19. 5

In the Supreme
Court of New
Zealand

No.10

"D" Balance Sheet
of Ashton,
Wheelans & Hegan
as at 31 March
1967

No.11.

"E"

S.B. ASHTON FAMILY TRUST

STATEMENT OF ACCOUNTS

FOR THE YEAR ENDED 31ST MARCH 1967

INCOME AND EXPENDITURE ACCOUNT

Accountancy Fees
General Expenses
Surplus Transferred to Appropriation Account

2950. 7. 0
2. 0. 0
2111.12. 2

Commissions Received
Interest Received

5026. 8. 7
37.10. 7

5063.19. 2

5063.19. 2

PROFIT & LOSS APPROPRIATION ACCOUNT

Income appropriated and credited by Trustees to Mrs J.E. Ashton (the wife) pursuant to Clause A. (i) of the Trust Deed

200. 0. 0

Net Surplus transferred from Income and Expenditure Account

2111.12. 2

Income specifically accumulated by Trustees pursuant to Clause A (IV) of Trust Deed and thereby added to the capital of the Trust Fund.

741.12. 2

Balance of income for year ended 31st March, 1967 not otherwise appropriated and thereby (pursuant to Clause (B) of Trust Deed) vesting equally and absolutely in the three named children living at 31st March, 1967 viz.

J.F. Ashton 390. 0. 0
C.J. Ashton 390. 0. 0
S.R. Ashton 390. 0. 0

1170. 0. 0

2111.12. 2

2111.12. 2

49.

In the Supreme Court of New Zealand

No.11

"E" Income & Expenditure Account of S.B. Ashton Family Trust for year ended 31/3/1967

S.B. ASHTON FAMILY TRUST

BALANCE SHEET

AS AT 31ST MARCH 1967

CAPITAL ACCOUNT:

Balance 1st April 1966 1. 0. 0
Add Part of Income for year ended
 31st March, 1967 accumulated
 and added to Trust Fund 741.12. 2

BENEFICIARIES ACCOUNTS:

Mrs J.E. Ashton: Income
 Appropriated as per Appropriation
 Account 200. 0. 0

Miss J.F. Ashton:
 Balance 1st April 1966 22. 4. 6
Add Income Appropriated as per
 Appropriation account 390. 0. 0
 412. 4. 6

Less Amounts paid to Mr S.B.
 Ashton, as parent 350. 0. 0
Less Taxation 40. 2. 5 390. 2. 5 22. 2. 1

Miss C.J. Ashton:
 Balance 1st April 1966 22. 4. 7
Add Income Appropriated as per
 Appropriation Account 390. 0. 0
 412. 4. 7

Less Amounts paid to Mr
 S.B. Ashton, as parent 350. 0. 0
Less Taxation 40. 2. 5 390. 2. 5 22. 2. 2

Miss S.R. Ashton:
 Balance 1st April 1966 22. 4. 7
Add Income Appropriated as per
 Appropriation Account 390. 0. 0
 412. 4. 7

Less Amounts paid to Mr
 S.B. Ashton as parent 350. 0. 0
Less Taxation 40. 2. 5 390. 2. 5 22. 2. 2

1008.18. 7

Australia and New Zealand Bank Limited 221. 8. 0
 Warwick Credits Limited – Deposit 737.10. 7
 Deposit Land Kaiapoi 50. 0. 0

221. 8. 0
 737.10. 7
 50. 0. 0

In the Supreme
 Court of New
 Zealand

No.12

Balance
 Sheet of S.B.
 Ashton Family
 Trust as at
 31/3/1967

1008.18. 7

In the Supreme
Court of New
ZealandNo.13"F" Income and
Expenditure
Account of J.W.
Wheelans Family
Trust for year
ended 31/3/1967J.W. WHEELANS FAMILY TRUSTSTATEMENT OF ACCOUNTSFOR THE YEAR ENDED 31ST MARCH 1967INCOME AND EXPENDITURE ACCOUNT

Accountancy Fees	2950. 7. 0	Commissions Received	5026. 8. 7
General Expenses	210. 0	Interest Received	3216. 6
Interest paid	1. 3. 0		
	<u>2954. 0. 0</u>		
Surplus Transferred to Appropriation Account	2105. 5. 1		
	<u>5059. 5. 1</u>		<u>5059. 5. 1</u>

PROFIT AND LOSS APPROPRIATION ACCOUNT

Income appropriated and credited by Trustees to Mrs E.A. Wheelans (the wife) pursuant to Clause A (i) of Trust Deed	200. 0. 0	Net surplus from Income and Expenditure Account	2105. 5. 1
Income specifically accumulated by Trustees pursuant to Clause A (iv) of Trust Deed and thereby added to the capital of the Trust Fund	705. 5. 1		
Balance of income for year ended 31/3/67 not otherwise appropriated and thereby (pursuant to Clause (B) of Trust Deed) vesting equally and absolutely in the four named children living at 31/3/67 viz			
J.A. Wheelans	300. 0. 0		
P.L. Wheelans	300. 0. 0		
R.S. Wheelans	300. 0. 0		
S.D. Wheelans	300. 0. 0		
	<u>1200. 0. 0</u>		
	<u>2105. 5. 1</u>		<u>2105. 5. 1</u>

J.W. WHEELANS FAMILY TRUST

BALANCE SHEET

AS AT 31ST MARCH 1967

In the Supreme
Court of New
Zealand

<u>CAPITAL ACCOUNT</u>					
Balance 1/4/66		1. 0. 0		Australia and New Zealand Bank Limited	302.10. 9
Add Part of Income for year ended 31/3/67 accumulated and added to Trust Fund		705. 5. 1		Deposit Land — Kaiapoi	50. 0. 0
		706. 5. 1		Advance Warwick Credits Limited	461.16. 8
Less Insurance Premium Paid		14. 0. 0	692. 5. 1	Deposit Australia and New Zealand Savings Bank (New Zealand) Limited	150. 0. 0
<u>BENEFICIARIES ACCOUNT</u>					
J.A. Wheelans — Balance 1st April 1966		19. 3. 5			
Plus Income Appropriated as per Appropriation Account		300. 0. 0			
		319. 3. 5			
Less Amounts paid to Mr J.W. Wheelans as parent	275. 0. 0				
Less taxation paid	26. 2.10	301. 2.10	18. 0. 7		
P.L. Wheelans — Balance 1 st April 1966		19. 3. 5			
Plus Income Appropriated as per Appropriation Account		300. 0. 0			
		319. 3. 5			
Less Amounts paid to Mr J.W. Wheelans as parent	275. 0. 0				
Less Taxation paid	26. 2.10	301. 2.10	18. 0. 7		
R.S. Wheelans — Balance 1st April 1966		19. 3. 4			
Plus Income Appropriated as per Appropriation Account		300. 0. 0			
		319. 3. 4			
Less Amounts paid to Mr J.W. Wheelans as parent	275. 0. 0				
Less Taxation paid	26. 2. 9	301. 2. 9	18. 0. 7		
S.D. Wheelans — Balance 1st April 1966		19. 3. 4			
Plus Income Appropriated as per Appropriation Account		300. 0. 0			
		319. 3. 4			
Less Amount paid to Mr J.W. Wheelans as parent	275. 0. 0				
Less Taxation paid	26. 2. 9	301. 2. 9	18. 0. 7		
Mrs E.A. Wheelans — Income Appropriated as per Appropriation Account			200. 0. 0		
			984. 7. 5		
					984. 7. 5

No.14

Balance Sheet
of J.W. Wheelans
Family Trust
as at 31/3/1967

53.

No. 15

"G" LETTER FROM SAUNDERS, HENEY & BEADEL
TO THE DISTRICT COMMISSIONER OF TAXES

"G"

SAUNDERS, HENEY & BEADEL
Barristers & Solicitors

Christchurch

28th November, 1968

10 The District Commissioner of Taxes,
Inland Revenue Department,
Private Bag,
CHRISTCHURCH.

Dear Sir,

re S.B. Ashton Family Trust - Your Ref.
CH/A/5A/Trust/22 J.W. Wheelans
Family Trust - Your Ref. CH/W/5A/Trust/523

We refer you to your letter to us of
the 13th November.

20 Mr Ashton has now received an amended
assessment for the year ending the 31st
March, 1967 which shows a balance of tax
payable of \$2543.83 and requires this to
be paid prior to the 7th February, 1969.
We are instructed to object to this
assessment on the ground that we take a
contrary view to that taken by your Regional
Controller. We do not consider that the
transactions come within the provisions of
Section 108 of the Land and Income Tax Act,
30 1954 so as to make them void. The Trust
was established by Mr J.W. Wheelans by Deed
dated the 26th November, 1965. The Trust
is a permanent one with no interest reserved
therein for Mr Ashton.

In so far as the arrangements which have
been entered into by the Trustees to provide
the Trust's source of income, these are all
with parties over whom Mr Ashton has no

In the Supreme
Court of New
Zealand

No.15

"G" Letter
from Saunders
Heny & Beadel
to District
Commissioner
of Taxes

28 November
1968.

In the Supreme
Court of New
Zealand

—
No.15

"G" Letter
from Saunders
Honey & Beadel
to District
Commissioner
of Taxes

28 November
1968
(continued)

direct control. In fact, the only instances in which he has any connection are in respect of the firm Ashton, Wheelans & Hegan, of whom he is one of three partners and Warwick Credits Limited in respect of which his wife is a shareholder as to half the capital. Mr Ashton was not in a position to, in any way, direct that the other parties concerned dispense with the services of Messrs Ashton & Wheelans and appoint the Trustees to carry out the work. Equally there is nothing Mr Ashton could do if these persons chose to appoint other persons to carry out the work which the Trustees are now responsible for. There is also nothing which Mr Ashton could do to prevent the Trustees from delegating the work to someone other than the firm of Messrs Ashton, Wheelans & Hegan. These are the main reasons for our client's objection. On the question of payment of the assessment, the matter will be taken further if the objection is disallowed and, in these circumstances, would request that payment should not be demanded nor the penalty imposed. We are instructed, however, to offer, in the event of the Department ultimately being upheld, 3% on the additional tax assessed.

The same comments apply to the J.W. Wheelans Family Trust with the exception that Mr Wheelans is also indirectly connected with Westburn Investments Limited, the shares of which, are held by his wife and sister. We formally object to the amended assessment issued to Mr Wheelans for the year ending the 31st March, 1967 on the same ground as for the S.B. Ashton Family Trust and make the same application in respect of payment.

You have also issued an assessment for Mrs E.A. Wheelans, the wife of Mr J.W. Wheelans, for the year ending the 31st March, 1967. In this you have deducted the income ex J.W. Wheelans Family Trust.

A cheque in payment of this assessment is enclosed but should be accepted by you on the basis that it does not in any way mean that the assessment is considered correct.

Yours faithfully,
SAUNDERS, HENEY & BEADEL,

Per: G.C.P.Beadel

Mrs Elizabeth A. WHEELANS

IT. \$7.65

10

In the Supreme Court of New Zealand

No.15

"G" Letter from Saunders Henev & Beadel to District Commissioner of Taxes

28 November 1968
(continued)

No. 16

"G1" LETTER FROM SAUNDERS HENEY & BEADEL TO DISTRICT COMMISSIONER OF TAXES

"G1"

SAUNDERS, HENEY & BEADEL
Barristers & Solicitors

Christchurch

6th June, 1968

The District Commissioner of Taxes,
Inland Revenue Department,
Cathedral Square,
CHRISTCHURCH.

20

Dear Sir,

re S.B. Ashton Family Trust
Your Reference Ch/A/5A/22
J.W. Wheelans Family Trust
Your Reference Ch/W/5A/499

Your letter of the 5th of June 1968 addressed to Messrs Ashton, Wheelans & Hegan in reference to the above matters has been handed to us with instructions to reply to you as follows:

30

In the Supreme Court of New Zealand

No.16

"G1" Letter from Saunders Henev & Beadel to District Commissioner of Taxes

6 June 1968

In the Supreme
Court of New
Zealand

No.16

"G1" Letter
from Saunders
Heney & Beadel
to District
Commissioner
of Taxes

6 June 1968
(continued)

1. The commissions received by the Trustees of the two Family Trusts are received from four Companies namely:

Westburn Investments Limited
Cresta Finance Limited
Warwick Credits Limited
Worcester Holdings Limited

The basis on which these commissions are computed is set out in each case in the four 10 letters attached, each of which is dated the 26th of October 1965 and addressed by the Companies named to the three Trustees involved with both Family Trusts i.e. Messrs Ashton, Wheelans and Beadel.

The four letters referred to in paragraph 1 constitute the arrangement for charging and receiving commission between the Trustees on the one hand and the Companies paying the commission on the other. 20

Prior to the inception of the Trusts, the commission referred to was substantially paid to Messrs Ashton & Wheelans who were formerly practising as Public Accountants in partnership under that firm name but, having admitted a third partner, they now practice under the firm name of Ashton, Wheelans & Hegan.

The four Companies named, each cancelled its respective instructions to Ashton & 30 Wheelans to act for the Company as Public Accountants immediately before the Companies instructed the Trustees to act for the Companies in the manner and at the remuneration set out in the letters referred to in paragraphs 1 and 2.

The Trustees being so instructed by the four Companies to act for these Companies at the remuneration described in the four attached letters, subsequently delegated their 40 instructions, with the consent of their principals, to the new Public Accountancy firm of Ashton, Wheelans & Hegan. We attach a letter written by ourselves

(Saunders, Heney & Beadel) on behalf of the two sets of Trustees and addressed to this new firm of Ashton, Wheelans & Hegan instructing that firm to act for the Trustees in doing the work required by the four Companies. The remuneration payable by the Trustees to Ashton, Wheelans & Hegan is set out in the letter of the 27th of October 1965, and attached also is a copy of the letter dated the 29th of October 1965 acknowledging receipt of these instructions to Ashton, Wheelans & Hegan and that firm agreeing to act accordingly at the remuneration stated.

In the Supreme
Court of New
Zealand

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No.16

"G1" Letter
from Saunders
Heney & Beadel
to District
Commissioner
of Taxes

6 June 1968
(continued)

An examination of the rates of remuneration paid by the four Companies to the Trustees and the rates of remuneration paid by the Trustees to the Public Accountancy firm of Ashton, Wheelans & Hegan will show that there is a difference in favour of the Trustees, this being the income as returned by the Trustees and as shown in the accounts presented to the Department. Your question asks for details of the services provided to the Trustees and the method used to compute the charges made. We believe that the second part of this question has been answered and so far as details of services provided are concerned, we can only answer this by stating that the firm of Public Accountants concerned do all accountancy work necessary and incidental to the financial operations of the four Companies mentioned.

As soon as you have completed your perusal of the enclosed letters, we should be glad if you would be kind enough to return these to us.

Yours faithfully,
SAUNDERS HENEY & BEADEL

40

Per: K.L. Heney

Encl:

P.S. We are enclosing photostats of the enclosures, and these need not be returned

In the Supreme
Court of New
Zealand

CASE STATED (WHEELANS v. COMMISSIONER
OF INLAND REVENUE)

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

No. 17

Case Stated
(Wheelans v.C.I.R.)

3 August 1972

BETWEEN JOHN WORRALL WHEELANS
of Christchurch,
Chartered Accountant

OBJECTOR 10

A N D THE COMMISSIONER OF
INLAND REVENUE

COMMISSIONER

C A S E S T A T E D

pursuant to section 32 of the Land and
Income Tax Act 1954.

1. AT all material times the Objector
resided at Christchurch. For some years
up to the 31st day of October 1965 he was
in practice as a public accountant in
partnership with one Sidney Boyd Ashton
under the firm name of Ashton and Wheelans.
Since that date he has carried on practice
in partnership with the said Sidney Boyd
Ashton and one Derek Robert Hegan under
the firm name of Ashton, Wheelans and
Hegan (hereinafter referred to as "the
partnership"). 20

2. BY deed dated the 26th day of
November 1965, the Objector created a trust
(hereinafter referred to as "the Ashton
Trust") for the benefit of the wife
children and grandchildren of the said
Sidney Boyd Ashton and certain other
persons. The Trustees of the said
trust were the Objector and Geoffrey
Charles Pitt Beadel of Christchurch,
Solicitor. A copy of the said deed is
annexed hereto and marked "A". 30

3. BY deed also dated the 26th day of November 1965, the said Sidney Boyd Ashton created a trust (hereinafter referred to as "the Wheelans Trust") for the benefit of the wife children and grandchildren of the Objector and certain other persons. The trustees of the said trust were the said Sidney Boyd Ashton and the said Geoffrey Charles Pitt Beadel. A copy of the said deed is annexed hereto and marked "A1".

4. ON the said 26th day of October 1965 CRESTA FINANCE LIMITED, WARWICK CREDITS LIMITED, WESTBURN INVESTMENTS LIMITED and WORCESTER HOLDINGS LIMITED (hereinafter called "the four finance companies") by separate letters of appointment signed by their Secretary, the Objector appointed himself, the said Sidney Boyd Ashton and the said Geoffrey Charles Pitt Beadel to act in the capacity of accountants for the four finance companies. The appointment of the Objector and Geoffrey Charles Pitt Beadel was in their capacity as trustees of the Ashton Trust and the appointment of the said Sidney Boyd Ashton and the said Geoffrey Charles Pitt Beadel was in their capacities as trustees of the Wheelans Trust. Copies of the said letters are annexed hereto and marked respectively "B", "B1", "B2" and "B3".

5. BY letter dated the 27th day of October 1965 solicitors acting for the said Sidney Boyd Ashton, Geoffrey Charles Pitt Beadel and the Objector requested the partnership to act professionally in the capacity of Public Accountants and carry out on behalf of their clients the accountancy work required by the four finance companies. A copy of such letter is annexed hereto and marked "C". The partnership accepted appointment by letter dated the 29th day of October 1965 a copy of which is annexed hereto and marked "C1".

6. IN furnishing a return of income to the Commissioner for income tax purposes it was declared on behalf of the partnership

In the Supreme
Court of New
Zealand

No.17

Case Stated
(Wheelans v.
C.I.R.)

3 August 1972
(continued)

In the Supreme
Court of New
Zealand

that the income derived during the year
ended on the 31st day of March 1967, was
£10,479. 16. 8, allocated as follows:

----- No.17	Sidney Boyd Ashton	£3,659.18.11.
Case Stated (Wheelans v. C.I.R.)	Objector	£3,659.18.10.
	Derek Robert Hegan	£3,159.18.11.

3 August 1972
(continued)

A copy of the financial statement furnished
in support of the said return is annexed
hereto and marked "D".

7. IN furnishing a return of income to 10
the Commissioner for income tax purposes it
was declared by the Objector as a Trustee of
the Ashton Trust that the assessable income
derived during the year ended on the 31st
day of March 1967, was £2,111. 12. 2. A
copy of the financial statements furnished in
support of the said return is annexed hereto
and marked "E".

8. IN furnishing a return of income of 20
the Wheelans Trust to the Commissioner for
income tax purposes it was declared by the
said Sidney Boyd Ashton that the income
derived during the year ended on the 31st
day of March 1967, was £2,105. 5. 1. A
copy of the financial statements furnished
in support of the said return is annexed
hereto and marked "F".

9. THE Commissioner considered that the 30
arrangements between the respective Trustees
of the Ashton and Wheelans Trusts of the
one part and the Objector and the said
Sidney Boyd Ashton of the other part were
void by virtue of the provisions of section
108 of the Land and Income Tax Act 1954.
Accordingly the Commissioner adjusted the
income returned by the partnership in
respect of the year ended on the 31st day of
March 1967, as follows:

Income Returned	£10,479.16. 8.	
Add income returned by		
Trustees of Ashton Trust	2,111.12. 2.	40
Income returned by		
Trustees of Wheelans		
Trust	<u>2,105. 5. 1.</u>	
	<u>£14,696.13.11.</u>	

Allocated as follows:

Sidney Boyd Ashton	£5,771.11. 1.
Objector	£5,765. 3.11.
Derek Robert Hegan	£3,159.18.11.

In the Supreme
Court of New
Zealand

—
No.17

10 10. SUBSEQUENTLY the Commissioner made an amended assessment of the amount on which in his judgment income tax ought to be levied on the Objector in respect of the year ended on the 31st day of March 1967, and the amount of such tax for that year. Included in the said assessment was the allocation of partnership income referred to in the previous paragraph hereof.

Case Stated
(Wheelans v.
C.I.R.)

3 August 1972
(continued)

20 11. THE Objector objected to the said assessment referred to in the previous paragraph hereof on the grounds set forth in his solicitors' letter dated the 28th day of November 1968, a copy whereof is annexed and marked "G". In disallowing the said objection the Commissioner also considered the letter dated the 6th day of June 1968, from the Trustees' solicitors a copy whereof is annexed hereto and marked "G1".

12. UPON such objection being disallowed the Commissioner was required to state this case.

13. THE Objector contends:

30 (a) That section 108 of the Land and Income Tax Act 1954 has no application to any of the transactions referred to in paragraphs 2 to 5 hereof;

(b) That if section 108 applies to the transactions or any of them (which is denied) the result is not to increase in any way the assessable income of the Objector.

40 14. THE Commissioner contends that the contracts agreement and arrangements referred to in paragraphs 2 to 5 hereof inclusive between the Objector, the trustees and other parties are absolutely void by

In the Supreme
Court of New
Zealand

—
No.17

Case Stated
(Wheelans v.
C.I.R.)

3 August 1972
(continued)

virtue of the provisions of section 108 of
the Land and Income Tax Act 1954.

15. THE question for the determination of
this Honourable Court is whether the
Commissioner acted incorrectly in making
the allocation of partnership income
referred to in paragraph 9 hereof for the
purposes of making the assessment referred
to in paragraph 10 hereof and, if so, then
in what respects should such assessment be
amended.

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Dated at Wellington this third day of
August 1972.

T.M. Hunt

Chief Deputy Commissioner
of Inland Revenue

No. 18

NOTES OF EVIDENCE TAKEN BEFORE
THE HONOURABLE MR JUSTICE WILSON

In the Supreme
Court of New
Zealand

IN THE SUPREME COURT OF NEW ZEALAND

CANTERBURY DISTRICT
CHRISTCHURCH REGISTRY

No. M.155
& 156/72

No.18

Notes of
Evidence taken
Before Wilson J.

BETWEEN JOHN WORRAL L WHEELANS
of Christchurch,
Chartered Accountant

Objector

A
Derek Robert
Hegan
Examination-
in-Chief

10

A N D THE COMMISSIONER OF
INLAND REVENUE

Commissioner

21 September
1972

AND

BETWEEN SIDNEY BOYD ASHTON
of Christchurch,
Chartered Accountant

Objector

20

A N D THE COMMISSIONER OF
INLAND REVENUE

Commissioner

NOTES OF EVIDENCE TAKEN BEFORE WILSON J.

Hearing: 21 September 1972

Counsel: Richardson for Objectors
Blank and Simcock for Commissioner

DR RICHARDSON OPENS AND CALLS:

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DEREK ROBERT HEGAN (SWORN): I am a
Chartered Accountant residing at Christchurch.
I am a partner in the firm of Ashton,
Wheelans & Hegan. I am 31 years old. In
May 1961 I joined the staff of the then firm
of Smith, Cormack, Ashton & Wheelans.
In September 1962 that partnership was
dissolved and I joined the staff of the
new firm of Ashton & Wheelans. In July
1963 the firm purchased the Kaiapoi Branch

In the Supreme
Court of New
Zealand

No. 18

Notes of
Evidence
Taken before
Wilson J.

A

Derek Robert
Hegan
Examination-
in-Chief

21 September
1972

(continued)

of Messrs Lake, Glynn and Smith and I became responsible for the operation of that branch of the firm. On 1 November 1965 I became a partner in the firm of Ashton, Wheelans & Hegan. Prior to entering into that partnership with Mr Ashton & Mr Wheelans there were discussions as to the goodwill which I would pay for a one-third share of the profit. As to what decision was reached on calculation of goodwill, the basis was set using a system called the super profits method whereby the salary to which I was entitled according to my qualifications was deducted from the income which it was anticipated I would receive as a partner in the firm to be formed. I could see at that stage that had the office charges been included as income of the new firm then the goodwill would have been high. Further I considered that this income was insecure mainly because of competition from other finance companies and the method by which the office charges were sometimes paid to the motor dealer concerned. I considered that possibly these office charges could eventually have to be paid to the motor dealer and thus the new firm would not receive them and I would have paid considerable goodwill for something which wouldn't last very long.

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You referred to the calculation of the share in goodwill on the super profits basis, was it to be a 3-year purchase? A 3-year purchase yes.

TO BENCH: Based on the difference between your anticipated profits? And a salary. Less the salary to which you would have been entitled as the employee? Yes.

TO COUNSEL: Had that formula been applied to the office charges income, can you recall the approximate amount you would have had to pay in goodwill? Approximately \$8,000. For the office charges goodwill. The office charges totalled about \$8,000 per annum thus 3 years purchase was about \$24,000 and my third would have been \$8,000.

40

In the upshot we know that the new partnership was formed, the goodwill was calculated without reference to the office charges because the office charges were not to accrue to the new partnership? That is correct. The trusts to which reference is made in the case stated then appointed the new partnership to handle the accountancy work involved in respect of the Finance Companies. Were you involved in the discussions concerning the charges to be made by the new partnership Ashton Wheelans & Hegan for the work done for the trustees? Yes I was. What were your views as to the adequacy of those charges? As far as I was concerned the prime importance was that the fees which the new firm received equated the New Zealand Society of Accountants scale fee. In terms of the amount received by the partnership for work done they satisfied the Society of Accountants charges.

XXM: MR BLANK:

I understood you to say the office charges, I presume the office charges arising from the hire purchase would amount to approximately \$8,000 per year? Yes. Was that only from these four companies? Yes. I wonder if you made a mistake, I see in the accounts attached to the case stated in the 1967 year the office charges were approximately \$2,100? Would that not be pounds. You weren't concerned in the trust arrangements at all? Never. Prior to the formation of the new partnership both the accountants fees and office charges arising from the operations of these four companies went to the old partnership? The old partnership yes. Afterwards only the accountants fees arising from these four companies went to the partnership? That is right. The problem of goodwill you were to pay could have been met in this way could it not, both the accountancy charges and the office charges arising from the four companies could have been paid to the new firm and the partnership

In the Supreme Court of New Zealand

No. 18

Notes of Evidence Taken before Wilson J.

A

Derek Robert Hegan Examination-in-Chief

21 September 1972

(continued)

Cross-Examination

In the Supreme Court of New Zealand

No.18

A

Derek Robert Hegan
Re-
Examination
21 September 1972

agreement could have provided that your share of the profits was not to include these office charges, could that have been done? I presume it could have.

REXM: DR RICHARDSON:

My learned friend has suggested to you a way in which the partnership agreement could have been drawn up, how would you have felt about paying for a share in the total goodwill which included as part of the total goodwill of the firm the office charges goodwill? Not very happy, I chose not to pay goodwill.

10

To Bench

TO BENCH:

If I understand Mr Blank's point correctly, he was putting to you that your agreement when you became a partner could have provided for your obtaining goodwill which ignored the office charges as was in fact done and that in order to give effect to that when you prepared your partnership accounts at the end of the year the part of the receipts represented by office charges would be disregarded when it came to finding your third share, they would be taken off so to speak, divided between Mr Ashton and Mr Wheelans, then the balance could be divided equally between the three of you, as far as you were concerned couldn't the same result have been achieved in that way? It would have been more cumbersome. I presume it could have been done. Why do you say it would have been more cumbersome? The way it ended up we were equal third partners there were no complications, we made a profit and ended up with an amount in the bank and split it three ways.

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DR RICHARDSON CALLS:

In the Supreme
Court of New
Zealand

No.18

B

John Worrall
Wheelans
Examination-
in-Chief

21 September
1972

JOHN WORRALL WHEELANS (SWORN): I am a
Chartered Accountant residing in
Christchurch and a member of the firm of
Ashton, Wheelans & Hegan. I am 37 years
old and I am married with 7 sons the eldest
of whom is 13 and the youngest of whom is 9
months old. I completed my professional
qualifications in accountancy in 1957 and in
10 July 1959 after other practical experience I
joined the staff of Mr S.M. Smith,
Public Accountant, Christchurch. Along with
Mr Ashton and a Mr R.D. Cormack I went into
partnership with Mr Smith from 1 April 1960.
Goodwill was fixed for the practice and paid
by the incoming partners. In August 1962
Mr Smith ceased practice and Mr Cormack
then commenced practice on his own account
and Mr Ashton and I commenced practice on our
20 own account under the firm name of Ashton &
Wheelans. The former partnership business
was divided between the new practice and Mr
Smith was paid out. Mr Ashton and I
purchased half of the old practice and Mr
Cormack I think

TO BENCH: Bought out Mr Smiths? I
think he did but we never came into that side
of it.

TO COUNSEL: At this time 1962 when Mr
30 Ashton and I were in our late 20's there was
not sufficient accountancy work available to
the new firm to fully occupy our time. Mr
Ashton and I started out together with
£3,000 worth of fees between the two of us, we
took with us 2½ staff members and in our
dissolution it was of concern to Mr Ashton and
I that no member of the staff of the old firm
would lose our positions and we took with
us any excess staff the other partners
40 didn't want, we didn't have enough work.
To fill this gap, we drew no wages for six
months.

TO BENCH: How did you make up for the lack
of work? We extended the business of the
finance companies quite substantially and also
got a lot of other accounting work. Those

In the Supreme
Court of New
Zealand

No. 18

B

John Worrall
Wheelans
Examination-
in-Chief

21 September
1972
(continued)

companies were in existence then when you and Mr Ashton commenced on your own? We only acted for two of them, one was in existence, the third one was in existence and we didn't act for them and the fourth one was in existence but it wasn't a finance company.

TO COUNSEL: The four finance companies, were the two companies in existence and clients of the previous firm which you took with you Warwick Credits Limited and Westburn Investments Limited? That is correct. Were the shares in Warwick Credits Limited owned at that time and following the formation of Ashton Wheelans by Mrs Ashton and Mrs Wheelans? That is correct. Coming to Westburn Investments Limited were the shares in that company owned by your wife Mrs Wheelans and your sister, Mrs Porter? That is correct. Subsequently did you come to act for Cresta Finance Limited and Worcester Holdings Limited? That is correct. Were the shareholdings in Cresta Finance Limited Mr and Mrs West and Mr and Mrs De la Tour? Correct. Were the shareholders in Worcester Shareholdings Limited Mr and Mrs Crowe? Correct. Did the shareholdings in all four companies remain the same to recent times? Worcester Holdings Limited Mr and Mrs Crowe had a domestic upheaval and shares in that company changed from wife to husband, other than that yes. Are the shareholders in Cresta Finance Limited and Worcester Holdings Limited related in any way to the Wheelans or Ashton families? No. At the time when you and Mr Ashton started the new firm you were able to concentrate on developing the finance company business? Yes. Did you have connections with motor-car firms? Yes. Were you able to develop those considerably over the next year or two? Yes. I think that in 1963 you also took over the Kaiapoi Branch of Lake Glynn & Smith? Yes. So that by late 1965 you were able to consider joining into partnership with Mr Hegan who had worked with you for some years? That is correct. Would you state briefly the discussions which took place

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concerning the fixing of goodwill and the basis on which Mr Hegan was to join you and Mr Ashton? Yes. One of the difficulties that any practitioner has when taking in another partner is getting him to realise how valuable the connection is, the connections are and how hard you have worked to get them to that stage. I considered that our accounting practice irrespective of any finance connection was worth about £10,000. And indeed we paid £7,000 to purchase it some two or three years earlier. I further considered that the developed finance connection was worth a considerable amount of money, that it was returning somewhere in the vicinity of \$8,000 per annum and I was looking for a figure somewhere in excess of \$20,000 for this.

In the Supreme
Court of New
Zealand

—
No.18

John Worrall
Wheelans
Examination-
in-Chief

21 September
1972

(continued)

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TO BENCH: \$20,000 from the new partner? No that was what it was worth. Mr Hegan had doubts on this finance connection because other finance companies at the time were being pressurised by motor dealers to make them keep these fees. The office charges? Yes, and they were having to concede these charges. We had a very close association with our dealers and it was through this close association that we were able to keep them.

30

TO COUNSEL: You have referred to the problem that arose so far as Mr Hegan was concerned and the question of goodwill, were there any family considerations at that time which influenced your thinking? Yes. I have always been a very thoughtful person when it comes to my family, thoughtful to the extent that my only great ambition in life is to see they are secure. I realised at the time I had an income producing asset the value of which seemed to be to all intents and purposes impossible to estimate and I was concerned that if I died at that time professionally my partners could not have carried on paying my estate this income and my wife would be left with probably about £5,000. I was also concerned by virtue of

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In the Supreme Court of New Zealand

No.18

B

John Worrall
Wheelans
Examination-
in-Chief

21 September
1972

(continued)

the severe illness which my partner had the January of that year, 1965, where I was rung at Picton where I was staying in the Christmas holidays and told to return to Christchurch because it was doubtful whether he would be alive much longer, and I determined to see that this income was as secure. I determined to see that this income would be retained by my family.

TO COUNSEL: Did this lead you to think in terms of settlement of a family trust? 10

Yes. The family trusts were established and I confirm the Deeds of Trust Exhibits A and A1 to the case stated. The old partnership of Ashton & Wheelans was dissolved and a new partnership formed as from 1 November 1965 with Mr Hegan. Mr Hegan agreed to pay goodwill but not including office charges goodwill. The finance company side of it,

did each finance company then withdraw the authority of Ashton & Wheelans to act for it? Yes. I produce as Exhibit H copy 20

letter of 26 October 1965 from Cresta Finance Limited to Ashton & Wheelans withdrawing Ashton & Wheelans instructions to act for Cresta Finance Limited. Letters in similar form were written at that time by the other finance companies to Ashton & Wheelan. I produce as Exhibit I a copy of the minute of 21 October 1965 of Cresta Finance Limited relating to these matters. I know and I am able to confirm that there were similar resolutions of shareholders passed by the other three finance companies at that time. 30

TO BENCH: You were secretary of all four companies? Yes.

TO COUNSEL: The minute shows it was signed by the shareholders who were not members of my family, directors. Each finance company appointed the trustees of the two family trusts as accountants for it and I confirm Exhibits B to B3 of the case stated as copies of those appointments. The trustees appointed the new firm of Ashton, Wheelans & Hegan to carry out the accountancy 40

work involved and I confirm the exchange of letters recorded as Exhibit C and C1 to the case stated. In late October 1965 at the time these discussions took place the decisions were made as to the constitution of the trusts with a - (Mr Blank objects). At the time these various documents to which we have been referring were executed in late October 1965 how far had discussions proceeded as to the formation of the trusts? They had been completed.

10

TO BENCH: Discussions between whom? Myself, Mr Ashton and Mr Heney of Saunders Heney & Beadel. Had you given instructions for the preparation of a document or what stage had been reached? We had issued instructions yes.

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TO COUNSEL: The method of payment of the fees in these matters, did each trust have a bank account at the ANZ Bank? That is correct. Who had authority to operate the Ashton family trust bank account? Wheelans and Beadel jointly. Who had authority to operate the Wheelans family trust bank account? Ashton and Beadel jointly. What practice was followed so far as the payment of remuneration by the finance companies to trustees and the trustees to the new partnership? Cheques were drawn monthly by each finance company in favour of Ashton Wheelans & Beadel and these cheques were paid into each trust bank account splitting each cheque half and half to each trust.

30

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TO BENCH: You can do that can you? Yes. They were split equally and paid into each trust, if \$100 fees \$50 would be put into each trust. Each trust drew a cheque and paid Ashton Wheelans & Hegan an equal amount. Where were the repayments paid by the hirer, did they owe them to the finance company? Into the finance company. What did you do for this office charges that you were paid? Trustees. Or the accountants before that? The firm of Ashton & Wheelans, it was part of the accounting remuneration

In the Supreme
Court of New
Zealand

No.18

B
John Worrall
Wheelans
Examination-
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21 September
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(continued)

In the Supreme
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No. 18

B
John Worrall
Wheelans
Examination-
in-Chief

21 September
1972
(continued)

for handling all the accounting and management functions of the finance company.

TO COUNSEL: The office charges were part of the total remuneration to Ashton & Wheelans and there had been concern the dealers might want to keep these office charges instead of passing them over. Why would the dealers have been willing for the finance companies or for you and Mr Ashton to have those office charges? I cannot say what was in their minds at the time but I believe it was caused by two reasons, the first of which was we had a very close contact with these people. The second one would I think be their loathness to deal with a big finance institute. After the new partnership was formed and the office charges income did the trustees themselves or any of them do any work to produce that income? Only a small amount. I went to a lot of trouble to make certain these gentlemen were happy I kept in very close contact with them both inside and outside office hours. 10 20

TO BENCH: That is the dealers? Yes.

TO COUNSEL: Why did you allow this money to accrue to the trust instead of just along with Mr Ashton taking these fees personally? The first reason is that I gave in evidence before, I was concerned that this income would cease should anything happen to him and if it had been done in the fashion that Mr Richardson says this would have happened. I also think that if you have a partner the arrangement you have with that partner should be clean and clearcut. Mr Hegan was some seven years younger than us, a capable person for his age and I felt he was putting as much into the place as we were and he should participate equally and I would not like to see produced in a partnership I was in a strange allocation of income. 30 40

Coming to the administration of the trusts, take the Ashton Trust of which you and Mr

Beadel were the trustees, who made the final decision as to the allocation of the income each year? These trusts were no different from any other trust in that the allocation of income was decided by the trustees in consultation with the parent. Was there any instance where the trustees of the Ashton Trust did not agree with the suggestion that Mr Ashton made as to income allocation? Yes there was one instance and could possibly have been more but I remember an instance, in which year it was I cannot remember now, but I felt he was asking for too much funds to support his family. I think he agreed with me in the long run. Can you say of your association with him how Mr Beadel conducted himself as trustee? Most forthrightly, he would never sign a cheque unless there was that much information backing it up. I produce the minute of the trustees of the S.B. Ashton Family Trust dated 22 May 1967 relating to the allocation of the income of the trust for the year ended 31 March 1967 as Exhibit J. I produce as Exhibit K a minute of the same date in respect of the allocation of income in the J.W. Wheelans Family Trust. The J.W. Wheelans Family Trust, the minute shows three different sums, £200 appropriated and credited to Mrs Wheelans, £705 accumulated and £1200 vested equally in the four named children. The £705 accumulated would be accumulated in the trust. The £200 was paid to Mrs Wheelans. She used it to go to her brother's wedding in Port Moresby. So far as the £1200 vested in the four children is concerned, that time I purchased a bigger home for the family and that cost me round about £1500 to change houses. I also used the money for their maintenance and support.

TO BENCH: You used the £1200 in a change of home? Yes. The money went into my bank account and at that time the moneys in the bank account were used for that home.

In The Supreme
Court of New
Zealand

—
No.18

B
John Worrall
Wheelans
Examination-
in-Chief

21 September
1972
(continued)

MORNING ADJOURNMENT

In the Supreme
Court of New
Zealand

No.18

B

John Worrall
Wheelans
Examination-
in-Chief

21 September
1972
(continued)

TO COUNSEL: The accounts of the trust for the 1967 income year, the balance sheet of the Ashton Family Trust, Exhibit E, contains as an asset at 31 March 1967 a deposit on land Kaiapoi £50, and there is a similar asset referred to in the J.W. Wheelans Family Trust, Exhibit F. This refers to a block of land at Kaiapoi purchased in that year and later subdivided and sold. The profit in that case was subject to tax and tax was paid on it by the trustees. (Witness refers to copy of Memorandum of Agreement). This is an Agreement, Exhibit L, of June 1972 relating to the sale by the trustees to the Broadlands Dominion Group of the goodwill of the accounting business which they had in terms of the transaction referred to in evidence. Under that agreement the goodwill was sold for \$40,000. Of which half accrued to each family trust. At the same time the two finance companies sold their shareholders fund to the Broadlands Group, Westburn Investments Limited and Warwick Credits Limited. The other two companies had ceased business. The present net capital of each trust is worth between \$30,000 and \$32,000. The position of the finance companies around October, November 1965, as to what the total funds was they had available for investment, I couldn't answer that, I could tell you the capital of the finance company but not the funds available for investment because there was a lot of amount of borrowing. The total of the capital of the four finance companies at that time was \$19,000. Worcester Holdings was about half the size, in terms of funds, of the other three.

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Cross-
Examination

XCM: MR BLANK: The four finance companies instructed the trustees to act for them in the capacity of accountants, that is correct is it? Yes. That is what the exhibits say? Yes. The case says that they were to act as accountants as trustees of the trusts is that right? Yes I think it says in their capacity as trustees. Of the trusts? Yes. Acting as accountants implies to my mind that the accountant will have offices, office machines, staff,

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stationery and all the usual paraphernalia the accountants have, did the trustees have any of this paraphernalia in their capacity as trustees? No. Mr Hegan said that he wasn't prepared to pay goodwill on the office charges? That is correct yes. Its not clear from his evidence but I take it he paid goodwill on the accounting work of the four companies? He paid goodwill three years purchase price of the super profit of our accounting practice. Included in that super profit was the accountants' work as distinct from the office charges which had accrued from your company? He paid goodwill for the total accounting fees of our practice at that time which accounting fees would have included the fees derived from the finance companies.

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TO BENCH: Other than the office charges? Correct. You worked on the existing position when you were carrying on these discussions you took the previous year's figures did you or a forecast of the future year's? I can't remember. He rather suggested it was a forecast of the next three years? No that wouldn't be right, I imagine it was the previous years. No it must have been a forecast of the ensuing year, not a forecast of the three ensuing years.

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TO COUNSEL: I think in evidence in chief you said this - "We had a very close association with our dealers and it was through this close association that we were able to keep them." or words to that effect? Yes the office charges. Is this why you thought you could keep the office charges coming in? This is correct. You put this down to the close contact you had with the dealers both within and without office hours? That is one of the reasons I gave. And they were loath to deal with finance companies? Yes. You said "we", was that you and Mr Ashton? More particularly me. Basically it was your association with the dealers that kept them? I am not

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No.18

B
John Worrall
Wheelans
Cross-
Examination
21 September
1972
(continued)

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No.18

B
John Worrall
Wheelans
Cross-
Examination
21 September
1972
(continued)

saying basically, but I had a closer association than Mr Ashton did, not basically, he knew them as well as I did but I was the person who went to see them. Mr Beadel had nothing to do with them? No, he acted in some cases as solicitor. Not in the association with the dealers? No. These office charges which if I understand correctly were payable by the hirers of vehicles? Correct. The fact they had to pay would pre-suppose some work was done to justify those payments, is that right? Yes. That is fair comment. What work was done which related to these payments? The dealer prepares the hire purchase agreement and secures the proposal. I would go and pick the hire purchase agreement up from the dealer either inside or outside office hours in some instances, the firm of Ashton Wheelans & Hegan prepared a notice of assignment, ledger card, a security record, entries into the record of the company.

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TO BENCH: This is all accountancy work? Yes. I thought the office charge probably included filling in the initial hire purchase agreement and the necessary attendance when payments were made of hire instalments, some clerking work involved in that, taking in money and issuing receipts, can you suggest anything else that could be attributed to office charges? That would be right, the office charges wouldn't be sufficient to cover all this work. Divorcing the actual accountancy work of preparing financial records was there anything attributable to the office charges other than making out hire purchase agreement and office work of receiving and giving receipts for instalments? No. And sending out hurry up notices now and again? No.

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TO COUNSEL: Giving of receipts and instalments was covered in accountancy work? Yes. What you are left with is \$20 was being paid to fill in the hire purchase form? Yes. The office charge? Yes.

You told my learned friend about the discussions you had with your partner and Mr Hegan as to what was to happen when the new partnership came in? Yes. You were secretary of the finance company? Yes. Was it you who suggested to the directors of your finance company they should transfer their instructions in this way? Yes.

10 TO BENCH: That was an essential part of the arrangement? Yes. It couldn't work otherwise? No.

TO COUNSEL: You gave instructions to Mr Heney? Yes. Were those instructions given by letter? No. Who gave the instructions to him? I did. Mr Ashton would possibly have been there, I can't remember, but I certainly gave the instructions.

20 TO BENCH: In relation to both his trust and your trust? Yes.

30 TO COUNSEL: Again the whole basis of the scheme was the two trusts should be set up at the same time? Correct. You told my learned friend that one of the reasons why you wanted to set up these trusts was so that the income from these office charges would continue coming in to your family if you died? Yes. But earlier you said the connection with the dealers was to a large extent due to your personal effort, doesn't it seem that if you were to die that connection would no longer be assured? I think you can only safeguard these things to the best of your ability, I would be leaving behind Mr Ashton who also knows and knew these dealers, I see no reason why they would be lost. If both of us were killed there would be a grave chance of this happening. But if Mr Ashton had died
40 as we thought he may have I feel certain that the income would have been retained.

TO BENCH: But the same thing would apply if you were still functioning in partnership as accountants? How do you mean.

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Zealand

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John Worrall
Wheelans
Cross-
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21 September
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(continued)

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B
John Worrall
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Cross-
Examination
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1972
(continued)

If you were to die you say you feel fairly confident that provided Mr Ashton survived the continuity or the retention of these office charges would be maintained and so long as one of you survived that would be the case, I couldn't see the difference? In our position as professional people we are not allowed to carry on in partnership with deceased estates. There would have to be a dissolution and the funds would come in but they wouldn't come in to you? To my estate.

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TO COUNSEL: After the new partnership came into existence and the new arrangements were put into operation to a person who did not know of these documents this withdrawal of the instructions and giving of new instructions to a person who didn't know of those it would have been apparent to them the business continued in just the same way as it had before, would you agree that would be the position? To any member of the public, yes.

20

TO BENCH: People paying instalments wouldn't know any difference? No.

TO COUNSEL: You told my learned friend on one occasion you had not agreed with a suggestion Mr Ashton had made as to the way in which his children's income should be distributed? The income of the trust should be distributed. You said you exercised your general abilities in this field to advise against what he - I take it you advised against what he proposed by reason of your business experience? Yes. You were doing no more than you were obliged to do as trustee by law? No. Did the trustees of your family trust ever refuse to do what you suggested? No, I can't remember it. And these minutes allocating income where were they prepared? In our office. Is it a fair statement to say that to all intents and purposes these two trusts were run as to what one may call a joint venture? Yes. As far as the finance side was concerned, yes. The office expenses? Yes. Indeed Mr Beadel in his letter to Broadlands said

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the trusts are carrying on business jointly? Yes. I want to refer to the sale to Broadlands in June this year, which is expressed to be for the goodwill of the accounting business at present carried on by the trustees, were the arrangements between the four companies - did all four companies cease carrying on business when the transfer to Broadlands took place?

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TO BENCH: There were only two surviving by then? Yes. Westburn and Warwick in fact sold out to Broadlands? Yes that is correct.

TO COUNSEL: You said Broadlands purchased the shareholders' funds? Yes that is correct. That was in addition to the purchase of goodwill? That is correct. And they paid something extra for those shareholders' funds? That is correct. So that what Broadlands was purchasing was really the goodwill of the dealers? Yes that is what they paid \$40,000 for to obtain an outlet for their funds. And the trustees as accountants dropped out of it as soon as the sale was completed? True. And I take it your firm is no longer doing the accountancy work? That is correct.

20

TO BENCH: Was the firm remunerated for the loss of its goodwill in the accountancy work? No. So that the trusts got the full compensation both for what it had passed on, the work it was passing on to the firm and what it was retaining? What do you mean by the firm. The firm of Ashton Wheelans & Hegan? I don't understand. You were appointed, the trustees were appointed accountants for these four companies? Yes. They delegated the truly accounting work, in fact all the real work to the firm of Ashton Wheelans & Hegan? Yes. Then the source of this business dries up by being taken over by Broadlands and Broadlands are persuaded to pay compensation to the trustees for the loss

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In the Supreme
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B
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Cross-
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(continued)

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B

John Worrall
Wheelans

Cross-
Examination

21 September
1972

(continued)

of the goodwill of this accountancy work, what I am saying is the real work was done by the firm but it doesn't seem to have got any money? Broadlands paid the money for the dealing connection. This sale only was effected because the interest on deposit regulations brought down by the Minister of Finance in late March this year which made it impossible for a small finance company to fund its operations. Are you telling me what Broadlands paid the trustees for was not loss of their accountancy goodwill with the companies, the finance companies, but for the goodwill which you and Mr Ashton really had with the dealers? And the profitability which arose from that connection part of which was these document fees to which we have referred.

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TO COUNSEL: The tenor of your earlier evidence was you were concerned to set up a trust for the benefit of your family, particularly your children? Yes. If this was your only intention you and Mr Ashton could have gone on receiving these expenses yourselves and just passed the £2,000 a year onto the trustees, you could have done that? At date of death what would have happened. Whilst you were alive, during the 1967 tax year, these same funds could have been got into the trusts' hands by your receiving the office expenses yourself and merely handing the money onto the trustees? Yes it is just a matter of drawing cheques are doing it, are you presuming no arrangements were entered into with the finance company.

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Re-Examination REXM: DR RICHARDSON: NO QUESTIONS

To Bench

TO BENCH: Did you have a deed of partnership with Mr Hegan? No. Just an oral one? No our original partnership with Smith Cormack Ashton & Wheelans had an agreement, the partnership was fraught with difficulties and the agreement never covered

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the situations that arose and I have always thought three sensible adult people should be able to sort their problems out without any reference to a document. You didn't feel any embarrassment in your capacity of trustee acting as an accountant in a sense of accepting work as such independently from the firm in which you were a partner?
No.

In the Supreme
Court of New
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No.18

10 DR RICHARDSON CALLS:

SIDNEY BOYD ASHTON (Sworn): I am a Chartered Accountant residing in Christchurch and a member of the firm of Ashton, Wheelans & Hegan. I am 36 years of age, married with four daughters the eldest of whom is 12 and the youngest 3 years old. I am able to confirm in general terms the evidence given by Mr Wheelans as to the background to the transactions entered into in 1965 with which this case is concerned and as to the way in which they were carried out.

C
Sidney Boyd
Ashton
Examination-
in-Chief
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1972

As to the Ashton Family Trust, how did the availability of trust funds allocated by the trustees to your children affect what you were able to do for your children? It enabled me to send one of them at that time to a private school and to provide funds for the purchase of land on which to build a family home. It has also enabled me to build up assets in the family trust of a current net worth of some \$30,000 - \$32,000.

30 XXM: MR BLANK: Have you ever heard of an arrangement of this nature being entered into before? No, I feel it is a fairly unique situation and I haven't heard of any such arrangement being entered into before.

Cross-
Examination

40 TO BENCH: You said that the setting up of this trust had enabled you to do things for your children which you probably wouldn't have been able to do without? Yes. You instance buying land and

To Bench

In the Supreme
Court of New
Zealand

No.18

C

Sidney Boyd
Ashton
To Bench

21 September
1972
(continued)

building a house? Yes. Whose name is that property in? It is in the name of my wife and myself. And how much of the money from your family trust has gone into that? Can you give me a rough estimate? I would think \$5,000 - \$6,000. Which year would that be? I think it would be possibly 1966/67, possibly the 1968 tax years. It wouldn't be 1966 the trust wasn't in being then? Yes it was. And by what means, I know your trust enables the funds to be allocated either to your wife or your children or both, what was done in this case, was it allocated to your wife or your children? Both over those particular years. What I am pointing out is that income which under the trust belongs to your children has been used by you to purchase an asset in which they have no apparent interest? Only the fact that they live there. Legally it is yours and your wives? It is left to them

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20

CONCLUSION OF EVIDENCE FOR OBJECTORS

EXHIBIT "H" referred to in the Evidence
of John Worrall Wheelans

In the Supreme
Court of New
Zealand

CRESTA FINANCE LIMITED

Christchurch

26th October, 1965.

Messrs Ashton and Wheelans
Public Accountants,
254 Oxford Terrace,
CHRISTCHURCH

No.18

Notes of
Evidence taken
Before Wilson J.

Exhibit "H"
referred to
in evidence
of John
Worrall
Wheelans

10 Dear Sirs,

I am instructed by my Company's
directors to confirm their verbal advise to
you, formally withdrawing your instructions
to act for the Company as Public
Accountants as from the 1st November, 1965.

Yours faithfully,
CRESTA FINANCE LIMITED

Per: J.W. Wheelans

SECRETARY

20 EXHIBIT "I" referred to in the Evidence
of John Worrall Wheelans

CRESTA FINANCE LIMITED

DIRECTORS MINUTE BOOK

Exhibit "I"
referred to
in evidence
of John
Worrall
Wheelans

RESOLUTIONS: of the Directors of the above
Company passed this 21st day of October
1965 as follows :

30 1. THAT: the appointment of Messrs
Ashton & Wheelans as Public Accountants
to the Company be withdrawn as from the
1st November 1965 and that in their place
Messrs S. B. Ashton, J.W. Wheelans and
G.C.P. Beadel be asked to undertake as
from the 1st November 1965 the same work

In the Supreme Court of New Zealand

hitherto carried on by Messrs Ashton and Wheelans, such new appointment to be revocable at the pleasure of the Company.

No.18

Notes of Evidence taken Before Wilson J. Exhibit "I" referred to in evidence of John Worrall Wheelans

2. AS remuneration of their services Messrs Ashton, Wheelans and Beadel shall be paid by the Company all office charges received by them in respect of their preparation of any Conditional Purchase Agreements together with 1½% of all moneys advanced or disbursed by them together with 1½% on all instalments of principal and interest received by way of repayment.

10

3. THE Directors record their understanding that Messrs Ashton, Wheelans and Beadel have agreed to accept the above appointment in their respective capacities as trustees under certain trust deeds which are to be produced to the Directors AND FURTHER that although Messrs Ashton, Wheelans and Beadel shall be personally responsible to the Company for the carrying out of the work undertaken by them, it is their intention to delegate all such work to Messrs Ashton, Wheelans and Hegan, Public Accountants, 254 Oxford Terrace, Christchurch AND the Directors do accordingly RESOLVE to confirm such delegation of duties to Messrs Ashton, Wheelans and Hegan.

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4. THE appointment of the Company's present secretary Mr J.W. Wheelans IS HEREBY CONFIRMED and he shall perform such duties as may be prescribed by the Directors of the Company including those duties imposed on him by the Companies Act 1955.

30

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.....

EXHIBIT "J" referred to in the Evidence
of John Worrall Wheelans

In the Supreme
Court of New
Zealand

S.B. ASHTON

No.18

FAMILY TRUST

Notes of
Evidence
taken before
Wilson J.

TRUSTEES MINUTE

RESOLVED: This 22nd day of May, 1967.

THAT: 1. The financial statements for
the year ended 31st March, 1967,
showing a net income of
£2,111. 12. 2., be approved.

Exhibit "J"
referred to
in evidence
of John
Worrall
Wheelans

10

2. The income be dealt with as
follows:

Income appropriated and
credited by Trustees to Mrs
J.E. Ashton (the wife)
pursuant to Clause A (I) of the
Trust Deed

£200. 0. 0

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Income specifically
accumulated by Trustees
pursuant to Clause A (IV) of
Trust Deed and thereby added
to the capital of the Trust
Fund

£741.12. 2

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Balance of income for year
ended 31st March, 1967, not
otherwise appropriated and
thereby (pursuant to Clause
B of Trust Deed) vesting
equally and absolutely in the
three named children living
at 31st March, 1967, viz.

J.F. Ashton	£390. 0. 0
C.J. Ashton	390. 0. 0
S.R. Ashton	<u>390. 0. 0</u>

1170. 0. 0

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Being total net income
for year ended 31st
March, 1967 £2111.12. 2

J.W. Wheelans
G.C.P. Beadel

In the Supreme
Court of New
Zealand

EXHIBIT "K" referred to in the Evidence
of John Worrall Wheelans

J.W. WHEELANS

FAMILY TRUST

TRUSTEES MINUTE

No.18

Notes of
Evidence
taken before
Wilson J.

Exhibit "K"
referred to
in evidence
of John
Worrall
Wheelans

RESOLVED: This 22nd day of May 1967,

THAT: 1. The financial statements for the year
ended 31st March, 1967 showing a net
income of £2105. 5. 1 be approved.

2. The income be dealt with as follows: 10

Income appropriated and credited
by Trustees to Mrs E A. Wheelans
(the wife) pursuant to clause A.(i)
of Trust Deed

£200. 0. 0

Income specifically accumulated
by Trustees pursuant to Clause
A.(IV) of Trust Deed and
thereby added to the capital
of the Trust Fund

705. 5. 1 20

Balance of income for year
ended 31/3/67 not otherwise
appropriated and thereby
(pursuant to Clause (B) of
Trust Deed) vesting equally
and absolutely in the four
named children living at
31/3/67 viz

J.A.Wheelans	300.0.0	
P.L.Wheelans	300.0.0	
R.S.Wheelans	300.0.0	
S.D.Wheelans	<u>300.0.0</u>	

30

1200. 0. 0

£2105. 5. 1

J.R. Wheelans
G.C.P. Beadel

EXHIBIT "L" referred to in the Evidence
of John Worrall Wheelans

In the Supreme
Court of New
Zealand

SAUNDERS, BEADEL & CO.
Barristers & Solicitors

—
No.18

Christchurch

30th June 1972

Notes of
Evidence
Taken before
Wilson J.

10 The Manager,
Broadlands Dominion Group,
P.O. Box 2762
AUCKLAND.

Exhibit "L"
referred to
in evidence
of John
Worrall
Wheelans

Dear Sir,

re S.B. Ashton and J.W. Wheelans
Family Trusts - Westburn
Investments Ltd & Warwick
Credits Ltd

20 On behalf of the trustees we are
instructed to offer to sell to you the goodwill
of the accounting business at present carried
on by the trustees for the sum of \$40,000.00.
This sum is to be satisfied by the issue of
shares in Broadlands Dominion Group based on
a share value of \$1.10.* Please indicate
your acceptance by signing and returning the
copy attached.

30 We are instructed to advise that the
trustees will cease business as from the
date of completion.** The Trusts are
carrying on the business jointly so each will
receive share certificates to the value of
\$20,000.00. The trustees for the S.B.
Ashton Family Trust are - Geoffrey Charles
Pitt Beadel Solicitor and John Worrall
Wheelans Chartered Accountant both of
Christchurch and those for the J.W. Wheelans
Family Trust are - Geoffrey Charles Pitt
Beadel Solicitor and Sidney Boyd Ashton
Chartered Accountant both of Christchurch.

In the Supreme
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In due course we would be grateful to
receive the relative share certificates.

No.18

Yours faithfully
SAUNDERS BEADEL & CO

per: G.C.P.Beadel

Notes of
Evidence
taken before
Wilson J.

Exhibit "L"
referred to
in evidence
of John
Worrall
Wheelans

- * The shares in Broadlands Dominion Group Ltd are fully paid ordinary shares of 50¢ each and will rank for one half of the dividend declared in respect of the six month financial period ending 30th September, 1972.
- ** The date of completion referred to in paragraph two shall be 30th June, 1972.

10

G.C.P. Beadel

In the Supreme
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Zealand

—
No.19

Reasons for
Judgment of
Wilson J.

22 September
1972
(continued)

on the other - that no other course was really practicable. The objectors have objected to the commissioner's action in assessing them to tax for the year ended 31 March 1967 in respect of not only the income respectively returned by them but also the income returned by their respective family trusts and the question for the determination of the Court is whether the Commissioner acted incorrectly in making that allocation of income and if so in what respects the assessment, which he made as a result of combining the trust income with the objector's income, should be amended. 10

In my opinion, as a result of the evidence and the argument which I have heard, the question must be answered in the affirmative. I hold that no part of the income of the respective trusts was properly assessable as the respective objector's income and accordingly the assessment made by the Commissioner on that basis should be amended by deleting that part attributable to the addition of the income of the respective trusts. 20

Having stated my conclusions I now propose briefly to state my reasons. The facts which I consider relevant are that up until October 1965 the objectors had practised for some years as co-partners in a firm of public accountants of which they were the only partners. About this time they proposed to take into partnership with them on an equal basis a qualified employee, Derek Robert Hegan, and it was a condition of their doing so that he should pay a sum by way of goodwill to the objectors. The formula for assessing this payment was agreed and I am informed that it is the usual one. It involves an assessment of income likely to be received. Amongst the sources of income (and it would seem, from the 30 40

figures that I have seen, prominent amongst those sources) was the remuneration which the old firm had received from four finance companies for doing what was somewhat loosely described as accountancy work. This remuneration was in two parts. One part was calculated on a percentage basis on moneys loaned and collected on behalf of the finance company. The other was what was called "office charges". This was a sum of money which was paid by the hirer under hire-purchase agreements. It was included in the additional charges in the hire-purchase agreement and on these agreements being assigned to a finance company became payable to the company. The arrangement which the objectors as the old firm, had had with the finance company was that, in addition to the strictly-regarded accountancy fees, they should also receive these office charges. The office charges themselves constituted a very substantial figure each year. Mr Hegan, who gave evidence, said that he regarded that part of the old firm's income as precarious because there was no competition amongst finance companies for the business of dealers and there was a growing practice of the dealers to take advantage of this competition to secure for themselves the office charges. Mr Hegan, therefore, informed the objectors he was not prepared to pay by way of his entrance premium into the partnership a sum which included an estimation of these office charges because if they ceased to be received he would have paid for something which would not be realised. The objectors agreed to this stipulation and it was decided that he would be admitted into the partnership at a premium which would not take into account any office charges received thereafter nor would he be entitled to any share of such office charges if they were received by the new firm. There was a necessity, therefore, to make some arrangements so that these office charges would be kept separate. I agree that the simplest way to have done it would have been simply to credit them to a special fund or special account in the partnership which would be divided amongst the old partners only and not include the new partner. That would be

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Reasons for
Judgment of
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1972

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Reasons for
Judgment of
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(continued)

the ordinary, simple, straightforward way of doing it. About this time, however, both the objectors were giving serious thought to the desirability of setting up family trusts and this project had been rather underlined for them both by the very serious illness suffered by Mr Ashton early in the year. I think that it can be inferred with some confidence that they decided that the income from these office charges would be a suitable type of income to be provided for the family trusts and they then made arrangements so that this would be effected. In the first place the companies, of all four of which Mr Wheelans was the secretary, terminated the appointment of the old firm as their accountants. About the same time the family trusts were constituted. In each case the one objector was settlor of the other objector's trust and, along with Mr Beadel, their solicitor or a member of the firm of solicitors, was the trustee of that trust. The trusts provided that the income in the discretion of the trustees might be paid out to all or any of the class consisting of the objector's wife and children and the trustees had power to accumulate the income or part of it. 10

The next step in the arrangement was that each of the companies appointed the two sets of trustees joint accountants to carry out their work on the same basis of remuneration as had obtained prior to the dissolution of the old partnership. The new partnership which had been formed was then appointed by the trustees to do the actual accounting work at a remuneration which excluded the office charges. The nett result of all that was that the office charges, which used to be paid by the companies to the old firm comprising the two objectors, were now received by the trustees of their respective trusts and used by the trustees for the purposes of those trusts. It was put to Mr Wheelans when he gave evidence, that there was no need for this elaborate structure, except perhaps (by implication) the advantage of 30 40

10 spreading his tax load and securing some advantage from that, but he gave an answer which seemed to me to be perfectly reasonable and which justified what was done without any thought of the tax consequences, and it was this : that whilst he and Mr Ashton received these payments as partners their enjoyment of them depended on their continued existence in that the partnership would be terminated by the death of either of them and presumably the survivor would succeed to the full payment of the charges; whereas by creating trusts and having those payments paid to the trusts they were ensured against that risk, and so long as either of them survived to ensure by his goodwill the continuity of those payments, both families would continue to enjoy the profits equally instead of one succeeding on the death of the other to the full amount. That seemed to me to be a very prudent and reasonable arrangement and in my opinion it thoroughly justified the setting up of the trust and the arrangement by which the payments were received by the trust rather than by the objectors.

30 In my opinion, although this is, perhaps, a novel course to be followed, it is nonetheless as I see it "ordinary family dealing" as those words were used by Lord Denning in the familiar passage in Newton's case. Ordinary family dealing means no more than dealing in such a way as the ordinary person faced with the circumstances as faced the taxpayer would have acted had he not been seeking to evade liability for tax. For that reason, although I cannot agree with Mr Richardson that the transactions were ordinary business transactions - indeed I can see some rather extraordinary aspects from the business point of view, particularly from the point of view of the companies, nevertheless I am satisfied that I can predicate here with confidence that what was done in the way of ensuring that this income became the income of the family trusts rather than the objectors was ordinary family dealing and was not referable in any significant degree to

50 any desire to avoid tax. The question

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No.19

Reasons for Judgment of Wilson J.

22 September 1972
(continued)

In the Supreme
Court of New
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1972
(continued)

whether this advantage entered the minds of the objectors was not discussed when they were giving evidence but they are public accountants, (or as they are now termed chartered accountants) and I would not insult their intelligence by thinking that they were not conscious of the fact that there would be a tax saving involved. That, however, is very far from finding that that was any significant part of the scheme which they put into operation and as far as I am concerned, having seen and having heard them, I am satisfied that the predominant purpose of the arrangement was to provide security for their families with regard to these office charges which had formerly been paid to them as partners. 10

That really concludes the case but in case I should be held to have found my facts wrongly I think perhaps I should go a little further, having heard argument about what would have been the consequences should I have found that the transactions were, as claimed by the Commissioner, void as against him as a result of the application of s.108. 20

The Commissioner submitted that the trusts were avoided, that the appointment by the companies of the trustees as accountants carrying with it the remuneration of these office charges was avoided, and that the instructions by the trustees to the new firm to carry out the strictly accounting duties at the lesser remuneration were also avoided. I do not think that, even if I were to hold that that was the effect of the application of s.108, the Commissioner would be in any better position. In my opinion, if the trusts were annihilated, the situation is that the money was paid by the companies to the trustees. Mr Blank suggested that they were not entitled to that money beneficially, that they, therefore, held it as constructive trustees, and that may well be so; but I fail to find any basis upon which I could say that they held it as constructive trustees for the objectors. 40

The money was received by them as trustees. They were appointed as trustees. If their trust was annihilated then they received it in a capacity which did not exist and in my opinion in that case there was a resulting trust to return it to the source from which it came, namely the respective finance companies. If, as was alternatively suggested by Mr Blank, they had given consideration for receiving it because the objectors had been active in ensuring the continuity of the business which the companies had received from dealers, then it seems to me that that was perhaps a question of quantum meruit, but in any event it was paid to the three of them and it would not become the income of the objectors or either of them. In fact, of course, there is no evidence to show that any consideration was given by them other than the consideration mentioned in the documents by which they were appointed, namely, that they undertook to see that the accounting work of the companies was done and they did that by appointing the new firm to do it.

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Accordingly then, even if the trust is destroyed the moneys do not become the income of the objectors and if one goes further (as the Commissioner claimed to do) and annihilates the appointment of the trustees as accountants by the company that still did not leave the money in the hands of the objectors or make it their income. Indeed, that would be an added reason for saying that such monies as were in fact paid by the companies to the trustees were held by them on resulting trust for the company, because they had no right to them whatsoever. I think Mr Blank agreed that the fact of the appointment of the new firm was not really relevant except as an incident of the whole arrangement.

In the result, therefore, I answer the question in the case stated in the form in which I have put it at the commencement of this judgment.

There was evidence which at one stage I regarded as being very strongly against the objectors in the fact that in the income year

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(continued)

in question each of them received in May 1967 from their respective family trusts sums of money which had been allocated by their trustees to their children. In the case of Mr Ashton the sum was £1,170 and in the case of Mr Wheelans, £1,200. These moneys were received by them as parents of their children and not personally although it is true that in the case of Mr Wheelans he agreed that the money was paid into his own bank account and used for the purposes connected with family housing and I think Mr Ashton agreed that he had used the money received by him for a similar purpose. It is true that in the event that money was used just as it would have been used had it gone to the objector as part of his own professional income but that, in my opinion, does not make it his income and unless the family trust can be destroyed and there can be still imported in its place a trust for the objector, the mere receipt of the money by each objector in his capacity of parent and guardian of his children does not in my opinion constitute it, even to that extent, his income for the purposes of assessment of tax. 10 20

Costs, I think, must follow the event. I allow a total of \$300 costs to the objectors, with any disbursements to be apportioned, if necessary, equally. 30

Solicitors:

Saunders, Beadel & Co., Christchurch,
for Objectors
Crown Law Office, Wellington
for Commissioner

FORMAL JUDGMENT OF THE SUPREME
COURT (ASHTON v. C.I.R.)

In the Supreme
Court of New
Zealand

BETWEEN SIDNEY BOYD
 ASHTON of
 Christchurch,
 Chartered
 Accountant

No.20

Formal Judgment
of Supreme Court
(Ashton v.C.I.R.)

Objector

22 September
1972

A N D THE COMMISSIONER
 OF INLAND REVENUE

Commissioner

10

Friday the 22nd day of September 1972

This Action coming on for trial on the 21st
and 22nd days of September 1972 before
his Honour Mr. Justice Wilson after hearing
Professor Richardson of Counsel on behalf
of the Objector and Mr. Blank and Mr.
Sincock of Counsel on behalf of the
Commissioner and the evidence then addressed
it is adjudged:

20

1. That no part of the income of the
Objector's family trust is properly
assessable as the Objector's
income and accordingly the assessment
made by the Commissioner should be
amended by deleting that part
attributable to the addition of the
income of the objector's family
trust

30

2. That the Commissioner pay to the
Objector costs in the sum of \$150.00

By the Court

L.S.

A.J. Herring

Deputy Registrar

In the Supreme
Court of New
Zealand

No. 21

FORMAL JUDGMENT OF THE SUPREME COURT
(WHEELANS v. C.I.R.)

No.21

Formal Judgment
of Supreme Court
(Wheelans v. C.I.R.)

IN THE SUPREME COURT OF NEW ZEALAND
CANTERBURY DISTRICT
CHRISTCHURCH REGISTRY

22 September
1972

BETWEEN JOHN WORRALL
WHEELANS of
Christchurch,
Chartered
Accountant

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Objector

A N D THE COMMISSIONER
OF INLAND REVENUE

Commissioner

Friday the 22nd day of September 1972

This Action coming on for trial on the 21st and 22nd days of September 1972 before his Honour Mr. Justice Wilson after hearing Professor Richardson of Counsel on behalf of the Objector and Mr. Blank and Mr. Sincock of Counsel on behalf of the Commissioner and the evidence then addressed it is adjudged:

1. That no part of the income of the Objector's family trust is properly assessable as the Objector's income and accordingly the assessment made by the Commissioner should be amended by deleting that part attributable to the addition of the income of the objector's family trust 30
2. That the Commissioner pay to the Objector costs in the sum of \$150.00

By the Court

L.S.

A.J. Herring

Deputy Registrar

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No. 22

NOTICE OF MOTION ON APPEAL
(C.I.R. v. ASHTON & WHEELANS)

In the Court
of Appeal of
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IN THE COURT OF APPEAL OF NEW ZEALAND

No.22

No. C.A. 5/73

Notice of
Motion on
Appeal (C.I.R.
v. Ashton
and Wheelans)

BETWEEN THE COMMISSIONER OF INLAND
 REVENUE

19 January
1973

Appellant

A N D SIDNEY BOYD ASHTON

First Respondent

10 A N D JOHN WORRALL WHEELANS

Second Respondent

20 TAKE NOTICE that this Honourable Court will
be moved by Counsel for the above-named
Appellant at the sitting of the Court which
commences on the 5th day of March 1973 or
so soon thereafter as Counsel can be heard
ON APPEAL from the whole of the judgment
of the Supreme Court of New Zealand delivered
herein by the Honourable Mr Justice Wilson
on the 22nd day of September 1972 UPON
THE GROUNDS that such judgment is
erroneous in fact and in law.

DATED at Wellington this 19th day of
January 1973

H.E. BLANK

Solicitor for the Appellant

TO: The Registrar, Court of Appeal

TO: The Registrar, Supreme Court, Christchurch

TO: The First Respondent and the Second
Respondent and their solicitors Messieurs
Saunders, Beadel and Co., 123 Worcester
Street, Christchurch.

In the Court
of Appeal of
New Zealand

No. 23

REASONS FOR JUDGMENT OF THE COURT
(DELIVERED BY McCARTHY P.)

No.23

Reasons for
Judgment of
the Court
delivered by
McCarthy P.

29 May 1974

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 5/73

BETWEEN THE COMMISSIONER OF INLAND
 REVENUE

Appellant

A N D SIDNEY BOYD ASHTON

First Respondent

A N D JOHN WORRALL WHEELANS

10

Second Respondent

Coram: McCarthy P.
 Richmond J.
 Speight J.

Hearing: March 19 and 20, 1974

Counsel: H.E. Blank and H.R. Sorenson
 for Appellant
 I.L.M. Richardson for
 Respondents

Judgment: May 29, 1974.

20

JUDGMENT OF THE COURT
DELIVERED BY McCARTHY P.

This appeal is from Wilson J. who, in an oral judgment delivered at the conclusion of a hearing on 22 September 1972 at Christchurch, allowed the objections of the two respondents to income tax assessments issued by the Commissioner for the year ended 31 March 1967. The two objections were heard together.

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The question involved was, once again, the application of s.108, the difficulties and unsatisfactory text of which McCarthy P.

has written about recently in Commissioner of Inland Revenue v. Gerard (Judgment 20 May 1974). Wilson J. held that s.108 was not to be applied in these cases, for he could predicate with confidence that the transaction or arrangement attacked by the Commissioner was entered into by the respondent objectors to effect ordinary family dealings and not for the principal purpose of avoiding tax, their predominant purpose being to provide security for their families.

10

As always, in this class of case, the facts must be studied in some particularity. We will do that under a series of headings and then add our conclusions.

FACTS

Preliminary

Messrs Ashton and Wheelans were in partnership as public accountants in Christchurch for a number of years up to 31 October 1965. A Mr Derek Robert Hegan was taken into partnership, and the firm became Messrs Ashton, Wheelans and Hegan from 1 November 1965.

20

The Finance Companies

At that time there were four finance companies in Christchurch, Cresta Finance Limited, Warwick Credits Limited, Westburn Investments Limited, and Worcester Holdings Limited, with which the partnership was connected professionally. They were private companies. The shareholdings of all these companies are not clearly defined in the proceedings, but it does appear that the wives of the objectors held all the shares in one, and Mrs Wheelans and Mr Wheelans' sister those in another. Mr Wheelans was the Secretary of all four companies. For some years, each company had employed the partnership of Messrs Ashton and Wheelans to do its accounting work, and paid fees based on a percentage of turnover, plus "office charges" of £8 per

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No.23

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delivered by
McCarthy P.

29 May 1974
(continued)

deal. These, it seems, were fees paid the partnership for each hire purchase or sale agreement submitted by car dealers to the finance companies and subsequently discounted, or in some other way financed, by these companies. They were said to be in return for the trouble and expense of preparing the different documents, and were added to the amounts the hirers or purchasers had to pay. In fact, the car dealer and not the partnership did most of the work involved. In total the charges were substantial, about \$8,000 a year. 10

The evidence indicates that there was substantial competition amongst finance companies for the work of the motor dealers, and it was largely because of the personal relationship of Messrs Ashton and Wheelans with various motor dealers that the four finance companies were able to procure much of their business. As a consequence, the companies were willing, or Messrs. Ashton and Wheelans were able to command, that the office charges which might, in other cases, be retained by the car dealers, were ultimately received by them. 20

When Mr Hegan was negotiating to be admitted to the partnership, he was unwilling to pay goodwill to the other two in respect of any continuing income derivable from the office charges. He doubted their continuity and thought that eventually dealers would insist on receiving the office charges themselves. So these were excluded from the new partnership agreement which commenced on 1 November 1965. Mr G.C.P. Beadel of the legal firm of Messrs Saunders, Heney and Beadel of Christchurch acted for the partnership and was instructed in relation to most of the events with which this appeal is concerned. 30 40

The Old Arrangement Terminated

On 26 October 1965 each finance company under the hand of the Secretary, Mr Wheelans, wrote to Messrs Ashton and

Wheelans saying -

I am instructed by my Company's directors to confirm their verbal advice to you formally withdrawing your instructions to act for the Company as Public Accountants as from the 1st November 1965.

The New Arrangement

10 On the same day, 26 October 1965, each of the four companies, again under the hand of Mr Wheelans as Secretary, wrote to Messrs. Ashton, Wheelans and Beadel, not Messrs Ashton, Wheelans and Hegan. The letters varied a little but generally confirmed the appointment of these three gentlemen to act for the Company in the capacity of accountants in its business as a finance company in the lending and advancing of money, and continued -

20 I would also like to confirm the arrangement for your remuneration which was verbally discussed and agreed to between us. This is, that you are entitled to retain all office charges which you recover on the preparation of documents together with a charge to be made directly on this Company of 1½% of all monies advanced or disbursed by the Company and 1½% of all monies by way of principal and interest which the Company receives on
30 the repayment of loans.

My directors also record that they have been advised by you that you intend to delegate your obligations to this Company to a firm of Public Accountants namely Messrs. Ashton Wheelans and Hegan, 254 Oxford Terrace, Christchurch and they agree fully with such delegation, but it must be understood
40 is subject to my Directors prior approval.

As I think you already know, your appointment, by this Company is "at the Company's pleasure" and is accordingly revocable at any time.

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It will be observed that these letters ensure that the future income will include the office charges, that there is no reference to the three appointees being appointed in their capacity as trustees of any trust, and finally that the appointment is "in the capacity of accountants" although Mr Beadel was and is a solicitor and as such presumably unable to practice as an accountant. On the face of this, the income to be paid would be derived by these three people personally. But there is on record extracts from the minute books of the finance companies recording their directors' understandings that Messrs Ashton, Wheelans and Beadel had agreed to accept the appointments in their respective capacities as trustees under certain Deeds of Trust. However, it seems likely that the particular Deeds of Trust had not been entered into at the date of the arrangement or at the date of the directors' minutes (21 October 1965) for the Deeds are dated 26 November 1965.

10

20

The Delegation

On 27 October 1965, a letter from Messrs Saunders, Heney and Beadel (as solicitors for Messrs Ashton, Wheelans and Beadel) was sent to Messrs Ashton, Wheelans and Hegan delegating the accountancy work secured under the before-mentioned letters to that firm of public accountants.

30

We are acting for Messrs S.B. Ashton, J.W. Wheelans and G.C.P. Beadel who have accepted an appointment by certain companies, to carry out the accountancy work for these companies in connection with their finance and lending activities. We now confirm our verbal request to you to act professionally in the capacity of Public Accountants for our clients in carrying out the work required by these Companies. The Companies concerned have all agreed to our making this approach

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to you, and their names and the suggested remuneration payable to you, are as follows:

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	Warwick Credits Limited) 1½% on loans or advances made and 1½% on all monies received in repayment of loans or advances	Reasons for Judgment of the Court delivered by McCarthy P.
	Cresta Finance Limited)	
	Westburn Investments Limited)	
10	Worcester Holdings Limited) 3% on all monies received by the Company in repayment of the principal or interest under loans or advances	No.23 29 May 1974 (continued)

It is of course understood that the rates of remuneration suggested would be subject to any requirements of the N.Z. Society of Accountants in this respect.

20 Our Clients are acting for the four Companies mentioned, as Trustees under certain Deeds of Trust recently completed, but the Company have in each case been made aware of the circumstances.

We should be glad if you would kindly confirm your acceptance, both of the above appointment as well as the remuneration suggested.

30 It will be noted that the fees to be paid were in accordance with the instructions received from the finance companies less the amount of the office charges. It will also be seen that the letter says that Messrs Ashton Wheelans and Beadel had accepted the appointment to do the accountancy work for the four finance companies "as trustees under certain Deeds of Trust recently completed". This is somewhat perplexing (apart altogether from the intriguing question of the capacity of two accountants and a solicitor to act professionally as public accountants pursuant to Deeds of Trust) because, as we have said, the Deeds

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of Trust, if correctly dated, had not then been executed. On 29 October Messrs Ashton, Wheelans and Hegan wrote to the solicitors confirming their acceptance of the appointment contained in this letter.

Deeds of Trust

One of the Deeds of Trust, dated 26 November 1965, was the Ashton Trust. Mr Wheelans was the settlor, Mr Beadel and Mr Wheelans were the trustees, the consideration was £1 and the purposes of the Trust were to make provision for Mrs Ashton, three Ashton children, other unborn issue, both children and grandchildren and husbands and wives of children and grandchildren of Mr Ashton. On the same date, 26 November 1965, the Wheelans Trust was created, with Mr Ashton as settlor, Messrs Ashton and Beadel as trustees. Its purposes were to make provision for Mrs Wheelans and for the same selection of children and grandchildren and their spouses. Again the consideration was £1. Each Deed is, word for word, identical with the other, even to the point of being executed on the same day in front of the same witness.

Payment

When commissions were earned and office charges were payable the finance companies forwarded a cheque to Messrs Ashton, Wheelans and Beadel for the amount owing. Messrs Ashton, Wheelans and Beadel then divided the amount of the cheque and made separate lodgments into bank accounts opened in the name of the trusts and operated by Messrs Ashton and Beadel in one case, and Messrs Wheelans and Beadel, in the other. These receipts are shown in the statement of accounts of each family trust as "commissions received". As some significance may attach to the eventual disposal of the money after its receipt from the hands of Messrs Ashton, Wheelans and Beadel (as a trio), it is interesting to observe that it having been lodged with

the two family trusts, some sums of money, usually about £200, was paid to the beneficiary wife pursuant to the provisions of the trust and the balance, though entered as appropriated to the infant beneficiaries' accounts was paid in each case to the objector "as parent". For example, in the Ashton Family Trust in 1967 £1,050 out of a net amount of £2,000 available for distribution was paid to Mr Ashton, and in the Wheelans Family Trust in the same year, a similar sum was paid to Mr Wheelans (as parent). Although the fact that this course of action was followed is not decisive, it certainly has significance. Mr Wheelans said that he felt that Mr Ashton "was asking for too much funds to support his family". Of more importance, however, is the evidence given by each objector as to the use made of the funds which he received from the relative family trust. Mr Wheelans said that apart from some money used by his wife for a trip to Port Moresby, most had been used for a given year to purchase a bigger home for his family, and "I also used the money for their maintenance and support". Mr Ashton similarly said that he spent most of the money annually appropriated to the children in completing a house which was in the names of himself and his wife.

Sale to Broadlands group

In 1972 the Broadlands financial group acquired the whole of the capital of two of the four finance companies. The other two had already ceased business. At the same time, the Broadlands group bought the goodwill of the arrangement between the finance companies and Messrs Ashton, Wheelans and Beadel (created by the letters of 26 October 1965) for \$40,000. This was treated by these three gentlemen as the property of the two family trusts, a half being allocated to each. But it is clear from the whole of the evidence concerning the relationship with the motor car dealers that what the Broadlands group were in reality buying was the custom of the motor car

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dealers to place their business with the finance firms controlled by Messrs Ashton and Wheelans. In particular this piece of Mr Wheelans' evidence is of some importance:

Question: Are you telling me what Broadlands paid the trustees for was not loss of their accountancy goodwill with the companies, the finance companies, but for the goodwill which you and Mr Ashton really had with the dealers?

10

Answer: And the profitability which arose from that connection part of which was these document fees to which we have referred.

CONCLUSIONS

If, as would be the position if the letters of appointment were read on their own, Messrs Ashton, Wheelans and Beadel were appointed as accountants to perform income earning services for the finance companies without any reservation as to their role, then no question of trusts or of the application of s.108 could arise. The moneys would then have been received by the three in their personal capacities in return, presumably, for their personal exertions. In their hands it certainly would have been derived income. Mr Beadel doubtless would have acted either as the solicitor or agent of the two others, and the Commissioner could in respect of his share invoke the agency sections of the Land and Income Tax Act.

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But the Commissioner has accepted in the Case Stated that the appointments made under the letters of 26 October, of these gentlemen were made as to Messrs Wheelans and Beadel in their capacity as trustees of the Ashton trust, and as to Messrs Ashton and Beadel in their capacity as trustees of the Wheelans trust. Whether this acceptance was mistaken, or was made

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designedly, we are unable to say, but it presented the cases to Wilson J. and now to this Court in a way which heightens the aura of artificiality surrounding these events. But we must consider the case on the basis accepted by the Commissioner, viz. that they were trustees.

10 We think it emerges rather clearly from Wilson J's oral reasons for judgment that he would probably have thought that the facts were sufficiently indicative of a principal purpose of altering the incidence of tax or of relieving the objectors from liability to pay tax, had it not been for the oral evidence given by the two objectors. That evidence seems to have persuaded him that their dominant purpose was otherwise. Mr Ashton and Mr Wheelans spoke quite freely of the motives which had actuated them, especially of their wish to provide for the welfare of their families. The need for this, they said, had been emphasised by a recent critical illness of Mr Ashton. No objection was raised to this evidence, nor any submission made concerning its admissibility.

20

But it is plainly established by the authorities that the test to be applied in relation to s.108 is an objective one. It excludes reliance on much of the evidence which seems to have influenced Wilson J. The well-known passage from Lord Denning in Newton v. Commissioner of Taxation [1958] A.C. 450, 465, is the authority for this:

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In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect - what it does - irrespective of the motives of the persons who made it. Williams J. put it well when he said:

40 The purpose of a contract, agreement or arrangement must be what it is intended to effect and that intention must be ascertained from its terms. Those terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect.

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In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to avoid tax. (Italics added.)

It is plain from the citation from Williams J. embodied in this passage that the Court can have regard to surrounding circumstances to ascertain terms and, we would think, their meanings too. But purposes must be determined by what the transaction effects. Motive is irrelevant. Observations of McCarthy P. in an oral judgment delivered in Martin v. Inland Revenue Commissioner 3 A.T.R. 707 were advanced by Mr Richardson as departing from this and justifying weight being given to the respondents' testimony. But those observations should not be taken outside the context of the particular case, and were intended to relate to matters of background rather than of motive. Doubtless, they could have been better expressed.

As it appears on the face of this arrangement that it was designed to transfer legally to the objectors' wives and children a substantial portion of their continuing professional earnings but in a way which enabled them still to handle this income and to spend it for their own personal benefit as well as in the maintenance and support of their wives and children, without becoming liable to pay any tax thereon, we must necessarily pay most careful attention to the machinery by which that scheme was carried into effect. We are prepared, without deciding - for despite what we have said earlier it may possibly be arguable - to accept that it is permissible for the Court to recognise as the background to this scheme that the objectors were taking a new partner into their business, that the incoming partner did not wish to share in certain of the partnership activities, that one of the objectors had suffered a recent severe illness, and that they both wished to make financial provision for their families.

Such circumstances are not uncommon in professional experience. The question we have to decide however is whether it can be predicated from the way the transaction was implemented that it was entered into for the purpose of avoiding tax.

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10 It seems to us that there are, very broadly, three divisions of cases arising under s.108. First, those where it cannot be predicated on the stated test that the sole purpose, or at least the principal purpose (Mangin v. Commissioner of Inland Revenue [1971] N.Z.L.R. 591 P.C.), was to avoid tax; here the Commissioner fails. Second, those where it can be said that the taxpayer merely exercised his right to choose, within the range of ordinary family or business dealings, a method of carrying out the arrangement which was the most favourable to him from a taxation point of view; here, too, the Commissioner fails. Third, those where the overt acts enable it to be predicated that though the taxpayer may have had other concurrent objectives, the principal purpose for carrying out the transaction in the way it was carried out was to avoid tax; here the Commissioner succeeds. The Commissioner contends that this present case falls within the third class.

30 We are satisfied that the argument for the Commissioner that s.108 applies must succeed. This transaction was a highly artificial one. The exclusion of the office charges from the share of Mr Hegan of the earnings of the partnership of Messrs Ashton, Wheelans and Hegan could have been effected far more simply by a specific term of that partnership. That can hardly be questioned. So Mr Richardson placed his greatest weight on the illness of one of the parties and the natural desire of a professional man to make provision for his descendants following death. That he said was the real and substantial purpose. He even urged us to imply a term in the arrangement here that each respondent would use his best endeavours to keep the contracts with the finance companies in existence after the death of the other, so that the latter's dependants

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could benefit from them. All this may have been in their minds but I see no justification, in the evidence, for going as far as to imply a specific term to that effect. Moreover, the importance, in the context of purpose, which Mr Richardson sought to place on the reasonableness of providing for future contingencies fails to recognise sufficiently that the two objectors were not elderly men, that their contracts with the finance companies could come to an end at any time, and that the arrangement was to operate upon immediate income and not merely in respect of office charges received after the death of one of them. Plainly, it must have been seen by the respondents that it was more likely to have effect upon charges received during their joint lives than upon those received after the death of one of them. And this is what in fact happened, until the connection was sold to the Broadlands group when each trust received a substantial capital payment in the order of \$20,000. Both objectors were then still alive and in practice as accountants.

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It may well be that the particular arrangement ensured an income for descendants in an advantageous way, especially having regard to the death duties which could have been involved on the death of a partner if the quite common covenant for payment by a surviving partner to the dependants of a deceased one had been employed. That may have been a consideration which in part influenced the objectors' choice of the more unusual machinery. But, in our opinion, when the steps by which the transaction was implemented and what was effected by those steps are seen in their totality, it is not possible to describe what was done as an ordinary business or family dealing in the sense that those words are used by the Privy Council in Newton's case - they are not so capable of explanation. We cannot escape the conclusion that the principal purpose of this highly artificial transaction was to alter the incidence of the tax which otherwise would have been payable by the

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respondents on these office charges while allowing them to enjoy the use of benefits of them. We think that Wilson J. was wrong in holding to the contrary.

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We come now to the always troublesome question of annihilation. The crucial documents in each case here are the Deed of Trust, the revocation of the old appointment, and the new appointment. If these are
10 eliminated, then for the reasons which we have already given the income received by the two respondents and their solicitor or agent must be treated as having been derived by them and taxable accordingly. But the argument is advanced, once again, in relation to the Deed of Trust and to the revocation of the old appointment, that the only arrangements, contracts or agreements
20 which may be set aside under s.108 are those to which the objecting taxpayer is a party in the strict sense, and as neither of the respondents here was a party to the Deed of Trust relating to his own family group or to the revocation, those steps cannot be annihilated. The foundation of this argument is an expression of opinion generally to that effect by Turner J. in Wisheart, Macnab and Kidd v. Commissioner of Inland Revenue [1972] N.Z.L.R. 319. The
30 Chief Justice in Udy v. Commissioner of Inland Revenue [1972] N.Z.L.R. 714 refused to accept and follow this, saying it was unsupported by authority and had been arrived at without the precise point being argued. The point was argued in this Court recently in Commissioner of Inland Revenue v. Gerard (supra) when it was also suggested that the Chief Justice may have misinterpreted Turner J. The Court did not find it
40 necessary to decide the point. But it faces us directly here. We agree with the Chief Justice's reading of the section. We see no reason to restrict its operation, in cases when documents are involved, to those documents to which the objector is a party. We read it as extending to others, if it be shown that the document was procured by or with the connivance of the taxpayer and as a step in the whole scheme.

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(continued)

The reciprocal trust deeds here are within that test - they were the key documents in the tax-avoidance arrangement.

So far as the revocations and the new appointments are concerned, Mr Richardson had another argument. He would put them in the same class as the grant of the insurance agency in Wisheart, Macnab and Kidd v. Commissioner of Inland Revenue (supra), where the grant was held not to be annihilated because it was quite plain that the insurance company there concerned could not be held implicated in any scheme to avoid tax and was manifestly free to grant its agencies where it wished. But the facts are very different in the present case. Here there is such an interdependence between these documents and the other steps in the transaction, and the objectors were so plainly in a position to procure and did procure all the steps which were taken that it would be quite unreal to see these two documents as anything other than pieces in a scheme worked out and put into operation by the objectors. In our view all these steps must be treated as annihilated.

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For these reasons we allow the appeal, thereby upholding the assessment of the Commissioner in respect of each respondent. The respondents must pay the Commissioner's costs which we fix at \$400 and disbursements. They must also pay costs in the Supreme Court.

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Solicitors for Appellant:

The Crown Law Office, Wellington

Solicitors for Respondents:

Saunders, Beadel and Co., Christchurch.

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No. 24

JUDGMENT OF THE COURT OF APPEAL OF
NEW ZEALAND

In the Court
of Appeal of
New Zealand

IN THE COURT OF APPEAL OF NEW ZEALAND

No.24

No. C.A. 5/73

BETWEEN THE COMMISSIONER OF INLAND
 REVENUE

Formal
Judgment of
Court of Appeal
(C.I.R. v.
Ashton and
Wheelans)

Appellant

29 May 1974

A N D SIDNEY BOYD ASHTON

First Respondent

10 A N D JOHN WORRALL WHEELANS

Second Respondent

BEFORE

THE RIGHT HONOURABLE MR. JUSTICE McCARTHY
(Presiding)
THE RIGHT HONOURABLE MR. JUSTICE RICHMOND
THE HONOURABLE MR. JUSTICE SPEIGHT

Wednesday the 29th day of May 1974

20 THIS Appeal coming on for hearing on the
19th and 20th days of March 1974 AND UPON
HEARING Mr. Blank and Mr. Sorenson of
Counsel for the Appellant and Mr. Richardson
of Counsel for the Respondents THIS COURT
HEREBY ORDERS that the Appeal be and the
same is hereby allowed with costs of \$4.00
to the Appellant together with costs of
\$300 in the Supreme Court and together
with Appellant's disbursements of \$18.00
as per the attached schedule.

BY THE COURT

30 L.S.

D. JENKIN

REGISTRAR

116.

In the Court
of Appeal of
New Zealand

No. 25

ORDER OF COURT OF APPEAL GIVING FINAL
LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

No.25

IN THE COURT OF APPEAL OF NEW ZEALAND

Order of Court
of Appeal
giving Final
Leave to Appeal
to Her Majesty
in Council

No. C.A. 5/73

BETWEEN THE COMMISSIONER OF INLAND
REVENUE

Appellant

19 November
1974

A N D SIDNEY BOYD ASHTON

First Respondent

A N D JOHN WORRALL WHEELANS

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Second Respondent

Tuesday the 19th day of November 1974

THE RT. HON. MR JUSTICE McCARTHY, PRESIDENT.
THE RT. HON. MR JUSTICE RICHMOND.

UPON READING the Notice of Motion of the
First and Second Respondents dated the 6th
day of November 1974 and the Affidavit of
Peter Robin Kyle AND UPON HEARING Mr
I.L.M. Richardson of Counsel on behalf of
the First and Second Respondents and Mr G.
Cain of Counsel on behalf of the Appellant
THIS COURT HEREBY ORDERS that final leave
to appeal to Her Majesty in Council from
the judgment of this Honourable Court
delivered on the 29th day of May 1974
be and the same is hereby granted to the
First and Second Respondents

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By the Court

D. JENKIN

L.S.

Registrar

CERTIFICATE OF ACTING REGISTRAR OF COURT OF
APPEAL AS TO ACCURACY OF RECORD

In the Court
of Appeal of
New Zealand

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 5/73

No.26

BETWEEN THE COMMISSIONER OF INLAND REVENUE

Certificate of
Acting Registrar
of Court of
Appeal

Appellant

A N D SIDNEY BOYD ASHTON

First Respondent

A N D JOHN WORRALL WHEELANS

Second Respondent

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I, WILLIAM DORMER L'ESTRANGE Acting Registrar of
the Court of Appeal of New Zealand DO HEREBY
CERTIFY that the foregoing 116 pages of printed
matter contain true and correct copies of all the
proceedings, evidence, judgments, decrees and
orders had or made in the above matter, so far as
the same have relation to the matters of appeal,
and also a correct copy of the reasons given by
the Judges of the Court of Appeal of New Zealand
in delivering judgment therein, such reasons having
20 been given in writing: AND I DO FURTHER CERTIFY
that the respondents have taken all the necessary
steps for the purpose of procuring the preparation
of the record, and the despatch thereof to
England, and have done all other acts, matters and
things entitling the said respondents to prosecute
this Appeal

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AS WITNESS my hand and Seal of the Court of
Appeal of New Zealand this 22nd day of January
30 1975

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L.S.

W.D. L'estrange
.....
Acting Registrar

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN :

SIDNEY BOYD ASHTON First Appellant

- and -

JOHN WORRALL WHEELANS Second Appellant

- and -

COMMISSIONER OF INLAND Respondent
REVENUE

RECORD OF PROCEEDINGS

LINKLATERS & PAINES
Barrington House,
59-67 Gresham Street,
LONDON, EC2V 7JA
Solicitors for the
Appellants

ALLEN & OVERY,
9, Cheapside,
LONDON, EC2V 6AD.
Solicitors for the
Respondent.