

CURRICULUM VITAE

SIMON WILLIAM BISSON FOOTE

LLB (Hons), DipICarb, FCIArb, FAMINZ

Barrister, Bankside Chambers, Auckland, New Zealand

Date of birth: 4 April 1971

Current position: Barrister, Bankside Chambers, Auckland, New Zealand

Qualifications and memberships

LLB (Hons), University of Canterbury, 1992

Barrister and Solicitor of the High Court of New Zealand, admitted August 1993

Diploma in International Commercial Arbitration, Chartered Institute of Arbitrators, UK, 2010

Fellow of the Chartered Institute of Arbitrators (FCIArb), 2011

Fellow of the Arbitrators' and Mediators' Institute of New Zealand (FAMINZ (Arb)), 2011

Member of New Zealand Law Society and New Zealand Bar Association

Publications

Reflections on a Marathon Trial [2010] NZLJ 213, Tom Weston QC and Simon Foote

Limitation Clauses [2010] NZLJ 317, Tom Weston QC and Simon Foote

Caveat Mediator: Exceptions to Privilege for Settlement Negotiations, NZ Lawyer, Issue 170, 17, Simon Foote and Anja Borchardt

Pending publication in 2011: *Recent Developments in the Approach to Identifying an 'Investment' Pursuant to Article 25(1) of the ICSID Convention*, David AR Williams QC and Simon Foote, *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, 2011 (Brown and Miles, editors).

Career

Barrister Sole, September 2002 – present. General commercial litigator, with particular interest and involvement in international and domestic arbitration, and construction and engineering litigation, copyright, fair trading, health and safety, conflict of laws, and estate matters.

Russell McVeagh, Auckland, October 2001 - October 2002. Senior Solicitor, litigation team.

Ben Vanderkolk & Associates, Palmerston North, 1998 – 2001. Crown Prosecutor and counsel responsible for civil litigation for Crown and private clients.

Clifford Chance, London, 1997-1998. International arbitration team solicitor working for Audley Sheppard and John Beechey.

Russell McVeagh, Wellington, 1993-1997. Senior Solicitor, litigation team, working for Justin Smith and Stephen Kos.

Highlights

- Currently counsel (junior to DAR Williams QC) for Philip Morris (tobacco multinational) in investment treaty claim against Australia concerning legislation mandating plain packaging of cigarettes.
- Lead counsel for Mainzeal Construction Limited in a leaky apartment tower matter worth approximately \$20 million.
- Counsel (junior to Tom Weston QC) for state owned enterprise Genesis Power Limited in High Court litigation involving Carter Holt Harvey and Rolls-Royce in relation to the construction of a co-generation power plant at Kinleith Mill near Tokoroa. Carter Holt claimed over \$175 million for remedial work and consequential losses. This matter settled after a 155 day (10 month) trial in the High Court before Cooper J in 2009/2010.
- Successful defence of a project manager in leaky home litigation: *ACC v Grgicevich* (High Court, Auckland, CIV 2007-404-6712, 17 December 2010, Brewer J).
- Appointment as Secretary to an International Commercial Arbitral Tribunal on a billion pound sterling aircraft insurance claim under LCIA Rules.
- Counsel for The Republic of China (Taiwan) Shipping Register in a \$6 million claim concerning an allegedly defective BVI flagged ship berthed at Auckland. Claim struck out on application by my client.
- Counsel for the plaintiffs in a multi-million dollar constructive trust claim in the High Court at Timaru which involved contributions by sons to the multi-million dollar family farm.
- Counsel in several Family Protection Act proceedings involving sizable estates.
- Retained by the three leading Indian (Bollywood) movie production houses and their New Zealand distributors to enforce copyright in their films within New Zealand. This retainer involved multiple applications for injunctions, summary judgment and Anton Piller orders in 2005-2007.
- Counsel for the Crown in more than 50 criminal jury trials for the Crown including 6 High Court trials, multiple sentencing and pre-trial evidential hearings.

- Counsel for plaintiffs in successful High Court proceeding under the Fair Trading Act in 2000: *Cornfields Limited v Kinsman* (2000) 9 TCLR 698. This case was unsuccessfully appealed by the defendant to the Court of Appeal: *Kinsman v Cornfields Limited* (2001) 10 TCLR 342. It remains a leading authority on directors' liability for misleading conduct under the Fair Trading Act.
- Seconded in 2000 from the Crown Solicitor's office in Palmerston North to Russell McVeagh, Wellington to act as one of Tranz Rail Limited's counsel at the Ministerial Inquiry into Health & Safety at Tranz Rail (Bill Wilson QC, Commissioner).
- Lead solicitor for Edison Mission Energy UK in relation to a month long trial concerning the construction of a co-generation power plant heard in the Technology and Construction Court, London, 1998. Leading silks were briefed by both sides.
- Counsel (junior to Justin Smith) for Tranz Rail Limited in *R v Tranz Rail Limited* (High Court, Wellington, 1996, Doogue J), highly publicised and politicised Crimes Act prosecution of Tranz Rail in relation to injuries suffered by a six year old passenger who fell from a passenger train. Principally involved in briefing and leading evidence of world rail engineering experts and preparing submissions in relation to all matters of evidence and law relating to corporate criminal liability.
- Counsel for Tranz Rail in two lengthy District Court prosecutions by the Department of Labour pursuant to the Health & Safety Employment Act in 1996 and 1997.

Index of notable judgments

Body Corporate 177519 v Auckland City Council (High Court, Auckland, Ellis J, 24 May 2011). Noted at 34 TCL 23/6. Lead counsel for Mainzeal Construction Ltd (fourth defendant builder). Application for leave to bring claim against Body Corporate for breach of statutory duty under Unit Titles Act.

Auckland City Council v Grgicevich (High Court, Auckland, Brewer J, 17 December 2010). Noted at 34 TCL 5/5. Counsel for Grgicevich. Defence of \$4m claim for contribution by Auckland City Council from project manager on a leaky townhouse development. Involved an in-depth examination of the extent of any duty of care owed by employed building project managers generally and specifically to warn local authorities about potential problems with buildings.

Twin Peaks Coffee Company Ltd v Broadway Developments (1986) Ltd (High Court, Auckland, Cooper J, 26 July 2010). Noted at 33 TCL 32/6. Lead counsel for Twin Peaks Coffee Company. Application for orders pursuant to ss261-264 Property Law Act 2007 compelling Broadway Developments to grant Twin Peaks a new lease following Broadway's refusal to renew existing lease.

Team Clavel Motorsport v Neil Allport Motorsports Ltd (High Court, Auckland, Miller J, 1 June 2010). Noted at 33 TCL 25/6. Lead counsel for Neil Allport Motorsports. Application for rescission of *ex parte* injunction preventing use of rally car in the Rally of New Zealand.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Cooper J, 10 September 2009). Noted at [2010] NZLJ 317; [2009] BCL 762. Junior counsel to Tom Weston QC for Genesis Power. Application by Carter Holt for leave to introduce further evidence on 95th day of trial.

Carter Holt Harvey Ltd v Genesis Power Ltd (2009) 20 PRNZ 87 (HC). Junior counsel to Tom Weston QC for Genesis Power. Application by Carter Holt for order allowing evidence of expert to be given by affidavit.

Footo v McMurtrie (Family Court, Auckland, Judge McHardy, 24 July 2009). Counsel for respondent. Application for provision from deceased mother's estate under Family Protection Act 1955.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Cooper J, 23 June 2009). Junior counsel to Tom Weston QC for Genesis Power. Application by Rolls Royce (2nd Defendant) for orders concerning scope of cross-examination.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Cooper J, 28 May 2009). Junior counsel to Tom Weston QC for Genesis Power. Application by Rolls Royce (2nd Defendant) for orders for further and better discovery and challenging Carter Holt's claims for privilege in relation to without prejudice meetings.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Cooper J, 21 April 2009). Junior counsel to Tom Weston QC for Genesis Power. Application by Rolls Royce (2nd Defendant) for leave to file amended statement of defence.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Randerson J, 6 May 2008). Noted at [2008] BCL 565; 31 TCL 20/3. Lead counsel for Genesis Power. Application by Genesis Power challenging claims for privilege by Carter Holt over certain documents.

Mamfredos v Herbert Equities Ltd [2007] NZSC 79. Noted at [2007] BCL 1039. Junior counsel to John Katz QC for Herbert Equities. Opposition to application for leave to appeal Court of Appeal judgment allowing Herbert Equities to lodge fresh caveat against land owned by Mamfredos' family trust.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Randerson J, 8 August 2007). Lead counsel for Genesis Power. Application by Genesis Power for further particulars of fifth amended statement of claim by Carter Holt.

Herbert Equities Ltd v Mamfredos [2007] NZCA 283. Junior counsel to John Katz QC for Herbert Equities. Appeal by Herbert Equities against refusal of leave to lodge caveat against land owned by Mamfredos' family trust.

Carter Holt Harvey Ltd v Genesis Power Ltd (High Court, Auckland, Randerson J, 27 April 2007). Lead counsel for Genesis Power. Application by Rolls Royce (2nd Defendant) for directions restricting scope of evidence to be filed by defendants.

Castlelight Maritime SA v China Corporation Register of Shipping (High Court, Auckland, Venning J, 5 December 2006). Lead counsel for China Corporation Register of Shipping. \$6m claim by Castlelight alleging negligence by CCRS in respect of the survey of the ship *Atlantic Trader*, flagged in the British Virgin Islands, previously owned by a corporation domiciled in Florida, and certified as unseaworthy by New Zealand Maritime Authorities. The claim was struck out for lack of an arguable duty of care and on *forum non conveniens* grounds.

P5 Holdings Ltd v Elisha's Well Ltd (High Court, Auckland, Andrews and Williams JJ, 27 September 2006). Noted at 29 TCL 43/3; (2010) 16 NZBLQ 68. Lead counsel for Elisha's Well. Application for injunctions arising out of dispute between franchisor and franchisees of specialist weight loss clinics.

Herbert Equities Ltd v Mamfredos (No. 2) (High Court, Auckland, Williams J 26 June 2006). Lead counsel for Herbert Equities. Application by Herbert Equities for orders that caveat not lapse.

Ming Shan Holdings Ltd v Ma (High Court, Auckland, Cooper J). Junior counsel to John Katz QC for Ming Shan Holdings. Application by defendants for orders releasing frozen funds for payment of legal costs.

Ming Shan Holdings Ltd v Ma (High Court, Auckland, Heath J, 18 May 2006). Noted at 29 TCL 28/6. Junior counsel to John Katz QC for Ming Shan Holdings. Application by Ming Shan Holdings for security for costs, payment of costs and timetabling and procedural directions.

Carter Holt Harvey Ltd v Genesis Power Ltd [2006] 3 NZLR 794 (HC). Noted at [2006] NZ Law Review 303. Junior counsel to DAR Williams QC for Genesis Power. Application by Rolls Royce (2nd Defendant) for stay of arbitration commenced by Genesis Power. Discussion as to whether a stay application could be brought as an interlocutory application within the current proceeding as opposed to as an originating application.

Cassidy v Cassidy (Family Court, Auckland, McHardy DCJ, 10 March 2006). Counsel for plaintiff. Application for provision from deceased mother's estate under Family Protection Act 1955.

Herbert Equities Ltd v Mamfredos (No. 2) (High Court, Auckland, Williams J, 8 December 2005). Lead counsel for Herbert Equities. Application for Herbert Equities that caveat not lapse.

R v Wang (Court of Appeal, Glazebrook, William, Young and Chambers JJ, 14 June 2005). Noted at [2005] BCL 682. Lead counsel for Wang in appeal against conviction for possession and supply of precursor substance.

Xuan v Wu (High Court, Auckland, Heath J, 14 October 2003). Noted at NZCLD, 5th Series, 5948; 26 TCL 46/7; [2003] BCL 1039. Junior counsel to John Katz QC for defendant Wu. Application by Wu for further and better discovery concerning NZ Immigration Service materials and bank records held by banks resident in Hong Kong.

Lauriedale Holstein Limited v Anderson (District Court, Palmerston North, Judge Ross, 13 June 2003). Trial concerning transfer of dairy cooperative shares under sale and purchase agreement for a dairy farm.

Kinsman v Cornfields Ltd (2001) 10 TCLR 342 (CA). Noted at 25 TCL 3/4; [2002] BCL 98; [2002] CSLB 17; (2004) 10 NZBLQ 386; (2002) 8 NZBLQ 110; [2006] NZLJ 257; (2006) 12 NZBLQ 201; [2007] NZLJ 165; [2003] NZLJ 109; [2002] NZLJ 148; [2008] NZLJ 441; [2008] NZ Law Review 747. Lead counsel for Cornfields Ltd (the respondent) on appeal of High Court judgment ordering damages under the Fair Trading Act 1986 against a director (Kinsman) of a company which had gone into liquidation. Leading case on liability of directors under the Fair Trading Act.

R v Hindmarsh (High Court, Palmerston North, McGechan J, 8 March 2001.) Noted at [2001] BCL 434. Counsel for Crown. Sentencing of teenager on charge of aggravated robbery.

Delta Transport (1995) Ltd v Bailiff, Palmerston North District Court (High Court, Palmerston North, McGechan J, 7 March 2001). Noted at 24 TCL 15/7; NZCLD, 5th Series, 4069; [2001] BCL 355; [2003] NZLJ 146. Counsel for the Bailiff and the Registrar of the Palmerston North District Court. Judicial review proceedings concerning road user charges and confiscation of trucks and trailers.

Cornfields Ltd v Gourmet Burger Co. Ltd and Kinsman (2000) 9 TCLR 698 (HC). Noted at 24 TCL 6/5; (2002) 8 NZBLQ 110; (2006) 12 NZBLQ 201. Lead counsel for plaintiffs. Trial concerning claim for damages under s 9 Fair Trading Act 1996 (misleading conduct) against the director of a franchisor company. Defendant franchisor made misleading statements as to the turnover of existing business on which

projections for a franchise in Palmerston North were based. Judgment of McGechan J confirmed the directors were essentially the “alter-ego” of a company “in trade” and are not shielded from liability for misleading statements. This finding was confirmed on appeal (see above).

Department of Labour v Tranz Rail Ltd (District Court, Dunedin, Judge Macdonald, 21 April 1997). Junior counsel to JBM Smith for Tranz Rail. Prosecution of Tranz Rail Ltd concerning serious injury to a shunter in Dunedin.

Department of Labour v Tranz Rail Ltd [1997] DCR 102 (DC). Noted at [1997] BCL 324. Junior counsel to Justin Smith for Tranz Rail. Prosecution of Tranz Rail under Health & Safety Act in relation to fatality in shunting yard.

R v Tranz Rail Ltd (High Court, Wellington, Doogue J, February 1996). Junior counsel to Justin Smith for Tranz Rail. High profile prosecution of Tranz Rail under Crimes Act in relation to serious injury to 6 yr old boy who fell from passenger train in South Island. Charge of criminal nuisance was dismissed under s 347 Crimes Act approximately one week into a two week Judge alone trial.

Cray Communications (NZ) Ltd v Wade (Employment Court, Wellington, Judge Castle, 1 July 1994). Noted at 17 TCL 35/7. Junior counsel to S A Dyhrberg for Cray Communications. Appeal against Employment Tribunal finding of unjustified dismissal of respondent.