**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CRI-2008-004-029179**
**[2012] NZHC 665**

**THE QUEEN**

v

**RODNEY MICHAEL PETRICEVIC**
**CORNELIS ROBERT ROEST**
**PETER DAVID STEIGRAD**

Hearing: 25-26 October 2011, 14-18, 21-24, 28 November 2011; 6-7, 15 December 2011, 23-27, 31 January 2012, 1-3, 7-9, 13-15, 20-24, 27-29 February 2012, 1-2, 5-7, 14, 16, 19-20 March 2012

Appearances: B Dickey, W Cathcart and T Molloy for Crown
C B Cato for Mr Petricevic
P Dacre and R Butler for Mr Roest
B Keene QC, M E Cole, S Nicolson and J F Anderson for Mr Steigrad

Verdicts: 5 April 2012

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**REASONS FOR VERDICTS OF VENNING J**

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R Butler, Auckland
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**Table of Contents**

**Summary**

[1] At material times Messrs Petricevic, Roest and Steigrad were directors of Bridgecorp Limited (Bridgecorp) and Bridgecorp Investments Limited (BIL). All three have been charged with 10 counts under s 58 of the Securities Act 1978. In addition, Messrs Petricevic and Roest have also been charged with six counts under s 242 of the Crimes Act 1961 and two counts under s 377(2) of the Companies Act 1993. The charges arise out of the alleged failures of the accused as directors of Bridgecorp and BIL.

[2] In summary the charges are:

(a) Count 1 – On 30 March 2007 Messrs Petricevic and Roest made a false statement in the Prospectus Extension Certificate for Bridgecorp's Term Investments Prospectus dated 21 December 2006;

(b) Count 2 – Between 30 March 2007 and 2 July 2007 Messrs Petricevic and Roest made a false statement in Bridgecorp's Term Investments Prospectus dated 21 December 2006;

(c) Count 3 – Between 7 February 2007 and 2 July 2007 Messrs Petricevic and Roest made a false statement in Bridgecorp's Term Investments Investment Statement dated 21 December 2006;

(d) Count 4 – On 30 March 2007 Messrs Petricevic and Roest made a false statement in the Prospectus Extension Certificate for BIL's Capital Notes Prospectus dated 21 December 2006;

(e) Count 5 – Between 30 March 2007 and 6 July 2007 Messrs Petricevic and Roest made a false statement in BIL's Capital Notes Prospectus dated 21 December 2006;

(f) Count 6 – Between 7 February 2007 and 6 July 2007 Messrs Petricevic and Roest made a false statement in BIL's Capital Notes Investment Statement dated 21 December 2006;

(g) Count 7 (as amended by leave on 15 February 2012) – Between 30 April 2007 and 1 May 2007 Messrs Petricevic and Roest made a false statement in the Director's Certificate dated 30 April 2007 to Covenant Trustee Company Limited in relation to the affairs of Bridgecorp;

(h) Count 8 – Between 19 April 2007 and 1 May 2007 Messrs Petricevic and Roest made a false statement in the Director's Certificate dated 19 April 2007 to Covenant Trustee Company Limited in relation to the affairs of BIL;

(i) Count 9 – Between 21 December 2006 and 7 February 2007 all accused distributed a prospectus, namely Bridgecorp's Term Investments Prospectus dated 21 December 2006, that contained an untrue statement;

(j) Count 10 – Between 7 February 2007 and 30 March 2007 all accused distributed a prospectus, namely Bridgecorp's Term Investments Prospectus dated 21 December 2006, that contained an untrue statement;

(k) Count 11 – Between 30 March 2007 and 2 July 2007 all accused distributed a prospectus, namely Bridgecorp's Term Investments Prospectus dated 21 December 2006, that contained an untrue statement;

(l) Count 12 – Between 21 December 2006 and 7 February 2007 all accused distributed BIL's Capital Notes Prospectus dated 21 December 2006, that contained an untrue statement;

(m) Count 13 – Between 7 February 2007 and 30 March 2007 all accused distributed a prospectus, namely BIL's Capital Notes Prospectus dated 21 December 2006, that contained an untrue statement;

(n) Count 14 – Between 30 March 2007 and 6 July 2007 all accused distributed a prospectus, namely BIL's Capital Notes Prospectus dated 21 December 2006, that contained an untrue statement;

(o) Count 15 – Between 21 December 2006 and 7 February 2007 all accused distributed an investment statement dated 21 December 2006 relating to Bridgecorp's term investments, that contained an untrue statement;

(p) Count 16 – Between 7 February 2007 and 2 July 2007 all accused distributed an investment statement dated 21 December 2006 relating to Bridgecorp's term investments, that contained an untrue statement;

(q) Count 17 – Between 21 December 2006 and 7 February 2007 all accused distributed an investment statement dated 21 December 2006 relating to BIL's Capital Notes Investment Statement, that contained an untrue statement;

(r) Count 18 – Between 7 February 2007 and 6 July 2007 all accused distributed an investment statement dated 21 December 2006 relating to BIL's Capital Notes Investment Statement, that contained an untrue statement.

[3] Two other directors, Messrs Davidson and Urwin, were charged in respect of the 10 counts under the Securities Act. Mr Davidson pleaded guilty on 2 September 2011 and was sentenced by Andrews J on 7 October 2011. Mr Urwin was arraigned with the present accused and pleaded not guilty. After the Crown had opened but before the first witness was called, Mr Urwin changed his pleas to guilty. He is for sentence later this month.

[4] Earlier today I found Messrs Petricevic and Roest guilty on all counts. I found Mr Steigrad guilty on counts 10, 11, 13, 14, 16 and 18 and not guilty on counts 9, 12, 15 and 17.

[5] These are my reasons for returning those verdicts.

**Judge alone trial**

[6] In *R v Connell*[1] the Court of Appeal stated that a Judge hearing a criminal trial without a jury is required to deliver:

> ... a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

[7] In *R v Eide*[2] the Court of Appeal confirmed the principles stated in *Connell* but made the following additional observations in respect of fraud prosecutions:

> The problems with short-form judgments are particularly acute in fraud prosecutions. The parties (that is, the prosecutor and accused) are obviously entitled to know the key elements of the Judge's reasoning. In a case of any complexity, this will not be possible unless the Judge provides an adequate survey of the facts. As well, in this context a Judge is addressing an audience which is wider than the prosecutor and accused. If the verdict is guilty, the Judge should explain clearly the features of the particular scheme which he or she finds to be dishonest. There is a legitimate public interest in having the details of such a scheme laid out in comprehensible form. Similar considerations apply if the verdict is not guilty. Further, some regard should be had to how the case will be addressed on appeal. A judgment which is so concise that some of the key facts in the case are required to be reconstructed by this Court on appeal is too concise.

[8] In the more recent case of *Wenzel v R*[3] the Court of Appeal again endorsed the *Connell* approach and affirmed the comments in *Eide* regarding fraud cases in particular.

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1 *R v Connell* [1985] 2 NZLR 233 (CA) at 237–238.
2 *R v Eide* [2005] 2 NZLR 504 (CA) at [21].
3 *Wenzel v R* [2010] NZCA 501 at [39]-[40].

[9] While the charges under the Securities Act do not allege fraud, the charges under the Crimes and Companies Acts allege deceit and, as Heath J observed in *R v Moses*,[4] in cases under the Securities Act it is appropriate to give full reasons to explain the verdicts reached. However, to do so it is neither feasible nor necessary to set out in full or to exhaustively review counsels' extensive opening and closing submissions in these reasons. I have carefully considered the relevant evidence in this case and counsels' addresses as they relate to that evidence and the charges. In compliance with the above authorities I formally address the elements of the offending, the principal evidence that bears directly on those elements, my conclusions in relation to those elements and the reasons for those conclusions. Before doing so I set out a brief background to Bridgecorp, BIL and the accused. I also address a number of legal directions that are relevant.

**General background**

[10] Bridgecorp was incorporated on 30 April 2001. It is a wholly owned subsidiary of Bridgecorp Holdings Limited (in liquidation) (BHL), a company registered in Australia.

[11] BHL was a small public company in New Zealand which was left as a shell after the 1987 sharemarket crash. Interests associated with Mr Petricevic bought it in about 1992. Mr Petricevic sold a portfolio of mortgages into the company in about 1994. BHL then started lending money in its own right and looked to the market to raise further money. It registered its first prospectus in the late 1990's. At about that time a decision was made to migrate BHL to Australia because the Australian market was seen as having more potential than the New Zealand market. Bridgecorp was then incorporated to continue the business in the New Zealand market.

[12] Bridgecorp's principal activity was the sourcing of funding and lending in relation to property financing transactions. It primarily funded the activity through issuing secured debentures to members of the public (who invested in term

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4 *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [5].

investments with Bridgecorp) and through issuing redeemable preference shares to BIL.

[13] In order to raise money and issue secured debentures to the public Bridgecorp was required by the Securities Act to issue prospectuses and investment statements and to register the prospectuses with the Registrar of Companies.

[14] Bridgecorp was also required to appoint a custodian for the debenture holders, Covenant Trustee Company Ltd (Covenant) and to enter a trust deed with Covenant.

[15] BIL was incorporated on 26 April 2002 as a vehicle to raise funds for the New Zealand subsidiaries of BHL. BIL's primary activity was the issuing of capital notes to the public. It invested the proceeds from those activities into redeemable preference shares issued by Bridgecorp. The redeemable preference shares rank behind all secured and unsecured creditors of Bridgecorp so that BIL's performance was entirely dependent on Bridgecorp's performance.

[16] As with Bridgecorp, BIL was required by the Securities Act to issue and register prospectuses with the Registrar of Companies. It also issued investment statements and entered a trust deed with Covenant, similar to the trust deed in relation to Bridgecorp.

[17] The Bridgecorp Charging Group were Bridgecorp Financial Services Ltd (BFS), Bridgecorp Nominees Ltd (BN), Bridgecorp Capital Ltd (BC), B2B Brokers Ltd (B2B), Monice Properties Ltd (Monice), Bridgecorp Australia Pty Ltd (BA), Bridgecorp Finance (Australia) Pty Ltd (BFAL), and Bridgecorp Properties Pty Ltd (BP), the last three being incorporated in Australia. BHL stood outside the Charging Group.

[18] Bridgecorp was placed into receivership on 2 July 2007. At the date of its receivership Bridgecorp had approximately $459 million of secured debenture stock outstanding to approximately 14,500 debenture holders. It is likely that any recovery for the secured debenture holders will be less than 10 cents in the dollar.

[19] BIL was placed into liquidation on 7 July 2007. As at the date of its liquidation BIL had approximately $28.8 million of capital notes outstanding to the public and $30 million redeemable preference shares outstanding in Bridgecorp. It is unlikely that the capital note holders of BIL will recover anything.

[20] At relevant times the accused were directors of both Bridgecorp and BIL. The present accused were described in the relevant prospectus as:

> **ROD PETRICEVIC** – *Managing Director*
>
> Rod has been involved in the finance industry for more than 30 years and has been a director of a number of publicly listed companies both in New Zealand and Australia. He has access to an extensive range of business contacts and potential opportunities. Rod has been a director of the Bridgecorp group of companies since 1993.
>
> **ROBERT ROEST** – *Finance Director, CA, BCom*
>
> Rob has in excess of 25 years of commercial experience in organisations in New Zealand, Australia and the South Pacific, of which the past 7 have been within the finance industry. He has a commerce degree and is a member of the New Zealand Institute of Chartered Accountants. Rob leads the financial and planning activities of the Bridgecorp group and has been a director of the Bridgecorp group of companies since 2006. [Mr Roest was appointed finance director of Bridgecorp on 17 July 2006].
>
> **PETER STEIGRAD** – *Non-executive Director, BE, MBA*
>
> Peter is an experienced company director, international businessman and immediate past Chairman of Young & Rubicam Asia Pacific and Dentsu Young and Rubicam. Peter is chairman of the Indigenous Community Volunteers Foundation, a director of the Museum of Contemporary Art and holds a Bachelor of Engineering (Sydney) and MBA (NSW). Peter has been a director of the Bridgecorp group of companies since 2002.

[21] Both Mr Petricevic and Mr Roest, (or entities related to them), held shares in BHL. In Mr Petricevic's case, Petricevic Capital Ltd held in excess of 3.8 million shares. Mr Roest's interests held 920,000 shares.

[22] At liquidation Bridgecorp employed 37 staff. The company operated in a number of divisions: finance (including treasury), internal audit, corporate, lending, investor services, credit and marketing.

[23] The two executive directors, Messrs Petricevic and Roest, met with the three non-executive directors, including Mr Steigrad, at the regular monthly board

meetings. In addition there were regular meetings of a number of other committees that Bridgecorp had established – the executive committee, credit committee, audit committee and the asset and liability (ALCO) committee.

[24] The executive committee comprised Messrs Petricevic, Roest, Mike Jeffcoat, (the general manager), (and before him Mike Drummond), John Welch (the treasurer), Will Martin (general manager of finance and company secretary), and, from time to time, Zach McHerron, (the general manager corporate).

[25] The ALCO committee comprised Messrs Petricevic, Roest, Christine Todd (manager of lending), Mr Welch, Mr Martin, Kevin Stephens and Andrew Doidge (business development), Mike Jeffcoat and Andy Harris (the credit manager).

[26] The credit committee was made up of Messrs Petricevic, Roest, and Urwin. Mr Urwin was the Chair until January 2007 when Mr Roest took over. The other attendees, although not formal members, were Mr Harris, Mr Jeffcoat, and the New Zealand Property Finance Manager, Mr Middleton who was later replaced by David Allitt.

[27] The audit committee was made up of Messrs Davidson (chair), Steigrad and Urwin. The audit committee meetings were also attended by Mr Roest, Will Martin, and Mr Kumar (the internal auditor) and, from time to time, a representative from PKF, the external auditors.

**Legal considerations**

[28] As this is a Judge alone trial I remind myself of a number of matters on which a jury would be directed. They may be fundamental, but as the finder of fact in a criminal trial, it is important I bear them in mind.

[29] The starting point is the presumption of innocence. The onus is on the Crown. The Crown must prove that the accused whose case I am considering at the time is guilty beyond reasonable doubt. The Crown must prove each essential

element of each count against each accused beyond reasonable doubt before I may bring in a verdict of guilty on that count.

[30] Proof beyond reasonable doubt is a very high standard of proof, which the Crown will have met only if I am sure that the accused is guilty. It is not enough for the Crown to persuade me that the accused is probably guilty or even very likely that he is guilty. A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the accused after I have given careful and impartial consideration to all of the evidence.

[31] The charges in relation to the prospectus and extension certificates under s 58(3) of the Securities Act and those in relation to the investment statements under s 58(1) of that Act are offences of strict liability. The Crown must prove that one or more of the statement(s) in the offer documents is untrue but it is not required to prove criminal intent on the part of the directors in relation to those offences. If the Crown succeeds in establishing the statement is untrue then the onus shifts to the accused to demonstrate, on the balance of probabilities, either that the statement was immaterial or that he had reasonable grounds to believe, and did believe, that the statement was true.

[32] The position is, however, different in relation to the counts under the Crimes and Companies Acts faced by Messrs Petricevic and Roest. In relation to those charges the onus remains with the Crown throughout. The fact that Messrs Petricevic and Roest have given evidence and relied generally on the defence expert Mr Lazelle (called by Mr Steigrad) does not alter the burden of proof. The accused do not have to establish their innocence. The question remains whether the Crown has proved their guilt on those charges beyond reasonable doubt. If I accept the evidence for the accused whose case I am considering at the time about the relevant elements or, if the evidence for the accused leaves me unsure whether the relevant elements have been proved beyond reasonable doubt then the proper verdict is an acquittal on that charge as the Crown will not have discharged its task. If I do not accept the evidence for the accused in relation to the particular elements then I must not leap from that assessment to a finding of guilt. Rather I must then put the accused's evidence that I have rejected to one side and assess the remaining

admissible evidence that I consider reliable and ask myself whether that evidence satisfies me that the Crown have proved the elements of the particular count to the required standard.

**Prejudice/sympathy**

[33] I also remind myself that I must reach my decision uninfluenced by prejudice against or sympathy for anyone associated with this case. This case has attracted a large amount of media interest. There has been considerable publicity about the extent of the loss of investors' funds and the effect on some investors. For their part the accused are all businessmen with no previous convictions. I remind myself to put all feelings of sympathy or prejudice for any party associated or affected by this case to one side.

**Lies**

[34] If I consider that an accused has lied about certain incidents the fact he has lied is something I can take into account like other evidence. But I remind myself that it is important not to think that just because an accused may have lied on a particular issue or issues he is necessarily guilty of the charges before the Court. I accept that people can lie for reasons other than because they are guilty. Ultimately it is for me as to the weight I place on the lie. The fact an accused may have lied is just one piece of evidence to consider in deciding whether the Crown has proved the relevant elements of the particular offences against the accused beyond reasonable doubt.

[35] Related to that is the issue that counsel addressed for the accused Mr Petricevic. Mr Cato submitted that the fact Mr Petricevic, at the age of 62, had no previous convictions was a factor that indicated he was not likely to have committed these offences or to lie about his actions. I note that logically there will always be a first time for everyone who offends, and evidence of previous good character is not in itself a defence. But it is a factor I bear in mind when I am assessing the accused's evidence.

[36] During his closing for Mr Petricevic, Mr Cato effectively suggested that Mr Roest may have had a motive to implicate Mr Petricevic and that I should be slow to act on Mr Roest's evidence concerning Mr Petricevic's knowledge. I remind myself, when considering that aspect of Mr Roest's evidence, of Mr Cato's submission.

**Expert evidence**

[37] In this case there have been expert accounting witnesses called by both the prosecution and defence. Mr Crichton, an experienced insolvency practitioner, was appointed as an inspector by the then Securities Commission to carry out an inspection of Bridgecorp and BIL for the purposes of considering whether the prospectuses or investment statements contained any untrue statements or whether the companies otherwise breached the securities or financial reporting laws. Mr Crichton gave evidence of his findings. Mr Graham, a partner in KordaMentha, was engaged by the Securities Commission to undertake a peer review of Mr Crichton's reports. He also considered a number of loans in detail and gave his opinion about Barcroft Holdings Ltd as a related party. Mr McCloy, the receiver of Bridgecorp, gave evidence of his opinion whether the solvency or liquidity position of Bridgecorp, as set out in the company's prospectuses, reflected Bridgecorp's true position by 21 December 2006.

[38] Mr Lazelle gave evidence for the defence. Mr Lazelle is the principal of Lazelle Associates Ltd, a company which provides litigation support and forensic accounting services. He is experienced in financial investigations and has a background in the commercial world. Mr Lazelle responded to the evidence of the accountants called by the Crown.

[39] I remind myself that when considering the evidence of the experts I should have regard to the relevant qualifications and experience of the expert accountants who have given evidence. But ultimately the issues in this case are to be resolved by me, not the experts. Ultimately it is for me to decide how much weight or importance to give to the various experts' opinions or whether I accept them at all in the context of all of the evidence I have heard.

**The position of the co-accused**

[40] There are two further matters I should refer to. As noted, both Mr Davidson and Mr Urwin have pleaded guilty to the Securities Act charges. The guilty pleas by the other directors to the charges under the Securities Act are irrelevant to the position of the present accused. In assessing the case against the present accused I put the pleas of Messrs Davidson and Urwin entirely to one side.

[41] Related to that is the issue of the statements Mr Davidson and Mr Urwin made to the investigating officers. A number of the witnesses, particularly Mr Crichton, considered those statements prior to trial on the basis that those statements, whilst inadmissible against co-accused, would have been admissible against the director who made them. However as Messrs Davidson and Urwin pleaded guilty and have not given evidence at trial the statements made by them prior to trial are inadmissible against the remaining accused. They properly have not been led and I have not considered them. Where it appears that a witness has relied on the statements I put that aspect of the witness' evidence to one side. That is particularly the case in relation to aspects of Mr Crichton's evidence.

**The charges**

[42] The charges under the Crimes and Securities Acts arise out of statements made in the following documents that were issued by the directors to support the raising of funds from members of the public:

(a) the Bridgecorp Prospectus dated 21 December 2006;

(b) the Bridgecorp Investment Statement dated 21 December 2006;

(c) the BIL Capital Notes Prospectus dated 21 December 2006;

(d) the BIL Investment Statement dated 21 December 2006;

(e) the Bridgecorp Director's Certificate relating to the Extension Certificate dated 30 March 2007;

(f) the BIL Director's Extension Certificate dated 30 March 2007.

(collectively I refer to the prospectuses, investment statements and extension certificates as "offer documents").

[43] The additional charges under the Companies Act arise out of two certificates dated 30 April 2007 and 19 April 2007 provided by the directors to Covenant.

[44] Prior to closing addresses, I provided draft question trails to counsel, identifying what I considered to be the elements of each charge that the Crown (and in the case of the positive defences under Securities Act counts, the accused) had to prove. Counsel agreed with the elements I had identified and I have proceeded accordingly. For Mr Steigrad, Mr Keene raised further legal issues which he submitted were particular to Mr Steigrad. I deal with them in the section that addresses Mr Steigrad's case.

***Count 1 – Section 242 Crimes Act 1961 – False statement by a promoter etc.***

[45] The Crown charge that Mr Petricevic and Mr Roest, on or about 30 March 2007 at Auckland and elsewhere in New Zealand, made or concurred in making or publishing a statement that was false in a material particular, with intent to induce any person to subscribe for securities in [Bridgecorp] knowing that the statement was false in a material particular, or being reckless as to whether the statement was false in a material particular.

*Particulars of statement*

> Prospectus Extension Certificate, dated 30 March 2007 for [Bridgecorp] Term Investments Prospectus, dated 21 December 2006 (the Prospectus).

*Particulars of falsehood*

> A statement in the Prospectus Extension Certificate that the Prospectus was not, at 30 March 2007, false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances, whereas this statement was false, as the Prospectus failed to disclose that [Bridgecorp] had missed interest payments and, when due, repayments of principal.

The relevant extension certificate stated inter alia:

> The Securities Act 1978
>
> **DIRECTORS' CERTIFICATE**
>
> *(Section 37A(1A))*
>
> **BRIDGECORP LIMITED**
>
> 1. Bridgecorp Limited has registered prospectus for an issue of secured first ranking debenture stock dated 21 December 2006 ("**Registered Prospectus")** pursuant to the Securities Act 1978 at the Companies Office at Auckland.
>
> 2. This certificate is given for the purposes of section 37A(1A) of the Securities Act 1978 in relation to the Registered Prospectus.
>
> 3. In the opinion of all directors of Bridgecorp Limited after due enquiry by them –
>
>  (a) the financial position shown in the statement of financial position contained in the Registered Prospectus has not materially and adversely changed during the period from the date of that statement of financial position (being 30 June 2006) to the date of this certificate; and
>
>  (b) the Registered Prospectus is not, at the date of this certificate, false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances.
>
> 4. Unaudited financial statements for the 6 month period from the date of the statement of financial position contained in the Registered Prospectus accompany this certificate.
>
> **DATED:** 30 March 2007

[46] The extension certificate was signed on behalf of all directors by Messrs Davidson and Petricevic. It was registered at the Companies Office on 30 March 2007.

[47] Section 242(1) of the Crimes Act states:

> Every one is liable to imprisonment for a term not exceeding 10 years who, in respect of any body, whether incorporated or unincorporated and whether formed or intended to be formed, makes or concurs in making or publishes any false statement, whether in any prospectus, account, or otherwise, with intent—
>
> (a) to induce any person, whether ascertained or not, to subscribe to any security within the meaning of the Securities Act 1978; ...

[48] To make out the charge the Crown must prove beyond reasonable doubt that:

> (a) the accused, on or about 30 March 2007, made or concurred in making or published the Prospectus Extension Certificate for the Bridgecorp Term Investment Prospectus dated 21 December 2006;
>
> and:
>
> (b) the extension certificate was false in a material particular by failing to disclose that Bridgecorp had missed interest payments and, when due, repayments of principal.
>
> and:
>
> (c) the accused knew the extension certificate was false in that material particular or was reckless as to whether it was false in that material particular;
>
> and:
>
> (d) the accused intended to induce any person, whether ascertained or not, to subscribe to a security in Bridgecorp.

*Count 1 – Mr Petricevic*

[49] In the case of Mr Petricevic there can be no issue as to the first element. Mr Petricevic made the certificate. He signed it. Although the certificate is dated 30 March 2007, for the reasons that follow later, I find that Mr Petricevic signed the certificate on 22 March. That is sufficiently close to 30 March to be "on or about 30 March". In any event, it could be said the certificate was published on 30 March as that was the date it operated from, following its registration with the Companies Office on that date.

[50] Nor is there any issue that the statement was false in a material particular. As at both 22 and 30 March 2007 Bridgecorp had missed interest payments and, when due, repayments of principal to debenture holders. The evidence of Mrs Todd (investor services manager), Ms White (group accountant), Mr Jeffcoat, Mr Kumar and Mr Roest satisfies me that Bridgecorp failed to make payments of interest and principal that were due to debenture holders on various dates from 7 February through to and including 30 March, the date of the certificate.

[51] Mr Kumar was retained by the receivers to assist with the receivership. He prepared an analysis of the defaults which Mr Crichton then incorporated into a schedule[5] which disclosed that on 7 February, debenture maturities (and accrued interest) payments of $642,258.18 were due to be repaid but only $436,166.84 was actually paid that day leaving a shortfall of $206,091.34. There were further shortfalls of varying amounts on 8, 9, 12-14, 22, 23 and 26 February and on 1, 2, 7, 9, 12-19, 27 and 30 March. The Crichton schedule and Kumar summary were based on the debenture maturity schedules prepared by Mrs Todd's department and the related schedules prepared by Ms White.

[52] Mrs Todd gave evidence as to the practice by which a debenture maturity schedule was prepared for each day. She confirmed that investor payments would not appear on the schedule as due for payment unless the relevant term investment certificate with the appropriate instructions had been received by Bridgecorp. Once the certificates were received they were processed and a schedule setting out payments required to be made on a given day (which Mrs Todd called the daily outwards cash schedule) was completed. The schedule recorded the relevant details including the certificate number, client name and number, principal and interest, tax, and whether the payment was to be by way of direct credit or cheque.[6] Mrs Todd confirmed that there were several checks in the system to confirm the accuracy of the schedule. Once Mrs Todd confirmed the daily outwards cash schedule was correct it was transmitted electronically to the accounts department to action payment.

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5 Exhibit 10.
6 Exhibit 385B.

[53] Ms White was responsible for ensuring that the payments of principal and interest set out in the daily outwards cash schedule, prepared by investor services, were paid. Following the receivership of Bridgecorp and BIL Ms White prepared a number of schedules to identify the payments that were missed.[7] She did so by reconciling the daily outwards cash schedules with the bank batch forms which were created automatically to process the payments identified as required by the outwards cash schedule. The bank batch forms could only be overridden manually by treasury, usually Mr Martin or Mr Welch. For each investor Ms White's schedule recorded the actual payment date, the scheduled payment date and the closed date. The scheduled date was the date Bridgecorp had scheduled to make the payment as noted on the daily outwards cash schedule. The closed date was the maturity date of the investment. Normally, all three would co-incide, except that when the maturity fell on a weekend, it was the practice to pay the Friday before, so that the scheduled and actual payment dates would be the Friday. However, after 7 February, there were a number of occasions when the actual payment date records the payment was made after the scheduled and closed dates. As an example the schedule discloses that for investor Grenfell, while the scheduled payment date and the closed date were both 7 February 2007, the actual payment date was not until 8 February 2007.

[54] As part of her spreadsheet analysis Ms White compiled a monthly summary of defaults. Mr Kumar extracted Ms White's monthly summaries in preparing his summary. Mr Crichton carried out a similar exercise in preparing his schedule. The evidence of Mrs Todd and Ms White, as summarised by Mr Kumar and Mr Crichton, confirms that between 7 February and 30 March 2007 Bridgecorp failed to pay principal and interest to investors on a number of due dates.

[55] I note here that while Mr Roest challenged Mr Kumar's analysis, his own reworked schedule recorded shortfalls in the payments of principal and interest due on various dates from 7 February on. I deal with Mr Roest's explanation in relation to what he categorised as delayed payments more fully when considering his case on this issue.

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[7] Exhibit 385.

[56] At the conclusion of his evidence, Mr Petricevic confirmed that, in light of the evidence led before the Court, he accepted Bridgecorp (and BIL) had failed to make payments of principal and interest on due dates on a number of occasions from 7 February on.

[57] I reject Mr Cato's submission the fact the payments were made on the next business day meant they were immaterial. In this context a matter will be material if it is important or something that matters. The question of materiality is to be determined objectively.[8] There cannot be any issue that in the case of a finance company the fact it has missed interest payments or failed to repay principal amounts of investments (even by a day) is important or something that matters, particularly when it has a prospectus before the public.

[58] The principal issues from Mr Petricevic's point of view in relation to this count (and the remaining counts under s 242) are whether, at the relevant time, he knew or was reckless as to whether the extension certificate (or other document(s)) was false in that material particular and whether he intended to induce any person to subscribe to a security in Bridgecorp.

[59] Mr Petricevic's defence on this aspect is common to all charges. It is that he did not know of any missed maturity payments of principal at all until 23 June 2007 when all directors were informed that from 20 June 2007, payments had not been made. At that time the directors resolved to take steps to advise Covenant. Mr Petricevic's evidence was that, while he also became aware, when he arrived at work on Monday 2 April 2007, that the quarterly interest run due on Saturday 31 March 2007 had not been paid, he knew that it was paid later that day. He said he did not regard this as a missed interest payment and was not terribly concerned about it because the interest run was paid on Monday 2 April, the next working day. He maintained in his evidence that the first he learnt of the missed payments of principal and interest prior to 31 March 2007 was after these proceedings were commenced when he read about it in the newspaper.

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[8] Sir Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CA242.03].

[60] I do not accept Mr Petricevic's evidence on this issue. I am satisfied beyond reasonable doubt that he knew that Bridgecorp had failed to make payments of principal and interest from early in February and in any event well before the 31st March interest run. I am satisfied as to that for the following reasons.

[61] A number of the senior management team were aware that Bridgecorp had missed payments of principal and interest. Messrs Jeffcoat, Martin and Welch were all aware, as they had to alter the bank batches. Mrs Todd was also aware. She prioritised which of the debenture holders were to be paid when there was insufficient moneys to meet all the maturities scheduled for payment on a particular day. They had various meetings at which the issue was discussed. All gave evidence that Mr Petricevic was also aware of the defaults before the March interest run. With the exception of Mrs Todd, all referred to meetings, attended by Mr Petricevic, at which the issue of missed payments was discussed.

[62] Mr Welch described fortnightly or monthly investor services meetings during early 2006 with Mrs Todd, Mr Petricevic, Mr Jeffcoat and, he thought Mr Roest, (but he wasn't sure about that) at which the debentures were reviewed and strategies for new moneys were considered. Mr Welch said that at those meetings the missed maturity payments were discussed.

[63] Mr Welch also said that at the monthly executive meetings (which were chaired by Mr Petricevic) the best and worst case cash scenarios were discussed, and he, Mr Welch, made it known that debenture payments had been missed. Mr Petricevic accepted that Mr Welch attended the executive meetings but said there was never any discussion by Mr Welch or anyone of missed maturities at those meetings. While the minutes of the executive committee meetings do not expressly refer to the missed maturity payments they regularly emphasise the need for cash. For example the minutes of the 19 March 2007 meeting record:

- a copy of the daily cash flow was distributed to members,
- Discussions held on what was being done to improve future cash flows,
- cash flow and day to day cash management is still king.

That is consistent with Mr Welch's evidence.

[64] Under cross-examination by Mr Cato, Mr Welch accepted he could not recall the name for the meetings where the question of missed payments was discussed but maintained that, whatever they were called, he believed Mr Petricevic attended them. When it was put to him he had not given evidence about that in his initial statement or before trial, he explained that failure on the basis he had not been asked whether there were any other meetings that he was involved in. It was put directly to him that there were no discussions of that kind involving Mr Petricevic or with Mr Petricevic present but he did not accept that. While Mr Welch was not able to refer to any documentation to support his evidence and accepted he could not recall the name for the meetings, he remained firm under cross-examination that Mr Petricevic attended meetings at which the failure to pay debentures was discussed.

[65] Mr Welch's evidence on this point is supported by the practical situation that existed within Bridgecorp at the time. Mr Welch knew there was insufficient money to make all the repayments required and that payments had been missed. He was monitoring the bank account daily. He needed to know when loans were expected to be repaid (and Mr Petricevic played a large part in managing some of the workout loans in particular) so that he could ensure Bridgecorp would be able to make up the missed payments. It is inevitable the issue of the missed maturity payments would have been raised at the meetings when cash flow and the source of the cash flow was discussed. The whole point of the cash flow meetings was to ensure there was sufficient money to pay Bridgecorp's obligations to its investors, which a number of witnesses referred to as the company's priority.

[66] Mr Welch said in his initial statement that if investors were not paid out he would inform Rob (Roest) and Mike (Jeffcoat) in particular, but that is understandable, as they were the people he reported to. It is not inconsistent with his evidence that Mr Petricevic also attended meetings at which the issue was also raised. Further, while Mr Welch accepted that Mr Petricevic did not, himself prioritise the payments, (which was done by Mrs Todd as she had the knowledge of the situation of the various debenture holders), again that it is not inconsistent with his evidence that Mr Petricevic attended meetings at which the issue was discussed.

[67] Mr Martin gave evidence that he became aware of the missed payments in early 2007. He then discussed with Mr Welch what they should do. He said that they would have contacted Rob Roest and asked him what to do. Mr Martin's focus was more on the payment of Bridgecorp's general creditors rather than debenture holders but he recalls the debenture holders were also prioritised for payment and that on a couple of occasions Mr Petricevic attended meetings at which the prioritisation was discussed. Mr Martin also suggested the defaults might have been discussed at meetings of the executive committee which is consistent with Mr Welch's evidence to that effect. While I accept there is some force in Mr Cato's criticism of Mr Martin's evidence on the basis that it was general, and at times vague, it is consistent with the evidence of other witnesses as to the issue of Bridgecorp's inability to pay creditors and investors in early 2007. For example, it is consistent with Jo Tait, the marketing manager's evidence, that in early 2007 she also discussed the issue that general creditors were not being paid with Mr Petricevic.

[68] From the time Mr Jeffcoat returned from Australia to take up the position as New Zealand General Manager in early February 2007, he held regular, if not daily discussions with Mr Welch regarding the cash flow, which loans were to going to be repaid and what debenture maturities were due. He said that he, Mr Petricevic, Mr Roest, Mr Welch and sometimes Mrs Todd would also get together for a brief update at least weekly and sometimes more regularly than that. Mr Jeffcoat was aware that after 7 February payments of interest and principal had been missed.

[69] Mr Jeffcoat said that there was a meeting, some time between 7 February and prior to 31 March, at which the issue of whether the quarterly interest payment due on 31 March would be made was discussed. He said Mr Petricevic attended the meeting. The idea of explaining to investors that there had been a "computer glitch" if the interest run was not able to be made was discussed. Mr Cato directly challenged Mr Jeffcoat about this evidence and particularly whether Mr Petricevic had been present at the cash flow meetings that Mr Jeffcoat described. Mr Jeffcoat remained firm in his evidence that Mr Petricevic had been present at those meetings. He said he was not mistaken about that. Again Mr Cato made the point in cross-examination and submission that Mr Jeffcoat had not mentioned these meetings in the statement he had provided to the Ministry of Economic Development. Under

cross-examination Mr Jeffcoat did accept that Mr Petricevic may not have been present on every occasion and also accepted that he did not have a perfect recollection of the meetings but rejected the proposition that Mr Petricevic was not at any of the meetings.

[70] The "computer glitch" explanation was given to an investor, Mr Fair who complained when his interest payment due on 31 March was made late. Mr Fair spoke to Chris Todd about the late interest payment. He was apparently given the explanation that a computer processing error had led to the late payments. He referred to that in his letter of complaint. The draft letter of response to Mr Fair was referred to Mr Petricevic. When cross-examined Mr Petricevic conceded that the statement about a computer processing error was a lie and that he knew that it was when he read the letter on 3 April, although he attempted to resile from that later in his evidence.

[71] Mrs Todd was actively involved in the discussions with Mr Welch and other members of the management team as to which investors should be paid when there was insufficient money to pay all the investors scheduled for payment. She played a leading role in identifying which investors would be paid on given days. While she was not able to say definitely that Mr Petricevic attended such discussions, she said on more than one occasion that she was sure Rob (Mr Roest) and Rod (Mr Petricevic) were aware of the situation leading up to the quarterly interest run of 31 March and were both concerned. She said she would see Rob and Rod about the office and tell them.

[72] Mr Cato submitted that Mrs Todd was making the decisions as to who to pay herself, but without reference to Mr Petricevic. While Mrs Todd took the lead in identifying the investors who should be given priority when it was necessary to do so because there was insufficient cash to pay all maturities, the decision was made in conjunction with other senior management and with Mr Roest and Mr Petricevic aware of that process. It is not conceivable that the senior management would have made such decisions without reference to the executive directors, Messrs Roest and Petricevic.

[73] I have considered why such a major issue was not documented or recorded in minutes by any of the staff. The most benign explanation for the failure to expressly or formally record discussions about missed maturities is that while all parties involved, from the executive directors Messrs Petricevic and Roest, down to the management team, knew that payments had been missed, they believed in Bridgecorp and believed that it would get through the current crisis just as it had got through tight patches in the past. The management team were also aware that both the managing director, Mr Petricevic and the finance director, Mr Roest, knew and that might have allayed their concerns.

[74] Next there is the evidence of Mr Roest. Mr Welch and Mr Martin reported, through Mr Jeffcoat, ultimately to Mr Roest. Mr Roest was well aware of the missed (or as he categorised them, delayed) payments in February and March as he accepts.

[75] Mr Roest and Mr Petricevic met regularly, often daily, if they were both in the office. Mr Roest gave evidence that Mr Petricevic was aware of the issues because he had discussions with him about cash flow issues. In cross-examination by Mr Cato, Mr Roest maintained his evidence that, while he did not believe the maturities were missed, they were just delayed, Mr Petricevic was also aware of the delay. Mr Roest supported that evidence by pointing out that Mr Petricevic was well aware of Bridgecorp's position because he was involved in a lot of the refinancing. While I remind myself of the need to be cautious about Mr Roest's evidence on this point, I am satisfied Mr Roest's evidence about Mr Petricevic's knowledge is reliable. Their offices were beside each other. They both arrived at work early. While Mr Petricevic was involved in a number of projects and may have been away from the office from time to time, they still communicated regularly in the ordinary course of business when both were in the office, which was often. Cash flow was a major issue for Bridgecorp from the middle of 2006 on. Given the situation that Bridgecorp faced at the time, it is logical that Mr Roest and Mr Petricevic would discuss Bridgecorp's cash flow and its commitments to its investors. The payment of Bridgecorp's debenture holders was its biggest commitment. Mr Roest described conversations starting with the questions: "What's the latest?" or "What's the updates?" That is the sort of discussion which inevitably would lead to a discussion about the missed maturities and the source of funds to enable them to be paid. Mr

Roest had nothing to gain and no reason to withhold information regarding the missed payments from Mr Petricevic, who was the managing director and had a far greater personal interest in the company and BHL than Mr Roest had.

[76] Mr Petricevic's evidence that he was not aware of the missed principal and interest payments of February and March 2007 until after these proceedings commenced is just not credible. The missed payments were known generally about the office. I cannot accept that Mr Petricevic would not have been one of the first to have such knowledge. A stark example of how far the knowledge extended at an early stage is the email from Michelle Leask (at the time a business development manager) to Ms Wong on 8 March 2007. In response to an email from Ms Wong relating to proposed amendments to the prospectuses for Bridgecorp and BIL and inviting comment whether the prospectuses contained statements that were misleading in form and context or by reason of omission, Ms Leask responded:

> Maybe we could tell them that we have no money, can't pay our bills, are holding back payments, lying to investors and brokers about why their money hasn't been paid and I'm not confident that we can meet the March interest payments to investors.

[77] It is simply not credible to suggest that in early March someone in Ms Leask's position would have such a clear insight into the difficulties that Bridgecorp faced but that Mr Petricevic, the managing director, was unaware of the situation.

[78] Mr Petricevic's evidence on the issue of knowledge was not convincing in a number of respects. I refer to only some of his evidence by way of example. He suggested he signed the extension certificate because Bridgecorp had spent a number of months through until December getting the sign-off and registering the prospectus and, in his mind, the accounts were up to date as at December and everything that needed to be disclosed was disclosed. He said January and February were very, very quiet months and there was not very much happening. He had looked at the management accounts for January and February and was not alerted to anything out of the ordinary in that period of time. The suggestion that somehow because the registration of the prospectus was delayed until December and the extension certificate was signed in March and not much had happened between those particular periods is obviously simplistic. The prospectus included the accounts as at 30 June

2006. The certificate expressly stated the financial position had not changed from that time to 30 March 2007, a nine month period. By his general evidence on this issue Mr Petricevic sought to downplay that factor.

[79] Next, on the issue of his state of knowledge about the missed payments in February and March, Mr Petricevic was taken to Mr Kumar's review of the investor services department. In that draft report, which was before the board members on 21 June 2007, there was a note:

> (b) Late payment of maturity proceeds and interest to investors that was due on 30 March 2007 ($1,674,814), with the payment being made on 3 April 2007.
>
> The above delay has resulted in complaints from investors, as it overlapped the end of the tax year, being 31 March 2007, and was non-compliant with the representations in the Prospectus and Investment Statement.
>
> (c) Late payment of maturity proceeds and interest to investors on certain other days, particularly during March, April and May 2007.

[80] Mr Petricevic was unable to explain how, despite that reference in the report that he had on 21 June 2007, he was able to maintain his position that he only learnt of the missed payments for February and March after these proceedings were commenced. He was forced to try to explain it by suggesting he must not have seen the report because if he had received the report it would have been in his papers and it was not in his papers. I do not accept that explanation.

[81] Further, there were a number of references in the executive committee and board packs to the issue of missed payments. For example, in the April board pack there was reference to a report from the business development department that:

> The late payment of interest on debentures and notes and repayment of maturities has done damage to us this month.

Mr Petricevic gave two explanations for not noting that report. First he said that he only read it as referring to missed interest payments. Second he gave a quite different explanation, namely that as it was written by a junior staff member he considered it was in error. Neither explanation bears scrutiny.

[82] I find that Mr Petricevic knew, at the time he signed the extension certificate dated 30 March, that it was false in a material particular in that it failed to disclose Bridgecorp had missed a number of payments of principal and interest to investors by that time. He could not reasonably have believed Bridgecorp was not in default. The defaults applied not only to payments that fell due on weekends but also to payments due during the week.

[83] The last element of the offence is whether Mr Petricevic intended to induce any person to subscribe to a security in Bridgecorp in reliance on the false statement in the extension certificate. Mr Cato submitted that if I found Mr Petricevic had knowledge of the missed payments, then as he believed they would be made up and were not missed at law, this last element could not be established. While I reject that argument it cannot, in any event, apply to the payments missed on working days. Further, some payments were not made up the next day. Finally, while there is no direct evidence as to Mr Petricevic's intention to induce any person to invest in Bridgecorp I infer that that was his intention at the time he signed the extension certificate. The purpose of the extension certificate was to extend the life of the prospectus. The prospectus had to be extended beyond 30 March in order to enable Bridgecorp to continue to take subscriptions and investments from the public. At this time, early 2007, Bridgecorp needed to maintain its cash inflows. As was noted in the Board minutes of 19 March 2007[9] "Cash flow and day to day cash management is still king". One of the most obvious and immediate sources of cash was fresh investments from members of the public. I conclude that, in signing the extension certificate which included the false statement, Mr Petricevic intended to induce a person or persons unknown to subscribe to the security in Bridgecorp.

[84] I find count 1 proved against Mr Petricevic.

*Count 1 – Mr Roest*

[85] The first issue for Mr Roest is whether it can be said he made or concurred in making or published the extension certificate. Mr Roest did not sign the extension

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[9] The minutes are of the meeting of BHL. The Board did not hold separate meetings for Bridgecorp or BIL.

certificate. However, the evidence satisfies me that at the least Mr Roest concurred in the making of the extension certificate. For the reasons that follow I am satisfied that the certificate was signed on behalf of all directors by Messrs Davidson and Petricevic and that the certificate was signed at the meeting of directors on 22 March 2007. Mr Roest was at the meeting, knew the extension certificate was required to extend the prospectus and concurred in Messrs Davidson and Petricevic signing the certificate on his behalf. He agreed to the completion and registration of the extension certificate.

[86] In *Thompson v R* the Court of Appeal accepted the following direction of the trial Judge was correct in relation to what was required to concur in something:[10]

> The crime is concurring in the false omission or the false entry as the case may be. Concurring, in its ordinary meaning, means agreeing with the happening of some event. It is really as simple as that. ... The Crown must prove that the accused agreed to those events happening coupled with the necessary criminal [intent].

[87] As for the second element, for the reasons given above I am satisfied the extension certificate was false in a material particular by failing to disclose that Bridgecorp had missed interest payments and, when due, repayments of principal between 7 February and 30 March 2007.

[88] I also find that Mr Roest knew the extension certificate was false in that material particular. There can be no doubt that Mr Roest was aware that payments were not made on due date from time to time after 7 February. Mr Welch confirmed that if there was insufficient money to pay investors he would normally make sure Mr Roest was aware that they were not paying the full amount. I accept that evidence. As treasurer, Mr Welch was responsible to Mr Roest, who he described as a "micro manager". As Mr Welch put it, if there was anything out of the ordinary he would be up the other end [of the office] telling him what was going on.

[89] Mr Roest suggested in his evidence that Mr Kumar's schedules seemed to indicate there were "issues" about the payment of principal and interest from 7 February and he queried whether Mr Kumar had gone back to check that investor

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[10] *Thompson v R* (1996) 14 CRNZ 235 (CA) at 243.

instructions were received as were required. The answer to that, however, is that Mr Kumar's evidence was prepared on the basis of the schedules prepared by Mrs Todd and Ms White. I accept the accuracy of Mrs Todd and Ms White's schedules. Mr Roest also challenged whether the necessary documentation had been provided by the investors for the payments. Again, Mrs Todd's evidence satisfies me that only investors who had returned the certificate and provided instructions appeared on the daily cash outwards schedule as due for payment.

[90] I find Mr Roest was aware that payments of principal and interest had not been made from 7 February through to 30 March. Mr Butler submitted that Mr Roest did not believe the certificate to be false as he held a genuine belief the payments had been delayed, but not to a material degree. In his evidence Mr Roest maintained the payments were delayed, rather than missed, and sought to explain the non-payment in a number of ways which, Mr Butler argued, show he lacked the necessary criminal intent or that at least there was a reasonable doubt on that issue:

- there was sufficient money in Bridgecorp's bank account or there were other funds available from other members of the charging group or other sources which could have been applied to make the payments;

- cheques could have been written out to investors to make the payments;

- additional interest was paid to the investors when the payments were delayed and that was, in effect, an extension of the original term;

- same day clearances on payments meant the investors would have access to their funds a matter of hours later than if the funds had been paid the previous day;

- payments made after the banks closed on the day would be processed the next business day even though the payment may have been received by the bank the previous day.

[91] Whether the bank statement may show that there was money in Bridgecorp's main bank account on certain days when the matured debentures were not paid does not alter what occurred, namely that the debenture holders were not repaid on that due date. Further, even Mr Roest's reworked schedule discloses that on 8 February a cumulative shortfall totalling in excess of $412,000 existed. On that day the bank statement disclosed a balance of only $268,900.03. The same general response applies to the suggestion that funds could have been available from other sources. While the bank statement does disclose deposits from other sources from time to time, including from other members of the charging group, the short point is that principal and interest repayments were missed, despite the best efforts of Messrs Welch, Martin, Jeffcoat, Roest (and Mr Petricevic on occasion) to identify sources of money to meet the repayments due. Mr Roest was aware of the impending defaults. If there were funds available from other sources they would have been applied to ensure the matured debentures were repaid. They were not.

[92] Mr Roest's suggestion that the problem would have been solved if Bridgecorp had written cheques to pay investors is simplistic and misconceived. Again, it did not happen. Further, the payments were required to be made by direct debit authority in accordance with the investors' instructions. The prospectus provided that all payments or credits due to the investors would be credited to the bank account or other account specified by the investor in the application form.

[93] In any event, even if cheques had been written to address an initial shortfall on a particular day that would have only postponed the ultimate default. If cheques were written on 7 February to meet the commitments due that date then, when ultimately presented, that would have put further pressure on the funds in the bank account on that date. Writing cheques would simply have put the commencement date of the defaults back. At best the problem would only have been postponed.

[94] The suggestion that the fact Bridgecorp paid additional interest which was accepted by the investor was an extension of the original term is unrealistic and contrived. It was only in cross-examination that Mr Roest identified the clause in the trust deed he relied on, cl 2.5. While that clause permits the alteration of the terms of the debenture securities, as one would expect, there are pre-conditions to such an

alteration. There must be prior arrangement with the holders of the securities and the directors are required to give prior written notice of any such alteration to the trust deed to Covenant. Neither of those pre-conditions were satisfied in this case.

[95] Finally, the suggestion that, in some way the same day clearance of payments (on some limited occasions) and the processing delays by the bank excuse the default is misconceived. Neither address the fundamental point that Bridgecorp failed to meet its obligations to pay on due date. At best the same day clearance system masked the fact the payment was missed on the preceding day by showing the payment in an investor's bank statement on the same day as it would have appeared if it had been paid on due date.

[96] Mr Roest's explanation that the payments were not missed but rather were only delayed, but not to a material degree, is specious. If a debenture investment matured and (with accrued interest) was due for repayment on the 7th February but was not paid until the 8th it is a missed payment, as it was not made on due date. While it could also be described as a delayed payment, (in that it was ultimately paid), it was a missed payment or a default in terms of the trust deed, which is a material event.[11]

[97] As finance director of a finance company with $529,533,000 of investors' moneys on hand[12] Mr Roest must have appreciated the significance of the failure to pay the principal maturity payments when due.

[98] Finally, for the same reasons discussed in relation to Mr Petricevic on this issue I find Mr Roest intended to induce persons to continue to subscribe to a security in Bridgecorp by making that false statement.[13]

[99] I find count 1 proved against Mr Roest.

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11 Bridgecorp Trust Deed cl 5.1(a)(i).
12 As at 30 June 2006.
13 At [83].

***Count 2 – Section 242 Crimes Act 1961 – False statement by a promoter etc.***

[100] Count 2 charges that Mr Petricevic and Mr Roest, between on or about 30 March 2007 and on or about 2 July 2007, at Auckland and elsewhere in New Zealand, made or concurred in making or publishing a statement that was false in a material particular, with intent to induce any person to subscribe for securities in [Bridgecorp], knowing that the statement was false in a material particular, or being reckless as to whether the statement was false in a material particular.

*Particulars of statement*

> [Bridgecorp] Term Investments Prospectus, dated 21 December 2006 (the Prospectus).

*Particulars of falsehood*

> A statement in the prospectus that [Bridgecorp] had never missed an interest payment or, when due, a repayment of principal.

[101] To make out count 2 the Crown must prove beyond reasonable doubt the same general elements identified in relation to count 1.

[102] There is an additional, preliminary issue. The statement in the prospectus that Bridgecorp had never missed an interest payment or, when due, a repayment of principal was correct at the time the prospectus was registered on 21 December 2006. It became false from, and after, 7 February 2007. The prospectus was at that time before the public. The prospectus was extended by the extension certificate registered on 30 March 2007.[14] The effect of the extension of the prospectus was that from 30 March until it was suspended on 29 June 2007 the prospectus was before the investing public. Count 2 relates to the time period between 30 March 2007 and 2 July 2007 (the date of Bridgecorp's receivership). The end date must be the date of suspension of the certificate.[15] For the reasons given above, the

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[14] Securities Act 1978, s 37A(1A).

[15] Although Bridgecorp was not placed in receivership until 2 July 2007, the prospectus was suspended as from 29 June 2007. From suspension the prospectus could not have been before the public to induce subscription for securities.

statement that Bridgecorp had never missed an interest payment or, when due, a repayment of principal was false as from 7 February until 29 June 2007.

[103] Although the statement may have been correct at the date of the initial registration of the prospectus on 21 December 2006, the accused should have withdrawn the prospectus once it became false. Section 34(1) of the Securities Act provides that no registered prospectus shall be distributed if it is false or misleading in a material particular. As directors, if they were aware the statement in the prospectus had become false, then the accused had a positive obligation to correct the false or misleading prospectus by amending that statement or by withdrawing the prospectus. They had the authority and ability to do so.

[104] The accused's failure to do so in such circumstances is a continuing failure between 30 March 2007 and 29 June 2007. As the Court of Appeal noted in *Thompson v R*, in response to a submission that concurs carries the concept of timing as in concurrent:[16]

> Even if that were correct, it would make no difference ... since an omission is a continuing event and simultaneous assent to it may be given so long as it continues. We do not accept however that to concur in an act or event the assent must precede or be simultaneous with it. We see no reason to construe the section so as to make it a crime to assent to an entry before or at the time it is made yet not a crime to come upon it afterwards and assent to it in circumstances where there is a duty to correct it, the authority and ability to do so and, of course, the required intent to defraud.

[105] While the Court was discussing s 252 of the Crimes Act in *Thompson's* case the above comments are applicable to s 242 as well. In the present case the accused both concurred in making or publishing the statement which became false on 7 February 2007 by leaving the prospectus containing that false statement before the public between 30 March 2007 and 29 June 2007 in circumstances where they had a duty to correct the false statement and also had the authority and ability to do so either by amending the prospectus or withdrawing it.

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16 *Thompson v R*, above n 10 at 243.

*Count 2 - Mr Petricevic*

[106] For the reasons discussed above I find Mr Petricevic made or concurred in making or published the statement that Bridgecorp had never missed an interest payment or when due a repayment of principal between 30 March 2007 and on or about 29 June 2007 in the Bridgecorp prospectus.

[107] The statement was false in a material particular. Between 30 March 2007 and 29 June 2007 Bridgecorp missed interest payments and, when due, repayments of principal to debenture holders.

*The 31 March interest run*

[108] During the period of the count, the quarterly interest run of 31 March 2007 became due. It was paid on Monday 2 April. The Crown seek to rely on that as a further missed payment. To do so, the Crown must prove beyond reasonable doubt that Bridgecorp had missed the interest payment due on 31 March. Was the payment on 2 April, the next working day following 31 March, a missed payment? The Crown rely on the reference in the Bridgecorp prospectus which states that interest will be paid:

> ... quarterly on the last Business Days of March, June, September and December in each year for the preceding quarter (or part thereof); ...

[109] References to the timing of interest payments in the investment statement are consistent with the statements in the prospectus.

[110] However, the prospectus states:

> You are deemed to have notice of, and have the benefit of, and be bound by, the provisions of the Trust Deed.

[111] Clause 2.9(b) of the trust deed provides:

> Securities shall be held with the benefit of and subject to the provisions of this Deed, any terms endorsed on the relevant Certificates, the terms contained in the First Schedule, and any further terms forming part of the terms of issue of the Securities, and those provisions and terms or such of

> them as are applicable shall be binding upon the Company the Holders and all Persons claiming through them respectively.

[112] The certificates issued to depositors state that interest dates are:

> Last day of March, June, September, December.

[113] It also states:

> The Secured Debenture Stock comprised in this Certificate ("Stock") is issued by Bridgecorp Limited ("the Company"). The Stock is constituted and secured by a Trust Deed ("the Trust Deed") dated 24 December 2003 between the Company, certain subsidiaries of the Company (each as a Charging Subsidiary) and the Covenant Trustee Company (as Trustee for Stock holders) and is issued as Registered Stock with the benefit and subject to the provisions of the Trust Deed and the conditions contained in the current Prospectus;

And later:

> Interest on the Principal Amount of the Stock comprised in the certificate is payable quarterly on the dates described below in each year until redemption and is payable on the Maturity Date, at the rate of interest described below, subject to the conditions contained in the current Prospectus. ...

[114] Mr Dickey submitted that the offer documents for Bridgecorp clearly stated the payments would be paid quarterly. While he acknowledged the trust deed stated the security was held with the benefit of and subject to the provisions of the trust deed and any terms endorsed on the certificate, which the investor was deemed to have notice of, he submitted that Schedule 2 of the Securities Regulations 1983 governs the matters that are required to be stated in a registered prospectus and that cl 14 of that Schedule relevantly stipulates that the prospectus must state all terms of the offer and all terms of the securities being offered, not elsewhere set out in the prospectus. Mr Dickey argued that it followed that the reader must have the plain terms of the offer and securities spelt out in the prospectus. He submitted the reference in the prospectus to the quarterly interest being paid on the last business day of March satisfied that requirement.

[115] Mr Cato submitted that the trust deed provisions have priority over the prospectus insofar as the certificate embodies those terms. The obligation to pay therefore arose on 31 March, a Saturday. While the failure to pay on the last

working day might arguably constitute a breach of the prospectus he submitted that the legal obligation to pay interest fell on the date referred to in the certificate and so the payment made on 2 April was not a missed payment.

[116] The Crown alleges criminal offending. The onus is on it to prove that the statement is untrue to the standard of beyond reasonable doubt.[17] If there is doubt whether the statement is untrue, which would be the case if arguably the payment was made on due date, then the Crown will not have proved that particular element.

[117] A debt security is defined in s 2(1) of the Securities Act to include debenture stock. The essence of such a debt security is that it creates or acknowledges a debt. In *Hickman v Turn & Wave Ltd*[18] the Court of Appeal noted that in relation to debt security:

> a subscription will normally involve depositing or lending money in exchange for the issue of a security evidencing the right to be repaid the money with whatever return is promised.

[118] Securities are defined in the trust deed as:

> ... debt securities (as defined in the Securities Act) of any nature, ... being either Secured Debenture Stock or Unsecured Notes, and where the context so admits shall be deemed to include the Certificates by which such Securities are evidenced or represented ...

[119] On a contractual analysis a prospectus invites members of the public to subscribe. That is not, under general contractual law, an offer despite the definition of offer in s 2 of the Securities Act 1978.[19] *Securities Law in New Zealand* describes an allotment as:

> ... part of the contractual process by which a person becomes a security holder in the issuer. It is the act of acceptance by the issuer of the offer by the investor. The investment process involves, first, an offer by the issuer to investors to subscribe for securities. The second step is when the investor makes an offer to the issuer by filling in an application form. The issuer then accepts or declines the offer. If the issuer allots the securities, that is an acceptance of the offer and the acceptance is complete on communication of the allotment to the investor.

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17 Securities Act 1978, s 58(3).

18 *Hickman v Turn & Wave Ltd* [2011] NZCA 100; [2011] 3 NZLR 318 at [313].

19 Victoria Stace *Securities Law in New Zealand* (LexisNexis, Wellington, 2010) at [3.2].

[120] The issuer's communication of acceptance of the investor's offer to subscribe takes the form of the certificate. It is at this point that the security is created.[20] It follows that there is a strong argument the issuer's, in this case Bridgecorp's, legal obligation to pay interest arose at the time the certificate was issued and on the terms in the certificate.

[121] As noted, however, Mr Dickey relied on cl 14 of Schedule 2 of the Securities Regulations 1983 and in particular the provision that the prospectus must state all terms of the offer and all terms of the securities being offered not elsewhere set out in the prospectus.

[122] A prospectus contains information about the securities being offered, the terms of the offer and information about the issuer and promoters. There is no specific requirement in the regulations that the prospectus set out the time at which interest must be paid. Further, as noted, on reading the prospectus a potential investor is deemed to have notice of and the benefit of and be bound by the provisions of the trust deed.

[123] The trust deed contains a number of clauses supporting the view that securities are issued pursuant to the conditions of the certificate. I note in particular the reference to interest in the definition of stock moneys:

> ... means at any time from time to time the Principal Moneys and interest payable on the Stock (such interest in the case of Secured Debenture Stock being interest for which the Holder of the Secured Debenture Stock is secured pursuant to the provisions of the relevant Stock Certificate) and any other moneys payable to or at the direction of the Trustee or to any Stockholders under or pursuant to this Deed or the terms of issue of any of the Stock.

[124] The trust deed does not make mention of the terms of the prospectus. The emphasis is on the terms of the certificate. In my judgment cl 14 of Schedule 2 of the Regulations does not change this position.

[125] In summary, the legal obligation to pay interest arises from the certificate. The actual source of the precise terms on which the interest is to be paid including

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[20] *DFC Financial Services v Abel* [1991] 2 NZLR 619 (HC).

the day is more open to debate. Both the prospectus and certificate can be read in a way that effectively makes each subject to the other. In the context of criminal liability, however, the defendants are entitled to any doubt.

[126] For the above reasons I am not satisfied that the Crown can prove beyond reasonable doubt that the payment of the quarterly interest on 2 April, the first working day after 31 March, was a missed payment. It follows that the Crown are unable to prove beyond reasonable doubt that the statement that Bridgecorp had never missed an interest payment was untrue insofar as it relates to the quarterly interest run on 31 March.

[127] However, quite apart from the quarterly interest run due on 31 March, there are numerous other examples of default in the payment of interest and principal from and after 30 March through to 29 June 2007 on working days.

[128] Mr Crichton's schedule based on Mr Kumar's summary identifies that even without the quarterly interest payment due on 31 March there were a number of other defaults on 5 April, 10-13 April, 16-23 April, 26- 27 April, 2-4 May, 7 May, 9 May, 15-17 May, 22 May, 25 May, 28 May, 31 May, 1 June and 20-29 June.

[129] Even on his reconciliation of these issues Mr Roest identifies defaults on 5 April, 11 and 12 April, 16 April, 18 April, 20 April, 24 April, 27 April, 3 and 4 May, 7 and 8 May, 10 and 11 May, 16, 17 and 18 May, 25 May, 29 May, 31 May, 1 June, 5 June, 21 June and 23 June.

[130] The next issue is whether Mr Petricevic knew the statement was false during the time period relevant to this count. Mr Petricevic's knowledge of the earlier failures from 7 February on continued during the relevant period of count 2. Further, Bridgecorp's financial position did not improve after 30 March, rather, the reverse occurred. It deteriorated.

[131] In addition to the knowledge that Mr Petricevic had as at 30 March there is further evidence of his knowledge of the defaults in payment of interest and principal. There is the additional evidence of Mr Stephens, a business development

manager that is relevant to this time period. Mr Stephens said that around April he experienced some difficulties with reimbursement of expenses he had lodged for travel. He was told by the accounts department it was delayed because Bridgecorp had trouble paying its creditors. He raised the matter with Mr Jeffcoat. Mr Stephens said that about that time (which would have been around April 2007) he became aware of the non-payment of investors as well. Mr Stephens gave evidence of weekly meetings with a number of the executives to talk about investments, maturities, stories in the market, potential for new business and a maturity schedule that was coming up within the week. Mr Stephens referred to a spreadsheet of clients who were due to be paid that week and identified clients who had not been paid previously. He said that there were general discussions about how they should go on making those repayments. Mr Stephens said Mr Petricevic attended those meetings. While he accepted in cross-examination that Mr Petricevic did not prioritise who was to be paid he said Mr Petricevic was aware that there were maturities that hadn't been paid as it was definitely discussed at such meetings.

[132] Further, Ms Wong, the corporate solicitor, who had been asked to answer the phones in the investor services department on 2 April when the investor services staff had refused to, said that after that incident she raised the issue of the missed interest payments with Mr Petricevic. She specifically referred him to the prospectus wording and the trust deed. She said she had those discussions with Mr Petricevic (and Mr Roest for that matter) within days of 2 April. Ms Wong agreed that some time later she was asked to give advice regarding a proposed amendment to the prospectus but was firm that that was in June, at the time when she prepared a draft memorandum of amendments on 23 June. She maintained that she first raised the issue of missed payments within days of the 2 April incident in relation to what was, in her view, the missed quarterly payment due on 31 March. Ms Wong said that her memory was clear the first discussion was in April because there were certain things about the conversation that stuck out and made her very nervous. She said she remembered going home, having a long discussion with her husband but still felt so uncomfortable that she couldn't sleep that night. While her discussion with Mr Petricevic centred on the March quarterly payment, it put Mr Petricevic on notice that payments were not being made in accordance with the prospectus, which at the

very least should have put him on a train of inquiry. His failure to follow up on that issue was reckless at the least.

[133] Next, Mr Martin described a meeting following the March quarterly interest run at which Mr Petricevic called staff to the lunch room for a general meeting. He said Mr Petricevic spoke to staff and said that he was aware that they were getting concerned with cash flow issues and Bridgecorp not being able to make payments to creditors and investors. Mr Martin said that Mr Petricevic told staff that the directors were looking at a number of deals to get some significant cash flow in which should make things a bit more comfortable going forward. Mr Martin thought that the meeting would have been in April.

[134] Quite apart from the further evidence of the above witnesses there is also the documentary record. Mr Jeffcoat's March report for the executive committee meeting of 16 April 2007 contained the following statement under the Investment Department's report:

> Higher than normal level of enquiries as a result of the interest payments being made on the subsequent business day.

[135] The marketing department report for the executive committee meeting on 16 April recorded:

> Investor Services Team 'on strike' due to interest not being paid on 31st.

[136] While the above statements could perhaps be explained on the basis they might refer to the quarterly interest payments of 31 March there were further statements in the business development report that:

> We took a big hit from the South Island advisers this month. This will continue as I can now report, after seeing the bulk of my top advisers, that the overall situation is that we will not receive any new funds, on maturity the funds will be withdrawn and a few (upon request by the client) will be rolled over. New money will be upon request by the respective client only.
>
> The main reasons are still the same and are as follows:
>
> - negative press;
> - rumours of liquidity problems (to be compounded by **late payment of interest and maturities**,

- PIR rating – who are they and why not S &P or Risk Analysis;

- Financial results (profits down, prior charges given etc)

General

...

**The late payment of interest on debentures and Notes and re-payment of maturities has done damage to us this month**. ...

(emphasis added)

Further, the finance department report of March 2007 for the same meeting referred to the issue of "... splitting maturity batches". The only reason the maturity batches had to be split was because there was insufficient money to run all principal payments in one batch.

[137] I do not accept Mr Petricevic's evidence that he did not take from those reports the very clear message, particularly from the business development report, that in addition to interest payments debenture maturity payments had been missed. The statements were clear and express.

[138] Finally, and perhaps the most compelling evidence that Mr Petricevic was aware of the financial position of Bridgecorp and its inability to meet its obligations to investors during the period of this count was the fact that, on several occasions after 10 April, Mr Petricevic himself paid substantial sums of money into Bridgecorp. Mr Petricevic paid $500,000 on 10 April, $400,000 on 12 April, $100,000 on 20 April, $200,000 on 17 May, $200,000 on 22 May, and $100,000 on 30 May. The payments were repaid within a day or so. Mr Petricevic's explanation that the money was paid in because Mr Roest requested it in order to give "a little bit of headroom" or words to that effect is unconvincing. Mr Petricevic must have known that if the company required sums of that nature from him it was in danger of missing its obligations to investors from time to time. While Mr Petricevic said he would not have paid the money in if he was aware the company was missing payments of repayments of principal, at the time Mr Petricevic and Mr Roest may have believed, or at least hoped, that Bridgecorp would get through its liquidity crisis as it had in the past and would be able to continue its operations.

[139] For the above reasons I find that Mr Petricevic knew the statement was false in a material particular.[21]

[140] Similarly, for the reasons given above, I infer that Mr Petricevic intended to induce a person or persons unknown to subscribe to securities in Bridgecorp by leaving the prospectus before the public.[22]

[141] I find count 2 proved against Mr Petricevic.

*Count 2 – Mr Roest*

[142] Essentially similar reasoning applies to Mr Roest in relation to count 2. Mr Roest was under the same obligation in relation to the false or misleading statement in the extended prospectus. If he was aware the statement that Bridgecorp had never missed an interest payment or, when due, a repayment of principal was false then he concurred in leaving it before the public between 30 March 2007 and 29 June 2007 when he had a positive duty to correct it. The statement was false in a material particular in that it failed to disclose that Bridgecorp had missed interest payments and, when due, payments of principal during that period. The evidence satisfies me that Mr Roest knew the statement in the prospectus was false in that material particular. The regular cash flow meetings that Mr Welch described attending with Mr Roest continued during this period.

[143] Next, Mr Roest attended the executive committee meeting on 16 April 2007 and received the same information as Mr Petricevic. Further, Mr Roest also paid money into Bridgecorp to assist it to meet its obligations. For his part he paid in $100,000 on 17 May through his company CRR Holdings Ltd and further sums of $10,000 on 25 May and $50,000 on 30 May.

[144] Next as noted, apart from speaking to Mr Petricevic, Ms Wong also raised the issue of the missed payments with Mr Roest.

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21 And also at [60]-[82] above.
22 At [83] above.

[145] Finally, I note that in May 2007 Mr Kumar advised Mr Roest that resident withholding tax had not been paid on the investors' deposits.

[146] There is no doubt that Mr Roest was aware of the missed payments during the period in count 2.

[147] For the reasons given above I infer that Mr Roest intended to induce a person or persons unknown to subscribe to a security in Bridgecorp by leaving the prospectus before them.[23]

[148] I find count 2 proved against Mr Roest.

***Count 3 – Section 242 Crimes Act 1961 – False statement by a promoter etc.***

[149] Count 3 charges that Mr Petricevic and Mr Roest, between on or about 7 February 2007 and on or about 2 July 2007 at Auckland and elsewhere in New Zealand made or concurred in making or published a statement that was false in a material particular, with intent to induce any person to subscribe for securities in Bridgecorp knowing that the statement was false in a material particular, or being reckless as to whether the statement was false in a material particular.

*Particulars of statement*

> [Bridgecorp] Term Investments Investment Statement, dated 21 December 2006.

*Particulars of falsehood*

> A statement in the Investment Statement that [Bridgecorp] had never missed an interest payment or, when due, a repayment of principal.

[150] To make out this count the Crown must prove the same general elements identified in relation to count 1.[24]

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[23] At [83] and [98].
[24] See [48] above.

[151] Count 3 relates to the investment statement but otherwise relies on the same essential particulars and knowledge as count 2. The Bridgecorp term investments investment statement[25] stated under liquidity risk inter alia:

> Bridgecorp has never missed an interest payment or, when due, a repayment of principal.

[152] The investment statement attached the application forms for investment in Bridgecorp. It remained current during the operation of the Bridgecorp prospectus including through the extended period of that prospectus after 30 March 2007 until its suspension on 29 June 2007.

[153] For the reasons given above, I am satisfied that Messrs Petricevic and Roest each concurred in making or publishing the relevant statement in the Bridgecorp term investments investment statement between 7 February 2007 and 29 June 2007. I also find during the relevant time period that the statement was false in a material particular namely that Bridgecorp had never missed an interest payment or, when due, a repayment of principal. Both accused knew it was false in that material particular and both intended to induce a person or persons unknown to invest in securities in Bridgecorp.

[154] Count 3 is proved against both Messrs Petricevic and Roest.

***Count 4 – Section 242 Crimes Act 1961 – False statement by a promoter etc.***

[155] The Crown charge that Mr Petricevic and Mr Roest, on or about 30 March 2007 at Auckland and elsewhere in New Zealand, made or concurred in making or publishing a statement that was false in a material particular, with intent to induce any person to subscribe for securities in [BIL] knowing that the statement was false in a material particular, or being reckless as to whether the statement was false in a material particular.

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[25] Exhibit 87.

*Particulars of statement*

> Prospectus Extension Certificate dated 30 March 2007, for [BIL] Capital Notes Prospectus dated 21 December 2006.

*Particulars of falsehood*

> A statement in the Prospectus Extension Certificate that the Prospectus was not, at 30 March 2007, false or misleading in a material particular by reason of failing to refer or give proper emphasis, to adverse circumstances, whereas this statement was false as the Prospectus failed to disclose that [Bridgecorp] and [BIL] had missed interest payments and, when due, repayments of principal.

[156] To prove this count the Crown must prove the same general elements as set out in count 1 except that the statement is to be found in the BIL capital notes prospectus. The allegation is that that statement was false as the prospectus failed to disclose not only that Bridgecorp had missed interest payments and, when due, repayments of principal but that BIL had also missed such payments.

[157] The certificate is, in all material details, the same as the certificate relating to Bridgecorp save that it refers to BIL and BIL's unsecured subordinated capital notes prospectus dated 21 December 2006 instead of Bridgecorp's first ranking debenture stock prospectus. The certificate is dated 30 March 2007 and was signed on behalf of all directors of BIL by Messrs Davidson and Petricevic.

[158] The BIL prospectus was registered on 21 December 2006. The extension certificate relating to the BIL prospectus was also registered on 30 March 2007.[26]

[159] The BIL prospectus, which was extended by registration of the extension certificate, stated that neither Bridgecorp nor BIL has ever missed an interest payment or, when due, a repayment of principal.

[160] For the reasons given above I find that Mr Petricevic made the statement and for his part Mr Roest concurred in the making of the statement.[27]

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[26] The evidence of Ms Docherty, an officer from the Ministry of Economic Development office, was admitted by consent to confirm the relevant dates of registration for both Bridgecorp and BIL.

[27] At [49] and [85]-[86].

[161] Mrs Todd gave evidence concerning the BIL capital note repayments as well. Mrs Todd said that, unlike the Bridgecorp debenture investments which matured on the anniversary dates of the actual investment, the BIL capital notes investments matured on the 15th of each month. The quarterly interest due on the capital notes was paid four times a year on the last days of March, June, September and December. Mrs Todd produced schedules of daily outwards cash as at the 15th of each month relating to BIL. Based on those schedules Mr Kumar produced a further summary disclosing that, while BIL's matured notes due on 15 February were paid on due date, the matured notes payments due on 15 March 2007 were short paid by $167,982.51. Mr Kumar's evidence on this point was not the subject of challenge.

[162] The evidence therefore satisfies me that the statement in the BIL extension certificate was false in a material particular by failing to disclose that by 30 March BIL had missed the repayments of principal on 15 March 2007. It was also false because it failed to disclose Bridgecorp's own default.

[163] For the reasons given above I find that Mr Petricevic and Mr Roest were aware of Bridgecorp and BIL's default. I infer that the knowledge of Messrs Petricevic and Roest that repayments of Bridgecorp maturities had been missed, also extended to the knowledge of failure to make the principal repayments due on 15 March for BIL. The same process was followed in relation to the short payments of BIL's investors. Mr Roest would have been aware of that and, given the regular communication between him and Mr Petricevic, I infer that Mr Roest would have told Mr Petricevic about the issue in relation to BIL as well. At the very least, Mr Petricevic was reckless in relation to that issue in allowing the extension certificate to go forward without inquiring about that matter when he was aware of Bridgecorp's default. I note Mr Petricevic gave no evidence on this particular issue.

[164] Finally I infer that, by issuing the extension certificate for BIL, both accused intended to induce a person or persons unknown to subscribe for securities in BIL. The extension certificate was required to extend the life of the BIL prospectus. Bridgecorp and BIL both required further fresh deposits from new investors to meet the cash flow crisis Bridgecorp faced at 30 March 2007.

[165] Count 4 is proved against both Mr Petricevic and Mr Roest.

***Count 5 – Section 242 Crimes Act 1961 – False statement by a promoter etc.***

[166] The Crown next charge that Mr Petricevic and Mr Roest, between on or about 30 March 2007 and 6 July 2007, at Auckland and elsewhere in New Zealand made or concurred in making or publishing a statement that was false in a material particular, with intent to induce any person to subscribe for securities in BIL knowing that the statement was false in a material particular, or being reckless as to whether the statement was false in a material particular.

*Particulars of statement*

> BIL Capital Notes Prospectus dated 21 December 2006.

*Particulars of falsehood*

> A statement in the prospectus that [Bridgecorp] and [BIL] had never missed an interest payment or, when due, a repayment of principal.

[167] Again the issues are similar to those that arise in relation to count 2 in the indictment but with the additional feature of the reference to BIL's position. Mrs Todd's and Mr Kumar's evidence satisfies me that as well as Bridgecorp, BIL also missed interest and principal repayments between 30 March 2007 and 29 June 2007.[28]

[168] In addition to the missed principal repayment on 15 March for BIL as noted, the payments for 15 April were also short paid by $272,121.30. This shortfall was not cleared until 18 April 2007. The principal payments due for 15 May and 15 June were also not paid on due date. In addition, the BIL quarterly interest payment due on 31 March of $620,755.28 was not paid until 3 April 2007. The payment due on 30 June 2007 also remained unpaid. Again Mr Kumar's evidence on this point was not seriously challenged.

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[28] The BIL prospectus was suspended on 29 June 2007 so that should be the end date for the count.

[169] I note that, unlike the Bridgecorp prospectus, the BIL prospectus provided for the quarterly interest to be paid on the last days of March, June, September and December:

> Interest is paid quarterly in arrears on 31 March, 30 June, 30 September and 31 December in each year. Interest payments are made to you on each of these dates. ...

[170] The BIL prospectus made no reference to the payment being on the last working day of that month. However, on Mr Kumar's unchallenged evidence the payment due on 31 March, which could have been paid on the next working day, Monday 2 April, was not paid until Tuesday 3 April. On any view the quarterly interest due on 31 March was not paid on due date and was in default.

[171] For the reasons given above I find the other elements of the offending are established in relation to count 5.

[172] I find Mr Petricevic and Mr Roest guilty of count 5.

***Count 6 – Section 242 Crimes Act 1961 – False statement by a promoter etc.***

[173] In count 6 the Crown charge Mr Petricevic and Mr Roest that between on or about 7 February 2007 and 6 July 2007 in Auckland and elsewhere in New Zealand made or concurred in making or publishing a statement that was false in a material particular, with intent to induce any person to subscribe for securities in BIL, knowing that the statement was false in a material particular, or being reckless as to whether the statement was false in a material particular.

*Particulars of statement*

> [BIL] Capital Notes Investment Statement dated 21 December 2006.

*Particulars of falsehood*

> A statement in the investment statement that [Bridgecorp] and [BIL] had never missed an interest payment or, when due, a repayment of principal.

[174] For the reasons given in relation to count 3 I find that Messrs Petricevic and Roest concurred in the making or publishing of the statement in issue. On the evidence of Mrs Todd and Mr Kumar the statement was false in a material particular. In addition to Bridgecorp missing interest and repayments of principal, BIL itself missed or was late in paying interest payments due for the quarterly run of 31 March and also in relation to the principal repayments due on 15 March, April, May and June.

[175] Similarly, for the reasons given above, I find the accused both knew the statement was false in a material particular or, in Mr Petricevic's case, he was at the least reckless as to whether it was false in that material particular.

[176] Finally I find, for the above reasons, that the accused intended to induce a person or persons unknown to subscribe to securities in BIL.

[177] It follows I find count 6 is also proved against both Mr Petricevic and Mr Roest.

***Count 7 – Section 377(2) Companies Act 1993 – false statements***

[178] In count 7 the Crown charge that Mr Petricevic and Mr Roest, between on or about 30 April 2007 and on or about 1 May 2007, at Auckland and elsewhere in New Zealand, were directors of Bridgecorp and made, furnished, authorised or permitted the making or furnishing of a statement relating to the affairs of Bridgecorp Limited to [Covenant], the trustee for debenture holders of the company, that was false or misleading in a material particular, knowing it to be false or misleading.

*Particulars of statement*

> Directors Certificate as at 31 March 2007, dated 30 April 2007 (as amended by leave on 15/2/12).

*Particulars of falsehood*

> A statement in the Directors Certificate that interest due on and principal monies of the securities had been paid or otherwise satisfied on due date.

[179] The Directors' Certificate was required by cl 4.3 of the trust deed. The certificate stated inter alia:

> **DIRECTORS CERTIFICATE**
>
> This certificate is given by the undersigned Directors of Bridgecorp Limited and certain subsidiaries (**"the Charging Group"**) pursuant to Clause 4.1.(a) and 4.3(a)(ii) of the trust deed dated 25 September 2001 and 19 December 2003 between the Charging Group and Covenant Trustee Company Limited (**"the Trust Deed"**). ...
>
> We, the undersigned, on behalf of all the Directors, and pursuant to Clause 4.3.a(ii)(bb), hereby state to the best of our knowledge and belief and after having made all due enquiry, that since the date of the last Directors Certificate that nothing has in our opinion occurred which will materially and adversely affect the interest of the Holders generally and without prejudice to the generality thereof:
>
> A. Interest due on and Principal Monies of the Securities has been paid or otherwise satisfied on due date. ...

The certificate was dated 30 April and stated the position as at 31 March 2007. Both Mr Petricevic and Mr Roest signed it in their capacity as directors of Bridgecorp.

[180] Section 377(2) provides:

> Every director or employee of a company who makes or furnishes, or authorises or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to—
>
> (a) A director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company; or
>
> (b) A liquidator, liquidation committee, or receiver or manager of property of the company; or
>
> (c) If the company is a subsidiary, a director, employee, or auditor of its holding company; or
>
> (d) A stock exchange or an officer of a stock exchange,—
>
> knowing it to be false or misleading, commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.

[181] To make out the charge the Crown must prove beyond reasonable that:

> (a) when acting as a director of Bridgecorp, between 30 April and 1 May 2007, the accused made or furnished a statement that interest due on

and principal monies of Bridgecorp's securities had been paid or otherwise satisfied on due date; and

(b) that the statement related to the affairs of Bridgecorp; and

(c) that the statement was false or misleading in a material particular; and

(d) that the accused knew the statement to be false or misleading.

The first two elements of the offence are readily established in relation to both accused. Both were directors of Bridgecorp at the relevant time. Both were acting as directors of Bridgecorp when they signed the certificate dated 30 April 2007 in that capacity. In doing so they made the statement. The statement related to the affairs of Bridgecorp. It was directly connected to, or concerned with, an essential feature of Bridgecorp's everyday business, namely the satisfaction of its requirements under the trust deed with Covenant.

[182] The next issue is whether the statement that "Interest due on and Principal Monies of the Securities has been paid or otherwise satisfied on due date" was false or misleading in a material particular.

[183] The statement was false in a material particular. As at 31 March 2007 and since the date of the last certificate Bridgecorp had failed to make payments of interest and principal due under the securities on a number of dates as detailed above.

[184] The last issue is whether the respective accused knew the statement to be false or misleading. Mr Petricevic's defence is again that the only missed payment he was aware of at around this time was the late quarterly interest run of 31 March 2007.

[185] These issues have been considered in relation to the preceding counts. Whatever the merits of the argument based on the quarterly interest run, for the reasons given above, I find that by 31 March 2007 Mr Petricevic knew that

Bridgecorp had failed to make payments of principal moneys (and interest accrued and due on that principal) from 7 February 2007 on so that he knew the certificate to the trustee was false.

[186] I find count 7 proved against Mr Petricevic.

[187] Mr Roest's defence to count 7 is primarily the same as his defence to the preceding counts, namely that he did not believe the statement to be false as he held a genuine belief that payments had not been missed, but only delayed, and not to a material degree. Mr Roest was aware that from 7 February 2007 Bridgecorp had failed to meet its obligations to repay debenture holders as their investments fell due.

[188] For the reasons given above, I do not accept that Mr Roest held a reasonable belief that the statement in the certificate was true. The explanations suggested by Mr Roest are neither credible nor reasonably arguable. In signing the statement and confirming that to the best of his knowledge and belief, and having made all due inquiry, interest due on and principal moneys of the securities have been paid or otherwise satisfied on due date Mr Roest knew he was making a false statement. Count 7 is proved against Mr Roest.

***Count 8 – Section 377(2) Companies Act 1993 – false statements***

[189] The Crown charge that, Mr Petricevic and Mr Roest between on or about 19 April 2007 and on or about 1 May 2007 at Auckland and elsewhere in New Zealand were directors of BIL and made, furnished, authorised or permitting the making or furnishing of a statement relating to the affairs of BIL to Covenant Trustee Company Ltd, the trustee for debenture holders of the company, that was false or misleading in a material particular, knowing it to be false or misleading.

*Particulars of statement*

> Director's certificate as at 31 March 2007, dated 19 April 2007.

*Particulars of falsehood*

> A statement in the director's certificate that all interest due on the capital notes had been paid or otherwise satisfied on due date.

[190] For present purposes the relevant director's certificate is, in material aspects, in the same terms as the director's certificate Messrs Petricevic and Roest completed for Bridgecorp. The certificate was stated to be as at 19 April 2007 and was signed on that date.

[191] To make out count 8 the Crown must prove the same legal elements as in count 7 but in relation to BIL's situation.

[192] Again the first two elements of the offence are readily established in relation to both accused. Both were directors of BIL at the relevant time. Both were acting as directors of BIL when they signed the certificate in that capacity. In doing so they made the statement. The statement related to the affairs of BIL.

[193] As to whether the statement was false or misleading in a material particular, for the reasons given above I find the statement was false in a material particular. As at 19 April 2007 and since the date of the last certificate BIL had failed to make payments of principal due under the securities. It had failed to make all principal payments due on 15 March and had also failed to pay the quarterly payment due on 31 March.

[194] The remaining issue is whether the accused knew the statement to be false or misleading. The defences of both accused remain the same. Mr Roest knew the BIL payments as well as the Bridgecorp payments had been missed. For the reasons given above I infer that Mr Petricevic knew of the failure of BIL to make the principal payment due on 15 March and that he was also aware that the quarterly interest run due on the BIL capital notes was not paid on the due date. The argument that the quarterly interest was paid on the next working day cannot apply to count 8, as the BIL quarterly interest run was not made up until Tuesday 3 April, which was the second working day after the weekend.

[195] I find count 8 proved against Mr Petricevic.

[196] In relation to Mr Roest, for the reasons given above I do not accept that he held a reasonable belief that the statement in the certificate was true when he signed the certificate on 19 April. He knew it was false.

[197] I find count 8 proved against Mr Roest.

***Count 9 – Section 58(3) Securities Act 1978 – criminal liability for misstatement in registered prospectus***

[198] The Crown charge that Messrs Petricevic, Roest and Steigrad between on or about 21 December 2006 and on or about 7 February 2007 at Auckland and elsewhere in New Zealand signed or had signed on their behalf a registered prospectus, namely Bridgecorp Term Investments Prospectus (dated 21 December 2006) that was distributed and included an untrue statement.

*Particulars of untrue statement*

(a) That Bridgecorp would/did not provide credit or advance loans other than in accordance with good commercial practice and internal credit approval policies;

(b) That Barcroft Holdings Limited (Barcroft) was not a related party;

(c) That Bridgecorp's financial position was as set out in the registered prospectus, which omitted a material particular, namely the deterioration in Bridgecorp's financial position from the reported financial position for the year ended 30 June 2006;

(d) That in the period 30 June 2006 to 21 December 2006 no circumstance had arisen that would adversely affect the trading or profitability of the charging group; or the value of its assets; or the ability of the charging group to pay its liabilities due within the next 12 months;

(e) As to "liquidity risk":

(i) that Bridgecorp managed "liquidity risk" by maintaining a minimum cash reserve on bank deposit; and

(ii) the omission of a material particular being the actual deterioration in Bridgecorp's liquidity since year end 30 June 2006.

[199] Section 58 of the Securities Act provides:

> **58 Criminal liability for misstatement in advertisement or registered prospectus**
>
> (1) Subject to subsection (2) of this section, where an advertisement that includes any untrue statement is distributed,—
>
> (a) The issuer of the securities referred to in the advertisement, if an individual; or
>
> (b) If the issuer of the securities is a body, every director thereof at the time the advertisement is distributed—
>
> commits an offence.
>
> (2) No person shall be convicted of an offence under subsection (1) of this section if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of the distribution of the advertisement, believe that the statement was true.
>
> (3) Subject to subsection (4) of this section, where a registered prospectus that includes an untrue statement is distributed, every person who signed the prospectus, or on whose behalf the registered prospectus was signed for the purposes of section [[41(1)(b)]] of this Act, commits an offence.
>
> (4) No person shall be convicted of an offence under subsection (3) of this section if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of the distribution of the prospectus, believe that the statement was true.

[200] To make out count 9 the Crown must prove beyond reasonable doubt the following elements of s 58(3):

(a) that one or more of the statements in the particulars to count 9 were included in Bridgecorp's prospectus dated 21 December 2006; and

(b) that one or more of the statements so included was untrue; and

(c) that Bridgecorp's prospectus containing the untrue statement was distributed between 21 December 2006 and 7 February 2007; and

(d) that the accused signed or had signed on his behalf the Bridgecorp prospectus.

[201] If the Crown has proved the above four elements in relation to the accused then the accused is guilty unless s 58(4) applies and he can establish on the balance of probability that either:

(a) the statement was immaterial; or

(b) he had reasonable grounds to believe and did, up to the time of the distribution of the prospectus, believe that the statement was true.

[202] The elements the Crown must prove are common to all accused. The first issue is whether the statement in issue was included in Bridgecorp's prospectus dated 21 December 2006.

[203] A preliminary issue arises as to what is required by way of the "statement" to support the charge. The offences created by s 58 arise from the distribution of an advertisement or registered prospectus that include any untrue statement. Prima facie, that requires the Crown to identify an untrue statement in the prospectus or advertisement.

[204] No difficulty arises where the allegedly untrue statement is expressly set out within the advertisement or prospectus. That is the case in relation to particulars (a), (d) and (e) of count 9 (and in relation to the additional particulars (f), (g) and (h) in the subsequent counts under the Securities Act). However, the particulars at (b), that Barcroft was not a related party and at (c), that Bridgecorp's financial position was

as set out in the registered prospectus, are not expressly set out in the prospectus (or, for that matter in the advertisement).

[205] The Crown submits that as s 55 confirms that a statement may be untrue by reason of an omission the existing particulars pleaded are sufficient. Section 55 provides:

> (a) A statement included in an advertisement or registered prospectus is deemed to be untrue if—
>
> (i) It is misleading in the form and context in which it is included; or
>
> (ii) It is misleading by reason of the omission of a particular which is material to the statement in the form and context in which it is included.

[206] A statement in a prospectus may be untrue if, when taken in context, it is untrue. In *R v Moses* Heath J observed that s 55 is:[29]

> designed to provide a wider meaning to the word "untrue" than its popular use.

Heath J rejected a narrow approach to relevant contextual evidence as unwarranted.[30]

[207] Earlier English authorities confirm the point made by Heath J and which finds statutory expression in s 55.[31]

[208] However, the particular point that has been raised in this case was not the subject of argument in *R v Moses*, nor for that matter in *R v Graham*[32] or the earlier cases under the Securities Act. *R v Rada Corporation Ltd*[33] is somewhat closer to the point. In *Rada*, the directors were charged under s 58 of the Securities Act in relation to a prospectus issued on behalf of Prorada Properties Ltd. The prospectus sought to raise 100 million shares at 50 cents each. Under the heading "Director's statement" the prospectus provided that Prorada Properties would be promoted and

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29 Above, n 4 at [19].
30 At [20]-[22].
31 *R v Kylsant* [1932] 1 KB 442 (CA); *Peek v Gurney* (1872) LR 6 HL 377 (HL) at 386; *Aaron's Reefs Ltd v Twiss* [1896] AC 273 (HL) at 281 and *Arnison v Smith* (1889) 41 Ch D 348 (CA).
32 *R v Graham* [2012] NZHC 265.
33 *R v Rada Corporation Ltd* [1990] 3 NZLR 438 (HC).

50% owned by Rada Corporation and that Rada Corporation's investment would be taken up by Rada Investments Ltd as a wholly owned subsidiary of Rada Corporation. The prospectus, by the wording of the director's statement, effectively represented Rada Investments was in a financial position to subscribe for 50% of the Prorada shares. The directors were charged that the statement Rada Investments was to subscribe to shares to the value of $50 million was untrue in that Rada Investments neither held in cash nor had made any firm arrangement to obtain the $50 million referred to. Both Wylie J (pre-trial) and Barker J proceeded on the basis there was a sufficient statement for the purposes of s 58. The focus was on the issue of the omission.

[209] In *R v Baxter*[34] the untrue statement underlying the prosecution was a general statement in the prospectus that:

> **40.2** Apart from the matter raised in 40.1 [Mr Baxter's bankruptcy in 1988 and discharge in 1991] there are no other material matters not already set out in this Prospectus.

[210] The prospectus sought to raise money for a salvage operation. While the statement was general, it failed to mention the important fact that the vessel referred to in the prospectus was still undergoing a refit and had not, only a few days before commencement of the critical weather period, obtained a deep sea certificate. That was an obvious material omission.

[211] In all the above cases there was either an express statement, albeit a general one, that the omission related to or, if the prospectus did not contain such an express statement, there were words to the general effect of the statement relied on by the prosecution.

[212] While s 55 extends liability to cases of omission, the omission is linked back to the statement: s 55(a)(ii). The omission relates to the statement, but it does not replace the requirement for a statement in the first place. It is not an offence to omit something from the prospectus unless that omission makes a statement in the prospectus untrue. Further, while s 55(b) deems a number of statements to be

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[34] *R v Baxter* [1998] 3 NZLR 144 at 157 (CA).

included in the offer documents if they appear elsewhere they must, to be included, appear elsewhere in the source documents referred to in s 55(b).

[213] The only reference there could be to financial position in the prospectus is to the accounts to 30 June 2006. The Crown's complaint on particular (c), however, is not that the accounts as at 30 June 2006 are incorrect, but rather that there was a failure to disclose a deterioration between 30 June 2006 and the issue of the prospectus in December. The accounts recorded Bridgecorp's financial position as at that date and not later. There is no statement which the omission alleged can relate to. As a matter of logic, the position in December would necessarily be different to the position in June.

[214] The Crown may have been on stronger ground on this particular if it had relied on the director's statement in the prospectus that:

> The 2006 financial result puts the Bridgecorp Group in a strong position to move forward over the coming years.

[215] That statement appears in both the prospectus and the term investment statement. The Crown does not, however, allege that as one of the particulars of the counts in the indictment and there was no request to amend during the trial.

[216] In summary, to support the count the charge must identify either a statement in the prospectus (or other documents incorporated in the prospectus by s 55(b)) or at least words that have the effect of making such a statement or representation. Given that s 58 creates a criminal offence (and one of strict liability), any ambiguity as to what is required ought to be construed against the Crown. The Crown is not able to rely on a general proposition such as that alleged in particular (c) to the indictment that "Bridgecorp's financial position was as set out in the registered prospectus" as a basis for alleging that that general proposition was misleading because it contained an omission, when that omission related to an alleged deterioration in position after the date of the accounts which set out the financial position as at a certain date.

[217] I therefore find that the Crown cannot prove particular (c) as it appears in counts 9 to 18 (inclusive) beyond reasonable doubt.

[218] I return to the other particulars. Particular (a) is contained in an introductory part of the prospectus.

[219] Next is particular (b). While there is no express statement in the prospectus that Barcroft was not a related party, note 15 to the financial accounts which deals with related party issues, includes a narrative stating that Barcroft is an unrelated company. Further, in the same note, which identifies loans to related parties, there is no reference to Barcroft. The accused accept that, although the transaction was referred to as a sale, it was treated as a loan. By omitting any reference to Barcroft in the section of the accounts providing for loans to related parties, the prospectus effectively represents Barcroft was an unrelated party. In the circumstances I accept that there is a sufficient statement to the effect that Barcroft was not a related party to support particular (b).

[220] Particular (d) is contained in the director's statement at the conclusion of the prospectus.

[221] A statement to the general effect of particular (e)(i) is contained in the prospectus. The statement is more accurately that Bridgecorp managed liquidity risk "by having a policy" of maintaining a minimum cash reserve held on bank deposit, rather than as recorded in the particular pleaded. I amend the indictment to include those words.[35]

[222] There is also an express statement to the effect that details of Bridgecorp's liquidity profile are set out in the audited financial statements contained in the prospectus which, I accept, provides a sufficient statement as a basis to support the allegation in (e)(ii) of an omission of a material particular, namely the deterioration in Bridgecorp's liquidity since the date of the statements.

[223] Therefore, with the exception of particular (c), I accept the statements identified in the particulars were included in the registered prospectus.

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[35] Crimes Act 1961, s 335(1).

[224] I turn to the second issue the Crown must prove, that one or more of the statements contained in the particulars and included in the prospectus was untrue. A statement may be untrue if it is misleading in the form and context in which it is included or if it is misleading by reason of an omission of a particular which is material to the statement in the form and context in which it is included.[36] I also accept Heath J's proposition in *R v Moses* that whether a statement is misleading is to be judged contextually and not literally. Even if there is some truth in what is said, a statement that fails to divulge the whole truth may be false and therefore misleading.[37]

[225] In this context and in relation to whether the statements are misleading in that way, I also bear in mind the concept of the notional investor referred to and discussed in the cases of *R v Moses* and *R v Graham.* In *R v Moses* the notional investor was identified as someone who: [38]

- falls somewhere between one who is completely risk averse and someone who is prepared to take a high level of risk;

- can be expected to know that the higher the interest rate offered, the greater the risk of loss;

- is sufficiently intelligent and literate to understand the language employed in the narrative sections of both an investment statement and a prospectus;

- has a general understanding of technical words (such as "debenture") and financial jargon (such as "roll-over");

- is expected to focus more on the narrative of the offer documents than on the financial statements;

- would seek assistance from a financial adviser;

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36 Securities Act 1978, s 55(a).
37 Above, n 4 at [42].
38 At [65]-[70].

- is not expected to be financially literate (in the sense of being able to read financial statements, to comprehend all aspects of what is disclosed and to understand how the various parts of statements of accounting policies fit together), but is likely to have sufficient ability to comprehend competent advice about such matters;

- is of modest financial means; neither rich nor poor; and

- is unlikely to have the financial capacity to obtain detailed accounting advice; much less a forensic analysis of the financial data.

[226] Dobson J would include within the range someone who may not seek investment advice despite realising that he or she is a non expert when it comes to weighing up investment decisions. However, I accept there is force in the submission advanced by Mr Keene that, as the test involves the prudent investor it must be contemplated that, to the extent such a notional investor is unable to understand any material aspect of the prospectus or other documents, including the financial statements, he or she would seek appropriate advice.

[227] Mr Keene also addressed a further preliminary submission criticising the date range applied by the Crown in the counts under the Securities Act. He submitted that the Crown must prove that the statements are untrue as at the first date of the various periods stated. He supported that submission by reference to the following passage from Dobson J's decision in *R v Graham*:[39]

> In the context of these particular charges, I am not satisfied that the Crown can make out an alternative form of relevant omission in respect of impairment at some unspecified point after the date of issue of the amended prospectus on 24 December 2007, without stating the events or dates or circumstances of deterioration that allegedly ought to have been recognised by the directors as requiring further disclosure. Conceptually, the stance for the Crown could require the accused to reflect on the prospect of material deterioration on each day that the prospectus remained before the public. Defending that position in respect of LFIL without the Crown being committed to the events or circumstances that individually or cumulatively required reconsideration does not meet the Crown's obligation under s 329(4) of the Crimes Act.

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39 *R v Graham*, above n 32 at [217].

[228] Dobson J's comment was in the context of a particular alleging the omission of material particulars relating to the impairment and recoverability of loans for five major borrowing groups on or after 24 December 2007. During the course of the trial Dobson J had raised with Crown counsel whether, if the Crown could not make out a material omission in respect of the impairment at 24 December 2007, the Crown relied on any milestones in the period thereafter as triggering such a requirement. Crown counsel did not seek to identify any such milestones or dates, but relied on the directors' obligation to appreciate the general state of deterioration in both the market and the level of risk to which its major loans were exposed. Dobson J's conclusion that the Crown could not meet its obligation under s 329(4) of the Crimes Act to adequately particularise the counts is, with respect, quite understandable in those circumstances.

[229] In the present case, while the counts include a reference to time bands during which it is said the prospectus including the untrue statements was distributed, the counts are framed and the case has been presented with sufficient detail in relation to the underlying particulars and the "milestone" dates the Crown relies on to establish the untruth of the statements and the respective accused's state of mind at relevant times.

[230] Nothing turns on this point in relation to count 9 in any event because, in the context of the particulars pleaded in count 9, the allegedly untrue statements must have been untrue as from the first date in the count. In relation to later counts where the Crown relies on further defaults or deterioration in position during the time period specified, details of the defaults, or milestones, were sufficiently identified during trial (and the background information was disclosed prior to trial).

[231] I now turn to consider whether the Crown has proved the statements were untrue.

*Particular (a): That Bridgecorp would/did not provide credit or advance loans other than in accordance with good commercial practice and internal credit approval policies.*

[232] In support of this general particular and in response to a request for further particulars the Crown have identified the following statements in the prospectus:

> The Trust Deed provides that Bridgecorp cannot advance loans or provide credit to any person other than in accordance with good commercial practice and the credit approval policies approved by the Trustee.
>
> ...
>
> In addition to the general requirement that all loans must be made in accordance with good commercial practice and the credit approval policies approved by the Trustee, the Trust Deed states that:
>
> - loans to the parent company, BHL, may not exceed 5% of the Total Tangible Assets of the Charging Group; and
>
> - loans to subsidiaries outside the Charging Group may not exceed 22.5% of Total Tangible Assets of the Charging Group.
>
> ...
>
> Bridgecorp and each other member of the Charging Group also covenant in the Trust Deed, amongst other things:
>
> (a) not to provide credit to any Person otherwise than in accordance with good commercial practice and the Security Lending Criteria.
>
> ...
>
> *Security Required*
>
> Generally. we require security for the majority of our lending. Securities taken include first, second and subsequent mortgages over land. On smaller transactions where there is a delayed land settlement, we may choose to place a caveat on the land and take an assignment of the sale and purchase agreement as security. In the case of corporate borrowers, security is generally supported by a security interest registered under the Personal Property Securities Act 1999 over all the borrowing company's assets. In the case of corporate or trust borrowers, personal guarantees are generally also sought.
>
> ...
>
> Generally, all new loan applications must be supported by a registered valuation and detailed project feasibility. Where the borrower is a company or a trust, we generally require personal guarantees.

All new loan applications are subject to careful assessment by Bridgecorp's Property Finance Unit and Credit Risk Department in accordance with our credit approval policies. All new loans are approved in accordance with our delegation of credit discretions policy and managed and reviewed on an ongoing basis by the Property Finance Unit.

...

The most significant credit risk is the risk that Bridgecorp is not able to recover loans in full from borrowers. Bridgecorp manages its exposure to credit risk by adhering to strict credit approval policies that have been approved by the Trustee.

All new loan applications are subject to careful assessment by Bridgecorp's Property Finance Unit and Credit Risk Department. All new loans are approved in accordance with our delegation of credit discretions policy and managed and reviewed on an ongoing basis by the Property Finance Unit.

...

Bridgecorp generally requires security for the majority of loans in the form of first, second or subsequent mortgages over real property. In addition, where the borrower is a company or a trust, we generally require personal guarantees.

...

Property development funding of the kind undertaken by Bridgecorp is subject to further risks that the development may not be completed, that the costs of construction may exceed the budgeted amount or that the contractor may become insolvent and fail to complete the development. To mitigate these risks, we usually require a certain level of pre-sales, construction costs to be locked in with a fixed price building contract, and that the building contractor is reputable and acceptable to us.

Bridgecorp will generally only lend up to a loan-to-value ratio (being the ratio of debt secured against the property owing to Bridgecorp and all other prior charge holders, to the completed value of that property determined by a registered valuer on a cost to complete basis or (if applicable) the aggregate amount of unconditional sale prices) of 75%. There may be occasions where the loan-to-value ratio on a loan exceeds 75%, but in such instances we mitigate risk by fixing costs and securing pre-sales to ensure the exit strategy or an acceptable residual loan-to-value ratio position is achieved.

...

There is a risk that Bridgecorp could become overly exposed to any one individual borrower. We manage this risk by limiting individual counterparty exposure to a single borrower, or group of related borrowers, to no more than 5% of the Charging Group's Total Tangible Assets unless unanimously approved by Bridgecorp's board of directors.

...

> Bridgecorp and each other member of the Charging Group also covenant in the Trust Deed, amongst other things:
>
> a. not to provide credit to any Person otherwise than in accordance with good commercial practice and the Security Lending Criteria.

[233] The Crown case on this particular is largely based on Mr Graham's analysis of eight loans, his opinion as to what constitutes good commercial practice for a property finance company, and excerpts from Bridgecorp's procedures manual containing its internal credit approval policies. The loans in question are:

- Dhuez Ltd and Akau Ltd;
- Myers Park Apartments Ltd;
- Victoria Quarter Depot Site Ltd;
- Kinloch Golf Resort Ltd;
- Gateway to Queensland Real Estate (NZ) Ltd;
- Bendameer AP Ltd;
- West Auckland Residential Developments Ltd;
- the Barcroft transaction.

[234] Although there was some criticism of the Crown's choice of these eight loans as unrepresentative, they are eight of the nine most substantial loans made by Bridgecorp.

[235] The defence case is that the loans on the projects in question were initially made a number of years before the prospectus in issue, they were not uncommercial at that time, and were not considered uncommercial by senior members of the Bridgecorp management team, including Mr Jeffcoat and Mr Kumar. It is also said that to the extent the loans may not have complied strictly with internal credit policies, when the prospectus is read as a whole it contained detailed disclosures

relating to Bridgecorp's lending practices and the risks associated with such practices so that the statement was not, in substance, untrue.

[236] As noted, Mr Graham discussed the characteristics of good commercial lending practice for a property finance company and identified key aspects of Bridgecorp's internal credit policies. In his opinion the loans he analysed did not comply with good commercial practice nor with Bridgecorp's internal credit loan policies.

[237] While Mr Graham acknowledged that a number of the loans were in effect work-out loans, it seemed to be his opinion that the appropriate approach would have been to acknowledge the impairment in the existing loans and, if necessary, to book that and then to consider whether further lending was appropriate. But as Mr Cato submitted, that is a different point. The issue under particular 9(a) is not impairment. It is whether, taken as a whole, the statement in Bridgecorp's prospectus as identified at 9(a) is untrue.

*(i) Kinloch/Bendemeer*

[238] I am not able to accept the Crown case in relation to the Kinloch and Bendemeer loans. Mr Graham himself noted that in relation to the Kinloch loan the initial approval complied with company policy. His complaint was more directed at aspects of the administration of the loan. Particular (a) to count 9, however, refers to the provision of credit or the advancement of loans, not to the administration of the loans.

[239] In relation to Bendemeer Mr Graham conceded that, in general, the loan appeared to have been advanced and managed in accordance with Bridgecorp's credit policies. He did, however, identify a number of issues he believed did not represent good commercial practice including the release of a personal guarantee (which occurred after the advance) and the alteration to a number of conditions in the original loan offer.

[240] Mr Graham went on to note that the key issues with the Bendemeer loan were not so much bad management but more related to Bridgecorp's position as second mortgage lender. But investors were advised in the prospectus of Bridgecorp's practice as a second mortgage lender and the risks associated with that:

> As Bridgecorp permits lending supported by second or subsequent mortgages, and lends on the basis of the assessed completion value of projects (rather than their assessed current value from time to time, as do trading banks), it carries a greater level of risk if the market experiences a downturn or the borrower otherwise fails to repay the loan. ...

[241] Mr Lazelle considered both the Kinloch and Bendemeer loans. He concluded that Bridgecorp was committed to support the Kinloch project. In relation to Bendemeer he concluded that Bridgecorp's management of the loan indicated commercially acceptable practice. Like Mr Graham he noted Bridgecorp's rights as second mortgagee were subject to restriction.

[242] I am not satisfied the Crown can establish that particular (a) was untrue in relation to the Kinloch and Bendemeer loans.

*(ii) Dhuez/Akau*

[243] Mr Graham categorised the Dhuez and Akau loans as an attempt by Bridgecorp to minimise an already substantial loss in relation to a previous loan involving two developments undertaken by Mr Clode. Bridgecorp was left with a residual debt of $11.8 million secured against a partly completed development of 42 townhouses in Whitney Street, Blockhouse Bay, Auckland. In June 2004 Dhuez Ltd (a Blue Chip company) purchased the Whitney Street development from Clode for the value of Bridgecorp's loan, $11.8 million. Bridgecorp made a fresh loan to Dhuez. In addition Bridgecorp provided working capital to fund remedial work to enable sales of the townhouses. Bridgecorp also advanced a further $1.44 million to a company associated to Blue Chip to enable it to acquire Tasman Insurance Brokers Ltd and six million to Akau Ltd to enable it to repay the first mortgage on a site at Beach Road, Auckland. The Akau development was forecast to generate a $14 million profit. Mr Graham noted the loan-to-value ratio (LVR) for Dhuez and Akau combined at 82% was outside Bridgecorp's 75% internal policy limit. In his view

even the 82% figure was questionable as it was supported by pre-sales at an inflated figure. Mr Graham was again critical of certain aspects of the administration of the loans.

[244] The Dhuez and Akau loans were effectively work-out loans made with the intention of addressing the situation Bridgecorp was in with the original advance. They were advanced in 2004. I accept the general thrust of the defence submission on this issue that work-out loans are in a different situation to new lending.

[245] The statement in particular (a) appears in the section of the prospectus that refers to new loan applications. But the prospectus distinguishes between new loans and situations that might arise where loans developed adverse features. The new loans section is followed by a reference to the steps that Bridgecorp takes if an existing loan develops adverse features. It says that the loan file is transferred to the credit recovery department for ongoing management and recovery (if necessary). The work-out loans were effectively part of the ongoing management of existing loans which had developed adverse features. In context I am not satisfied that advances that can properly be categorised as part of the work-out of an existing loan come within the statement in particular (a). Further, taken overall the evidence does not support the finding beyond reasonable doubt that such work-out loans were made (at the time they were made) other than in accordance with good commercial practice. In cross-examination Mr Graham accepted that the property market in 2004 was quite different to that in 2006 and 2007. It must be the case that reasonable commercial lenders would vary in their views as to whether it was better to terminate the loan and cut the losses at a particular stage or, by advancing further moneys and engaging another developer, seek to complete a development. I note that between 19 January and receivership $2.012 million (net) was recovered from the Dhuez and WARD loans.

[246] Next, I note that the prospectus warned of the risks associated with Bridgecorp's business of funding property development:

> Property development funding of the kind undertaken by Bridgecorp is subject to further risks that the debt may not be completed, that the costs of construction may exceed the budgeted amount or that the contractor may become insolvent and fail to complete the development. To mitigate these

> risks, we usually require a certain level of pre-sales, construction costs to be locked in with a fixed price building contract, and that the building contractor is reputable and acceptable to us.

[247] On the specific issue of the LVR, the prospectus disclosed that the 75% LVR was a general policy:

> ... generally only lend up to a loan-to-value ratio (being the ratio of debt secured against the property owing to Bridgecorp and all other prior charge holders, to the completed value of that property determined by a registered valuer on a cost to complete basis or (if applicable) the aggregate amount of unconditional sale prices) of 75%. There may be occasions where the loan-to-value ratio on a loan exceeds 75%, but in such instances we mitigate risk by fixing costs and securing pre-sales to ensure the exit strategy or an acceptable residual loan-to-value ratio position is achieved.

[248] In the case of Dhuez and Akau there were pre-sales in place. While Mr Graham challenges the value ascribed to those pre-sales, that is with a degree of hindsight. In any event, I note the reference in the prospectus is again in general terms in that it refers to "usually" requiring a certain level of pre-sales.

[249] I conclude that the Crown cannot prove the statement in particular (a) is untrue in relation to the Dhuez and Akau loan.

*(iii) Myers Park Apartments Ltd*

[250] In June 2004 Bridgecorp approved a $14.6 million loan in respect of a development at 239 Queen Street, Auckland (Myers Park). The purpose of the loan was to refinance the first and second mortgages from Westpac and Auckland Finance totalling $6.2 million, provide further development funding and also to refinance a $2.5 million shortfall/loss on four existing loans to the Kells Group of Companies which were associated with the development at Myers Park. While the development had resource consent it still required further consents from the owners of the remaining retail space in the existing buildings. Mr Graham identified a number of features of which he was critical:

- the developer did not have consent from the owners of the balance of the retail space;

- the LVR at origination was 93%;

- the security calculations were completed on the basis of "as completed" valuations despite the fact the developer did not hold appropriate consents to enable construction;

- of 153 pre-sales recorded when the loan was advanced 38 pre-sales were to one purchaser in breach of Bridgecorp's policy that pre-sales to any one purchaser should not exceed five units or 20% of the total complex. The pre-sales were subject to cancellation and had a sunset clause.

[251] I note again that the potential investors were told that the 75% was a general rule only as was the pre-sales level. Further, as noted above, Bridgecorp made it clear that as its lending was to developers it did so on the basis of the assessed completion value of the projects (as opposed to "as is" valuations as suggested by Mr Graham). Next, Mr Petricevic's evidence, (which I accept on this issue), was that, in relation to the lack of consent for Myers Park, the solicitors for the borrowers advised that the costs of litigation involving the consents would be less than the cost of inducements to the body corporate members to obtain the consent at around $70,000. In the context of the loan advance the $70,000 required to obtain the consent was not material. It was also, in part at least, a work-out loan. The Myers Park loan does not support the allegation in particular (a).

*(iv) Victoria Quarter Depot Site*

[252] The Victoria Quarter Depot Site Ltd advance was not a work-out loan. In August 2004 Bridgecorp provided a loan of $21.5 million to First Class Baggage Ltd. A further $11.5 million was provided by City West Ltd (CWL). The purpose of the loans was to:

(a) settle a $13 million purchase of a property bordered by Nelson Street, Cook Street and Wellesley Street;

(b) purchase leasehold interests, a third from CWL of $10 million and two-thirds from a Bridgecorp related company $20 million; and

(c) advance $3 million in relation to working capital for the project.

Bridgecorp owned 50% of the lessor's interest in the project through Bristol Securities Ltd and the lessee's interest through a related company. The project involved a substantial development envisaging some 20 new buildings.

[253] Mr Graham was critical of a number of aspects of the transaction which he described as very complicated. In particular Mr Graham identified the following defects in relation to this advance:

- the feasibility analysis for the proposed development was a one-page, work in progress document.

- The LVR at origination was 161%. The LVR calculation was based on lessee valuations which assumed the resource consents were approved.

- At loan origination the development did not have resource consent;

[254] Mr Kumar prepared a memorandum[40] and report for Mr Drummond and the executive committee in relation to the Victoria Quarter Depot Site Ltd in June 2006. Mr Kumar's report outlined a number of matters in relation to the loan that raised issues specifically concerning Bridgecorp's credit policies. Further, internal emails in Bridgecorp recorded that the:

> ... deal was not done through our normal lending procedures, it is/was a Paul Priddey "baby" and all documents were signed by Rod and Rob ...

[255] The evidence satisfies me that whatever the commercial justification for the advance, the moneys advanced in relation to the Victoria Quarter project were in clear breach of Bridgecorp's internal credit approval policies. The Victoria Quarter loan supports the Crown case that the statement in particular (a) was untrue.

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[40] Exhibit 299.

*(v) Gateway to Queensland Real Estate (NZ) Ltd*

[256] This loan relates to the Oceans Resort Hotel and apartment complex in Tutukaka. The complex was originally developed by Jadco Investments with a loan from Bridgecorp. By July 2006 the complex had incurred a total debt of $14.9 million (made up of a first mortgage to Equitable of $8.1 million and a second mortgage to Bridgecorp of $6.8 million). The partially uncompleted complex was running at a loss. To avoid a liquidator being appointed it was agreed Jadco would sell the complex to Gateway to Queensland with Bridgecorp's assistance. Bridgecorp's loan to Gateway to Queensland was a work-out loan. The complex was sold to Gateway to Queensland at the level of the project debt at the time, namely $14.9 million. The terms and conditions were agreed in late 2006. In Mr Graham's opinion the following are the principal defects with the loan advance:

- the original loan to Jadco should have been placed under credit management. That may be correct with the benefit of hindsight. But a commercial decision was made to advance money to Gateway to Queensland to take the project over. I do not accept this first point;

- the LVR's origination was 97%. Bridgecorp's position was weakened as a consequence of the transaction. Again, the general practice was disclosed in the prospectus.

- the valuation report was six months old;

- there was a delay in finalising the F40;

- there were no effective guarantors.

[257] The Gateway to Queensland loan was another work-out loan made in the context of the commercial situation that Bridgecorp faced with Jadco at the time. Jadco, an unsuccessful developer, was replaced with an organisation that had a reputation for completing developments. The Crown has not proved that it was not a

reasonable commercial decision. Mr Kumar accepted that it was a work-out loan and that it was made on different terms to a new loan.

[258] The same point applies to the internal credit policy issues. The statements in the prospectus were general. The variations from it were not marked.

[259] I am not prepared to find beyond reasonable doubt that the circumstances surrounding the Gateway to Queensland loan supports the conclusion that the statement in particular (a) is untrue in relation to that loan.

*(vi) West Auckland Residential Developments Ltd (WARD) loan*

[260] The loan relates to the St Clair Retirement complex at Te Atatu. The development was funded by Bridgecorp but was only partially completed when it ran into difficulties in 2003. WARD was established to take over the loan. WARD was controlled by property developers Ottow and Burke, who were known to Bridgecorp. WARD agreed to purchase the St Clair development for $19.2 million late in 2003 funded by a $9.1 million first mortgage from National Mortgage and a $10 million advance by Bridgecorp. WARD was to complete the development and share 50/50 in the profit with Bridgecorp.

[261] Mr Graham identified a number of aspects of the administration of the loan he believed were not in accordance with good commercial practice or with Bridgecorp's internal credit policies as follows:

- the LVR at origination exceeded 75%. He calculated it to be approximately 131% yet the figure quoted on the front page of the F40's, Bridgecorp's internal loan application form, was 72%;

- WARD showed an absence of independent feasibility studies for stages 3 and 4 of the development;

- stage 4 was going to be crucial if Bridgecorp was to recover its loan yet stage 4 had no resource consent.

- Bridgecorp's December 2005 F40 identified the loan as not complying with Bridgecorp's standard business rules in a number of respects;

[262] Again the WARD loan was a work-out loan. There is no evidence the issues Mr Graham identified in 2005 were present when the initial loan was made. I note Mr Kumar did not seem unduly concerned about the WARD advance. He said:

> ... Our stepping in in itself is very often a good step, so that thing itself doesn't warrant the loan to be bad. It's very often, what does happen is that after we step in it takes us awhile to settle down and get things in place and streamlined to safe guard our interests. ... it was good that we stepped in and took over the reins, so to say, got into the shoes and tried to make it move forward. Typically when that happens over a five or six month period there could be certain aspects of the whole process that can be streamlined, strengthened, and when an audit review is done we identify such situations and express them to management as process improvements.

[263] Mr Kumar accepted that he did not see the WARD loan as something which was uncommercial or which should be disclaimed. I also note that there were recoveries up to the date of receivership and at the time of Bridgecorp's receivership stage 3 of the development had been completed. Stage 4 was still to be completed.

[264] In the circumstances the Crown fails to prove beyond reasonable doubt that the WARD loan supports the allegation particular (a) is untrue.

[265] The remaining loan the Crown relies on to prove particular (a) is the Barcroft transaction.

*(vii) The loan to Barcroft*

[266] The first point in relation to the Barcroft transaction is that the narrative in the prospectus that deals with it refers to it as a sale. It appears in note 15 to the accounts as follows:

| Loans to related parties | 2006 | 2005 |
|---|---|---|
| | $'000 | $'000 |
| **CURRENT** | | |
| North Ryde Property Pty Ltd* | - | 13,391 |
| Urwin Fernandez (Fiji) Ltd* | - | 3,054 |
| Manukau City Hotel Projects* | - | 4,052 |
| | | 20,497 |

** members of UFB Pacific Limited Group*

> The above loans were made on normal commercial terms and conditions.
>
> In December 2003, BHL, the parent entity of the Company, established UFB Pacific Limited, a 50:50 joint venture with a company associated with the Urwin Fernandez Group. The Urwin Fernandez Group is a shareholder in Bridgecorp Holdings Limited, and Mr G.K. Urwin is a director of BHL and the Company. UFB Pacific Limited sources and develops hotel and resort projects. BHL provides funding for individual projects while the Urwin Fernandez Group provides access to the hotel operator and project management. Within the UFB joint venture are the Marriot Courtyard hotels operating at North Ryde (Sydney), Parramatta and Surfers Paradise, and the development of a Marriot-managed hotel and resort complex in Fiji scheduled for completion in stages from late 2006.
>
> **By agreement dated 30 June 2006, the Company and Bridgecorp Finance (Australia) Pty Ltd ("BFAL" – a subsidiary of the Company), sold certain loans in the ordinary course of business, including loans to members of UFB Pacific Limited Group, to Barcroft Holdings Ltd ("Barcroft"), an unrelated company incorporated in New Zealand, for $76,759,081.** The purchase price for the loans was payable by the issue of certain notes by Barcroft. Barcroft's obligations to each of Bridgecorp ("BL") and Bridgecorp Finance (Australia) Pty Ltd ("BFAL") are secured in each case by a general security agreement in respect of Barcroft's present and after -acquired property and a specific security agreement in respect of the acquired loans and their proceeds.
>
> (emphasis added)

[267] Despite that description as a sale, the Barcroft transaction has been treated in Bridgecorp's accounts as a loan. The $76,759 which reflects the underlying loans to the UFB Pacific Ltd Group and others is included in the accounts to 30 June 2006 under "mortgages and loans".

*(viii) The background to Barcroft – Momi Bay*

[268] Among the principal reasons for Bridgecorp's ultimate failure was its lending in relation to a development at Momi Bay, Fiji and the other loans related to its joint ventures with the Urwin Fernandez Group, a company associated with Mr Urwin and his interests which ultimately became the Barcroft transaction. Momi Bay was also a principal reason Bridgecorp entered the Barcroft transaction.

[269] Momi Bay was a significant development not far from the main airport at Nadi. It was to be developed in two stages. The first stage involved a nine hole golf course, a subdivision providing for separate units on individual residential lots, a Marriott resort hotel, a lagoon and beach (to be created). The stage 2 development provided for the completion of the golf course to an 18 hole course, the construction of a more luxurious Ritz Carlton hotel and the further subdivision of residential lots for individual ownership.

[270] Momi Bay was developed by Matapo Ltd (Matapo) a subsidiary of UFB Pacific Ltd. UFB Pacific subsequently changed its name to REAL Estate Assets Ltd (REAL). It was a joint venture between BHL and the Urwin Fernandez Group. By 30 June 2005 Bridgecorp had advanced $45,370,395 to Matapo for the development of Momi Stage 1. That loan was, however, treated as a receivable in the accounts of Bridgecorp as at 30 June 2006 on the basis of pre-sales of residential lots in stage 1 assigned or charged to Bridgecorp. The accompanying narrative to the accounts stated:

> Other receivables is made up of an assigned third party receivable of $45,370,395 arising from the sale of properties at Momi Bay, Fiji which is a development being carried out by Matapo Ltd, a subsidiary of UFB Pacific Ltd (a related party). The receivable is due for settlement by 31 December 2006 for $47,684,739.

[271] As noted, the Momi receivables related to Momi stage 1. The Momi stage 2 land was acquired towards the end of 2005 by a trust called the Pacific Trust. Although Matapo, which owned Momi stage 1, held an option to acquire stage 2, the consents in relation to stage 2 had run out. The vendor took the view that the previous consents held by Matapo were void and the land could be resold. An

arrangement was made to have a Fijian entity purchase Momi stage 2. As a result of the Barcroft transaction, Bridgecorp obtained a guarantee from Muainarewa Resorts Ltd (MRL), the trustee of Pacific Trust, to support the debt owing by Barcroft.

[272] I deal with the relationship between the various parties when considering particular (b). For present purposes the issue is whether the loan to Barcroft was made otherwise than in accordance with good commercial practice and in breach of Bridgecorp's internal credit policies.

[273] The seven loans which underlay the subject of the Barcroft transaction were as follows:

| **Borrower** | **Lender** | **Net Book value as at 1 June 2006** | **Maturity date** |
|---|---|---|---|
| Manukau Hotel Developments Ltd (NZ) | Bridgecorp | 8.8 million | 31 January 2006 |
| REAL (formerly UFB Pacific Ltd) NZ | Bridgecorp | .03 million | 27 September 2006 |
| Matapo (through Urwin Fernandez Fiji Ltd | Bridgecorp | 22.2 million | 31 December 2007 |

[274] In addition there were the additional loans owing to Bridgecorp Finance Australia Ltd, (BFAL) a member of the charging group:

| **Borrower** | **Lender** | **Net Book value as at 1 June 2006** | **Maturity date** |
|---|---|---|---|
| North Ryde Property Pty Ltd, loan number 1043 | BFAL | 16.9 million | 30 June 2006 |
| North Ryde Property Pty Ltd, loan number 1073 | BFAL | 17.4 million | 30 June 2006 |
| Muainarewa Resorts Ltd (MRL) | BFAL | 1.5 million | 30 June 2006 |
| Australian Hotel Acquisition Ltd | BFAL | 9.6 million | 30 August 2006 |

[275] Mr Petricevic referred to those loans and the lending to Urwin Fernandez in his evidence. He said that in early 2006 he wanted Bridgecorp to sell the Australian hotels to improve its liquidity. However, Mr Urwin would not agree to the sale as he considered that the hotel projects would ultimately provide more profit in the future if they could be further developed.

[276] I infer that Mr Urwin saw the offer of additional security over Momi stage 2 as a means to achieve his aim of an extension in the term of the existing loans. In preparation for the Barcroft transaction Mr Urwin and Mr Roest took a number of steps to structure MRL and the Pacific Trust and to advance the transaction before instructing Mr Dawson, a commercial lawyer in relation to it on 28 June.

[277] Effectively, in exchange for extending and consolidating the loans owing to Bridgecorp and BFAL by the related parties associated with Mr Urwin until December 2008, Bridgecorp obtained the further security of Momi Stage 2. It also obtained a $5 million fee which it booked in its accounts to the year of 30 June 2006 but which was to be capitalised and paid at the conclusion of the period.

[278] Mr Dawson considered there to be a real commercial benefit to Bridgecorp in the transaction, namely that Bridgecorp obtained MRL's guarantee which was supported by the Pacific Trust's ownership of Momi stage 2. He considered the most likely source of repayment in the future for the borrowing in relation to the overall Momi development was the sale of Momi stage 2.

[279] Ultimately the security was not able to be registered because it would have incurred stamp duty in Fiji and possibly Australia as well. Instead MRL agreed to grant a mortgage if called upon. Mr Dawson considered that was the best result.

[280] The Crown fails to prove that the Barcroft transaction was made otherwise than in accordance with good commercial practice. In exchange for extending the repayment date for the loans underlying the transaction, Bridgecorp obtained a security which, at the time, was considered to have real value and also booked a fee of $5 million. Mr Dawson's evidence supports the commerciality of the transaction.

[281] I turn to consider the issue of the Barcroft transaction's compliance with Bridgecorp's internal lending policies.

[282] Mr Graham only briefly referred to the Barcroft loan in this context. He noted pre-sales to one purchaser exceeded five units, that there were no values held for Fiji, the LVR was unknown and there was no record of formal approval by the board.

[283] Mr Kumar raised a number of issues concerning the underlying loans in reports of 27 February 2006, and 29 May 2006. He also regularly reported on the transaction in his internal audit reports to the audit committee. In his November and December 2006 reports Mr Kumar detailed the ways in which he considered the transaction failed to comply with Bridgecorp's standard lending practices. He was concerned that he could not locate relevant documents.

[284] But as Mr Keene submitted, the loans underlying the Barcroft transaction had been audited by the internal auditor prior to Mr Kumar. While that audit also identified deficiencies in the documentation the deficiencies seem to have been resolved given the unqualified audit report that followed which confirmed all necessary documentation was located. Also Mr O'Sullivan (the finance director before Mr Roest) had noted the file in March 2005 that certain security documents and valuations for Momi stage 1 were held by him.

[285] While Mr Kumar continued to report documentation as missing, it was also his initial evidence that he was not provided with the bundle of documents relating to the transaction until December 2006. He said Mr Urwin gave him the documents at a board meeting. When it was pointed out Mr Urwin was in fact in Fiji at the time, Mr Kumar ultimately accepted he must have received the documents earlier. Mr Hawkes accepted he had received most of the information relating to Barcroft by November 2006.

[286] A considerable amount of evidence was also given as to the preparation of an F40 for the Barcroft transaction. A detailed F40 was prepared which disclosed the failings in procedure. A much shorter version was ultimately presented to the board.

I consider the difference to be largely irrelevant. The accused accept that an F40 was not prepared before the transaction was completed. One was prepared later, for the record. But the Barcroft transaction was never an ordinary loan transaction. An F40 was not relevant to it. F40's and the credit approval policies were to ensure management compliance with lending procedures. The Barcroft loan was agreed to directly at board level.

[287] While the Barcroft transaction was not made in accordance with internal credit policies, the real issue is whether the statement in the prospectus that Bridgecorp would only advance loans on commercial terms and in accordance with its internal credit policies relates to it at all. Again, in context, the statement relates to new loans advanced in the general course of Bridgecorp's business. Significantly, (subject to the related party issue) the Barcroft transaction was fully disclosed in the prospectus. Apart from the reference in the notes to the financial statements, the Barcroft transaction was disclosed in its entirety under the material contracts section. That section was drafted by Mr Dawson. I note the disclosure records that there was an oral agreement dated 30 June 2006 pursuant to which Bridgecorp and BFAL sold certain loans to Barcroft. It then details the various notes, the security and the loan administration agreements and escrow agreement. Any notional investor reading the prospectus would be aware that the terms and structure of the Barcroft transaction were quite outside the standard range of lending that Bridgecorp generally involved itself in. Further, I note the trustee reviewed the Barcroft transaction and apparently accepted Minter Ellison Rudd Watts' argument that trustees' consent was not required and, if it was, that it should consent.[41]

[288] Putting the related party issue to one side for the moment, the Barcroft transaction was fully disclosed in the prospectus.

[289] It follows, that while I accept that the Barcroft transaction does not comply with Bridgecorp's internal lending policies it was not a loan to which those policies applied and the transaction was disclosed. This aspect of the Barcroft transaction does not support the Crown case in relation to particular (a).

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41 Exhibits S26, S27.

[290] To summarise, I find that the Victoria Quarter loan was not made in accordance with Bridgecorp's internal credit approval policies, but I am not prepared to find, beyond reasonable doubt, that particular (a) to count 9 was, in context, untrue in relation to the remainder of the above loans.

*Particular (b): That Barcroft Holdings Limited was not a related party*

[291] While there is no express statement in the Bridgecorp prospectus that Barcroft was not a related party, a reasonable reader (by which I mean a notional investor) of the prospectus is left with the clear impression that Barcroft is not a related party. I agree with Mr Graham's evidence that the clear impression that the narrative to note 15 particularly "[Barcroft] is an unrelated company" gives is that Barcroft is unrelated to Bridgecorp. It is the use of the word "unrelated" that carries the significant meaning of independence for most readers, the word that follows it, "company" or "party" is not so important.

[292] It is convenient to deal with the issue of Barcroft as an unrelated company at this point. It was suggested, as part of the Crown case, that one reason for the Barcroft transaction was to avoid the reporting requirements under the relevant provisions of the trust deed. Under cl 4.1(a)(iv) Bridgecorp covenanted that:

> the aggregate value of all Secured External Loans shall not exceed an amount equal to 22.5% of the Total Tangible Assets of the Charging Group.

[293] Defence counsel engaged with that argument, and some time was spent on the issue of whether Barcroft was or was not, a related company (as distinct from a related party).

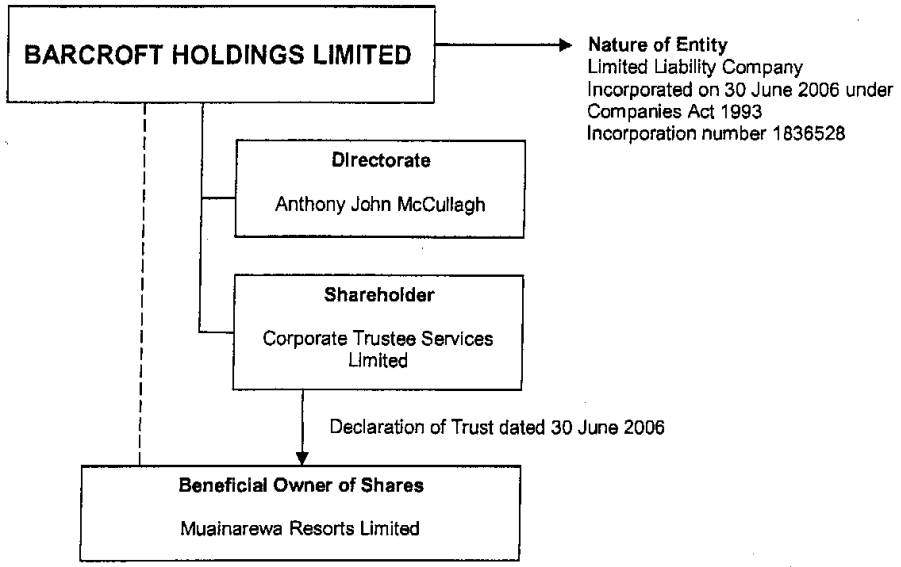
[294] The issue of whether Barcroft is a related company in terms of the trust deed is somewhat of a red herring. I accept that, given the various definitions in the trust deed of Secured External Loans; Non-Charging Related Company; Related Company and Associated Company, cl 4.1(a)(iv) of the trust deed did not apply to these advances so that in terms of the operative trust deed Barcroft was not a company related to Bridgecorp. That, however, does not address the issue of whether in substance Barcroft was a related party.

[295] Barcroft was a $100 special purpose vehicle (SPV) incorporated at 30 June 2006. Corporate Trustee Services Ltd, (CTSL), a company controlled by Mr McCullagh was its nominal shareholder. Mr McCullagh had a long association with Mr Urwin. He had known Mr Urwin since the 1970's when he had first worked with him. He regularly acted for Mr Urwin and, through CTSL, acted as trustee for Mr Urwin's interests in various projects that Mr Urwin ultimately owned or controlled. Mr McCullagh also knew Mr Petricevic. Mr McCullagh had also acted for Bridgecorp on a number of occasions since the late 1990's.

[296] Barcroft's organisational structure is best set out in the following chart which was forwarded by Mr Dawson to Mr Roest by email of 6 November 2006.

**BARCROFT HOLDINGS LIMITED**

**ORGANISATIONAL STRUCTURE**




[297] That confirms CTSL held the shares in Barcroft for MRL. MRL in turn was the trustee of the Pacific Trust which owned Momi stage 2.

[298] The Pacific Trust was constituted by a trust deed dated 10 February 2003. Beachen Holdings Ltd was initially its sole trustee. Mr McCullagh was the sole director of Beachen Holdings Ltd. While Pacific Trust's trust deed identifies the international Red Cross as the final beneficiary, other beneficiaries can be nominated by the trustee.

[299] On 20 February 2003 Mr Urwin was appointed the new appointer of the Pacific Trust. Mr Urwin retired Beachen Holdings Ltd and appointed CTSL as sole trustee of the Pacific Trust. The trust deed and trustees were subsequently varied on a number of occasions, leading to the appointment of MRL as trustee. MRL then appointed Stallman Holdings Ltd (Stallman) a discretionary beneficiary of the Pacific Trust. Stallman is an Urwin company. CTSL held the shares in Stallman for Mr Urwin's interests. BHL was also a beneficiary of the Pacific Trust.

[300] Through a succession of deeds of variation, nomination and removal of appointers during 2006, the class A appointers became Mr Urwin and Mr Trevor Webb, and the class B appointers became Mr Petricevic and Mr Roest.

[301] It seems MRL was incorporated because it was necessary to have a Fijian entity hold the land at Momi stage 2. As at 28 February 2006 its directors were Kafoa Muaror, Phillip Temo, Harvey Probert, Gary Urwin and Eric O'Sullivan. By 7 November 2006 Messrs Muaror, Urwin and O'Sullivan were no longer recorded as directors. MRL acquired the stage 2 land at Momi Bay as trustees of the Pacific Trust. I note that the financial statements for BHL for the year ended 30 June 2006 identify MRL as a related party.

[302] The evidence satisfies me that Mr McCullagh and Barcroft were not independent. The defence refer to the fact that different legal firms represented the parties to the transaction. But whatever legal form may have been given to the establishment of Barcroft, the practical reality was it was not independent. Mr McCullagh confirmed that throughout the relevant period he took his instructions in relation to Barcroft from Messrs Urwin and Roest. Mr McCullagh was told by Mr Urwin that he was to be a director of Barcroft and to hold the shares in it for a Fijian company (MRL). Despite that, Mr McCullagh never received any directions from

the Fijian directors of MRL and always went straight to Mr Urwin and Mr Roest. Mr McCullagh said he believed the Fijians would have taken their directions from Mr Urwin in any event.

[303] Mr McCullagh also said that he was to be paid an initial fee of $50,000 together with director's fees of $1,800 per month for his role in relation to Barcroft. Although the initial fee was never paid, Mr McCullagh was paid his monthly salary by REAL. Bridgecorp also agreed to pay all Mr McCullagh's legal fees.

[304] There were further relevant features of the relationship. Bridgecorp charged substantial administration fees (in addition to the $5 million fee) to Barcroft which Mr Roest was aware of but which Mr McCullagh said he never authorised. Bridgecorp also charged the Barcroft loan account with monthly payments to Winworth, an Urwin company. Again, Mr McCullagh did not authorise those payments.

[305] In my judgment Barcroft was a related party to Bridgecorp and there was a duty to disclose that in the accounts. Section 11(2) of the Financial Reporting Act 1993 provides:

> If, in complying with generally accepted accounting practice, the financial statements do not give a true and fair view of the matters to which they relate, the directors of the reporting entity must add such information and explanations as will give a true and fair view of those matters.

[306] NZIAS24 provides for the disclosure of related party transactions and outstanding balances. The standard identifies related party relationships and transactions. Clause 9 defines related party. The relevant provisions are:

> *A party is related to an entity if:*
>
> *(a) directly, or indirectly through one or more intermediaries, the party:*
>
> *(i) controls, is controlled by, or is under common control with, the entity (this includes parents, subsidiaries and fellow subsidiaries);*
>
> *(ii) has an interest in the entity that gives it significant influence over the entity; or*
>
> *(iii) has joint control over the entity;*

> *(b)* *the party is an associate (as defined in NZ IAS 28* Investments in Associates *of the entity);*
>
> ...
>
> *(d)* *the party is a member of the key management personnel of the entity or its parent.*
>
> ...
>
> *(f)* *the party is an entity that is controlled, jointly controlled or significantly influenced by, or for which significant voting power in such entity resides with, directly or indirectly, any individual referred to in (d) ...*

The following definitions also apply:

> *Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.*
>
> *Key management personnel are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.*
>
> *Significant influence is the power to participate in the financial and operating policy decisions of an entity, but is not control over those policies. Significant influence may be gained by share ownership, statute or agreement.*

[307] Significantly, paragraph 10 of the standard provides:

> In considering each possible related party relationship, attention is directed to the substance of the relationship and not merely the legal form.

[308] Mr Keene submitted that the definition of related party did not apply because substituting Barcroft for party and Bridgecorp for entity in the above definitions, Barcroft was not under common control with Bridgecorp nor was Barcroft a member of the key management personnel of the entity or its parent. However, in my judgment that places far too restrictive an interpretation on the definitions in the clause. It is necessary to consider the definition of cl 9 as a whole and against the direction in clause 10.

[309] Mr Keene also referred to clause 11 of the standard which provided that:

> In the context of this standard the following are not necessarily related parties:

(a) Two entities simply because they have a director or other member of key management personnel in common, notwithstanding (d) and (f) in the definition of related party.

(b) Two ventures simply because they share joint control over a joint venture.

[310] Clause 11 simply confirms the rule is not absolute. In each case the matter must be determined on the surrounding circumstances as a whole in the context of the relationship under consideration.

[311] Mr Keene also sought to draw comfort from a passage in Mr Dawson's evidence where Mr Dawson said that in his view the issue was not a related party matter but rather an accounting, derecognition issue. However, Mr Dawson made it clear he had given no legal advice about that matter and in other parts of his evidence confirmed that he had raised the related party issue. Mr Keene also submitted that the Crown ought to have called an expert on related party issues to assist the Court. But the issue is not for an expert. It is for the Court to determine whether, as a matter of law, Barcroft was a related party or not.

[312] It is convenient to deal with one further matter that Mr Keene raised at this stage. During the course of closing submissions Mr Keene criticised the failure of the Crown to call evidence from the auditors PKF, particularly on this issue. He referred to a decision of *Morley v Australian Securities and Investments Commission*[42] where the New South Wales Court of Appeal overturned declarations of civil liability about seven former non-executive directors of James Hardie in respect to misleading announcements to the market in circumstances where the ASIC had failed to call a lawyer who was present at the board meeting when the draft announcement was discussed.

[313] The present case is a criminal prosecution. It is for the Crown to prove its case. The Crown has a discretion whether to call witnesses (even if they have given depositions or statements): *R v Fuller*.[43] While the Crown must call witnesses

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42 *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; [2010] 247 FLR 140.

43 *R v Fuller* [1966] NZLR 865 (CA) at 868.

essential to the narrative on which the prosecution is based,[44] that did not require the Crown to either seek to interview the auditors or to call them in this case. The auditors' evidence is not essential to the determination of whether Barcroft was a related party or not. The auditor's view is not determinative. As I have said, the issue is for the Court to determine. Further, the accused could have called the auditors. The issue of the auditors' view is more relevant to the defence case of reliance. In short, in this case, as fact finder I must deal with the evidence before the Court and, on the basis of that evidence, determine the issue.

[314] The evidence confirms that Barcroft is an entity controlled or significantly influenced either directly or indirectly by Mr Urwin (and to an extent Mr Roest). Mr Urwin (and Mr Roest) was a member of the key management of Bridgecorp. The link traces through the beneficial ownership of the shares in Barcroft to MRL and from there to Pacific Trust and its discretionary beneficiaries Stallman (Urwin's interests) and BHL.

[315] Through his ultimate interests in the Pacific Trust and his apparent ability to act on behalf of the Pacific Trust and direct Mr McCullagh in relation to Barcroft,[45] Mr Urwin had control and significance influence over Barcroft. Through their ability to appoint trustees to direct the Pacific Trust Messrs Roest and Petricevic and, through them, Bridgecorp also had control or significant influence over Barcroft.

[316] I find that the statement in particular (b) is untrue.

*Particular (d) – That in the period 30 June 2006 to 21 December 2006 no circumstances had arisen that would adversely affect the trading or profitability of the charging group or the value of its assets or the ability of the charging group to pay its liabilities due within the next 12 months*

[317] The Crown rely on the following further sub-particulars to support the allegation that particular (d) is untrue:

---

44 *Seneviratne v R* [1936] 3 All ER 36 (PC).

45 Which I take from Mr McCullagh's evidence. I have not considered Mr Crichton's evidence on this issue as I consider that in large part he based it on Mr Urwin's statement which is not admissible against the accused.

(a) the decline in investor investment and reinvestment;

(b) loans were not being repaid on time, and were being rolled over on due date;

(c) the actual recovery of loans as against forecasted recovery of loans;

(d) the capitalisation of interest on loans;

(e) an increase in loan impairment and non performing assets;

(f) the inadequate provisioning of bad debts;

(g) the financial drain of the wider Bridgecorp group, particularly the Australian operations;

(h) the increase in borrowing costs in order to meet principal and interest repayments to investors;

(i) conceding its higher ranking security position to other creditors to raise funds;

(j) adverse market conditions;

(k) the effect of the coup in Fiji on Bridgecorp's exposures there;

(l) a deterioration in cash flow.

[318] This is a criminal charge based on untrue statements in the prospectus. The accused should not be liable for failure to disclose adverse circumstances where the possibility of such adverse circumstances has been disclosed in the prospectus. That applies in relation to a number of the elements identified by the Crown under this head.

[319] The practice of capitalisation of interest on loans[46] was disclosed in the prospectus. Under the heading of "Capitalising of interest and fees" the prospectus states:

> The majority of Bridgecorp's loan are capitalising, with payments of interest, fees and principal not due until the end of the loan term. If this is not managed, the borrower's equity in the loan could be diminished. Bridgecorp manages this risk by calculating loan-to-value ratios taking into account the capitalised position at the end of the loan term.
>
> **Extension of loans**
>
> Bridgecorp's policy of lending for short durations means that borrowers may request loan extensions past the date of their original maturity. As the majority of our loans are capitalising (in that interest accrues during the life of the loan and becomes payable by the borrower only when the loan is due to be repaid at the expiration of the term), granting extensions may result in a delay in receipt of income on loans, which my impact on earnings.

[320] Next, the financial drain of the wider Bridgecorp Group, particularly the support given to the Australian operations[47] was also disclosed in full in the prospectus:

> In the early part of February 2006, ASIC suspended the dissemination of BFLA's prospectus in Australia. As a result, BFLA's inflow of investor funds was interrupted. BFLA, therefore, determined not to make new advances in Australia and decided to wind down BFLA's loan book, at that time. Discussions with ASIC have been ongoing and, as at the date of this prospectus, BFLA has not lodged a new prospectus to raise deposits on the Australian market.
>
> Against that background, BHL's board resolved to support BFLA to meet its obligations to depositors and to borrowers as they fell due. In the period from 1 March to 20 May 2006, Bridgecorp advanced AUD$15 million to BHL to enable share capital and subordinated debt to be injected into BFLA. ...
>
> Bridgecorp reserves the right to provide further financial accommodation to BFLA or to BHL, if required, within the parameters of the restrictions contained in the Trust Deed – being that such loans be acquired for proper value and on reasonable commercial terms, and that loans to BHL be not greater than 5% of Total Tangible Assets. ...

[321] Next, the potential for adverse market conditions[48] affecting Bridgecorp's ability to meet its commitments was also disclosed in the prospectus. Under a heading "Economic downturn risk" the prospectus provided:

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46 (Sub-particular (d)).
47 (Sub-particular (g)).

> Bridgecorp's business plan is premised on the continuation of a stable economy, particularly in New Zealand, Australia and the Pacific. There is no assurance that such stability will continue. Any downturn or decline in these economies may adversely affect Bridgecorp's future business.

Under "Exposure to the property sector" the prospectus provided:

> Bridgecorp is a property finance company and is, accordingly, heavily exposed to the property market. Any deterioration of the New Zealand, Australian or Fiji property markets (or the property markets in any other country in which Bridgecorp holds mortgages over real property) could adversely affect the value of properties over which we have a mortgage, and may also impact the ability of our borrowers to repay their loans. These impacts could lead to a reduction in earnings or the value of Bridgecorp's assets.

[322] The prospectus also made adequate disclosure in relation to the effect of the coup in Fiji.[49] Under the "Economic downturn risk" the prospectus disclosed that:

> On 5 December 2006, the Fijian military staged a coup and overthrew the Fijian Government. As a result, the political and governmental situation in Fiji may adversely affect Bridgecorp's cash flows or lead to a reduction in Bridgecorp's earnings or in the value of Bridgecorp's assets.

[323] Under "Lending activities related to Fiji" further information was provided which concluded:

> Having regard to the information available to the directors, the directors are of the opinion that the Stage 1 Development will proceed to completion albeit with a delayed timetable, the extent of which delay the directors are unable to ascertain at present.
>
> From time to time, Bridgecorp makes loans to borrowers, or enters into transactions with counterparties, who may themselves have business transactions or dealings in Fiji. The current political and governmental situation in Fiji may adversely impact on those borrowers' or counterparties' businesses which, in turn, could impact on the ability of those borrowers to repay their loans to Bridgecorp or those counterparties to perform their obligations.

[324] It follows that I do not consider the sub-particulars at (d), (g), (j) and (k) support particular (d). I turn to consider the remaining sub-particulars relied on. The first is the decline in investor investment and reinvestment. Mr Kumar's

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48 (Sub-particular (j)).
49 (Sub-particular (k)).

reconciliation of the rate of term investment renewals[50] for the relevant period prior to the issue of the prospectus was as follows:

| | |
|---|---|
| June 2006 | 61% |
| July 2006 | 55% |
| August 2006 | 53% |
| September 2006 | 51% |
| October 2006 | 56% |
| November 2006 | 54% |

[325] While the figure for June 2006 was high at 61%, for the period from 30 June 2006 to the date of issue of the prospectus in December term investment renewals fluctuated between a high of 56% and a low of 51%. The figures do not disclose a trend. The variance between 30 June 2006 and December 2006 is unremarkable.

[326] The Crown also refer to the decline in new investment moneys as a deterioration in Bridgecorp's financial position that ought to have been disclosed. The reduction in the amount of new investments was significant:

| | |
|---|---|
| July 2006 | 13.4 million |
| August 2006 | 10.2 million |
| September 2006 | 9.1 million |
| October 2006 | 5.2 million |
| November 2006 | 6.3 million |

[327] Mr Lazelle suggested there was a cyclical trend relating to re-investments. While there were reductions over the various time periods Mr Lazelle refers to, only on one of the previous periods had new investments fallen below $10 million during the respective period and then not below $9.3 million. The low figures for new investments for October and November at $5.2 million and $6.3 million should have been a cause of concern to the executive directors in particular. Notwithstanding the variability in previous years the new money inflows from September 2006 to

[50] Exhibit 66.

November 2006 had shown a significant reduction. It reflects circumstances that would adversely affect the charging group's trading profitability or its ability to pay its liabilities within the next 12 months.

[328] The next set of sub-particulars, (b), (d), (e) and (f) are related.

[329] Even accepting Mr Lazelle's reconciliation of the information for this purpose, the figures relating to impaired and non-performing assets from June 2006 to November 2006 were of concern and disclosed concerning trends.[51] The total of impaired and non-performing assets (which includes both non-accrual and past due loans) for the Bridgecorp charging group in New Zealand dollars increased from $48.3 million as at June 2006 to $118.9 million as at November 2006.[52] While acknowledging the increase in non-performing loans Mr Lazelle suggested it was not an isolated event and that:

- non accrual assets had increased by 195% in the financial year to 30 June 2006;

- the loan impairment provision had increased by 100% for the financial year to 30 June 2006 and bad debt write-offs had increased by 550% for that period.

[330] However, rather than being a mitigating feature, the fact an existing negative trend continued should have been an issue of concern for Bridgecorp.

[331] Mr Roest also sought to explain the increase on the basis that there had been a change in policy to seek recovery of loans and a firmer view was taken to recover loans once they went past due date. There may have been a change in Bridgecorp's internal policy but, as Mr Dickey submitted, ultimately Bridgecorp was required to comply with the relevant accounting standards when reporting these loans. There was also a suggestion that the change in accounting standards to comply with IFRS

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[51] Impaired loans are loans where the amount advanced by Bridgecorp exceeded the security value of the loan.
Non-accrual loans are loans on which interest was not being earned.
Past due loans are loans which were past their due date.

[52] Sourced from the management accounts for June, September and November.

may have affected the reporting, but there was no material change required on this issue.

[332] The trend was established. Mr McCloy's analysis disclosed that reported impaired and past due loans increased from 10.2% as at June 2006 to 27.5% by November 2006. As he also noted the number of non performing assets increased as well from 16.2% as at June 2006 to 28.2% by November 2006.

[333] The marked increase in impaired, non-accrual and past due loans was a circumstance that would adversely affect the trading or profitability and the charging group or the value of its assets. It would also affect its ability to pay its liabilities due within the next 12 months.

[334] Mr McCloy also gave evidence that there was inadequate provisioning of bad debt, noting in particular that although Bridgecorp identified potential sale proceeds arising from security sharing arrangements relating to the Sale Street apartments and Robert Brown Developments in Queenstown, neither led to a successful recovery. One was written off just before Mr McCloy's appointment as receiver and the latter resulted in a nil recovery. However, that information was gleaned with the benefit of hindsight. On this issue I accept Mr Lazelle's evidence that the assessment of exposure at $8.5 million (as calculated in accordance with the schedule of impaired assets and approved by the credit committee) was consistent with the doubtful debt provision of approximately $10 million. Further, I note the review by Deloittes of a number of BFAL and Bridgecorp loans in September 2006 concluded only a further $405,000 needed to be provisioned as bad debt. The Crown has not proved the sub-particular relating to the inadequate provisioning of bad debts.

[335] At sub-particular (c) the Crown alleges the actual recovery of loans predicted in the financial statements for 30 June 2006 in the period July to December 2006 was $482 million when actual collections realised only $95 million. The defence take issue with that analysis as it is drawn from the note to the liquidity position of the company. The defence argue that the liquidity profile was a statement of contractual obligation rather than a forecast of moneys to be received.

[336] I accept that the sub-particular records contractual obligations and needs to be considered in the context of Bridgecorp's disclosures in the prospectus that loans were rolled over from time to time and that interest was capitalised. But even taking those factors into account, it is significant that less than a fifth of what was contracted to be repaid in that six month period was actually repaid. The information is relevant to liquidity. It is provided in a liquidity profile which the reader of the prospectus is taken to when considering Bridgecorp's liquidity position. I conclude that the variance was so significant it would impact on the ability of the charging group to pay its liabilities due within the next 12 months. It also supports sub-particular (b) relating to the roll-over of loans.

[337] Next, at sub-particular (h), the Crown alleges that in order to generate cash flow Bridgecorp was forced to enter a number of refinancing arrangements. Mr Kumar produced a schedule setting out the refinancing between June 2006 and May 2007.[53] But most of the refinancing between June 2006 and December 2006 related to Compass Capital Ltd. Compass Capital was a company within the BHL group.

[338] The most significant borrowing the Bridgecorp charging group engaged in was a loan taken out by BC from St Laurence for $8 million.[54] The loan was initially for a three month period. Bridgecorp provided shares it owned in Dorchester Pacific Ltd as security. The loan initially had a rate of 13% per annum and a fee of $200,000.

[339] While, as the defence argued, from time to time a finance company might borrow short-term, the borrowing of $8 million from a second tier finance company in the situation Bridgecorp was in should have been a matter of concern to directors. However, given the size of Bridgecorp's loan book, I am not prepared to say that such a loan, of itself, would adversely affect Bridgecorp's profitability or its ability to pay its liabilities.

[340] At sub-particular (i) the Crown alleges that in order to obtain cash Bridgecorp conceded its higher ranking security position to other creditors to raise funds. I

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53 Exhibit73.
54 Exhibit 28.

accept the argument advanced on behalf of the defence on that issue, namely that in doing so Bridgecorp was effectively cashing up its position and reducing its ultimate risk. I am not prepared to say that that was a matter that required to be disclosed as affecting Bridgecorp's ability to meet its liabilities or otherwise affected the value of its assets. It was a reasonable practice for a finance company that lent on second and third mortgages (as was disclosed) to adopt and of itself did not adversely affect Bridgecorp.

[341] The final sub-particular (l), relates to the deterioration in cash flow. The evidence is clear that Bridgecorp was experiencing a shortage in cash flow from mid 2006. Cash was so tight that the decision had been made by May 2006 to cease fresh lending. From mid 2006 cash flow was a major focus for Bridgecorp.

[342] Even Mr Lazelle's figures for the consolidated and charging group cash balances disclose a marked reduction in cash available between 30 June 2006 and November 2006 as follows:

| Month | Consolidated cash AUS$ | Cash for the Bridgecorp charging group $NZ |
|---|---|---|
| June 2006 | 21.3 million | 13.3 million |
| July 2006 | 17.3 million | 15.8 million |
| August 2006 | 10.8 million | 11.4 million |
| September 2006 | 4.4 million | 4.6 million |
| October 2006 | 4.0 million | 3.3 million |
| November 2006 | 3.0 million | 3.4 million |

[343] The significant reduction in cash, particularly at a time when new lending was not being undertaken in order to build up a cash reserve was a circumstance that would have adversely affected the company's ability to pay its liabilities within the next 12 months.

[344] It follows that I find particular 9(d) proved in the respects noted above, namely sub-particulars (a) (new investments), (b), (c), (e) and (l). The statement that

between 30 June 2006 and 21 December 2006 no circumstances had arisen that would adversely affect the trading or profitability of the charging group, or the value of its assets, or its ability to pay its liabilities within the next 12 months was untrue.

*Particular (e)(i) – That Bridgecorp managed liquidity risk by maintaining a minimum cash reserve on bank deposit*

[345] The prospectus recorded under the heading "Liquidity Risk":

> Liquidity risk is the risk that a company may (though solvent) encounter difficulties in raising funds at short notice to meet its financial commitments as they fall due. Details of Bridgecorp's liquidity profile are set out in the audited financial statements contained in this prospectus. Liquidity risk mitigation involves the management of cash, deposits and credit lines to ensure Bridgecorp has sufficient funds to meet its obligations, including the payment of interest on and, when due, repayment of your original investment. Liquidity risk is managed by:
>
> ...
>
> - having a policy of maintaining a minimum cash reserve held on bank deposit.

[346] Mr Roest gave evidence that he believed there was a policy but could not recall if it was documented. He said that essentially the policy was that Bridgecorp would maintain a reserve, or an amount of cash, and if Bridgecorp got below that level it would stop lending, in order to bolster the level of cash on hand up.

[347] Other witnesses referred to a figure of 50 million as the figure required to be held in reserve before Bridgecorp would recommence lending. There is no evidence that at any stage a cash reserve of 50 million was met. Bridgecorp did not recommence lending prior to its receivership in July 2007. At no time was there any money held on bank deposit by way of cash reserve.

[348] Even if the rather general evidence about Bridgecorp's intention could be elevated to the status of a policy to maintain a cash reserve, the statement was untrue in that it was misleading in the form and context in which it was included in the prospectus. A notional investor would take from reading that statement that Bridgecorp had a structured policy of holding funds on bank deposit to manage the risk of difficulty in raising funds at short notice to meet its financial commitments as

they fell due. The notional investor would take comfort from that. That was not, however, the true position. The true position, if outlined, would have been that Bridgecorp had stopped new lending, that it intended to set aside a fund to manage liquidity issues and build the fund to approximately $50 million before recommencing lending, but that figure had not been achieved. The statement in particular (e)(i) was untrue.

*Particular (e)(ii) – The omission of a material particular being the actual deterioration in Bridgecorp's liquidity since year end 30 June 2006*

[349] This allegation requires consideration of the elements of deterioration in Bridgecorp's financial position previously considered under particular (d) with particular reference to the decline in new investments, the shortfall in the recovery of loans and the deterioration in cash flows. For the reasons given above I find the failure to disclose those factors which confirm the actual deterioration in Bridgecorp's liquidity since 30 June 2006 was a material omission. If a notional investor was informed of those factors, it is inevitable they would have affected his or her decision to invest. It made the statement of Bridgecorp's liquidity position untrue.

[350] I find the Crown has proved that the statements in particulars (a), (b), (d) and (e) were untrue to the extent I have identified.

[351] The third element the Crown must prove is that the Bridgecorp prospectus containing the statements which I have found to be untrue was distributed between 21 December 2006 and 7 February 2007. In *R v Steigrad* the Court of Appeal confirmed that s 58 contemplates continuing distribution and that "distribute" in s 2 contemplates individual communication and includes not only making available, publishing and circulating but also communications by letter or by electronic means so that every communication of a document to an individual investor is an act of distribution caught by s 58.[55] The evidence is that the prospectus was communicated to and remained available to the public between 21 December 2006 and 7 February

[55] *R v Steigrad* [2011] NZCA 304; (2011) 10 NZCLC 264,862 at [51].

2007 and accordingly was communicated to the public during that period. This element is satisfied.

[352] The last element that the Crown must prove under s 58(3) is that the accused signed or had signed on his behalf Bridgecorp's prospectus. The Bridgecorp prospectus was signed by Messrs Davidson, Petricevic, Roest and Urwin. Mr Roest also signed it on behalf of Mr Steigrad. Mr Steigrad had given the requisite authority to the other directors, including Mr Roest, to sign the prospectus on his behalf. The requirement of s 41(b) of the Securities Act was complied with. The last element the Crown must prove in relation to count 9 is established.

[353] As the elements the Crown are required to prove are made out, the onus shifts to the accused to prove either that the untrue statements were immaterial or that, in relation to the particular accused, he had reasonable grounds to believe and did, up to the time of the distribution of the prospectus, believe that the untrue statements were true.

[354] As to materiality, the starting point is *Coleman v Myers* where Cooke J identified as material:[56]

> ... those considerations which can reasonably be said, in the particular case, to be likely materially to affect the mind of a vendor or of a purchaser.

In *R v Moses* Heath J reviewed the relevant authorities and concluded that in company with Cooke J, it was not "appropriate to attempt to define the concept of "'materiality'" too tightly". He concluded:[57]

> At the risk of adding a further phrase to the debate, if there were something that ought to have been disclosed that could well have made a difference to the decision whether to invest, it would almost inevitably be characterised as "material".

[355] I do not consider the failure to disclose that the Victoria Quarter loan was made otherwise than in accordance with Bridgecorp's internal credit policies was material for a number of reasons. While I accept materiality under s 58 is not to be

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[56] *Coleman v Myers* [1977] 2 NZLR 225 (CA) at 334, relying on the test expressed by Marshall J in *TSC Industries Inc v Northway Inc* 426 US 438 (1976) at 449.

[57] *R v Moses* above n 4 at [51].

equated with materiality in accounting terms, quantum is still an important consideration. The Victoria Quarter loan was $21.5 million. That only represented 5% of the loan book of mortgage and other loans in excess of $425 million. Second, while it did involve a loan advance, Bridgecorp was also involved in the project as a joint venturer and had a direct interest in the property. The prospectus reserved the right for Bridgecorp from time to time to take up opportunities to invest in assets other than loans. The loan must be considered from the point of the notional investor's appreciation of that context. Next, while the advance did not comply with Bridgecorp's internal credit policies the prospectus was replete with generalities about Bridgecorp's loan policy as to securitisation, guarantors and LVR's. For example, the prospectus stated variously :

> Generally, we will lend up to 75% of the registered valuation of the relevant development ...
>
> Generally, we require security for the majority of our lending ...
>
> *Term*
>
> Generally, between six months and two years, although we consider loans for shorter or longer durations. ...
>
> Generally, all new loan applications must be supported by a registered valuation and detailed project feasibility. ...

[356] It is also relevant that, while Mr Kumar pointed out the failings with this loan, he does not seem to have been concerned about the lack of disclosure about those failings. On this direct issue there was the following exchange:[58]

> Q. [The allegation is that] "the prospectus was misleading in stating that Bridgecorp Limited would not and did not provide credit or advances or advanced loans other than in accordance with good commercial practice." As far as you were concerned is that a complaint that you made during the time you were employed as an internal auditor of Bridgecorp?
>
> A. I can't recollect having mentioned that during my tenure as internal auditor, ...

[357] On the balance of probabilities I accept that if a notional investor who was otherwise prepared to invest in Bridgecorp was presented with all the above information, about the Victoria Quarter loan it cannot be said that it could well have

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[58] At p 967.

made a difference to his or her decision to invest. I do not consider particular (a) further.

[358] I note here that for similar reasons, even if I had found the St Laurence borrowing could be seen to adversely affect Bridgecorp's trading, then, on the balance of probabilities, the quantum of the borrowing from St Laurence supports a finding the initial borrowing was not material. It was a relatively small sum in the context of Bridgecorp's loan book and was borrowed short term. If it was repaid at the end of the term (as was intended) I accept that such borrowing would not have been material to a notional investor.

[359] However, there can be no doubt that it would have been material to disclose that Barcroft was a related party. In an earlier part of the prospectus the directors noted the significance of the related party concept and the perception that such a relationship can have on an investor:

> **Related party transactions**
>
> From time to time, Bridgecorp lends to, or acquires loans from, related parties. There is a perception that when related parties transact with one another, they may do so on more favourable terms than they would ordinarily (which could in Bridgecorp's case lead to a reduction in earnings). Details of Bridgecorp's related party transactions as at 30 June 2006 are set out in the audited financial statements contained in this prospectus and in the section entitled "Other Statutory Information" under the heading "Other Material Matters". The Trust Deed requires that all loans be made on normal commercial terms and in accordance with Bridgecorp's credit approval policies.

[360] A notional investor would have taken comfort from the fact an unrelated party was prepared to pay $76 million for loans that Bridgecorp had previously advanced to its related parties. It would lend support to the investors' reliance on Bridgecorp's lending policy, and the value of its loan book. The picture becomes quite different, however, once it is disclosed that Barcroft is a related party.

[361] The untrue statement that no circumstances had arisen that would adversely affect the trading or profitability of the charging group, or the value of its assets, or its ability to pay its debts was material. If a potential investor had been told:

- of the downturn in new investments;

- of the difference between the quantum of loans stated as being payable within six months of 30 June 2006 and the loans actually repaid in that period;

- of the increase in impaired loans and non-performing assets;

- that, despite its policy, Bridgecorp did not have any money set aside on bank deposit by way of reserve; and

- that Bridgecorp's liquidity position had deteriorated since 30 June 2006;

those factors would have influenced a notional investor considering whether to invest in Bridgecorp. All the above indicate negative factors about Bridgecorp's trading position (and the value of its assets). They suggest a risk to the investor that Bridgecorp may not be able to meet its commitments.

[362] Similarly, the untrue statements as to Bridgecorp's policy to maintain a minimum cash reserve on bank deposit and the omission to disclose the deterioration in liquidity were material and would have affected a notional investor's decision to invest.

[363] I turn to the issue of reasonable belief. As Heath J stated in *R v Moses*, the question of whether a director had an honest belief, based on reasonable grounds, has two components, one subjective and one objective:[59]

> The first inquiry, into whether an actual belief was held, is viewed through the eyes of each director. The second arises if I were to find that an honest belief was held. At that stage, an objective assessment of whether there were reasonable grounds on which that actual belief could have been based is required. ...

[364] In assessing whether a belief is based on reasonable grounds the position of each director (against the background of that director's role and duties) can be judged by reference to the information available to that director during the relevant

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[59] *R v Moses* above n 4 at [268].

period leading up to the distribution of the prospectus containing the untrue statements.[60]

[365] In relation to this issue counsel raised a number of general propositions.

[366] All the accused say they relied on management and outside agencies. They refer to the line by line due diligence and management reports to the board prior to the execution of the prospectus, and the involvement of the auditors, the external solicitors Buddle Findlay and Dawson Harford, Covenant and the Ministry of Economic Development (MED) in finalising the prospectus before it was signed by them.

[367] The issue of the obligations of directors of finance companies facing charges such as these have been considered in *R v Moses* and *R v Graham*. The following propositions are generally relevant:[61]

> Directors direct; managers manage. That is the essential difference between governance and management. Directors establish the policy or rules that are to be implemented by management and put systems in place to ensure their instructions are carried out.
>
> ...
>
> Directors of finance companies operate in a dynamic business environment in which many difficult decisions of a significant nature must be made promptly, to respond to market pressures. A standard of near perfection is both undesirable and unattainable. The focus is on the range of reasonable courses open to directors, in the circumstances they face at the time a decision is made.

[368] The directors have a non-delegable duty to form their own opinions on the issue as to whether the prospectus contains untrue statements. The directors have an obligation to review the material before them, including, in this case, the due diligence and management reports, other information known to them, and the prospectus to satisfy themselves whether the information in the prospectus would present to a notional investor an accurate impression of the state of Bridgecorp at the relevant time.

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60 *R v Moses*, above n 4 at [413].

61 At [74] and [76].

[369] Both s 2B of the Securities Act 1978 and s 138 of the Companies Act recognise that at times directors must rely on others for the provision of information but they also envisage the possibility of the need for further inquiry by a director. As Heath J put it:[62]

> Both of [s 2B and s 138] envisage the possibility of the need for further inquiry by a director, on the basis of information already held or incomplete information on which further explanation is required. The protections afforded by s 2B and s 138 will be forfeited if appropriate inquiry is not made.

[370] Also as Dobson J put it:[63]

> Directors are appointed to exercise judgement and that extends to testing the competence of management within areas in which managers are relied upon. Each circumstance of reliance on management needs to be assessed within its own context.

And by reference to s 2B of the Securities Act and s 138 of the Companies Act:[64]

> Neither section can be read in a way that would relieve a director of the obligation to check on the competence of a delegate, in any circumstances where a signal occurs that would put a reasonable director on notice of the need to do so. ...

[371] In relation to the reliance placed on external advisers such as the solicitors, auditors, the trustee and MED, the obvious first point is that each of those parties has quite separate roles in the process distinct to that of the directors.[65]

[372] While the auditors audit the accounts, the accounts remain the directors' accounts. The auditors rely on the information presented to them. They do not sit on the executive committees or around the board table. The solicitors do not have an obligation to ensure compliance. Their advice is necessarily based on the information provided to them by the directors. The review of the prospectus by Covenant and MED was to enable those agencies to fulfil their own statutory and contractual obligations. The involvement of these outside agencies does not absolve the directors from compliance with their own non-delegable duties.

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62 At [86].
63 *R v Graham*, above n 32 at [35].
64 At [34].
65 The roles are set out and discussed in some detail in *R v Moses*.

[373] As Dobson J put it in *R v Graham*, where the company retained competent outside advisers, respected their views and completed the offer documents without those advisers raising any relevant concerns it will be marginally easier for the accused to make out reasonable belief. It is not, however, sufficiently material to establish a basis for such reasonable belief if that belief did not independently exist.[66] I would be prepared to drop the qualifier, "marginally", but the point remains, there must be an objective basis for the independent belief in the first instance.

[374] In the present case the directors rely heavily on the line by line due diligence review of the prospectus by management and the accompanying management report. But the important point is that the directors are not relieved of their obligation to check or question the advice of management where they have other information that should put them on inquiry. If there is such information available to them, they are not entitled to put it to one side and accept the line by line sign off or management report without question. Where a reasonable director would be put on notice that there was an issue, or may be an issue, then the director is obliged to take the next step of pursuing an inquiry in relation to that matter rather than relying on the fact the standard management reports do not raise the issue. The director is obliged to raise the issue, test the response and consider in light of all the information he or she then has what further steps may be appropriate or required.

[375] There is a further important issue which it is convenient to note at this stage. I remind myself that whether the directors had a reasonable belief must be determined in the context of the information that the individual directors had at the particular time periods in 2006 and 2007 that the counts deal with. It is now known that Bridgecorp failed. The causes of its failures were analysed and discussed in some detail by a number of witnesses. Mr McCloy's evidence in particular explained why Bridgecorp failed. With the benefit of hindsight it is relatively easy to understand why Bridgecorp failed. But particularly when considering the argument for the directors that they had a reasonable belief as to the position, it is necessary to consider the information that the particular director had at the particular

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66 *R v Graham*, above n 32 at [145].

time in issue and to bear in mind that the directors were looking forward on the basis of the information they held at the time.

*Count 9 – Mr Petricevic's belief*

[376] I have dealt with the issue of materiality which is general to all accused. I turn to consider Mr Petricevic's case as to his belief in relation to count 9.

[377] The essence of Mr Petricevic's defence was that he had both an actual and genuine belief in the truth of the statements in the prospectus and that the belief was based on reasonable grounds.

[378] Save for saying that the issue of Barcroft as a related party did not occur to him and that he was content to leave matters on the basis that if it was required to be disclosed it would, Mr Petricevic did not address this issue in detail in his evidence-in-chief. Mr Petricevic said that the accounting of the transaction was not something he focused on because the loans were in the accounts as related parties. His view was that if they were going to be related parties in the future that was fine. If they were not, that was also fine. He said there was no discussion about that at the meeting on 30 June.

[379] Mr Petricevic's recollection was that he was first advised that the Companies Office or any other outside entity had a concern about the issue in March 2007 when Ms Wong raised the issue.

[380] While Mr Petricevic was not as directly involved as Mr Roest and Mr Urwin were with the structure of the transaction with Mr Dawson, he was at the board meeting on 31 August when Mr Dawson's reporting letter of 30 August was before the board. At paragraph 17 of that letter Mr Dawson stated:

> We should observe that we have not considered the impact of this transaction on the financial statements of [Bridgecorp]. An issue for consideration will be the relationship (if any) between [Bridgecorp] and the Pacific Trust and the proper treatment of that relationship.

[381] Arguably, that could have put Mr Petricevic on inquiry, but I accept that reference could also be read as an accounting issue as opposed to raising an issue as to the appropriate disclosure in the prospectus.

[382] More significantly, at the executive committee meeting of 17 November 2006, the matter was expressly referred to in an item discussing Property Investment Research (PIR's) review of Bridgecorp. The minutes record:

> ZM mentioned a comment from Geoff Ballard at PIR. His concern related to related party lending to Barcroft and that Gary Urwin is chairman of the Credit Committee. ...

[383] Mr Petricevic said he took that to be a reference to Mr Urwin's position only. I cannot accept that as a reasonable interpretation. The note expressly identified the issue of related party lending to Barcroft. Even accepting there could have been some doubt about the reference in Mr Dawson's letter, that note of the discussion at the executive meeting should have caused Mr Petricevic to make further inquiry about the issue. Further, and importantly, Mr Petricevic was aware of the background to the Pacific Trust. Mr Petricevic held a power of appointment of the trustees. As well as being aware of Mr Urwin's involvement and control of the Pacific Trust and other entities, Mr Petricevic was also very aware that the seven related party loans were being incorporated into the Barcroft transaction. As managing director he must have appreciated that raised issues about how the related party issue was to be dealt with or, at least, should have been on inquiry as to how the matter would be treated in the prospectus, and he should have realised the reference to Barcroft as an unrelated company was misleading.

[384] I find that Mr Petricevic could not have had a genuine and reasonably held belief that Barcroft was not a related party. That is sufficient to establish count 9.

[385] For completeness I consider particulars (d) and (e). Mr Petricevic was aware of the decrease in fresh investments from July 2006 through to November 2006 through the various reports presented at the executive committee meetings. The reports to the executive committee were detailed. From those sources he was, or should also have been aware of the increase in loan impairments and non-performing assets. Further, he was or should also have been aware of the significant decline in

cash balances during the relevant period. All of this was against a background that Bridgecorp had ceased new lending in order to increase its cash reserves.

[386] In its prospectus, Bridgecorp stated that its primary focus was the sourcing of and lending in relation to property financing transactions. So effectively, since May 2006 Bridgecorp had not been engaged in any new business activity. The cash position, inflow of new investments (and rollovers) and repayments of existing loans was crucial. While existing, successful loans may have been providing a return, there was a need to generate further income from Bridgecorp's core business.

[387] Mr Cato noted that Mr Petricevic was not an accountant. Mr Cato submitted that while Mr Petricevic could understand financial statements, the accounts were not matters that he was competent to construct. Mr Cato submitted Mr Petricevic relied on Mr Martin and also Mr Davidson, who at board meetings had a practice of asking whether there were other matters that he should know about before signing off on documents. He also relied on Messrs Roest and Urwin who were both chartered accountants.

[388] Mr Petricevic was entitled to look to Mr Roest as finance director and Mr Davidson as a commercial lawyer and the independent chair for expertise in certain areas, but that did not absolve him from the obligation to make his own inquiries if he was put on notice, as I have found he should have been. Mr Cato's argument places the bar far too low in terms of Mr Petricevic's responsibility as the managing director of Bridgecorp. In the context of a finance company, even a non-executive director is expected to have the ability to read and understand financial statements and to use that understanding when making decisions about matters such as solvency and liquidity. As Miller J stated in *Davidson v Registrar of Companies*:[67]

> I accept that the standard of care required of a director depends on his or her position and responsibilities, but it also depends on the nature of the company and any given decision being made. [Section 137]. A director must understand the fundamentals of the business, monitor performance and review financial statements regularly. [*Australian Securities and Investments Commission v Adler* [2002] NSWSC 171, (2002) 41 ACSR 72 at [372]]. It follows that a degree of financial literacy is required of any director of a finance company. ...

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[67] *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) at [121].

[389] Further, a detailed level of sophistication was not required. It was not necessary to be a chartered accountant to understand the clear reports presented to the executive meetings on this issue. For example, Ms Todd's report clearly disclosed the situation regarding the reduction in inflow of new funds. Other information was also provided in a clear way. The BHL report of key performance indicators for the period ended 31 October 2006 showed, in a graphical form, an increase in non-performing assets and a substantial reduction in the group liquidity basis for example. With all the information Mr Petricevic had, particularly from the executive committee meetings, he could not have had an honestly held reasonable belief that no circumstances had arisen that would adversely affect the trading or profitability of the group or its ability to pay its liabilities due within the next 12 months.

[390] Next, Mr Petricevic knew that there was no cash reserve held on bank deposit and that, if there was a policy of setting aside $50 million in a cash reserve, it was never achieved.

[391] While Mr Petricevic received the line by line due diligence sign-off and the manager's report, with the information Mr Petricevic had at the time, he should have been put on notice that he could not rely on those aspects of the reports, at least not without further inquiry.

[392] Mr Petricevic could not reasonably have believed the statements in 9 (b), (d) and (e) to be true between 21 December and 7 February 2007. I find count 9 proved as against Mr Petricevic.

*Count 9 – Mr Roest's belief*

[393] Mr Roest's case on Barcroft is that that none of the auditor, MED, Covenant or Buddle Findlay raised the issue of Barcroft as a related party. He also relied on the extensive disclosure in the prospectus about the Barcroft transaction.[68]

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[68] Interestingly material contracts were noted as "not" being contracts entered into in the ordinary course of business but later, under note 15, the transaction was described as being in the ordinary course of business.

[394] However, I am satisfied Mr Roest could not have honestly held a reasonable belief that Barcroft was not a related party. Mr Roest was involved with Mr Urwin in developing the Barcroft deal from the outset. Following the first meeting with Mr Dawson regarding the transaction Mr Dawson directly raised the issue of Barcroft as a related party with Mr Roest in an email of 29 June 2006:

> Balance sheet treatment needs to be addressed: is this a related party transaction for accounting purposes?

[395] In the course of cross-examination by Mr Cato, Mr Roest said he told Mr Dawson he was going to run that issue past the auditors and also said he thought that he raised it at the meeting of 30 June. Mr Roest was clearly on notice that the related party issue was something that needed to be addressed.

[396] Mr Kumar also gave evidence that he had raised the issue of Barcroft as a related party with Mr Roest and that Mr Roest told him he had advice about it. Mr Kumar said that when he was asked to sign off the due diligence report in December 2006 for the prospectus he raised the issue with Ms Wong who suggested he speak to Mr Roest. Mr Kumar said he did so and:

> emphasised to him that I need some comfort that Barcroft is indeed not a related party, because to me it has all the features of a related party transaction once you took the full chain of links. And [Mr Roest] said, "No, no, it's not a related party." And then I asked whether there was any professional opinion or information to confirm that, and he indicated that there was.

Mr Roest denies that discussion. I accept Mr Kumar's evidence on this issue. He had no reason to lie on this issue or to fabricate the discussion. His evidence of Mr Roest's response is consistent with Mr Roest's general argument on this issue that the auditors signed off on the accounts and therefore, must have satisfied themselves Barcroft was not related, a fact he relied on.

[397] The evidence is clear that Mr Roest was aware the issue of Barcroft as a related party had to be addressed. Mr Roest says that he relied on the auditors, Covenant and MED's views on Barcroft. But Mr Roest did not produce any evidence, other than the accounts themselves, to support his defence that those parties had all the relevant information to determine whether Barcroft was a related

party transaction. Certainly there was no formal advice to that effect. If there had been, no doubt Mr Roest would have produced it.

[398] Next, while Covenant and MED considered the Barcroft transaction, they did so for their particular purposes. In any event, whatever view the others took, Mr Roest, like Mr Urwin, had the benefit of full knowledge of the Barcroft transaction.

[399] In addition, Mr Roest would have been aware of, and alert to, the significance of the issue of Mr Dawson's reporting letter of 30 August and the PIR reference in the executive committee papers. Mr Roest could not have held an honest belief on reasonable grounds, that Barcroft was not a related party when he signed the prospectus.

[400] That is sufficient to prove count 9 against Mr Roest. For completeness I consider the particulars (d) and (e) proved as well. As finance director Mr Roest was well aware that there were circumstances that had arisen that affected Bridgecorp's profitability, the value of its assets and its ability to pay its liabilities. Mr Roest was aware of the significance of the factors that showed the deterioration in Bridgecorp's financial position. Despite that, he signed off on the due diligence reports and the further advice in the management report accompanying the due diligence report by confirming that nothing had come to his attention which caused him to believe the prospectus contained a statement:

- misleading in the form and context in which it was included;

- or misleading by reason of an omission of a particular that was material to the statement in the form and context in which it was included.

[401] With his knowledge of the reduction in cash balances within the company, the significant reduction in new investments, the carrying forward of short term loans, and the increase in impaired loans, Mr Roest could not have had an honestly held belief that no adverse circumstances had arisen that would affect Bridgecorp's profitability or its ability to pay its liabilities. He also knew that Bridgecorp did not

maintain a cash reserve on deposit and that there had been a deterioration in Bridgecorp's liquidity. I find count 9 proved against Mr Roest.

*Count 9 – Mr Steigrad's position*

[402] Mr Steigrad's general defence to all counts is that he was a non-executive director based in Australia. While he had a good and sufficient understanding of the finance company fundamentals and significant business and boardroom experience he had no particular accounting experience. Unlike Messrs Petricevic and Roest he had no personal interest in Bridgecorp or BHL. His financial interest in the company was limited to the director's fee of $75,000 per annum.

[403] Mr Steigrad accepts it was his non-delegable duty to satisfy himself that the statements in the offer documents were true. But while it was his independent judgment to make that decision, Mr Keene emphasised that Mr Steigrad's judgment has to be assessed in the context of all of the information Mr Steigrad received and his circumstances at relevant times. Mr Keene noted that senior management and other directors had information (particularly about missed payments, but also as to Mr Kumar's concern regarding Barcroft's related party status) that, for whatever reason, they withheld from Mr Steigrad.

[404] Mr Keene also submitted that the Court should consider the total mix of information available to Mr Steigrad in context. In the Bridgecorp context it was relevant that Bridgecorp had robust corporate governance processes and had, over time, established and adopted good corporate governance practices and procedures. It had appropriate and active sub-committees. There were policy and procedural manuals in relation to lending and policy documents in relation to delegation of credit discretion. He submitted Mr Steigrad was entitled to rely on these factors.

[405] Mr Steigrad sat on the audit committee and the board. He was not a member of the executive or any other working management committees. The information he received was generally limited to the information in the audit and board packs. The audit committee also received monthly internal audit progress reports from Mr Kumar.

[406] While Mr Steigrad accepted that he received cash flow forecasts from Mr Welch, for a time that practice stopped towards the end of January 2007. Thereafter he only received what was in the board packs. I do not accept Mr Dickey's submission that he should have called for more cash flow reports. There was no need for Mr Steigrad to require that further information at this time.

[407] Mr Steigrad attended the special meeting on 11 December to sign-off the prospectus by telephone. He gave his authority in writing for the other directors to sign on his behalf. Mr Steigrad said that, before confirming his approval, he considered the wording of the prospectus and paid particular attention to the changes in the draft. He noted that the management report and due diligence reports had been signed off. Mr Steigrad said that with the PKF audit of the accounts to 30 June 2006, Buddle Findlay and Dawson Harford's involvement, and the previous reference to the Ministry of Economic Development and the trustees' approval he was happy with the prospectus when he signed it off.

[408] On the Barcroft issue, Mr Steigrad's case is that at no stage was the issue that Barcroft might be a related party drawn to his attention. I note that Mr Kumar ultimately accepted that, despite his concerns about this issue, he had not raised that matter with Mr Steigrad.[69]

[409] Mr Steigrad accepted that he knew the Pacific Trust owned Momi stage 2 and that Stallman and BHL had an active financial interest in the Pacific Trust. Until these proceedings were commenced however, he was unaware that Messrs Urwin, Roest and Petricevic had roles as appointers of the trustees of the Pacific Trust. He was not a director of any of the companies within the REAL group. Mr Steigrad's involvement with Barcroft was less than Mr Petricevic and significantly less than Messrs Roest and Urwin.

[410] Mr Steigrad said he did not take Mr Dawson's note in his letter of 30 August to refer to a related party issue. That is to a degree supported by Mr Dawson's own

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[69] Kumar at p 942 and 954.

evidence on that point where he accepts that the issue he raised in that way was more an accounting point than a related party one.[70]

[411] Mr Steigrad was not a member of the executive committee. He did not see the express reference to PIR's concern that Barcroft was a related party that was reported to Mr Petricevic and Mr Roest at the executive committee meetings. As at 21 December 2006 and continuing through to 7 February 2007 the only independent evidence that should have put Mr Steigrad on inquiry about the related party issue, other than his general knowledge of the loans underlying it, was Mr Dawson's letter.

[412] The Crown emphasised that Mr Steigrad had certain obligations as a member of the audit committee to ensure Bridgecorp properly reported financial information and maintained the integrity of external financial reporting. Mr Steigrad also had a role in reviewing the performance of the external auditors. While that is correct, it does not, however, address the issue of whether Mr Steigrad should have raised the issue of Barcroft as a related party or have been put on inquiry as to that effect when there were no triggers to do so.

[413] In that regard it is surprising, to say the least, that Mr Kumar, who reported to the audit committee issues concerning the Barcroft transaction from a management and loan point of view, never saw fit to raise with Mr Steigrad or other members of the audit committee his concerns that Barcroft was a related party transaction until much later when he raised the issue in the memo for Mr Davidson. Mr Kumar's explanation that he did not want to raise it until he was sure he had his facts correct is difficult to follow.

[414] Nevertheless, Mr Kumar's evidence does confirm that there was nothing arising from Mr Steigrad's position on the audit committee that would have raised the issue of Barcroft as a related party. Given that Mr Kumar had raised a number of other issues in relation to Barcroft it would have been reasonable for Mr Steigrad, sitting as a member of the audit committee, to consider that there were no other matters of concern to Mr Kumar. To a degree that would have been reinforced when

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[70] At p 1570.

the due diligence and management reports were signed off by, amongst others, Mr Kumar and Mr Roest, without issue.

[415] As noted, Mr Steigrad did not have the full detail concerning Barcroft that the other accused (and Mr Urwin) had. I find that, as between 21 December and 7 February, Mr Steigrad satisfies the onus on him that he had an honestly held reasonable belief that the statement Barcroft was unrelated was true.

[416] I turn to consider Mr Steigrad's position in relation to the untrue statements in particulars (d) and (e) to count 9. The information supporting the finding the statements were untrue was mainly provided in the executive committee packs rather than in the summarised form of management and other reports contained in the board packs received by Mr Steigrad. As noted, when considering the issue of Mr Petricevic's knowledge, the executive committee received much more detailed reports and information than was contained in the board pack. In addition to the various departmental reports prepared for the executive committee, the members of the executive committee also received 10 day cash flow forecast for New Zealand and Australia, including worst case forecasts. Those detailed cash flow forecasts were not in the board packs.

[417] I accept that the summarised information contained in the board packs that Mr Steigrad had up to the end of December and January (during the period of this count) did not contain any particular triggers to have put Mr Steigrad on inquiry, in relation to adverse circumstances significant enough to impact on Bridgecorp's ability to trade or affect the value of its assets or its ability to pay its liabilities, particularly when he had the additional comfort of the recent management line by line sign-off and management report supporting the statements in the prospectus.

[418] Also, while Mr Steigrad must have been taken to be aware of the statements in the prospectus concerning particular (e), I am satisfied that he was entitled to rely on the information from the finance director, Mr Roest, in the management sign-off and in the line by line sign-off on those issues at the time relevant to this count. There were no particular highlights to put him on notice during this period.

[419] I find that to the extent that statements in the prospectus were untrue as at the time of this count Mr Steigrad had an honest and reasonably held belief at the time that the statements were true. He is not guilty on count 9.

***Count 10***

[420] In count 10 the Crown charge that the accused between on or about 7 February 2007 and on or about 30 March 2007 at Auckland and elsewhere in New Zealand signed or had signed on his behalf a registered prospectus, namely Bridgecorp Term Investments Prospectus (dated 21 December 2006) that was distributed and included an untrue statement.

*Particulars*

[421] The particulars are the same as count 9 with the additional allegation that the statement Bridgecorp had never missed an interest payment or, when due, a repayment of principal was untrue. That statement was untrue as from 7 February 2007 when the payments of maturities (and accrued interest) were missed.

[422] In addition, by 7 February, there had been further information relating to the deterioration in Bridgecorp's liquidity as reflected in the cash flows after November 2006. Further circumstances had also arisen that adversely affected the trading or profitability of the charging group, the value of its assets and its ability to pay its liabilities due within the next 12 months. The level of new investment funds continued to decrease. In December 2006 it was $5.6 million, in January 2007 it had reduced to $4.7 million. In addition Bridgecorp (or its charging subsidiary) had not been able to repay the St Laurence loan of $8 million. That loan had been extended in December 2006. St Laurence charged a $350,000 extension fee with the result the finance rate was in excess of 30%.

[423] While the statement was untrue on the first day in the date range for the count, as principal and interest payments were missed on or about 7 February, the Crown is also able to rely on the further defaults during the period which make the statements in the prospectus untrue. The particular defaults and the dates on which

payments were missed were specified. The milestones that the Crown could not identify in *R v Graham*[71] are present in this case. The accused cannot say they have been caught by surprise or that they were not aware of the case they faced. The days the Crown says the defaults occurred were disclosed and were well known to the accused.

[424] The statements at (a), (b), (d), (e) and (f) are untrue.

[425] The elements the Crown are required to prove are made out. The onus is on the accused to establish a defence under s 58(4).

[426] The additional untrue statement alleged in particular (f) and the further information confirming the untruth of the particulars in (d) and (e) were undoubtedly material. It is difficult to imagine anything more material to a notional investor's decision to invest than advice that the finance company he or she is contemplating investing in had missed payments of interest and principal. With the exception of (a), the untrue statements were material.

*Count 10 - Mr Petricevic*

[427] Mr Petricevic's defence to this count, like the others, is that with the exception of the quarterly interest run on 31 March he was unaware of the missed principal and interest payments on 7 February and thereafter. I have rejected that evidence. As Mr Petricevic was aware of the missed principal and interest payments he could not have had an honestly held reasonable ground to believe that the statement in the prospectus that principal and interest had never been missed was true.

[428] In addition, for the reasons given before when considering count 9, Mr Petricevic could not have reasonable grounds to believe the untrue statements in the prospectus concerning particulars (b), (d) and (e) were true. I find count 10 proved against Mr Petricevic.

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[71] *R v Graham* above n 32.

*Count 10 – Mr Roest*

[429] As finance director Mr Roest was aware of the missed principal and interest payments from 7 February on. He was also aware of the further deterioration in Bridgecorp's financial position and liquidity. He and Mr Welch were reviewing Bridgecorp's financial position daily. He was well aware that by 7 February a number of statements in the prospectus were untrue. They were also material.

[430] Further, Ms Wong gave evidence that, during this period, in March 2007, she raised the issues concerning the related party status of Barcroft with Mr Roest. She said that she had a discussion with Mr Roest in respect of Barcroft in which she queried the issues that had been raised by the Companies Office. The Companies Office was querying whether Barcroft was a related party transaction. She said that she was told by Mr Roest that Bridgecorp had received external advice and it was not a related party. She asked to see the advice but was never shown it. She thought this discussion was about the time of an email from Mr McPherson from the Companies Office on 22 March 2007.

[431] Given his state of knowledge, there was no basis upon which Mr Roest could have held an honest and reasonable belief that the statements in particulars (b), (d), (e) and (f), were true during the relevant time period.

[432] I find count 10 proved against Mr Roest.

*Count 10 – Mr Steigrad*

[433] Mr Steigrad's defence to count 10 is again the same, namely that if the statements in the prospectus were untrue he was unaware they were untrue. I accept Mr Steigrad's evidence that, if he knew or appreciated the statements in (b), (d) and (e) were false he would have followed the matters up. However, the issue for Mr Steigrad is whether, in light of all of the information he had by 7 February and particularly up until 30 March, he can satisfy the Court, on the balance of probabilities, that his belief the untrue statements in the prospectus were true was reasonable.

[434] I also accept that between 7 February and 30 March Mr Steigrad was not aware that interest and principal payments had been missed on a number of dates after 7 February. Although the other accused (and senior management) knew that payments had been missed, that fact was not reported to Mr Steigrad. I note here that the statements were untrue at 7 February and remained untrue during the period.

[435] The issue is again the reasonableness of Mr Steigrad's belief. While, in relation to the time period in count 9 I have found Mr Steigrad's belief the statements in the prospectus were true was reasonable, by later in February and certainly by 30 March Mr Steigrad was in possession of a number of significant items of information and had notice of several factors that should have put him on inquiry as to the truthfulness of the statements in (d), (e) and (f) to count 10 and such proper inquiry would have led to him taking steps to involve the trustee at that stage. I accept that nothing changed from his point of view in relation to Barcroft, particular (b).

[436] My reasons for coming to the conclusion that the situation changed is that between 7 February and 30 March there was a tipping point when all the information Mr Steigrad had would have put a reasonable director on inquiry. Further, by then some months had passed since the line by line and management sign-offs of 21 December. His reliance on that, without more was no longer reasonable at that point.

[437] The context is that Mr Steigrad was aware of the general position facing Bridgecorp during 2006. The need to support the Australian company had led to the decision not to engage in any new lending from May 2006. From then on cash was continually reported as a major issue for Bridgecorp. All directors were aware of that. For example, the minutes of the board meeting of 31 August 2006 record:

- Mr Petricevic advising that "the focus is now on receiving cash in on due dates";

- the same note recorded Mr Jeffcoat was invited into the meeting to discuss the problems with the Australian cash flows; and

- extra board meeting may be required to verify the latest cash flow.

[438] Reporting of those issues continued. Mr Steigrad knew cash was tight. The new investments and reinvestments were important to Bridgecorp. Mr Welch sent cash flow forecasts to all directors including Mr Steigrad from 22 September 2006 to 22 January 2007. Those cash forecasts disclosed significant variations over that period. Mr Steigrad accepted that he noted huge variations week by week. He explained that if there was something of significance with the cash flow that needed clarification he would ring up and ask about it. He said he was actively engaged in the process of asking and seeking clarification so he was aware of the situation.

[439] Next, Mr Steigrad accepted that he knew, as a consequence of the coup in Fiji and the issues that raised, that the Momi Bay receivable of $48 million, which had been due for settlement by 31 December 2006, was not going to be achieved. By January 2007 he knew it had been removed from cash flow predictions. This added to Mr Steigrad's general knowledge of Bridgecorp's position.

[440] All this provides a background to the further information available to Mr Steigrad in the time period relating to count 10.

[441] There was further significant information before the board meeting on 22 March. The minutes of that meeting record a number of factors referring to cash flows. The note recorded that cash flow and day to day cash management was still king and that there were discussions as to what was being done to improve cash flows.

[442] The summarised general management report presented in the board pack for the meeting on 22 March recorded the following note from the marketing department:

> Most of the planned marketing activities have been put on hold, as we have been unable to meet our creditor payments to our suppliers.

[443] And under the properties department, there was a further note:

> Difficulties being experienced because we haven't been able to meet the construction cost payments nor payments to the selling agents.

[444] Next, the summary of the consolidated group's cash position in Australian dollars as reported in the board pack for the 22 March 2007 meeting reported an actual position of negative $3,168,000 as opposed to a budgeted forecast of $33.5 million in credit.

[445] This information should have raised concern in Mr Steigrad's mind whether the statements in 10(d) and (e) in particular were true.

[446] Further, I find that the email of 29 March 2007 Mr Roest sent to the non-executive directors, including Mr Steigrad, attaching a negative cash flow forecast would have put a reasonable director in Mr Steigrad's position on notice that further inquiry and action was required because the information raised the issue whether the statements in (d) and (e) were true and should also have put him on inquiry regarding (f).

[447] The probable cash flow forecast Mr Roest sent on the afternoon of 29 March to Mr Steigrad (and Messrs Davidson and Urwin) predicted a negative cash balance of $2.044 million for the Bridgecorp Group Consolidated for the week ended 30 March. It also recorded the week had started with negative $61,000. Given the forecast was sent on 29 March and predicted a negative cash balance the next day and that Mr Steigrad was aware the quarterly interest run was due on 31 March, that must have been significant and should have set him on a train of inquiry.

[448] Despite the importance of the email Mr Steigrad made no mention of it or the forecast in his evidence-in-chief. In cross-examination when asked about it Mr Steigrad's evidence was not convincing:

> ... Okay, the first point I want to make is that – and in a sense this will be surprising but I think in the context in which I make it, it should not be – and that is I don't recall this email or the attached cashflows, ...

And later when he sought to explain what he did on receipt of it (which he acknowledged):

> I would see that I would need to respond very urgently indeed, and there's some issues in this. . There's a large negative cash position in Australia and because of my proximity to the office I knew that there'd been no missed

> payments so I wouldn't understand that; that's the first point [which seems inconsistent with his general position that his role was limited to that of a director and he was not involved hands on at all]. Secondly, the timing as you so well put out would give me alarm bells, that would be something that I would deal with immediately. I can't say for certain that I received – that I read it on the Thursday evening, it was sent – I received it at 3.19, which is 5.19 New Zealand time, and there was due to be a phone conversation in this email at 5.00 pm, that conversation didn't occur obviously. So let's assume I read it the next morning, I have no recall whether I read it the night before or the next morning. I would've immediately have rung Robert Roest and I would've questioned him about the cashflows 'cos I would've been deeply concerned. And as I have now recalled it, I can only assume that the satisfactory – the assurances he gave me satisfied me as to our ability to meet our payments over the coming weekend.

[449] Under further cross-examination Mr Steigrad accepted he could not recall having a conversation with Mr Roest.

[450] Mr Steigrad's evidence was essentially hypothetical, as to what he would have done rather than what he did do. On the evidence Mr Steigrad fails to satisfy the Court on the balance of probabilities that he did make any inquiry of Mr Roest in response to the email and cash flow. In response to Mr Keene's cross-examination on this point, Mr Roest said he did not have any memory of a response coming back to him about the cash flows. There is no evidence other than Mr Steigrad's very general statement that he would have inquired that he actually did so. Mr Steigrad was quite straightforward and direct in most of his evidence but on this aspect his evidence was general. He was unable to address the specific issues and instead spoke in generalities and in a hypothetical way.

[451] Mr Lazelle was asked about the information disclosed in that cash flow. He accepted that it was pretty plain there was a forecast deficiency for, by then the next day, Friday 30 March 2007. Mr Lazelle also conceded that if, as a director your attention had been drawn to this cash flow "you'd have to be concerned about that".

[452] Mr Lazelle also conceded that on the basis of that probable cash flow forecast, that unless the company could do something to ensure it was able to produce the interest run that week (when it was meant to happen) then the company would be forced to delay it and it would be in default. He also accepted if that was the position then as a director he would require proof that it was okay on the actual

day, or he would want reasonably good assurance that things were okay and the payment due was going to be made.

[453] Mr Lazelle's evidence confirmed that by the end of March 2007 the cash position with Bridgecorp itself had become so tight as to be of concern on its own. There had been a material deterioration in Bridgecorp's financial position on cash alone.

[454] For the above reasons I find that Mr Steigrad is unable to establish on the balance of probabilities that he had reasonable grounds to believe that the untrue statements in relation to proven particulars in (d), (e) and (f) of count 10 were true during the relevant time period of the count. By 22 March he should have been on inquiry and by 29 and 30 March at the latest, Mr Steigrad should have realised he needed to find out what Bridgecorp's exact financial position was. He did not do so. I find count 10 proved against Mr Steigrad.

***Count 11***

[455] In count 11 the Crown charge that the accused between on or about 30 March 2007 and on or about 2 July 2007 at Auckland and elsewhere in New Zealand signed or had signed on their behalf a registered prospectus, namely Bridgecorp Term Investments Prospectus (dated 21 December 2006) that was distributed and included an untrue statement.

*Particulars of untrue statement*

[456] Particulars (a) to (f) are the same as in count 10. I have found (a), (b), (d), (e) and (f) to be untrue.

[457] The additional particulars arise out of the statement in the extension certificate:

> (g) that the financial position shown in the statement of financial position contained in the registered prospectus had not materially and

adversely changed between 30 June 2006 and 30 March 2007 (extension certificate); and

(h) that the registered prospectus was not at 30 March 2007 false or misleading in a material particular by failing to refer, or give proper emphasis, to adverse circumstances (extension certificate).

[458] The statements were contained in the extension certificate and as such, are included in the prospectus.[72]

[459] There is a minor issue in relation to the time frame. The prospectus was suspended on 29 June 2007. The prospectus was therefore not distributed between 29 June and 2 July 2007. No offence can have been committed in that period. I amend the time period in the count to take that into account.

[460] The statements in the extension certificate are untrue in a number of respects. By 30 March 2007 and thereafter there had been a deterioration in Bridgecorp's position since 30 June 2006 sufficient to adversely affect the trading or profitability of the charging group and its ability to pay its liabilities within the next 12 months. There had also been a further deterioration in Bridgecorp's overall liquidity. In addition, a number of principal and interest payments had been missed up to 30 March.

[461] The deterioration in Bridgecorp's liquidity position and its defaults in payment of principal and interest[73] also continued during the period 30 March to 29 June.

[462] By way of example, the inflow of new investments remained at low levels. In February it was $5.3 million. Thereafter, during the period referred to in the count it remained at a critically low level: March 2007 – $4.7 million; April 2007 – $4.0 million; May 2007 – $5.9 million; June 2007 – $4.1 million.

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72 Securities Act 1978, s 55(c).
73 Particulars (d), (e) and (f).

[463] The information contained in the board packs for the succeeding months show a bleak cash position as well: 19 April 2007 negative $1.7 million – forecast $19.6 million; 24 May 2007, $1.3 million – forecast negative $181 k; 28 June 2007, $24,000 – forecast $18.4 million.

[464] The untrue statements in count 11, (a), (b), (d), (e), (f), (g) and (h) were, with the exception of (a), material.

*Count 11 - Mr Petricevic*

[465] I have found Mr Petricevic was aware of the failure to make interest and principal repayments and was, or should have been, aware of the issues concerning Barcroft. He also attended the board meetings at which the continuing deterioration of Bridgecorp's financial position and particularly its liquidity position was discussed. As managing director he reported that cash flow was king. He knew and must have appreciated the importance of the deterioration in Bridgecorp's cash position.

[466] In relation to the issue of Barcroft as a related party the defence refer to the further involvement of MED and the trustee regarding Barcroft at the time of memorandum of amendments and extension certificate. There are email exchanges between the Companies Office, Ms Wong, Buddle Findlay, at times copies to Mr Petricevic and Mr Roest in relation to both the Momi receivable and the Barcroft transaction. The most relevant correspondence is on 21 and 22 March when, in response to a query raised by Mr McPherson of the Companies Office on 21 March:

> ... has Bridgecorp taken the view that the insertion of Barcroft into the equation stops the loan being a "related party" loan.

[467] Buddle Findlay responded:

> (2) Barcroft Holdings Limited is an unrelated third party incorporated in New Zealand ("Barcroft") ...
>
> To the extent that any of the loans were related party loans vis-à-vis Bridgecorp prior to the date of sale, the sale of such loans to Barcroft extinguished this relationship.

> This transaction was reviewed by Bridgecorp's auditors as part of their review of the company's accounts. ...

[468] The response from Mr McPherson of the Companies Office was:

> We can accept it although [Ian Ramsay] doesn't agree with the auditor's conclusion on the related party issue – he'll probably want to pursue that again at some stage.

[469] That exchange really does not advance matters from the accused's point of view. Ultimately the MED noted it did not accept Barcroft was not a related party but was prepared to allow the matter to proceed to registration on the basis of the advice that apparently the auditors had approved the transaction. The executive directors, Messrs Roest and Petricevic, had the complete picture of the Barcroft transaction because of their knowledge of the Pacific Trust and Mr Urwin's involvement on both sides of the transaction. It does not appear this was communicated to MED. I note for example that, when responding to a request from the Securities Commission on this issue, in a letter drafted by Mr Roest but signed off by Mr Petricevic on 17 April 2007, the only reference to Pacific Trust is in the concluding paragraph where it is said "[MRL] is the trustee for the Pacific Trust (a discretionary trust)". No reference was made as to the ultimate beneficiaries of the Pacific Trust and their interest in the transaction.

[470] I do not consider that the further review of the Barcroft transaction by MED, Covenant and Buddle Findlay at the time of the memorandum of amendments and extension certificate alters the position concerning the directors' honest belief in relation to Barcroft.

[471] I find that Mr Petricevic was aware that the statements at particulars (b), (d), (e), (f), (g) and (h) of the prospectus and the extension certificate were untrue during the period of count 11. He could have no basis for an honest and reasonable belief the statements were true. Count 11 is proved against Mr Petricevic.

*Count 11 – Mr Roest*

[472] Mr Roest had the same information that Mr Petricevic had but, in addition also had the cash flow which he forwarded by email on 29 March 2007 to the non-executive directors which disclosed the negative start of week cash of $61,000 for the week commencing 30 March 2007 and the negative end of week cash of $2 million.

[473] In addition Mr Roest was clearly aware of the continuing and ongoing defaults in relation to the principal and interest during the period in count 11. Again, by way of example, Mr Roest received an email from Mr Welch on 17 April 2007 at 4.29 p.m. in which Mr Welch told him:

> Just to clarify the NZ cash situation as it stands at 4.00pm.
>
> 1. We currently have available funds of $45000.00
>
> 2. Non executive staff salaries are due today amounting to $157,000 and executive salaries amounting to $110,000 (BMSL)
>
> 3. Compass directors have stipulated that compass is not to transfer funds to bridgecorp today (ie $140,000 was to be used for nonexecutive staff salaries).
>
> 4. It does not seem that Braemar will settle today ($4m from compass).
>
> 5. Debenture maturities due today (including unpaid batches from previous days) total $1,702k
>
> 6. Capital notes due today (unpaid from Friday) are $272k
>
> I would suggest that staff are emailed today to inform them that payments will not go through today but that payments will be made tomorrow.

[474] On the Barcroft issue, Mr Roest was again reminded there was an issue of related parties when Mr Kumar sent him an email on 2 May 2007 in which he referred to Bridgecorp's related party policy statement in relation to Barcroft. Mr Roest responded:

> Barcroft is not a related party loan? So please advise the perceived conflicts".

[475] I find there is no basis upon which Mr Roest could have held an honest and reasonable belief that the statements in the prospectus that I have found to be untrue were true. I find count 11 proved against Mr Roest.

*Count 11 – Mr Steigrad's position*

[476] As noted, count 11 includes an additional particular which relies on the statements in the extension certificate. Mr Keene raised a further defence for Mr Steigrad in relation to the extension certificate.

[477] Mr Keene submitted that on this count the Crown also had to prove that Mr Steigrad had authorised the signature of the extension certificate on his behalf. Mr Keene posed the question this way: Was the extension certificate relied on in counts 11 and 14 proven to satisfy the provisions of s 37A(1A) of the Securities Act either generally or particularly in the case of a director who did not authorise its signature on his behalf? Mr Keene's submission raises the issue of what the Crown has to prove in relation to a charge brought against a director relating to the period the prospectus has been extended for by the extension certificate, where the director has not signed the extension certificate.

*Extension certificate*

[478] A prospectus has a life span of nine months from the date of the last audited financial statements. That period can be lengthened if an extension certificate is signed on behalf of all directors.[74] The certificate must state:

> (c) ... in the opinion of all directors of the issuer after due enquiry by them,—
>
> (i) The financial position shown in the **[**statement of financial position**]** referred to in paragraph (b) of this subsection has not materially and adversely changed during the period from the date of that **[**statement of financial position**]** to the date of the certificate; and
>
> (ii) The registered prospectus is not, at the date of the certificate, false or misleading in a material particular by reason of

[74] Securities Act 1978, s 37A(1A).

> failing to refer, or give proper emphasis, to adverse circumstances; ... .

[479] Such a certificate is deemed to be part of the registered prospectus to which it relates.[75]

[480] Mr Steigrad gave evidence that he did not authorise the extension certificate to be signed on his behalf. He said he was unaware of the extension certificate process. I deal with that evidentiary issue shortly.

[481] Mr Keene submitted that, in the absence of proof Mr Steigrad authorised the directors to sign the certificate on his behalf, the Crown cannot rely on the certificate against Mr Steigrad. He relied on passages of Dobson J's decision in *R v Graham* where failure by the Crown to prove an extension certificate had been registered was fatal to those elements of the Crown case that relied on financial statements annexed to that certificate. Mr Keene noted the certificate was not a corporate document signed on behalf of the issuer but was a document purporting to express the opinion of all directors. He argued that s 37A(1A) simply sets out the requirements for the certificate to be filed but does not address the issue of whether a certificate was in fact signed on behalf of a non-signing director. He submitted it would be extraordinary to find that agency was inherent in s 37A(1A) in the absence of express words to that effect.

[482] Mr Dickey submitted that the s 37A(1A) certificate is admissible evidence against all directors because the agency principle is embedded in the s 37A(1A) scheme.[76] There was an obligation on directors to undertake a due inquiry to form the requisite opinion. A non-signing director could not avoid his own non-delegable duty to make such an inquiry by relying on the fact he had not signed the extension certificate.

[483] *R v Graham* does not support the general proposition that Mr Keene argued for. In that case the amended prospectus and extension certificate were lodged with the Companies Office on 24 December 2007. On that day Mr Foley, the partner in

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75 Section 55(c).

76 *Roest v R* HC Auckland CRI-2008-004-029179 19 July 2011.

the external firm of solicitors responsible for dealing with the Companies Office, received an informal confirmation from the Companies Office that the amended prospectus would be treated as registered on that day. Mr Foley passed that advice on to Lombard. However, on 1 February 2008 an accountant with the Companies Office informed Mr Foley that the financial statements accompanying the certificate required amendments before the certificate could be registered. The accountant advised that on receipt of the amended financial statements and, assuming all was in order, registration of the extension certificate would proceed as at 24 December 2007, the date the Companies Office had received the extension certificate. Lombard attended to the amendments to the financial statements but before receiving formal advice that the registration was confirmed as at 24 December 2007, Lombard requested its prospectus be suspended. The formal confirmation of registration was not issued until after the prospectus was suspended. In an operational sense Lombard proceeded on the basis that the amended prospectus was valid from 24 December 2007 and had, after that date, accepted fresh investments. Defence counsel argued that the Crown had failed to prove all elements of the charges and particularly that the Crown could not prove the extension certificate was registered under s 37A(1A) throughout the relevant period. They argued that the deeming provision in s 55(c) depended on the certificate being registered.

[484] Dobson J considered the steps required for registration under the Act and concluded that the extension certificate had not been registered as at 24 December 2007 as contemplated by s 37A(1A). To the extent that aspects of the Crown case relied discretely on the 30 September 2007 financial statements annexed to that extension certificate the Crown case could not be made out. However, Dobson J was not prepared to accept the broader proposition that failure by the Crown to prove registration, and therefore, distribution of the extension certificate meant that the Crown could also not establish distribution of the amended prospectus when as a matter of law it could not be circulated it the absence of a registered extension certificate. He did not accept a discrete legal error as to the legal status of what was being distributed could exempt the amended prospectus from being the subject of a charge under s 58(3) during the period following 24 December 2007.

[485] In summary, Dobson J held that both the acts of registration and distribution of the extension certificate are elements required to be proven by the Crown in reliance on statements in the extension certificate and the accounts attached to it, but it was an entirely different matter to treat the deficiency in proof as tainting the balance of the charges relating to the statements or omissions in the amended prospectus when the amended prospectus was registered and inarguably was distributed.[77]

[486] The facts in this case are fundamentally different to that of *R v Graham*. In *R v Graham* Dobson J accepted as a fact the certificate had not been registered. In this case there is no issue about the registration of the extension certificate. The extension certificate was registered on 30 March 2007. Dobson J held that the Crown had to prove registration of the extension certificate because without registration, the certificate could not be deemed to have been "distributed" under s 58, not because s 37A(1A) created further elements to be proved by the Crown. The Crown has proved registration in this case. In my judgment the Crown is not required to also prove that Mr Steigrad expressly authorised the directors who signed the certificate to do so on his behalf.

[487] The start point is s 58(3) which provides that a director will be criminally liable for untrue statements in a prospectus that is distributed. The Crown is required to prove that the statements in the prospectus were untrue and that those statements were distributed. Section 55 makes it clear that an extension certificate under s 37A(1A), and therefore any statement it contains is deemed to be part of the registered prospectus to which it relates.

[488] Section 37A(1A) was inserted as from 1 October 1997 by s 15(1) of the Securities Amendment Act 1996. The wording chosen is notably different from that in s 41 (relating to the initial prospectus) and s 43 (relating to the amendment of a registered prospectus) both of which were in force at the time s 37A(1A) was inserted. Both sections 41 and 43 require the relevant document to be "signed by ... every person who is a director ... or by the ... director's agent authorised in writing".

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[77] At [85].

By contrast s 37A(1A) provides no such requirement. Rather the certificate is able to be signed by two directors only "on behalf of" the rest of the directors.

[489] The wording of s 37A(1A) differs from that in ss 41 and 43 in another important respect. It states the certificate delivered to the Registrar must state that

> ... in the opinion of all directors of the issuer **after due enquiry by them** –...
>
> (emphasis added)

[490] Where the extension of a prospectus is contemplated by the board s 37A(1A) imposes an obligation on each director to make due enquiry into the financial circumstances of the company. This requirement to make due enquiry appears several times in the Act and associated Regulations. Section 2B defines the meaning of "due enquiry".

[491] The requirement that directors are to make due enquiry explains in part why written authorisation is not required for the extension certificate to be signed on their behalf. The Registrar is entitled to assume that due enquiry has been made and that the opinion presented is, therefore, the opinion of all directors of the issuer.

[492] There are two answers to Mr Keene's submission it would be wrong for a director to be found criminally liable for the making of statements of opinion he or she never authorised in circumstances where there was no opportunity for due enquiry to be made and no such opinion was formed. Section 58(4) provides a defence where a director can prove he had reasonable grounds to believe and did believe that the statements were true. Alternatively, because s 58(3) creates an offence of strict liability a defence of total absence of fault might be available to a director who had no knowledge whatsoever of the proposal to extend the prospectus and therefore was unaware of the existence of the statements made in the extension certificate.[78]

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[78] This defence was successfully relied on in *R v Graham* in respect of DVDs distributed without the director's knowledge, Dobson J holding at [310] that the actus reus of the offence in s 58 required conscious behaviour on the part of an accused.

[493] I conclude that, as a matter of law, the Crown is required to prove that an extension certificate was registered (which it has proved) but that it is not required to prove that Mr Steigrad authorised the directors who signed the certificate to sign it on his behalf. In the present case the technical requirements for registration were all complied with. Mr Steigrad is taken to have authorised the signing in the absence of his making out a defence either under s 58(4) or on the basis of total absence of fault.

[494] However, in any event, for the reasons that follow I am satisfied that, despite Mr Steigrad's evidence to the contrary, he was aware of the proposal to extend the prospectus and that he authorised Messrs Davidson and Petricevic to sign the extension certificate on his behalf.

[495] Mr Steigrad said that while he was aware the prospectus had a finite life, he believed it was extended by filing the accounts. He also accepted that at the meeting on 22 March 2007 he confirmed the board should sign off the unaudited financial statements to 31 December 2006, which must have been for that purpose. But he maintained he was not aware of previous extension certificates and had not authorised the execution of this extension certificate on his behalf.

[496] I find that the extension certificate was signed at the board meeting on 22 March and that Mr Steigrad was aware of that and authorised it. The evidence relating to the completion of the certificate can be found from a variety of sources. Ms Wong was principally responsible for preparing the certificate. She prepared the certificate on the basis it would be signed at the Board meeting on 22 March. She forwarded the certificate, together with an email on 21 March 2007 to Mr Martin so that he could take it to the board meeting the next day. The email stated inter alia:

> Hi Will
>
> As discussed, please find **attached** prospectus extension certificates for BL and BIL for signing by Bruce and Rod at tomorrow's board meeting. The signed certificates will be filed at the Companies Office on 30 March 2007 with the half year accounts for BL and BIL.
>
> As you will see, the date of each of the certificates is 30 March 2007. This is in order to extend the 'lives' of the BL and BIL prospectuses out to 30 December 2007.

**Please arrange for Bruce and Rod to sign in any colour pen other than black pen.**

I have obtained email acknowledgements from certain key personnel in respect of the BL and BIL prospectuses for the benefit of the directors. The acknowledgements confirm in each case that nothing has come to the relevant person's attention which causes him/her to believe that the existing BL and BIL prospectuses contain a statement that:

- is misleading in the form and context in which it is included; or
- is misleading by reason of the omission of a particular that is material to the statement in the form and context in which it is included.

I will give you copies of those acknowledgements so that you can table them at the board meeting if required.

If you have any questions, please let me know.

Thanks
Jo

[497] Mr Martin attended the board meeting on 22 March. He confirms in his evidence that he took the extension certificates and memorandum from Ms Wong to that board meeting. The Board meeting was attended by all directors, including Mr Steigrad.

[498] The memorandum of amendments to the prospectus was also before the board at its meeting on 22 March 2007. At the meeting the memorandum of amendments to the prospectus was signed by all of the directors, including Mr Steigrad. Although the Crown argues that the accounts which were required to be attached to the prospectus extension certificate could have been signed by Mr Davidson and Mr Petricevic on 16 March, they may also have been signed at the meeting on 22 March. But in any event the extension certificates could not have been signed before the board meeting as they were only provided to Mr Martin by Ms Wong on 21 March. Although provided on 21 March, she dated them at 30 March because that was the nine month anniversary of the accounts, the "drop dead" date referred to.

[499] The minutes of the board meeting of 22 March recorded:

**7. OTHER BUSINESS**

...

**(iv) Signing of half year accounts and prospectus Memorandum of Amendment**

- BL, BIL and BFLA accounts were signed by the directors
- BL & BIL memorandum of amendment to the prospectuses and resolutions to the effect of were signed by the directors

[500] Mr Steigrad's reliance on the absence of express reference to the extension certificate in the board papers or minutes is, in my judgment, opportunistic.

[501] While the minutes do not expressly refer to the execution of the extension certificate they do refer to execution of the accounts. The only purpose of having the six monthly accounts to 31 December before the meeting for execution was to satisfy the requirement for the accounts to accompany the extension certificate.[79] The accounts, like the extension certificate, were signed by Mr Davidson and Mr Petricevic. There was no reason why the certificates which, were before the board would not have been signed at the same meeting. All directors were present then. The two important matters before them were the amendment to the prospectus and the extension certificate. The accounts were effectively incidental to the extension certificate.

[502] The extension certificates were ultimately returned by Mr Martin to Ms Wong. She then forwarded them to Buddle Findlay for registration with the Registrar of Companies. The registration duly followed on 30 March 2007.

[503] There is no evidence, other than Mr Steigrad's suggestion, that the extension certificate was signed on any date other than 22 March, or without his approval. I do not accept his evidence in relation to this. While Mr Martin could not recall the execution of the certificates at the meeting, that is not surprising given the passage of time. He considered (reasonably) the certificate was signed at the board meeting but fairly accepted the proposition that Mr Davidson could have signed it at any time. Mr Petricevic stated that his recollection was that he and Mr Davidson signed the prospectus extension certificates at that board meeting on 22 March 2007. Mr

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[79] Securities Act 1978, s 37A(1A)(d).

Petricevic had no reason not to give reliable evidence on that issue. I find the extension certificates were signed at the 22 March meeting.

[504] Next, from his previous experience on the board Mr Steigrad was aware that the prospectus had a limited life. He was also aware that the previous prospectuses had been extended. By the meeting in March 2007 Mr Steigrad was well aware of Bridgecorp's need for cash. An obvious source of cash was the inflow of deposits from new investors. Mr Steigrad knew that required a valid and current prospectus. Although he suggested he was not familiar with the extension certificate process, I consider he understated his actual knowledge on this issue. Mr Steigrad had attended the meeting the previous year (in March 2006) when there had been a discussion about the extension certificate for the previous prospectus. Under cross-examination Mr Steigrad ultimately conceded that he was "happy" that the prospectus was extended. I am satisfied that the extension certificate was signed at the meeting on 22 March and that it was signed by Mr Petricevic and Mr Davidson with Mr Steigrad's authority.

[505] There is one further legal issue that Mr Keene raised on behalf of Mr Steigrad. Mr Keene submitted that s 63 of the Securities Act provided grounds for relief from liability wholly or partially in respect of the period from when Mr Steigrad learnt that Bridgecorp had missed payments (said to be 23 June 2007) until 29 June 2007 when the prospectus was suspended. Section 63 provides:

> **63 Power of Court to grant relief in certain cases**
>
> (1) If in any proceedings against any person for negligence, default, breach of duty, or breach of trust in connection with—
>
> (a) An offer to the public or allotment of [securities; or]
>
> [(b) The distribution of a registered prospectus or [[advertisement; or]] ]
>
> (c) The management of securities offered to the public; or
>
> (d) Any matter related thereto—
>
> it appears to the Court hearing the case that the person is or may be liable in respect of the negligence, default, breach of duty, or breach of trust, but that he [or she] has acted honestly and reasonably, and that having regard to all the circumstances of the case, including

> those connected with his [or her] appointment, he [or she] ought fairly to be excused for the negligence, default, breach of duty, or breach of trust, the Court may relieve him [or her] either wholly or partly from his [or her] liability, on such terms as the Court may think fit.
>
> (2) Where any such person has reason to apprehend that any claim will or might be made against him [or her] in respect of any such negligence, default, breach of duty, or breach of trust, he [or she] may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him [or her] as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty, or breach of trust had been brought.
>
> (3) Where any case to which subsection (1) of this section applies is being tried by a Judge with a jury, the Judge may, after hearing the evidence, if he [or she] is satisfied that the defendant ought in pursuance of that subsection to be relieved wholly or partly from the liability sought to be enforced against him [or her], withdraw the case wholly or partly from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the Judge may think proper.

[506] Despite Mr Keene's submissions, in my judgment s 63 does not apply to criminal proceedings involving charges under s 58 of the Securities Act. Section 63 provides relief for parties who may otherwise have civil obligations for breach of their duties or for negligent acts under the Securities Act, such as accountants, auditors or trustees. I note the section was referred to in this context in *Fletcher v National Mutual Life Nominees Ltd.*[80]

[507] Insofar as directors or promoters are concerned, ss 58(2) and (58)(4) provide the specific statutory defence of honest and reasonable belief to charges under s 58(1) and (3).

[508] Further, in *Lawson v Mitchell*,[81] a full Court of the Supreme Court of Victoria rejected a similar submission in reliance on English authorities that a similar section applied to criminal liability.

[509] Finally, the wording of s 63(3) itself does not support Mr Keene's argument. In a criminal case an accused is either guilty or not guilty. Section 63(3) provides

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80 *Fletcher v National Mutual Life Nominees Ltd* [1990] 3 NZLR 641 (HC) at 692.

81 *Lawson v Mitchell* [1975] VR 579.

for relief in whole or in part. That is just not applicable to a finding of guilt or not. Further, nor is the concept of judgment being entered for a defendant (I note as opposed to accused) on such terms as to costs or otherwise as may be thought proper, applicable to a criminal charge. The reference to jury is no more than a recognition that, when enacted in 1978, civil cases involving juries were more prevalent than they are now.

[510] I am satisfied that s 63 of the Act has no application in this case.

[511] The issue for Mr Steigrad then is whether his belief between 30 March and 29 June 2007 that the untrue statements in the prospectus and extension certificate were true was a reasonably held belief.

[512] For the reasons given above I find that by 22 March, in the context of all of the other relevant financial information and pointers that Mr Steigrad had as to Bridgecorp's financial position, a reasonable director in Mr Steigrad's shoes would have been alerted to the fact the statements in (d) and (e) were untrue and that by 29 March, and when Mr Steigrad received the email from Mr Roest attaching the cash flow disclosing a negative cash balance for the week ended 30 March, he should have been put on notice and taken steps to raise and address the issues with the board, management and, if necessary, the trustee in relation to (f). Mr Steigrad did not do so.

[513] That was the factual position as at 30 March 2006. However, during the period to which this count relates, namely from 30 March to 2 July 2007, the position only worsened from Bridgecorp's, and on this particular issue, Mr Steigrad's point of view. It is sufficient to refer to the board meeting of 19 April. Amongst the board papers for that meeting was a note in the general manager's summarised report to the executive committee for March 2007 under the investments department:

> The tem is short staffed with Judy having finished and Serena not back until mid-May.
>
> Higher than normal level of enquiries as a result of the interest payments being made on the subsequent business day.

That should have alerted Mr Steigrad to the issue that Bridgecorp had failed to meet its obligations to investors. While, for the reasons discussed above, that may not be so at law, it was a very relevant piece of information that should have put Mr Steigrad on inquiry as to whether Bridgecorp was in fact meeting its obligations to investors.

[514] Mr Steigrad's evidence about that note was unconvincing. When he was taken to that report in evidence-in-chief he said it conveyed to him Bridgecorp was having problems with short staffing but denied that it conveyed to him that Bridgecorp was not honouring its obligation to investors. When pressed in cross-examination on that issue, he suggested first that, with some difficulty he could have read into the statement that interest payments were missed. But he maintained that the statement did not say the payments were paid late or that they were in default. Mr Steigrad was ultimately forced to concede that there was a reference to investors calling as a result of something to do with the interest payments. Of note Mr Steigrad did not suggest that he had not seen the statement but the essence of his evidence was that he did not read it to refer to missed payments. Even accepting his evidence on that basis, (which I do not), he was at the very least negligent. The statement would have alerted a reasonable director and caused him or her to raise issues and make further inquiries.

[515] At the same meeting there were other pointers of the financial difficulties Bridgecorp was facing. There was another report from the marketing department to the effect that some of the planned marketing activities had been put on hold, "as we have been unable to meet our creditor payments to our suppliers". The properties department reported against difficulties being experienced because they were not able to meet the construction cost payments. In addition, the key performance indicators report for the period ended 31 March 2007 for BHL disclosed negative cash for February and March 2007, in February's case over $70 million below budget and in March's case in excess of $80 million below budget. Again, they are issues which, when taken with the other information Mr Steigrad had, would have put a reasonable director on notice that the statements in 11(d), (e), (f), (g) and (h) were untrue.

[516] There are some indicators that Mr Steigrad was concerned about Bridgecorp's liquidity position. The minutes of the board meeting held on 19 April 2007 record the following:

> - Commented by PS that with the current property holdings in place BL is unable to produce the cash flows of a finance company.

[517] In addition, around this time Mr Steigrad and Mr Davidson were discussing the issue of Bridgecorp's liquidity. In preparation for the board meeting of 19 April Mr Steigrad emailed Mr Davidson to suggest they ask Mr Roest to come armed with:

> 1. cash flows for Aus and NZ up to date to that day and not historical. All key assumptions to be set out in writing.
>
> 2. An up to date report on McDermott ...
>
> 3. alternative strategies to deal with the approx $5 million a month funds deficit in NZ going out for say 6 months. The weekly sale of mortgages must be getting more difficult as the quality of the security declines over time.
>
> 4. progress of the sale of Dorchester shares.
>
> 5. a plan to sell nelson st in a timely manner.
>
> 6. A plan to sell 100% of the Bridgecorp stake in the 3 Australian hotels. I presume Gary wont agree to sell the 3 hotels outright, but the board should have a point of view on this. It makes the most sense. We should have a 3rd party prepare a memorandum and put them up for sale properly. It may be we can only make a sale if we sell the lot.
>
> 7. I cant imagine anyone would pay for 50% of momi stage 2 at this time, but we want a proper report on this as well.
>
> We should be undertaking asset sales on a number of fronts and at the same time so we can get out of this situation as quickly as possible. Dorchester, aussie hotels and nelson st are the key assets to be sold. If necessary we should go to a board vote. Too often we gloss over these issues. It is imperative that Gary attend the meeting in person.

[518] Despite raising those matters in that way Mr Steigrad apparently did nothing further, not even when in receipt of the further information at the meeting on 19 April. He allowed the prospectus containing the untrue statements to remain before the public.

[519] Finally, there is the issue of the information in the 28 June board pack. There is a report from Mr Jeffcoat that there were:

> issues surrounding morale/resignations etc relate directly to the business's lack of ability to pay investors on time, creditors on time and payment of drawdowns etc.

[520] Despite that clear statement in the report Mr Steigrad maintained in his evidence that, as he told the MED when interviewed, the first he was aware of the missed payments was on 23 June and then was only aware of the missed payments from 20 June on.

[521] I conclude that, during the time period in count 11 Mr Steigrad did not have reasonable grounds to believe that the untrue statements in particulars 11 (d), (e), (f), (g) and (h) were true. I find Mr Steigrad guilty of count 11.

***Count 12***

[522] Count 12 charges the accused that between on or about 21 December 2006 and on or about 7 February 2007 at Auckland and elsewhere in New Zealand signed or had signed on their behalf a registered prospectus, namely BIL Capital Notes Prospectus (dated 21 December 2006) that was distributed and included an untrue statement. The particulars are the same as the particulars to count 9 in all material respects but with the additional reference to BIL.

[523] For the reasons given above, I find that (with the exception of (c)) the untrue statements were included in the prospectus.

[524] Also for the reasons given above the particulars at (a), (b), (d) (as specified), and (e) were untrue. Mr Keene suggested that (b) was not established in relation to the BIL prospectus. But I note under note 29 Related Party Transactions the BIL prospectus has the following reference to the Barcroft transaction:

> By agreement dated 30 June 2006, Bridgecorp and BFAL sold certain loans in the ordinary course of business, including loans to members of UFB Pacific Ltd Group to Barcroft Holdings Ltd (Barcroft) an unrelated company incorporated in New Zealand for NZ$76,759,081 ...

[525] By incorporating that reference in the BIL prospectus to the transaction the same untrue statement that Barcroft was not a related party was carried into the BIL prospectus.

[526] The remaining elements that the Crown must establish under s 58(3) are satisfied. The BIL prospectus was distributed between 21 December 2006 and 7 February 2007. The accused signed or had signed on their behalf the BIL prospectus. Again, the prospectus was signed by Mr Petricevic and by Mr Roest and by Mr Roest on behalf of Mr Steigrad who had given authority in writing in compliance with s 41(b) of the Securities Act.

[527] The onus is on the accused to establish a defence under s 58(4).

[528] The statements in the BIL prospectus that I have found to be untrue were, with the exception of (a), material.

*Count 12 - Messrs Petricevic and Roest*

[529] Mr Petricevic and Mr Roest were aware or should have been aware the statements were untrue. For the reasons set out above relating to the state of knowledge in relation to count 9, there is no basis upon which they can establish an honestly held reasonable belief that the statements were true as at 21 December. I find count 12 proved against Mr Petricevic and Mr Roest.

*Count 12 – Mr Steigrad*

[530] Count 12 relates to the same period as count 9. For the reasons given in relation to Mr Steigrad's position on count 9 I accept that, up until 7 February Mr Steigrad can establish, on the balance of probabilities, that he had reasonable grounds for believing the statements I have found to be untrue were true. Up until 7 February, while there were a number of general indicators that Bridgecorp was facing real stresses in relation to its financial position and particularly liquidity, there were no specific triggers to have put Mr Steigrad on inquiry as to the advice he was receiving, particularly given that as recently as December 2006, he had the

reassurance of the line by line due diligence and management report sign-off. Mr Steigrad is not guilty on count 12.

***Count 13***

[531] The Crown charge that the accused between on or about 7 February 2007 and on or about 30 March 2007 at Auckland and elsewhere in New Zealand signed or had signed on their behalf a registered prospectus namely BIL Capital Notes Prospectus (dated 21 December 2006) that was distributed and included an untrue statement. The particulars are to intents the same as the particulars in count 10 but with reference to BIL. BIL missed principal repayments due on 15 March 2007.

[532] For the reasons given above, I find that (with the exception of (c)) the statements were included in the prospectus.

[533] Also for the reasons given above the particulars at (a), (b), (d), (as specified) (e) and (f) were untrue.

[534] The elements the Crown are required to prove are made out in relation to all accused. The issue for all accused is whether they can establish a defence under s 58(4).

[535] The statements in the BIL prospectus that were untrue were, with the exception of (a), material.

*Count 13 – Messrs Petricevic and Roest*

[536] Mr Petricevic and Mr Roest are unable to make out an honest and reasonable belief that the statements were true as at 7 February or for that matter as at 15 March when the principal repayments due to the BIL capital notes holders were missed. I find count 13 proved against Mr Petricevic and Mr Roest.

*Count 13 – Mr Steigrad*

[537] For the reasons given above, while Mr Steigrad may have held an honest belief that the statements were true it could not, by 22 March in relation to (d) and (e) and by 29 and 30 March in relation to (f), have been a reasonably held belief. I find count 13 proved against Mr Steigrad.

***Count 14***

[538] The Crown charge that the accused between on or about 30 March 2007 and on or about 6 July 2007 at Auckland and elsewhere in New Zealand signed or had signed on their behalf a registered prospectus namely BIL Capital Note Prospectus (dated 21 December 2006) that was distributed and included an untrue statement.

*Particulars of untrue statement*

[539] The particulars are materially the same as the particulars to count 11. They rely on the extension certificate in relation to BIL.

[540] There is the minor issue in relation to the time frame. The prospectus was suspended on 29 June. I amend the time period in the count accordingly.

[541] For the reasons given above, I find that the particulars (a), (b), (d) (as specified) (e), (f), (g) and (h) were untrue.

[542] The elements the Crown are required to prove are made out. The issue for all accused is whether they can establish a defence under s 58(4).

[543] The statements in the BIL prospectus that were untrue were, with the exception of (a), also material.

*Count 14 – Messrs Petricevic and Roest*

[544] The extension certificate was completed on 30 March 2007. Given my previous findings, neither Mr Petricevic nor Mr Roest could reasonably believe the statements in the prospectus I have found to be untrue and material were true. Count 14 is proved against both Mr Petricevic and Mr Roest.

*Count 14 – Mr Steigrad*

[545] The same issue regarding the extension certificate arises in relation to Mr Steigrad's position with this count. For the reasons given above I find that the Crown has proved that the extension certificate was registered and that in any event Mr Steigrad authorised Messrs Davidson and Petricevic to sign the extension certificate on his behalf.

[546] This count mirrors the time period in relation to count 11 but is in relation to BIL. For the reasons given above I am satisfied that, by the time period in this count, while Mr Steigrad may have honestly believed the statements in the prospectus and extension certificate were true there was no reasonable basis for that belief. Mr Steigrad is guilty of count 14.

***Count 15***

[547] The Crown Solicitor charges that the accused, between on or about 21 December 2006 and on or about 7 February 2007 at Auckland and elsewhere in New Zealand were directors of and issuers of securities namely Bridgecorp that distributed an advertisement that included an untrue statement.

*Particulars of advertisement*

Bridgecorp Term Investments Investment Statement dated 21 December.

*Particulars of untrue statement*

[548] Particulars (a), (c) and (d) mirror particulars (a), (c) and (e) of count 9. Count 15 pleads at particular (b) that Bridgecorp's related party transactions were set out in the registered prospectus, which omitted a material particular, namely that Barcroft Holdings Ltd was a related party.

[549] For the reasons given above, I find that, (with the exception of (c)) the untrue statements were included in the advertisement.

[550] Also for the reasons given above, the particulars at (a), (b) and (d) (as particularised) were untrue.

[551] The additional elements in relation to an offence under s 58(1) are that the prospectus was distributed and that the accused was a director of the issuer at the time the advertisement was distributed.

[552] The elements the Crown are required to prove are made out in relation to this count.

[553] The issue for all accused then is whether they can establish a defence under s 58(2).

[554] With the exception of (a), the untrue statements included in the advertisement were material.

*Count 15 – Messrs Petricevic and Roest*

[555] The defence under s 58(2) is in all respects identical to the defence under s 58(4). For the reasons given above, Messrs Petricevic and Roest cannot establish an honest and reasonable belief that those statements were true. Messrs Petricevic and Roest are guilty of count 15.

*Count 15 – Mr Steigrad*

[556] Count 15 mirrors the time period in counts 9 and 12 but relates to Bridgecorp's investment statement. Section 58(2) of the Securities Act applies. For the reasons given in relation to counts 9 and 12, I find that during this time period Mr Steigrad satisfies the Court that he had an honestly and reasonably held belief that the statements in Bridgecorp's investment statement were true. Mr Steigrad is not guilty of count 15.

***Count 16***

[557] The Crown Solicitor charges that the accused between on or about 7 February 2007 and on or about 2 July 2007 at Auckland and elsewhere in New Zealand were directors of an issuer of securities namely Bridgecorp that distributed an advertisement that included an untrue statement.

*Particulars of advertisement*

> Bridgecorp Term Investments Investment Statement dated 21 December 2006.

[558] There is the minor issue in relation to the time frame. The prospectus was suspended on 29 June. Again I amend the end date of the count accordingly.

[559] The particulars are the same as count 15 with the additional particular (e) that Bridgecorp had never missed an interest payment or, when due, a repayment of principal.

[560] For the reasons given above, I find that (with the exception of (c)) the statements were included in the advertisement.

[561] Also for the reasons given above the particulars at (a), (b), (d) and (e) were untrue.

[562] The elements the Crown are required to prove are made out in relation to count 16.

[563] The issue for all accused is whether they can establish a defence under s 58(2).

[564] Again, with the exception of (a), the untrue statements are material.

*Count 16 – Messrs Petricevic and Roest*

[565] Messrs Petricevic and Roest are unable to establish an honest and reasonable belief the statements were true at the relevant time. Messrs Petricevic and Roest are guilty of count 16.

*Count 16 – Mr Steigrad*

[566] Count 16 relates to the distribution of Bridgecorp's investment statement between 7 February and 29 June before it was suspended. For the reasons given in relation to counts 10 and 11 I find that during that period Mr Steigrad had sufficient information so that he should have been put on notice. He could not reasonably have held a belief that the statements were true. Count 16 is proved.

***Count 17***

[567] The Crown Solicitor charges that the accused, between on or about 21 December 2006 and on or about 7 February 2007 at Auckland and elsewhere in New Zealand were directors of an issuer of securities, namely BIL that distributed an advertisement that included an untrue statement.

*Particulars of advertisement*

> BIL Capital Notes Investment Statement dated 21 December 2006.

[568] The particulars of untrue statement are the same as count 15 with reference to Bridgecorp and BIL where appropriate.

[569] For the reasons given above, I find that (with the exception of (c)) the untrue statements were included in the advertisement.

[570] Also for the reasons given above the particulars at (a), (b) and (d) were untrue.

[571] The elements the Crown are required to prove in relation to count 17 are made out.

[572] The onus is on the accused to establish a defence under s 58(2).

[573] With the exception of (a), the untrue statements contained in the BIL advertisement were material.

*Count 17 – Messrs Petricevic and Roest*

[574] For the reasons given above Messrs Petricevic and Roest are unable to establish that they held an honest and reasonable belief the untrue statements were true. I find Messrs Petricevic and Roest guilty on count 17.

*Count 17 – Mr Steigrad*

[575] Count 17 relates to the distribution of BIL's investment statement during the same time period referred to in counts 9, 12 and 15. For the reasons given in relation to those counts I find Mr Steigrad had a reasonable held belief that the statements were true. He is not guilty of count 17.

***Count 18***

[576] The Crown charge that the accused between on or about 7 February 2007 and on or about 6 July 2007 at Auckland and elsewhere in New Zealand were directors of and issuer of securities, namely BIL, distributed an advertisement that included an untrue statement.

*Particulars of advertisement*

BIL Capital Notes Investment Statement dated 21 December 2006.

[577] The particulars are the same as count 16 but with reference to BIL where appropriate.

[578] For the reasons given above, I find that (with the exception of (c)) the untrue statements were included in the advertisement.

[579] Also for the reasons given above the particulars at (a), (b), (d) and (e) were untrue.

[580] There is the minor issue in relation to the time frame. The prospectus was suspended on 29 June. I amend the end date in the count accordingly.

[581] The elements the Crown is required to prove are made out.

[582] The onus is on the accused to establish a defence under s 58(2).

[583] The untrue statements in the advertisement were, with the exception of (a), material.

*Count 18 – Messrs Petricevic and Roest*

[584] For the reasons given above Messrs Petricevic and Roest cannot establish an honest and reasonable belief in the statements. They are both guilty of count 18.

*Count 18 – Mr Steigrad*

[585] Count 18 relates to the distribution of the BIL advertisement during the time period referred to in count 16. For the reasons given above in relation to Mr Steigrad's knowledge in that time period I find that he could not reasonably have held a belief that the statements were true. Count 18 is proved against Mr Steigrad. He is guilty of count 18.

**Conclusion**

[586] For the above reasons I returned the verdicts set out above.

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Venning J