



➤ **“Carrying on business” in New Zealand ... a new legal test for internet trading**



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By Michael Chin

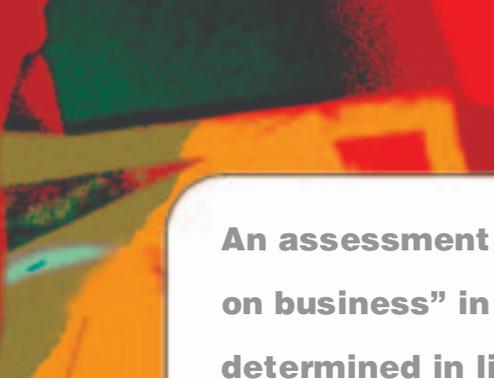
“The genius of the common law derives from its capacity to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems. When the new problem is as novel, complex and global as that presented by the internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for. Yet the question remains whether it can be provided, conformably with established law and with the limited functions of a court under the Australian constitution to develop and re-express the law.”

Dow Jones & Company Inc v Gutnick [2002], HCA 56 (Dec 10, 2002), para 92, per Kirby J.

An increasing proportion of business is transacted over the internet. A survey of New Zealand businesses commissioned by the Ministry of Economic Development in May 2002 revealed that three of every four large businesses have their own websites and 95 per cent have a domain name. One consequence of this growth in internet trade is the increasing number of foreign companies that transact with New Zealanders over the internet. These foreign companies do not have, nor need to have, a physical presence in New Zealand to trade with New Zealanders. Under current New Zealand law, such companies may not be considered “carrying on business” in New Zealand and for this reason may not attract reporting and other obligations that would otherwise apply.

For example, the directors of an overseas

company physically present in New Zealand and considered to be “carrying on business” in New Zealand, much like the directors of many New Zealand companies, must prepare and register financial statements within a specified time of its balance date in accordance with the terms of the Financial Reporting Act 1993. Directors who fail to comply with these terms of the Act commit an offence and are each liable on summary conviction to a fine not exceeding \$NZ100,000 for each failure to (a) complete and sign the appropriate financial statements within the specified time, (b) comply with the applicable financial reporting standard and (c) deliver the appropriate financial statements and the auditor’s report to the Registrar of Companies within the specified time. Hence, a director who failed to do all three (a, b and c) may well be fined up to



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\$300,000. Overseas companies that are not physically present in New Zealand but that transact as much, if not more, business with New Zealanders over the internet may not be considered “carrying on business” in New Zealand under current New Zealand law and do not have the same reporting obligations as many New Zealand companies and overseas companies physically present here.

Similar considerations may arise in relation to overseas people who, in accordance with the terms of the Overseas Investment Regulations 1995, are in need of the relevant Minister’s consent because they were “not lawfully carrying on business in New Zealand at the commencement of” the Regulations, but who thereafter “[established] a business in New Zealand”.

This article seeks to explore the test of “carrying on business” in New Zealand that currently applies and ways in which the test could be extended by New Zealand courts to foreign companies trading over the internet with New Zealanders, conformably with the established law and with the limited functions of a court to develop and re-express the law.

“CARRYING ON BUSINESS” UNDER THE COMPANIES ACT 1993

An overseas company “carrying on business” in New Zealand is required to register under Section 334 of the Companies Act 1993 within 10 working days of commencing business in New Zealand. Section 332 of the Act provides some guidance on what constitutes “carrying on business” in New Zealand. Under Section 332(a), an overseas company is “carrying on business” in New Zealand if it either:

- establishes or uses a share transfer office or a share registration office in New Zealand; or
- administers, manages, or deals with property in New Zealand as an agent, or personal representative, or trustee, and whether through its employees or an agent or in any other manner.

Under Section 332(b), it is not conclusive

evidence that a company carries on business in New Zealand merely because it:

- is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute;
- holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- maintains a bank account;
- effects a sale of property through an independent contractor;
- solicits or procures an order that becomes a binding contract only if the order is accepted outside New Zealand;
- creates evidence of a debt or creates a charge on property;
- secures or collects any of its debts or enforces its rights in relation to securities relating to those debts;
- conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time;
- invests its funds or holds property.

Given the broad terms of Section 332 of the Act, an assessment of whether an overseas company is “carrying on business” in New Zealand is a question of fact to be determined in light of all the relevant circumstances. There is no clear single test of whether an overseas company is “carrying on business” in New Zealand.

We next consider case law and the authorities for further guidance on what constitutes “carrying on business” in New Zealand.

CASE LAW AND AUTHORITIES

The 19th and 20th century cases and authorities on the meaning of the term, in various areas of law and in various jurisdictions, suggest the following (non-exhaustive) criteria that go toward determining whether the business is carried on in New Zealand:

- Does the foreign company employ any New Zealand resident agents to act on its behalf or

manage, administer or deal with property in New Zealand?¹

- Is any part of management of the business in New Zealand?²
- Is the "brain power" in New Zealand?³
- Does the company have a place of business, staff or infrastructure in New Zealand?⁴
- Has business been solicited in New Zealand?⁵
- Has the company entered into contracts with New Zealand resident entities for the supply of services to those entities?
- Have contracts been entered into, wholly or in part, in New Zealand?⁶
- Have contracts been executed in New Zealand?
- Have negotiations leading to the transaction been conducted in New Zealand?⁷
- Is there a degree of "system" involved in New Zealand?
- Is there a degree of regularity involved in the transactions in New Zealand? Is there a series of repeated transactions in New Zealand?⁸
- Is there an element of continuity in New Zealand?⁹

¹ Re Norfolk Island Shipping Line Pty Ltd (1986), 6 ACLC 990; Gibson, Battle & Co Ltd v James King and Sons [1915], SALR 14; Pacific Fruit & Produce Co v Dingle (1992), 32 Man. R. 4 at 7,8 [1922] 1 WWR 870, 65 DLR 64 (CA) the court per Perdue C.J.M.

² Brown v London & North Western Railway Co (1863), 32 LJQB 318 at 321 per Blackburn J.

³ San Paulo Railway v Carter [1895], 1 QB 580; [1896] AC 31.

⁴ CAC v Transphere Pty Ltd (1985), 9 ACLR 1005; Haggin v Comptoir d'Es-compte (1889), XXII QBD 519; La Bourgogne [1899], P.1; Dunlop Tyre Co v Actien Gessellschaft, etc [1902], 1 KB 342; Saccharin Corporation Ltd v Chemische Fabrik Von Heydon, etc [1911], 2 KB 516; Actiesselskabet Dampskib Hercules v Grand Trunk Railway [1912], 1 KB 222; Thames & Mersey Marine Insurance Co v Societa, etc del Lloyd Austriaco, 111 LT 97, op Okura & Co v Forsbacka, etc [1914], 1 KB 715.

⁵ Turner v Evans, 22 LJQB 412; Brampton v Beddoes, 78 LT 679.

⁶ Brewster, Leeds and Co v Waldman and Stone Ltd (1953), 8 WWR 710.

⁷ Brewster, Leeds and Co v Waldman and Stone Ltd (1953), 8 WWR 710.

⁸ Smith v Anderson (1880), 15 Ch D 247 at 277, 278, CA per Brett L.J.

⁹ CAC v Transphere; Slater v Commissioner of Inland Revenue [1996], 1 NDLR 759.

- Or was the transaction an isolated occurrence?¹⁰
- Is there a "permanence" in New Zealand?¹¹
- Can a motive of profit be attributed to the undertaking?¹²
- Have bank accounts been opened in New Zealand?¹³
- Have expenses been incurred in New Zealand?¹⁴
- Will the goods or services be delivered in New Zealand?¹⁵
- Will the contract be performed in New Zealand?

In every case, the question is to be decided on its facts, in light of all the surrounding circumstances; the business does not have to have a place of business in New Zealand nor does it have to have central management and control in New Zealand.¹⁶ None of the factors in this list of criteria in isolation would necessarily be sufficient for a finding that a business is carried on in New Zealand. But there could be grounds for a finding that business is being carried out in New Zealand if more than one of these features exists.

Both the statutory and the case law lists above give emphasis to a continual and systematic physical presence, whether through the agency of others, the setting up of infrastructure, bank accounts, control, management, meetings or by some other means.

¹⁰ Re Norfolk Island Shipping Line Pty Ltd; Pacific Fruit & Produce Co v Dingle (1992), 32 Man. R. 4 at 7,8 [1922] 1 WWR 870, 65 DLR 64 (CA) the court per Perdue C.J.M.

¹¹ 10 Halsbury's Laws (4th edition).

¹² Re Norfolk Island Shipping Line Pty Ltd.

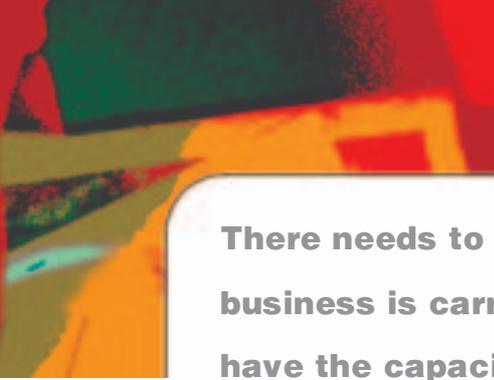
¹³ Re Atlantic Isles Shipping Company Inc (1988), 6 ACLC 992; Elsinct (Asia Pacific) Ltd v Commercial Bank of Korea Ltd (1994), 2 8CK 365.

¹⁴ Luckins (receiver and manager of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd (1975), 133 CLR 164.

¹⁵ Pacific Fruit & Produce Co v Dingle (1992), 32 Man. R. 4 at 7,8 [1922] 1 WWR 870, 65 DLR 64 (CA) the court per Perdue C.J.M.

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None of the above cases was decided in the context of internet businesses. With businesses conducted on the internet, there is no reason to have a physical presence to be effective in trading with New Zealand customers. There is no need to have a physical presence to be continual or systematic. For example, there is no need for bank accounts in the jurisdiction as payments can be made over the internet; there is no need for agents or middlemen in New Zealand where communications are directly between the business and customer; there is no need for contracts to be negotiated or entered into in the jurisdiction; there is no need for management and meetings to be in the jurisdiction; there is no need to advertise within the jurisdiction to be effective.

As the internet matures, a need for a physical presence will lessen as more facilities, of a better quality, are offered on the internet. A time may come when a firm will be substantially “virtual” or even wholly “virtual” in any one jurisdiction. Therefore, there needs to be a new test to determine whether an internet business is carried on in a jurisdiction and this new test must have the capacity to adapt to the evolving technology.

A NEW “CARRYING ON BUSINESS” IN NEW ZEALAND TEST

In adapting the above tests to accommodate internet transactions, the following test of whether an overseas company is carrying on business in New Zealand, is proposed:

Is there a continuing effective and legal presence in New Zealand where New Zealand custom is solicited and supplied for profit?

“Effective” is defined in terms of the ability of the business presence to solicit local custom; a physical presence is not necessary. A legal presence is defined by the legal obligations imposed on the business from the fact of trading and these could be contractual (as between the business and New Zealand customers) or statutory (as between the business and the Inland Revenue Department and other authorities).

The new test is supported by the following principles derived from, and observations made of, the authorities.

- There is no need for the activities of a business in a jurisdiction to be anything more than incidental to its main business; it is unnecessary to show that a substantial part of its business was conducted within the jurisdiction.¹⁷ This principle was in connection with the term “established place of business”, however. But as this represents an even higher threshold than “business carried on” in a jurisdiction, it should equally apply to the latter, which is of interest to us. This is a principle that is relevant to internet businesses because such businesses may span many jurisdictions; it is unlikely that a substantial part of the business can be found in any one jurisdiction.

- The evidence of contracts having been entered into by a corporation in a jurisdiction goes toward a finding that the business was carried on in that jurisdiction.¹⁸ At common law, contracts are entered into when and where an offer to buy or sell is accepted by the seller or buyer, respectively. The offer to buy or sell may be preceded by an “invitation to treat” by the seller or buyer, respectively. An “invitation to treat” is an invitation to the other party to make an offer to buy or sell, often on the terms set out in the “invitation to treat”. The sale of goods and services over the internet should still involve an “invitation to treat” by the seller in the form of an advertisement on the internet, followed by an offer to buy by the buyer (normally on the terms of the “invitation to treat”) and an acceptance of that offer to buy by the seller. If acceptance by the seller is effective only on the receipt of that acceptance by the buyer and not merely on its transmission by the seller, the contract will be made in the jurisdiction of the buyer. Thus, in the ordinary case, contracts entered into over the internet would be entered into in the jurisdiction of the buyer (i.e. in New Zealand in our case).

- The meaning of the term “carries on business”

¹⁷ *South India Shipping Corporation v Bank of Korea* (1985), 1 BCC 99, 350.

¹⁸ *Huber v Pocklington Financial Corp* (1982), 134 DLR (3d) 532; *Brewster, Leeds and Co v Waldman and Stone Ltd* (1953), 8 WWR 710.

varies according to the type of business and product. In the case of a railroad company, the English courts have held that it can only carry on business in its principal office where directors meet and the general business of the company is transacted.¹⁹ In the case of manufacturing companies, they “dwell and carry on business” at their place of manufacture and sale, and not at their registered offices.²⁰ A building contractor “carries on business” where its general place of business is and not at the locality where particular contracts are being executed.²¹ A company is considered to be carrying on business in an entire district if the nature of the company’s business is such that the company’s employees must move about within that district.²² These cases highlight the willingness of the English (and by implication, the New Zealand) courts to adapt the law according to the facts of the case and, in particular, the nature of the business and their products. It is likely the New Zealand courts will adapt the law to fit the new facts surrounding internet businesses.

- A company can carry on business in more than one place.²³ Internet businesses are likely to be spread over many jurisdictions, carrying on business in all these jurisdictions.
- A company can carry on business in a jurisdiction even though performance is entirely outside this jurisdiction; for example, the carriage of goods.²⁴
- The English House of Lords has held that

advertising within an area prohibited by a restraint of trade clause constitutes a carrying on of the business in that area in breach of that covenant even though the actual physical office is outside this area.²⁵ In that case, the House of Lords considered advertising by the use of noticeboards on houses within the prohibited area. In principle, it could be extended to advertising outside the area that can be seen by people in the area. What matters is that custom in that area is being solicited by advertising that “reaches” people within the area. With the internet, invitations to treat are often on servers in foreign jurisdictions. Nonetheless, these advertisements “reach” patrons within New Zealand, effectively soliciting the custom of New Zealand residents.

- A legal presence may be more important than a physical presence. The English Court of Appeal has held that a business carries on business in England until all its obligations imposed by the fact of trading have been performed; a physical presence is unnecessary.²⁶
- Although the recent High Court of Australia judgement in *Dow Jones & Company Inc v Gutnick*²⁷ concerned the jurisdiction of the Victorian courts, the applicability of Victorian law and whether the Victorian courts were the appropriate forum for the determination of proceedings brought by a Victorian plaintiff against an American defendant for a particular tort (with its specific features) namely defamation (and not as such the issue of whether a foreign company is carrying on business locally), the case did concern the internet and the judgement does have implications for the proposed carrying on business in New Zealand test for internet trading. The judges in that case were

¹⁹ *Minor v London & North Western Railway*, 26 LJCP 39; *Shiels v Great Northern Railway*, 30 LJQB 331; *Brown v London & North Western Railway*, 32 LJQB 318; *Le Tailleur v South Eastern Railway*, 3 CPD 18.

²⁰ *Keynsham Lime Co v Baker*, 33 LJ Ex 41; *Oldham Co v Heald*, 33 LJ Ex 236.

²¹ *Gorslett v Harris*, 29 LTOS 75; *Kirkwood v Gadd* [1910], AC 422 at 438 per Lord Mersey.

²² *Mitchell v Hender*, 23 LJQB 273.

²³ *Davies v British Geon* [1957], 1 QB 1.

²⁴ *Erichsen v Last* 8 QBD 414 per Jessel M.R.

²⁵ *Hadsley v Dayer-Smith* [1914], AC 979.

²⁶ *Bird v IRC*, re ex p. *The Debtor* [1962], 1 WLR 686.

²⁷ [2002] HCA 56 (Dec 20, 2002).

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unanimous in holding that the American defendant, a publisher, could be subject to the laws of defamation of other jurisdictions, despite the fact that the publisher and the server on which the allegedly defamatory article was hosted were both physically in the US and despite the fact that this made it harder for international publishers to conduct business by increasing the uncertainty to them of the applicable laws and what constituted lawful conduct.

One implication of this judgement is that businesses that trade on and benefit from the internet assume the risk of being the subject of multiple foreign laws in countries where they do not have a physical presence. By extension, this could include being deemed to carry on business in multiple foreign jurisdictions and attracting resulting legal obligations in countries where these companies do not have a physical presence.

CONCLUSION

The current legal test of whether an overseas company is “carrying on business” in New Zealand gives prominence to the physical activities

of that company. Although this was appropriate in the 19th century and most of the 20th century, a legal test that emphasises physical presence is not suited to overseas companies trading over the internet. But a sufficient basis in the law exists to support a legal test formulated by the courts of New Zealand that could accommodate the growing internet trade, conformably with established law and with the limited functions of the court to develop and re-express the law. This will inevitably involve an assessment of the facts of each particular case, however.

A new legal test that can accommodate the growing internet trade may have the effect of levelling the regulatory playing field shared by businesses physically present in New Zealand, including New Zealand businesses, and enhance the protections these regulations may afford the New Zealand public.

While the focus of this article has been on foreign companies trading with New Zealanders over the internet, the analysis and conclusions in this article may also have implications for the reverse situation, namely New Zealand companies trading with non-New Zealanders over the internet. Subject to the specific terms of existing legislation and the legislative and policy developments and initiatives of foreign jurisdictions, the proposed test for “carrying on business” in respect of internet trading may also be developed by the courts of a common law jurisdiction like New Zealand such as the United Kingdom, Australia and Canada, and the courts with a common law heritage such as the courts of the US. After all, the proposed new test has been formulated on the basis of principles derived from and observations made of common law authorities.

New Zealand companies should be aware, therefore, of the risk of being deemed to be “carrying on business” or words to that effect (with attendant legal obligations) in these and other jurisdictions even though these New Zealand companies do not have a physical presence in these foreign jurisdictions. It is likely that this risk will increase in time with the continued evolution of the internet and growth in internet trade.



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NOTE

The views in this article are the author's personal views and should not be taken as legal advice.