IN THE DISTRICT COURT
AT AUCKLAND
WELLINGTON REGISTRY

Decision No. 61/2010

DCA 129/98

UNDER	The Accident Rehabilitation and Compensation Insurance Act 1992
IN THE MATTER	of an appeal pursuant to s.91 of the Act
BETWEEN	**ALAN GORDON THOMAS**
	Appellant
AND	**ACCIDENT REHABILITATION COMPENSATION INSURANCE CORPORATION**
	Respondent

HEARD at AUCKLAND on many diverse dates between 2006 and 2009

DATE OF THIS DECISION 21 April 2010

APPEARANCES

Appellant on his own behalf
Mr D Tuiqereqere (with Ms S Mechen and Ms A Clarke assisting) counsel for ACC

RESERVED DECISION OF JUDGE P F BARBER

The Issue

[1] Was the appellant incapacitated, as at 18 August 1997, by an injury to his wrist while yachting in December 1989; or, was he substantially able to carry out his pre-accident employment as a project manager?

[2] Of course, this appeal comes from a review decision finding against the appellant and upholding the 18 August 1997 decision of ARCIC (ACC) ceasing the appellant's entitlement to weekly compensation.

[3] The hearing before me became lengthy and detailed, because every aspect of this case was reheard before me on appeal. Mr Tui has referred to the vast amount of evidence (and documents) and the extremely extensive submissions from the appellant. Although the final booklet of submissions from the appellant was filed on 30 September 2009, I did not personally receive it until 6 January 2010 but I had been on circuit for most of October, November, and December 2009.

The Basic Facts

[4] On 27 December 1989 the appellant suffered an injury to his right wrist while yachting in the Marlborough Sounds. ACC is doubtful about the truth of the appellant's description of the accident and the injury he allegedly suffered on that date and, indeed, put credibility very much in issue throughout this case. However it is accepted that the appellant has suffered an injury to his right wrist which was subsequently diagnosed as a rupture of ligaments in the wrist and the appellant still has this condition.

[5] A prime question raised by ACC throughout this appeal is to what extent does that wrist condition affect the appellant's use of his right hand?

[6] At the time of the alleged 27 December 1989 accident, the appellant was in receipt of earnings-related compensation for an earlier hernia injury which he suffered in June 1989. He had been in receipt of that compensation since October 1989. That compensation continued through to April 1990. Prior to June or October 1989, the appellant was employed by a company called Trigon as a project manager, and the project was the design and construction of a Rotaseal machine.

[7] The appellant seems to have received medical treatment for his right wrist injury in either March or April 1990, and he lodged a claim for cover of it with ACC in September 1990. As it happens, he had been adjudged bankrupt that month of September 1990 and, a month previously, his employment with Herd Park Personnel was terminated. ACC emphasise that context for the appellant claiming cover for a right wrist injury and seeking weekly compensation for it backdated to the cessation date of his compensation for the hernia injury, namely, April 1990.

[8] Although at that point ACC had concerns regarding the veracity of the appellant's claim, it had agreed to weekly compensation now saying perhaps due to *"some persistence"* from the appellant.

[9] In early 1991 ACC received certain information to again make it suspicious of the circumstances alleged by the appellant and, in particular, suspected that he was working. It had an investigation undertaken by its agents and staff. The appellant refers to that as flawed. That revealed that the appellant had some involvement with a business called 'Career Pilot', but the investigators could not then be precise about the appellant's involvement in that business. It seems that ACC ceased the appellant's weekly compensation in late 1991 but that decision was overturned by Reviewer G M Smith in September 1992 on the evidence then available. Accordingly, the appellant had weekly compensation renewed or re-instated.

[10] In August 1996, ACC again received information suggesting that the appellant was involved in work activities so that a second fraud investigation was commenced. That revealed that the appellant had been involved in a number of companies over 1990 to 1997 and that some of those companies undertook substantial business activity.

[11] It is put for ACC that, during his period of bankruptcy over 1990 to 1992, the appellant had been involved in a loose business arrangement but, as soon as his bankruptcy ended, he immediately incorporated companies as vehicles for his various business ventures and activities; and over 1992 to 1996 there were at least 15 such companies with the appellant as a shareholder and director of each.

[12] The group of companies invariably shared the name *"Orac"* and the various business activities covered employment consultancy and placement, immigration services, an English language school, importing and exporting with China, the production of a magazine in Chinese, international funds transfer activities, and other related activities. It was disclosed that a number of the ventures started by the appellant fizzled but others such, as Orac Migration Services Ltd and Orac Publishing Ltd, involved significant operations and employed a number of employees operating out of central Auckland office premises.

[13] There were approximately 14 bank accounts opened regarding these companies and the appellant controlled most of those accounts. The relevant bank statements reveal large sums of money being deposited. The total amount deposited into those accounts for 1995 and 1996 was, respectively, $343,105 and $573,957. Over those two years the appellant had been in receipt of weekly compensation from ACC.

[14] ACC was satisfied that its investigation revealed that the appellant was not only a shareholder and director of these companies, but also was working full-time in charge of their operations and, indeed, was involved minutely in the-day-to-day affairs and running of the businesses of all those companies.

[15] At that time ACC noted that, despite appearing to live off modest payments of ACC weekly compensation, the appellant regularly travelled overseas, seemingly for business related reasons mainly, and from 1993 to 1996 made several trips to China, the Pacific Islands, the United States of America, and Canada. At that time ACC concluded that the appellant *"had a full working existence, extensive overseas travel and, on the face of it, some significant sums of money at his disposal"*.

[16] From the results of that second fraud investigation, ACC became satisfied that the appellant was not incapacitated so that he was not entitled to weekly compensation. Accordingly, a primary decision was issued by ACC on 18 August 1997 ceasing the appellant's entitlement to weekly compensation. It is this decision which is the subject of the present appeal before me.

[17] By way of further background, I record that the appellant was interviewed by ACC's private investigators on 20 October 1997 and search warrants were executed on his property in April 1998. All that led to criminal charges being laid against him on 12 June 1998. The criminal proceedings were conducted in the District Court at Auckland before a Judge alone, namely, Judge Barry Morris, over October and November 1999 with 43 witnesses called for the prosecution. The appellant gave evidence and called his girlfriend Miao Lin and Dr Miles Wislang (apparently a friend and business associate). The defendant was found guilty in a reserved decision from Judge Morris dated 10 December 1999. His Honour found the appellant guilty of 24 of the 25 counts, namely, that with intent to defraud the appellant had used medical certificates to obtain weekly compensation over the period 1990 to 1997. The appellant was convicted and, I understand, sentenced to imprisonment.

Further Background Detail

[18] In 1988 the appellant was involved in advanced Manufacturing Systems Limited ("AMS") a company which he owned and which and which designed and manufactured machines. It went into liquidation in November 1988.

[19] On 23 December 1988 the appellant signed a contract with Trigon Industries Limited to build it a Rotaseal machine. He commenced this employment on 16 January 1989. The project was ultimately unsuccessful as the machine did not work. The appellant's employment was terminated by Trigon on 3 October 1989.

[20] On 13 October 1989 the appellant saw his general practitioner, Dr Jonathon Wilcox, in respect of a hernia. A C1 Advice of Injury claim dated 19 October 1989 was lodged with ACC for a hernia injury suffered at Trigon on 27 June 1989. Cover was granted and weekly compensation paid from 18 October 1989.

[21] According to the appellant, on 27 December 1989 he suffered an injury to his right hand/wrist while yachting by himself in the Marlborough Sounds.

[22] On 25 January 1990 the appellant had surgery to repair his hernia. A 1 March 1990 medical certificate indicated that the appellant may be able to return to work in six weeks.

[23] On 13 March 1990 the appellant attended his GP, for the first time in respect of the hand/wrist arm injury.

[24] On 11 April 1990 the appellant's earnings-related compensation for the hernia ceased.

[25] Thereafter, the appellant received a benefit from the Department of Social Welfare. On 8 June 1990 he commenced employment with Herd Park Personnel but such employment was terminated by the employer on 13 July 1990.

[26] In September 1990 the appellant was adjudged bankrupt.

Lodgement of ACC Claim re Wrist

[27] On 7 September 1990 the appellant lodged a claim for cover for the right hand and wrist injury apparently suffered on 27 December 1989. A C14 medical certificate was completed by Dr Wilcox on 4 September certifying the appellant unfit to work from 3 April 1990 as having epicondylitis. Dr Wilcox noted that he first saw the appellant for that injury on 3 April 1990. He certified the appellant unfit for two weeks. ACC subsequently wrote to the appellant for further information regarding the claim and his prior employment.

[28] According to a file note prepared by an ACC officer on 21 September 1990, the appellant telephoned ACC in September 1994 to advise that he had had a prior claim on 1976 and that he had re-injured his arm on 27 December 1989. A further file note of the same day expressed concern over the genuineness of the claim. The file note reads:

> *"I am not happy with accepting this claim, IP did not seek medical treatment for 4 months after his injury and past records indicate that he is not the sort of man to ignore his injuries, (5 claims?) please see my memo at 21.9.90, IP was very vague, did not want to answer direct questions regarding employers names, dates, etc.*
>
> *He was off work from? to May 1990 with a hernia he suffered on 6.89 then apparently lost his job in October 89 due to accident (4.6.90?).*

There is a clear pattern here whenever IP "loses" *a job he suffers from an accident which happened months previously.*

He also is on DSW benefit as he received a letter from them and I feel he is "using" *us until this new business starts.*

What do you recommend we can do about this situation?"

[29] ACC subsequently wrote to Trigon Packaging Systems Ltd and Herd Park Personnel Ltd seeking information regarding the appellant's previous employment.

[30] On 26 September 1990 ACC received a report from Dr Wilcox advising that he considered the appellant's prognosis excellent.

[31] A response was received from Trigon on 3 October 1990 advising that the appellant's employment had been terminated by mutual agreement on 3 November 1989.

[32] An undated letter from Russell Davey, of Herd Park Personnel, advised that the appellant's employment there was from 8 June 1990 to 13 July 1990 and that due to unsatisfactory conduct by the appellant, his employment was ended. The letter reads:

"... He was telling clients that our service was for free ... After his employment he proceeded to break in to the building twice and sabotage the computer in an effort to extort money from an alleged motor vehicle claim. He was apprehended by the Police but I did not press charges in return that he did not enter the premises again."

[33] In November 1990 the appellant was referred by ACC to Mr Joe Brownlee, orthopaedic surgeon, for assessment. Mr Brownlee prepared a report on 1 November 1990 stating that the appellant had tennis elbow symptoms since the accident in 1989, but opining that the appellant was fit for light work not *"including repetitive tasks such as keyboard work, [as they] are reported to cause him pain."*

[34] On 21 December 1990 ACC wrote to the appellant to advising that his claim for cover had been accepted but he was not entitled to earnings-related compensation as he was not an earner at the time his incapacity commenced in March 1990 (i.e. 13 March 1990 when first seen by Dr Wilcox).

[35] On the same date the appellant attended at the Corporation branch. It appears, from file notes prepared by Corporation officers on this date, that the appellant did not accept the explanation from the case manager. Following discussions with the Corporation's officers it was decided by ACC, on the same date, to pay earnings-related compensation to the appellant from 12 April 1990. It is not clear from the available records on what basis the decision was made that the appellant was an earner or how the quantum was calculated.

1991-1992 and First Fraud Investigation of Appellant

[36] On 7 January 1991 a request for funding for surgery was completed on behalf of the appellant by Mr Brownlee for a right tennis-elbow release. Despite approval by ACC the appellant was subsequently reluctant to undergo surgery it did not therefore proceed.

[37] The appellant was subsequently seen by Mr Tonkin, an orthopaedic surgeon. Again a request for assistance for surgery was completed by Mr Tonkin on behalf of the appellant but the surgery, despite being approved by the Corporation, did not proceed.

[38] In April 1991, ICIL, Private Investigators, was instructed by ACC to investigate the appellant's circumstances to determine if the appellant was then working. On 29 April 1991 ICIL advised the Corporation that the appellant *"appears to be employed by this company [Career Pilot]"*.

[39] A letter was sent by the Corporation to Career Pilot seeking information regarding the appellant's employment there. Michelle Hyland, office manager for Career Pilot, replied to ACC on 25 June 1991 that he appellant was not employed by Career Pilot. According to a report (and information) from ICIL dated 7 August 1991, it appears that the appellant was playing a significant role in the affairs of Career Pilot had been since August 1990.

[40] As ACC had not received a C15 medical certificate certifying incapacity, it closed its file on 7 October 1991 and suspended its fraud investigation. On the same day the appellant attended at his local ACC branch with a C15 medical certificate certifying incapacity. The Corporation sought an interview with the appellant to discuss his employment at Career Pilot. According to an 8 October 1991, file note the appellant was reluctant to attend such a meeting. The Corporation therefore advised the appellant that his earnings-related compensation would be suspended until the appellant attended the meeting.

[41] A meeting of the appellant with the private investigator was conducted on 18 October 1991.

[42] On 5 November 1991 ICIL prepared a report for the Corporation providing details of the results of its further investigations, including a copy of the record of the interview with the appellant on 18 October 1991.

[43] On 21 November 1991, Mr Ross Nicholson, orthopaedic surgeon, prepared a report assessing the appellant as having a 14.5 percent permanent disability but noting that the appellant was fit for light work, being the type of work that he had engaged in previously.

[44] On 3 December 1991 the Corporation wrote to the appellant's then barrister advising that, on the basis of Mr Nicholson's report, the appellant was not incapacitated and, therefore, the appellant was not entitled to earnings-related compensation.

[45] The appellant applied for a review of that decision.

[46] In March 1992 a request for assistance for surgery to the right wrist was completed for the appellant by Mr Martin Rees, surgeon. Following 15 July 1992 a review decision it was determined by the review officer, (R M Carter), that the appellant was entitled to assistance for the costs of the surgery.

[47] On 24 August 1992, a review hearing, was heard in respect of the ERC decision. The review officer (G M Smith) issued a decision on 7 September 1992 allowing the review on the basis that the appellant was unable to work and therefore entitled to weekly compensation.

[48] In September 1992, the appellant was advised by the Corporation that he was entitled to $6,000.00 under s.79 of the Accident Compensation Act 1982 ("the 1982 Act'). An award under s.78 was not made because the appellant's injury had not yet stabilised. The appellant applied for a review from the s.79 decision.

[49] On 4 September 1992, Mr Rees wrote to the Corporation advising that he had operated on the appellant's wrist on 28 August 1992.

[50] On 11 September 1992, the Corporation wrote to the appellant to advising that, as a result of its administrative review, it had increased his lump sum award to the maximum payable under s.79.

1992 to 1995

[51] ACC considered that the appellant's business activity continued from 1992 to 1995 and that, over this period, the appellant was involved in a significant number of companies and business operations. Two of the larger operations, Orac Publishing Ltd and Orac Migration Services Ltd, were created and were in full operation in 1994 and 1995. The businesses were run out of central Auckland business premises in Symond Street. The appellant and his girlfriend (and business partner) lived on the office premises.

[52] However, the appellant's contact with the Corporation, was minimal and sporadic. He continued to receive full weekly compensation on the basis that he was incapacitated and not working.

[53] Janice Lorier, at ACC's Henderson Branch, became the appellant's case manager. From November Ms Lorier was in communication with the appellant to develop a vocational rehabilitation plan; but the appellant did not inform her of his companies, business activity, or place of residence (i.e. at the companies office premises).

1996 to 1997

[54] On 29 March 1996 an FLC16 was completed by IRD advising again that no tax returns had been filed by the appellant since 1988. The appellant had been involved in numerous businesses in the interim. Significant sums of money had been received in some of these operations (in particular, at Orac Migration) and the appellant had control over these monies. Apparently, the appellant did not declare any income from these activities, either personally or for the companies.

[55] On 21 May 1996 the appellant completed a Statutory Declaration at the request of the Corporation. The appellant stated that he had not been working or creating an income.

[56] In July 1996 ACC prepared a rehabilitation plan for the appellant to consider and sign. In August 1996 the appellant was referred by ACC to Cranston-Hunt & Associates for vocational assistance.

[57] On 28 August 1996 the Corporation received information that suggested that the appellant may be working, so that it commenced another fraud investigation.

[58] In November 1996 the appellant was assessed by Mr Tim Tasman-Jones,, hand surgeon, who opined that the appellant was fit for light duties.

[59] In February 1997, due to the termination of the lease at the Symond Street premises, the appellant moved his business operations to the 7th floor of Peace Tower, St Martins Lane, Auckland Central.

[60] On 15 April 1997 the appellant was advised by the Corporation that until he signed the earlier rehabilitation plan provided by it, his weekly compensation would be suspended. That plan was signed by the appellant on 6 May 1997.

[61] In July 1997 Orac Migration Ltd went into liquidation, but the appellant resumed the immigration business under a new vehicle, Orac International Immigration Services Ltd. The appellant was the sole shareholder and director of this company, and he continued to have sole control over the company's bank accounts.

[62] At a meeting with the appellant on 29 July 1997 an officer of the Corporation advised the appellant at a meeting that it was conducting an investigation into his activities.

ACC Primary Decision and Review Proceedings

[63] As a result of that investigation, the Corporation was satisfied that the appellant had been working while in receipt of weekly compensation and thus not incapacitated. Accordingly, ACC wrote to the appellant on 18 August 1997 advising that his entitlement would cease pursuant to s.73 of the Accident Rehabilitation & Compensation Insurance Act 1992 ("the 1992 Act").

[64] On 20 October 1997 the private investigator for the Corporation conducted an interview with the appellant.

[65] On 11 November 1997 the appellant applied for a review of ACC's said 18 August 1997 decision. He stated therein that he had not been working. The appellant also then made a complaint to the Corporation's complaints investigator.

[66] A review hearing was conducted on 5 January 1998 before Reviewer G M Smith. That evidence from the fraud investigation was subsequently provided to Mr Smith at the end of January. The evidence included a number of witness statements, a record of the interview with the appellant, lease documents signed by the appellant as well as a 30 October 1997 report from ICIL. These documents were forwarded to the appellant for his comment and he responded on 9 February 1998. In a 25 February 1998 decision, the Reviewer upheld the Corporation's decision. A Notice of Appeal was filed on behalf of the appellant on 25 March 1998.

This Appeal Hearing

[67] In the hearing before me, the appellant has provided evidence and been cross-examined all at very great length. He has called Nicole Rosie and Stephen Davey as witnesses in support of his appeal. The Corporation made the following witnesses available, at the request of the appellant, for cross-examination by the appellant, namely, Robert Cheetham (private investigator; Maree Hill (complaints investigator at the time of the 1997/98 review); Janice Lorier (the appellant's previous case manager); Martin Williscroft (ACC fraud unit). Also, the Corporation has called the following witnesses in support of its case: Russell Cassey (Trigon); David Martin (Trigon); Benjamin Masoe (Orac Migration); and Bruce Bryant (chartered accountant).

Credibility

[68] From nearly 29 years experience as a District Court Judge in many jurisdictions, I am conscious that it is often difficult to know whether to believe a witness or to what extent to believe a witness. It is possible for a witness to become hazy and confused over time. Broadly, in assessing credibility, it is my practice to look at a witness' evidence not only in its context, but also in the context of the total evidential fabric of the case. To some degree, I take into account a witness' manner, demeanour, and general body language when giving evidence and being cross-examined; but I am conscious of cultural factors and that demeanour and body language can be misleading e.g. a witness may be affected by nervousness. There is no such factor in this case where the appellant is very assertive, confident, fluent, and talented. A witness' evidence is probably best tested against the known facts and for its inherent probability and consistency, and evidence needs to be related to sensible inferences. In terms of my approach and experience, I did not find the appellant a convincing witness.

Relevant Law

[69] The primary decision by the Corporation was issued in August 1997, when the 1992 Act was in force. Accordingly, it is necessary to refer to the provisions of that Act to determine this appeal.

[70] A claimant's entitlement to weekly compensation under the 1992 Act was prescribed under ss.37 and 37A of the 1992 Act. Section 37 of the 1992 Act provides that a claimant who has cover is entitled to weekly compensation if he or she is incapacitated within the meaning of s.37A. Section 37A sets out the test for incapacity. A claimant is incapacitated if he or she is unable, by reason of personal injury, to engage in his or her pre accident employment. Section 37(1) and 37A(1) and (2) of the 1992 Act read:

"37. Application of incapacity and work capacity provisions -

(1) Where the Corporation is required to consider the claim of any person for weekly compensation under this Act -

(a) The Corporation shall determine the person's incapacity under section 37A or section 37B of this Act, as the case may require; and

(b) If the Corporation determines that the person is not incapacitated within the meaning of section 37A or section 37B of this Act as the case may be, the person shall not be eligible to receive weekly compensation under this Act; and

(c) If the Corporation determines that the person is incapacitated within the meaning of section 37A or section 37B of this Act, as the case may be, the person shall not be eligible to receive weekly compensation under this Act and the provisions of this Act (including sections 22 and 23) apply accordingly.

...

37A Determination of incapacity in relation to earners generally -

(1) For the purpose of this Part of this Act, the Corporation shall determine the incapacity of a person (other than a person to whom section 37B of this Act applies) in accordance with this section.

(2) The object of a determination of incapacity under this section is to determine whether or not the person is, by reason of his or her personal injury, for the time being unable to engage in employment in which the person was engaged when the personal injury occurred."

[71] Section 73 of the 1992 Act reads, inter alia:

> *"(1) The Corporation shall, and any exempt employer may, if not satisfied on the basis of the information in its possession that a person is entitled to continue to receive any treatment, service, rehabilitation, related transport, compensation, grant or allowance under this Act, suspend or cancel that payment for treatment, service, or related transport, or the payment of compensation, grant, allowance, or provision of rehabilitation."*

[72] Pursuant to s.73 the Corporation was entitled to cease a claimant's compensation where it was not satisfied that the claimant was entitled to receive the same on the evidence before it.

Case Law on "Incapacity"

[73] In *Eason* 28/94 the District Court held that a claimant was not incapacitated if he or she was substantially able to carry out his or her pre accident employment. The decision was confirmed in *Richardson* 125/97 and *Broome* 117/97.

[74] The interpretation of *"incapacity"* was considered in *Lamb* 74/98. Beattie DCJ held at 8 and 9:

> *"The appellant is by profession a registered nurse and had for some seven years prior to her accident in November 1990 been employed as a nurse in the geriatric field. It was submitted by Mr Hutchison, her advocate, that the provisions of section 37A of the Act require a consideration of whether the appellant is able again to return to a nursing position in a geriatric environment.*
>
> *I find that such an interpretation of section 37A is far too narrow and gives a far too restricted meaning of the worked employment.* "Employment" *as defined in section 3 means* "work engaged in or carried out for the purpose of pecuniary gain or profit".
>
> *Where a person is a duly qualified registered nurse I find that limiting that qualification to a particular type of nursing would be an artificial limitation. The appellant is a nurse and if she is able to resume her work as a nurse, and in that regard the field of nursing is multi-faceted and some tasks within it are less demanding physically than others, then I consider that no such incapacity can be said to arise within the meaning of section 37A.*
>
> *It was submitted by Mr Condie, counsel for the respondent, that at the time of her personal injury the appellant worked as a nurse (the broad field) who specialised in the care of geriatric patients (the particular field). There is no*

suggestion that this required special skills or attributes by the appellant or that she was unsuited to other forms of nursing. Indeed the fact that the appellant has so easily settled into psychiatric nursing clearly indicates her suitability for various forms of nursing. He therefore submitted that the employment in which the appellant was engaged when her personal injury occurred was nursing in general rather than specifically geriatric nursing.

I agree with that submission as such it fits in with the overall scheme and intention of the Act and in particular the object of facilitating and encouraging claimants to return to work."

[75] The Court held that the term *"employment"* ought not to have a narrow or restricted meaning and was not limited to the particular job a claimant is performing at the time of injury but rather employment of a general type undertaken at the time of the personal injury.

[76] In *O'Connor v* ACC (210/2000), the claimant was self employed as a welder at the time of his accident in 1993. He was incapacitated for a short period, i.e. six weeks, before returning to work until 1997 at which time he applied for weekly compensation backdated to 1993. The claimant contended that he had in fact been incapacitated since 1993 (despite returning to work). Evidence was led for the claimant that he had performed light duties only due to his injury when he returned to work in 1993. The District Court held, inter alia, at pages 7 and 8:

"It is settled law that the burden of proof for proving incapacity rests with the appellant and the standard of proof is the balance of probability. When I stand back and look at the evidence overall, I find that there is insufficient evidence for the appellant to establish on the balance of probabilities that he has been continuously incapacitated due to this injury from September 1993 through to 13 January 1997. There is no contemporaneous medical evidence of such incapacity and, in fact, the appellant was able to return to his pre-injury employment.

...

At that time, the appellant was a self-employed welder and, following his injury, he returned to that work. It therefore seems to me to be self-evident that capacity for work has been established over material times, even though the appellant may have had to adjust his work-site and the type of welding work which he himself undertook over that period because of his 1993 injury. I appreciate that the appellant has given evidence that he undertook a different and lighter type of work following his injury, but it was still welding-type work. It is not necessary for the work undertaken after an injury to be exactly the same in all aspects for work capacity to be established. The appellant was a welder prior to his incapacity. However, he has been able to carry on his business by organising it so that he himself does not undertake the heavy work aspects of welding. I appreciate that there is evidence that the appellant's business undertook heavy welding which other welders declined to perform. However, after his 1993 injury the appellant was still able to carry on his previous business of welding. He may well have changed his personal contribution to heavy work, but he still worked in the business and managed it. He could not be regarded as incapacitated at material times and, certainly, has not adduced adequate evidence of that."

Issue and Nub of Corporation's Case

[77] The question in this appeal is whether, as at 18 August 1997, the appellant was incapacitated as a result of personal injury suffered on 27 December 1989; i.e. was he unable to carry out his pre-accident employment as a Project Manager.

[78] The question of the appellant's ability to undertake his pre-accident employment is a question of fact and credibility is a vital issue.

[79] The corporation's position is that the contemporaneous medical evidence from 1990 to 1997 is tainted by the appellant's inaccurate self reporting, and he has overstated the pain and discomfort suffered by him as a result of the 1989 wrist injury and the resulting disabilities or limitations.

[80] Mr Tui submits that the medical evidence should only be relied on in respect of the objective medical findings from the specialist medical practitioners as to the nature of the wrist injury; and that the evidence of the appellant's actual use of his hand, by persons who saw the appellant using the right hand/wrist from 1990 to 1997, is the best evidence of what the appellant was capable of doing. In this case, I agree with that approach.

[81] Mr Tui puts it that, while the issue is confined to the appellant's circumstances in August 1997, the evidence from 1990 to 1997 is material and shows that the appellant's condition was static for the entire period. The appellant contends that attempted remedial surgery in August 1992 and an alleged stroke in August 1993, made his condition worse; but ACC submits that the evidence does not support either contention.

[82] The starting point in assessing the appellant's incapacity is to identify his pre-accident employment. It is then necessary to consider, as a matter of fact, whether the appellant was substantially capable of performing this employment at the material time (i.e. 18 August 1997). To this end, the Corporation focused on the work activities the appellant was able to undertake while he was in receipt of weekly compensation (and while he was certified unfit to work in respect of his right wrist).

[83] It is the corporation's position that:

[a] The work activities the appellant undertook from 1990 to 1997 are entirely inconsistent with any incapacity to his right wrist;

[b] There is no medical reason why the appellant's right wrist injury precludes him from undertaking the activities he was performing prior to his accident;

[c] The medical evidence, in respect of the appellant's restrictions/limitations caused by the wrist injury, is tainted by the subjective self reporting of the appellant.

[84] Finally, it is the corporation's position that the appellant's failure to disclose his true work activities to both the medical practitioners and the Corporation is indicative of the appellant's awareness that proper disclosure would have resulted in the disentitlement of his weekly compensation; and there is no other reasonable explanation for this failure.

[85] The submissions for ACC are so thorough and, in my view, relevant that I saw little point in going much beyond them. It is not necessary to cover the extent of those submissions in order to determine this case, but the appellant wished to push every aspect so that this decision is much more detailed than required.

Pre-Accident employment

Areas of Dispute

[86] It is necessary to identify the appellant's pre-accident employment in order to determine whether the appellant was incapacitated at the material time (i.e. 18 August 1997).

[87] Mr Tui submits that the appellant has overstated both the physicality of his role at Trigon and the delicacy of the hand movements required to operate the mouse when using the CADD software programme to design machinery components.

[88] The Corporation therefore called three persons who were working for Trigon in different roles at the time of the Rotaseal project; namely Russell Cassey, Jeffrey law and David Martin. They refute the appellant's contention regarding the physicality and delicacy of the tasks.

[89] The appellant also claims that he was self-employed at the time of his employment with Trigon and that this self-employment ought to be taken into account when considering his incapacity. The Corporation's position is that the evidence of the self-employment is both inconsistent and irreconcilable; and, even if the appellant was undertaking such self employment, the position was very much the same as that of his employment at Trigon; i.e. project managing the design and construction of machines. I agree.

Trigon - Project Manager

[90] There is no dispute that the appellant was employed with Trigon Industries Ltd from January 1989 to 3 October 1989 as a Project Manager for the design and construction of a sealing machine.

[91] The Corporation relies on the evidence of the said three previous employees of Trigon. Mr Cassey was then the Technical Director at Trigon. The Rotaseal machine was his project. It is clear from his evidence that he knew the relevant background intimately despite the fact that 20 years had since passed. Mr Cassey provides a helpful overview of the project.

[92] Mr Law was responsible for providing employees to assist the appellant with the assembly and trial of the machine. He states that the appellant's role did not require any heavy lifting and Mr Cassey supported that position.

[93] Mr Martin was the Design Engineer at Trigon. He has worked on CADD software for many years and is extremely experienced in using the CADD programme. He taught draughtsmen and apprentices to use the programme at Trigon. His evidence is that the use of the mouse was not delicate but a simple point and click. He stated that the computer undertook the precise drawing tasks by the input of commands.

[94] I agree with Mr Tui that their evidence is reliable and independent. None of the three witnesses have any interest in this proceeding. Mr Cassey, in particular, demonstrated an excellent recall of the facts surrounding the project and the appellant's involvement. Mr Martin's demonstration of the CADD programme was entirely consistent with his description of the use of the mouse.

[95] The appellant was employed as a Project Manager to build a Rotaseal machine for Trigon. The terms of the agreement were set out in a contract signed on 23 December 1988. The project was Mr Cassey's; he was instrumental in the employment of the appellant for this project. Mr Cassey explained in detail the various stages of the project and the appellant's tasks in respect of the stages which were:

[a] Designing components for the Rotaseal machine; the same being undertaken using CADD computer software;

[b] The manufacture and/or purchase of the designed components, requiring telephone communication and contact with third parties;

[c] Once the components were to hand, there followed the assembly of the machine at the Trigon warehouse;

[d] Finally, the trialling of the machine, to ensure it worked properly and achieved the purpose for which it was constructed.

[96] Mr Cassey's explanation is clear and unambiguous that The various tasks and activities required of the appellant for this particular project were reasonably straightforward. Mr Cassey also stated that Trigon provided a number of employees to assist the appellant at various stages, most importantly, at the assembly and trialling stages. Mr Cassey summarised the appellant's tasks and activities at paragraphs 47 and 48 of his brief as:

"47. I have set out above the nature of Mr Thomas' tasks and activities at Trigon. A substantial part of his work involved using the computer, primarily the mouse in respect of the design work.

48. There were also communications with suppliers and various other persons and supervision of the assembly of the machine, together with modification trialling of the machine. Most of the work was sedentary in nature."

[97] The evidence from Mr Law is consistent with that of Mr Cassey in respect of the physical nature of the position. Mr Law described the physical requirements of the appellant's position as *"light"*. Mr Law provided a dedicated engineer, as well as other staff, to undertake the more physically demanding aspect of assembling and trialling the machine.

[98] Mr Martin explained the CADD programme (at paragraphs 6 to 10 of his brief) and described the movements required to operate the keyboard and mouse for this software. Mr Martin outlined his particular experience using AutoCAD at paragraphs 11 to 14. Mr Martin stated the VersaCad programme (being used by the appellant in 1989) and considered that programme and AutoCAD (being used at Trigon) to be identical in their operation.

[99] In short, Mr Martin did not agree with the appellant's assertion that the use of the mouse was delicate. He described the use of the mouse and keyboard at paragraph 28 of his brief as:

> *"... The use of the mouse and keyboard was straightforward. It was simply Point and Click. The movement required for the use of the mouse is a sideways movement with the wrist. If a person can operate the mouse to play a computer game then that person is capable of operating a mouse to use AutoCAD or VersaCad."*

[100] On 25 June 2008, Mr Martin provided a demonstration before me at the appeal hearing to illustrate the point.

[101] I refer below to the evidence in respect to the two primary areas of disagreement regarding the appellant's tasks to demonstrate that the appellant's description is quite inconsistent with it therefore was the same description he provided his medical practitioners from 1990 to 1996.

[102] There are a number of other areas of disagreement between the appellant and the three ex-Trigon employees. These areas of disagreement are not central to this appeal but are more relevant in terms of further undermining the appellant's credibility.

Dexterity of Hand Movements

[103] On 27 March 2007, in the course of his examination in chief, the appellant stated at page 3 of the transcript:

> *"Q Um, what skills do you need to run a computer a CAD program ...*
>
> *A Well you have to have basic computer skills for a start. You have to already know how to design from a drawing board. And from that you can learn to use um, CAD programs which has a lot of unique advantages where you can do a lot more than you can do with a drawing board. But you need to use. The unique thing. The difficult thing is you use a mouse to position parts of the screen. Like size and position of parts and it's a very precise way of using a mouse. Um like it requires quite a lot of dexterity. It's not like point and shoot, like what we see on a Windows programme. It's precision. You are moving a mouse to the point of only moving like a hair's thickness literally. That's how fine a movement is. And you've got to use your other hand for keyboard activity at the same time."*

[104] Similarly, on 28 March 2007, again in examination in chief, the appellant stated at pages 42 and 43 of the transcript:

> *"... The mouse in itself is much like any other mouse, mice. But it's the way in which it's operated. Like we would be familiar today with Windows where it's point and click at a little box, but you can be within a bull's roar of where you are pointing. But with designer work you're producing like a rectangle on a screen for example and you'll have to create the side of that rectangle and you're moving the mouse in very, very fine movements with a great deal of dexterity and control. The precision is absolute. You are talking in terms of. You're quite. It's within the range of, of a thickness of a half movement at a time. As*

the numbers read out and before you press the Enter key to create the size of something for example. Or position something so that as you are designing you are actually fitting parts together on that. You make mistakes the machine doesn't fit together. So it's precision ..."

[105]The appellant puts it that the dexterity required of the hand in the use of the mouse for the CADD programme is surgeon-like. This was his evidence in cross examination on 30 January 2008 at page 3 of the transcript:

"That's, that's the type of movement you're using on the mouse ... it's back and forward like that and side to side like that and your arm is rested and course precision of the movement you'd have to move like a surgeon you're moving very very fine movements."

[106]ACC's position, relying on the evidence from Mr Martin, is that the skills required of the mouse are basic and its use simple. The precision of creating a drawing on the screen is performed by the computer itself by simple commands being entered into the computer either by the keyboard or mouse. The precision is not performed by the operator using the mouse, as the appellant maintains.

[107]In his cross-examination, the appellant remained fixed in his stance that the use of the mouse created the precision so that the dexterity and skill required of the hand and wrist was surgeon-like. He did accept that Mr Martin was familiar with the CADD software which the appellant was using at the material time in 1989 (i.e. VersaCAD) and so in a position to be aware of its operation and use.

[108]An example of the appellant's disagreement with Mr Martin's description of the hand movements and use of AutoCAD was in relation to the use of the commands on the computer to draw precise line measurements. The following evidence was provided at page 2 of the transcript on 30 January 2008:

"Q So these commands allow you to draw shapes, allow you to draw lines and they allow you to draw precise distances so if you want to do a line say 5.4mm long, you would type that into the computer, and it would draw a line up with that length. I put it to you it would.

A No, no you'd use the mouse.

Q I put it to you it would. But you could type it in.

A I wouldn't imagine, I don't know anyone that would.

Q You can, can't you, Mr Thomas?

A No, no, no. I don't see anyone work that work.

Q I'd put it to you Mr Thomas.

A I'd imagine a modern programme definitely you could, you could so such commands in nowadays um, but no one would in particular terms, no one actually would get into that I guess."

[109]Mr Martin gave a demonstration of the use of the AutoCAD at the hearing on 25 June 2008 - pages 2-7 of the transcript. He was cross-examined by the appellant in relation to his evidence and in relation to the demonstration - pages 7-44 of the

transcript. I find that Mr Martin's evidence was clear, precise and unequivocal. The demonstration illustrated the simplicity of the hand movements required to perform the mouse for AutoCAD.

[110] Mr Martin drew a variety of objects (vertical line, horizontal line, rectangle, circle and ellipse). He also drew precise measurements. In doing so Mr Martin used the mouse in a simple click and point manner selecting commands and icons on the computer to make the drawing at the measurement required. The movements of the mouse did not require tension of the wrist or fingers. Such was the simplicity of the movements that Mr Martin drew a horizontal and vertical line using his left hand - page 6 of the transcript. He confirmed in re-examination, that he was right hand dominant - page 44 of the transcript).

[111] The appellant attempted many ways to undermine Mr Martin's evidence that the use of the mouse was basic. The appellant suggested that the use of the mouse created the preciseness, that an injured person could not properly use the mouse, and that operating CADD was dissimilar (in the use of the mouse) to Windows and other software packages. If felt that the appellant made no headway with Mr Martin on that. Inter alia Mr Martin stated in cross examination; (at page 29):

> *"Mr Thomas: All I'm saying is that there is a difference isn't there?*
>
> *...*
>
> *Mr Thomas: A difference from using the Microsoft products of Word and Excel, those type of things, than there would be with a CAD programme?*
>
> *Mr Martin: A semantic difference I suppose, you could talk about games as well and say, there was a semantic difference but you still use a mouse, you move him around, you pick objects, you put them on your screen."*

[112] At page 33:

> *"Mr Martin ... Mr Thomas had indicated that to operate CAD sir, you had to have very fine movements, very accurate movements of the mouse, and you had to have good dexterity to move it. I have been involved with CAD now for quite a long time and I have never ever seen any of my men or myself who had to use fine movement and I tried to show that on there, that you did not need fine movements. If you did need fine movements, you would not be able to draw what you were trying to draw. You cannot move things to a hundredth of a millimetre, it is impossible."*

[113] At page 34:

> *"Mr Martin: I did not agree with the statements where you are indicating that to operate a CAD system using the mouse, you use very fine and precise movements. You do not need fine and precise movements. In fact, you could not operate a CAD system if you did. It is like drawing in pencil and saying, I'm going to draw a line 100.01 line - a hundredth of a millimetre, which you cannot see. You have to rely on a computer to do these things for you and you do not need precision."*

[114] At pages 36 and 37 (demonstrating that the measurements are drawn by commands on the computer rather than manually using a mouse):

"Mr Thomas: Now you've got there 45 with no tolerances whatsoever. It is not zero point something or other.

Mr Martin: I have to type the tolerances in.

...

Mr Martin: The machine itself does not know what the tolerances are unless I tell it.

Mr Thomas: Yes, but you could have the - you could arrange it so you have the resolution set where that could be 00, point 00, couldn't you?

Mr Martin: Yes I could.

Mr Thomas: Yes, and that would require you to make fine movements with the mouse, wouldn't it?

Mr Martin: No.

...

Mr Thomas: You would elect to draw it at 45 and dimension it manually?

Mr Martin: No, you would change the dimensions which the computer puts on and you put on the tolerances you want. This chart has obviously got tolerances to take another chart which would be slightly smaller, so it would be pressed into that. I would have to click this dimension 45 and just type in 45.02 and then - there is a technique, and it is quite - I do not know if I have ever got it actually in this computer at the moment, which you can type a line fairly quickly. All you do is .02 and then you, for a single option, just above the 6 and then you put 45.03 and press like that and it comes out.

...

Mr Thomas: But when you are drawing and you want to place a box somewhere, you can know exactly what you are doing by looking at the numbers and moving your hand in accordance, and read the numbers rather than watch the square correct?

Mr Martin: Or you can type them in."

[115] During the appellant's cross examination of Mr Martin's demonstration, the appellant became involved in the demonstration operating the mouse himself in the context of questions. Mr Martin observed this activity and noted at pages 38 and 39:

"Mr Martin: Well, you moved that box. You moved it very, very well.

...

Mr Martin: You have just operated the mouse.

Mr Thomas: No I did not operate the mouse, I moved it. I did not operate it. It is like a drunk trying to drive.

Mr Martin: I thought you did quite well actually."

[116] I had noted at pages 39 and 40 in relation to the effect of Mr Martin's evidence:

"His Honour: The short point is, Mr Martin thinks that that system is pretty easy to operate. That is what he is saying.

...

His Honour: but I mean in simple terms, you seem to be saying that from your experience with Mr Thomas and from your experience in running of the CAD system, you cannot think why Mr Thomas still could not operate it. Right?

Mr Martin: I cannot see any reason, Sir.

...

Mr Martin: In general terms, you do not need much dexterity at all. The computer will do it for you.

His Honour: Yes.

Mr Martin: If you use it correctly."

[117] Finally, at pages 43:

"Mr Thomas ... No, if a person has got a broken hand and you are drawing Workshop (?) and the doctor said 'light duties', what would you get them to do?

Mr Martin: Well as I said before, I had someone who had a withered hand and he used AutoCAD quite well."

[118] I agree with Mr Tui that Mr Martin's evidence is compelling in its clarity and simplicity. The appellant sought to make the activity look complex.

Heavy Physical Work

[119] The appellant also suggests that the position of Project Manager required a degree of heavy physical manual activity. The appellant was at pains to suggest that a person who does not have full use of his/her right hand cannot undertake the physical activity required of the appellant's role at Trigon (or for that matter any role as a Project Manager/Design Engineer). The appellant's said that his role was physical, requiring assembling and dismantling the machine as well as lifting of heavy objects.

[120] Messrs Cassey and Law stated that the appellant was supplied with full-time persons to assist him with the physical aspects of the position of Project Manager. Mr Cassey disagreed with the appellant's assertion that a one-armed person, or somebody without a driver's licence, would be incapable of undertaking the appellant's position of project manager and stated at paragraph 37 of his brief:

"Mr Thomas' role was to oversee the building of the machinery and to solve any problems identified as assembly took place. Assembling, was in the main, bolding small steel components together. Mr Thomas' assistance did not go beyond hearing to hold a part in place, or bolding parts. His physical involvement was really assisting the engineer when needed. If Mr Thomas had one arm in a sling, he would have been able to do most of what he did."

[121]Mr Cassey was challenged, in cross examination as to the accuracy of the above statement regarding *"one arm in a sling"*. Mr Cassey stood by the statement, and stated, inter alia, at pages 55-58:

"Mr Cassey: When I make the comment that "if you had one arm in a sling you would have been able to do most of what you did", *I am meaning that you would have been able to work in a team situation where you had engineering labour - skilled engineering - supplied to do most of the manual work, like taking that assembly apart and putting it back together, by standing there and saying:* "Look, this needs to come apart, what you need to do is take off these three cap screws, take out that circlet and that is it". *Now that is how I would have seen it functioning.*

...

Mr Cassey: We are talking about your explaining something on a machine which, because it is your machine and it is not something they have worked on before, is a wee bit unfamiliar with them. So you are helping them understand and work on your machine correctly.

...

His Honour: ... In the light of what has been put to you, Mr Cassey, do you think that perhaps the last sentence of your paragraph 37 is a slight - a slight exaggeration or not?

Mr Cassey: No I don't. I never, when we negotiated the contract with Mr Tomas, I never had it as my intention that he would build the machine by himself. We would always provide staff to do the assembly stages of the machine, and Mr Thomas would provide advice to those staff.

Now, I do not accept that one of those staff could not disassemble and reassemble that bearing provided Mr Thomas gave them the correct instructions, and was standing in their vicinity when the job is done. And that is my key point. We set it up so that he could do it.

If Mr Thomas, at the start of the whole exercise, had been impaired and was one armed, I would still have been very keen to have him involved in helping us build the floss gloss machine because it was his knowledge from prior experience and his ideas that we were using, rather than his dexterity.

...

Mr Thomas: ... But I'm not going - as a project manager, I'm not going to be at their shoulder all the time, am I?

Mr Cassey: You should be aware of what are critical stages in that process. Now that's why you are there. You are there to anticipate the problems and to help them through it. Now, if you, from your prior experience know that this is a sensitive part of the machine and liable to provide a small problem, then you're going to provide them that good advice and that training and it is going to go."

[122] I found Mr Cassey to be an impressive witness. He was thoughtful and careful with his answers and clear in his recollections. If he was unsure of any facts he said so.

Advanced Manufacturing Systems Ltd ("AMS") - Self-employed Work for Liquidator?

[123] The appellant contends that, in addition to his role with Trigon, he undertook other work in 1989 in a self-employed capacity. The appellant's company, AMS, went into liquidation in late 1988, and he contends that he had an agreement or arrangement with the liquidator to complete *"work in progress"* for clients of AMS. He stated that his work came to an end shortly after his hernia in June 1989.

[124] ACC's position in relation to this employment question is twofold:

[a] That the evidence in relation to this alleged self-employment is scant and inconsistent, and accepting the fact of this employment (as well as the fact that it ceased due to the hernia) is largely dependent on accepting the appellant's evidence; and

[b] That even if this Court accepts that the appellant was undertaking some of this work, the activities were largely the same as the appellant's role of project manager and, therefore, the fact of this employment should have no bearing on this appeal.

[125] The appellant stated, in examination-in-chief on 27 March 2007 at page 8 of the transcript, that he had, *"made an arrangement with the liquidator that I would take over the work in progress"*. He produced correspondence from the liquidator. Peat Marwick, dated 1 August 1991 [exhibit 9] and proceeded, at page 8 of the transcript, to identify (from the *"work in progress"* described in the Peat Marwick correspondence) projects that the appellant was involved in following the liquidation in late 1988.

[126] In cross examination on 30 January 2008, the appellant was questioned in relation to this alleged arrangement with the liquidator at pages 19-23. He seemed to be saying that he took over completion due to his relationship with the customers and the liquidator not wishing to be involved. Then, he seemed to be saying that he had an arrangement with the liquidator but wasn't working for the liquidator. Then he stated:

"I had the permission, I had the permission of the liquidator to carry on with the contracts unheated by the liquidator, the liquidator declared no interest in those projects because without me they weren't gonna be fixed or finished. No on was gonna fix those machines except me. And the liquidator, liquidator said well, we would have to pay you if we got you to do it and as there is we don't know a thing about it we are best to abandon. So you are free to carry on. And then I approached the customers, one of the customers approached me actually, but, and um arrangements were made with these companies. And so, everyone was in agreement, everyone was happy with the arrangement".

[127] The appellant then said that he was to be paid for that work by the client themselves. It was put to him that his company AMS went into liquidation owing $350,000 to its creditors which was never paid, yet he says he had an arrangement to go to the client and get money for work. He insisted that the reason he was treated *'so kindly"* is that he was not responsible for his company's failure. It was put to him that there is no reference to that arrangement in the said letter of 1 August 1991 from Peat Marwick. The appellant's answer was confusing.

[128] Mr Cassey indicated that the appellant was involved in some activity outside of Trigon designing and/or constructing machinery at the time of the employment with Trigon. His agreement with Trigon provided for this and Mr Cassey understood that the appellant was undertaking work with someone at Warkworth. However, the nature of such a job is unclear, as is whether the appellant received remuneration for it. Mr Tui puts it that the most reliable evidence as to whether the appellant was involved in any other work activity in the period prior to his 1989 accident is as follows:

[a] In a 19 October 1989 C1 Advice of Injury claim form for the 1989 hernia injury, the appellant stated that his two most recent employments were Trigon from 16 January 1989 to 4 October 1989 and self-employment from June 1986 to 14 November 1988. There was no mention of any self-employment in 1989. In the course of cross examination on the point, the appellant stated *"I'm sorry. I mean if I was lax I was lax. But I was. I was owning 90% on my company and during the previous year I was um, I was the owner of the company and working in my company as the engineer and during the course of that period of time as described I was self-employed. And also the um, I see here it's got 14 November 1988. Well I was certainly working beyond that. I mean there's irrefutable evidence of my carrying on in a self capacity. So I was being told by the person guiding me through filling this out (i.e. the C1 ACC form) I can't have two jobs at the one time, I can only have one job at one time. So I guess I was somehow manipulated there without thinking much of it. But that's not actually precise information."*

[b] Similarly, on a subsequent C1 Advice of Injury form (dated 7 September 1990) for the 1989 wrist injury, the appellant provided similar information and there was no reference to his self-employment in 1989 but only reference to his employment with Trigon in 1989, to his weekly compensation from ACC, and to his employment with Herd Park Agency in 1990. That document was also put to him, in cross-examination as being inconsistent with his assertion of self-employment in 1989 and he stated: *"Well I just didn't think it was very important at that time. I mean it didn't occur to me that I'd be having trouble like this now".*

[c] In the appellant's examination in chief at his said criminal trial in 1999 he made no mention of any self-employed work in 1989. Inter alia, the appellant was cross examined as to whether he had in fact received income from the alleged self-employment in 1989 but his answers were contradictory and unsupported by other evidence. The same issue was raised again with the appellant before me on 30 January 2008 but without clarification by him. Interestingly, in that exchange with Mr Tui he maintained that he had supporting documentary evidence that he had got self-employment remuneration in 1989, but that he did not have the

physical capacity to trawl through his box loads of written material which would record that he is *"disabled with an incapacity to do documentation of this type"*. Not surprisingly, Mr Tui submits that on the issue of the appellant's capacity to do *'documentation of this type"* I need only observe the voluminous documentation which the appellant has produced in this appeal both with regard to his extremely detailed submissions and various memoranda and his bundles of documents which he has collated. That activity of the appellant is impressive by any standard and shows good capacity for his pre-injury work requirements.

[129] With regard to the alleged income from self-employment in 1989, the appellant has not produced any supporting documentation, and IRD forms over the period 1991 to 1996 state that no tax returns have been filed by the appellant since 1988. The appellant has filed an enormous amount of documentation before me but none of that assists his stance about his alleged self-employment in 1989.

[130] There are other between the appellant and the three ex-Trigon employees but these areas of disagreement do not pertain to the appellant's pre-accident employment tasks. The relevance of these areas of disagreement lies in their impact regarding credibility.

The Appellant's Photographs, Exhibits 1-5

[131] In the appellant's examination in chief on 27 March 2007, he introduced exhibits 1-5. At pages 6 and 7 of the transcript for 27 March 2008 the appellant stated that photographs 4, 4A and 4B were each the same photograph of the Rotaseal machine which the appellant had designed for Trigon.

[132] However, at paragraphs 24 and 25 of Mr Cassey's brief, Mr Cassey stated that photographs 4 and 4A are of a different machine to 4B and that the photograph 4B is the photograph of the Rotaseal machine designed by the appellant. The machine in 4 and 4A is considerably larger than the machine in 4B.

[133] That conflict was put to the appellant in cross examination on 29 January 2008. The appellant accepted that his examination in chief was incorrect and that Mr Cassey's evidence was correct.

The Haysenn Machine

[134] In his examination in chief on 27 March 2007, the appellant stated that the photograph in exhibit 3 was a Haysenn machine which Trigon built (for the purpose for which the appellant was subsequently employed to build the Rotaseal machine). The appellant stated that the Haysenn machine was a failure and that, prior to the Rotaseal project, Trigon had employed the appellant to prepare a report on why the Haysenn machine failed.

[135] Mr Cassey, stated that the appellant was involved in only one project for Trigon, namely, the Rotaseal machine; and that the appellant was not involved with the Haysenn machine. Mr Cassey was cross examined by the appellant inter alia in relation to the Haysenn machine. Mr Cassey rejected the appellant's suggestion that the Haysenn machine was a failure and was adamant that the appellant had not been involved in any other capacity with Trigon other than with the Rotaseal project.

[136] In his cross-examination into the Haysenn machine The appellant insisted that he had done another job for Trigon, prior to the Rotaseal project, and had prepared his report. When asked to produce this report the appellant was unable to do so; nor was he able to produce any documentation to verify any involvement in a second project with Trigon.

Alleged "Sabotage" by Trigon Employees

[137] The appellant stated, in examination in chief that he believed that there were certain employees of Trigon who , through professional jealousies, had sabotaged the Rotaseal project, and so quashing any prospect of the appellant's success. The appellant stated on that the *"workshop manager"* at Trigon was responsible for the failure of the Haysenn machine and was jealous and did not wish for the appellant's project to succeed. The appellant also stated that the workshop manager provided the wrong plastic for the Rotaseal project and this delayed the completion of the machine. The appellant said: *"their fellow switched the plastics and it wouldn't work ..."*. It appears the appellant's reference to the *"workshop manager"* and *"their fellow"* was a reference to David Martin. Later in examination in chief, the appellant stated that *"I think really Dave Martin didn't want the project to succeed"*.

[138] The appellant was cross examined in relation to the reasons for the failure of the Rotaseal machine. On 30 January 2008, the appellant again alleged that the project had been sabotaged. He stated at page 16 of the transcript:

"Q *What was it [the failure of the machine] to do with Mr Thomas?*

A *It was sabotaged.*

Q *It was sabotaged by who?*

A *Not, the, not the machine, the film and the, the foam.*

Q *Sabotaged by who, Mr Thomas?*

A *They, they had incompat ... the incompatible, two incompatible products were given to put through the machine ...*

Q *Mr Thomas, who sabotaged the machine?*

A *They didn't sabotage the machine, I said, I said it was the project was sabotaged.*

Q *Who did the sabotaging?*

A *The product ... the produced was changed. I have no idea who changed the product."*

[139] These allegations were put by the appellant to Mr Cassey in cross examination; but Mr Cassey categorically denied that there was any desire on the part of any Trigon employee to undermine the project.

The Reasons for the Termination of the Project

[140] In addition to suggesting sabotage and professional jealousy, the main reason suggested by the appellant for the termination of the project on 3 October 1989 was

his deteriorating hernia condition and his inability to continue with the project. The appellant stated as much on 27 March 2007 in his examination in chief - at page 10.

[141] The appellant was cross examined on 18 June 2007 regarding the hernia, as being the alleged cause of the termination of the contract. He stated at pages 52 and 53 of the transcript:

> "Q *Now back to this hernia injury, Mr Thomas. You say it caused you to eventually give up employment with Trigon in October 1989. I take it then that the hernia got progressively worse.*
>
> A *Yes. It strangulated and the surgeons said that I must stop. I'm overdoing it.*
>
> Q *Now you had this surgery [for the hernia] on 25 January 1990.*
>
> A *I think so.*
>
> Q *Prior to that of course you had your right arm injury [i.e. 27 December 1989] ...*
>
> A *That's correct.*
>
> Q *Now the evidence you gave ... [the wrist injury]] occurred during a yachting accident on the 27th of December 1989 ...*
>
> A *Yes.*
>
> ...
>
> Q *Now you've said that you were resting with friends ...*
>
> A *We sailed a yacht from Auckland to Picton. They flew to Auckland, I tootled around on the yacht by myself for a week. And while I was moving the yacht up to where the flow pan was going to come in, that's where I had the accident. I probably shouldn't have been moving the yacht about by myself.*
>
> Q *Well Mr Thomas you had a hernia but you were capable of sailing a yacht by yourself for a week.*
>
> ...
>
> A *It's not like sailing a P-class. It's very, very sedate and relaxing. It's not a difficult thing to do.*
>
> Q *So you were able to sail a yacht by yourself for a week but you had to give up less intensive physical work for Trigon and AMS ...?*
>
> A *It wasn't less, it was more.*
>
> Q *So that was more physically demanding ...?*
>
> A *Absolute. Absolutely yes."*

[142] In cross-examination on 30 January 2008 the appellant again emphasised that the project was terminated because of his hernia condition. The appellant also suggested that the machine was not a failure but in fact a success.

[143] On 30 January 2008, at page 15, the appellant stated in cross examination:

> Q *I put it to you that despite tinkerings by you over months in 1989 you never got the machine to do what you were supposed to do.*
>
> A *That is incorrect.*
>
> Q *You never produced a good marketable plastic pouch.*
>
> A *Yes we did.*
>
> Q *You never produced the quantities that were required to be produced.*
>
> A *That's correct as well.*
>
> Q *I put it to you, Mr Thomas, the machine was a failure.*
>
> A *No it wasn't. It worked to specification."*

[144] At pages 17 and 18 of the transcript, the appellant suggested that the products for the Rotaseal machine had been switched thereby undermining the project. The appellant also stated at page 18 that his hernia had become so intolerable that he had to stop working.

[145] The evidence from Mr Casey and Mr Martin was that the project was not successful, but a failure. None of the Trigon officers were aware of any hernia suffered by the appellant in 1989 or any injury affecting the appellant's employment up until termination on 3 October 1989.

[146] At pages 39-44, again under cross examination, Mr Cassey explained the reasons for the failure of the Rotaseal machine. At page 44 he stated:

> *Mr Thomas: ... the point that it does have to do with you, is the machine failed to produce the product, end of story and I was out of there.*
>
> *Mr Cassey: Yes, the customer made the call on that effectively. He said, we were finished.*
>
> *Mr Thomas: Yes, and I am saying that the machine, provided with the right foam, was viable and you didn't have enough time to bother any more.*
>
> *Mr Cassey: No, well the project was over. As I previously said, I felt that the machine didn't give us enough margin to reliably produce seals with the best we could do of compability of foam and film. So I think that was the basic.*
>
> ...
>
> *His Honour: ... Actually, Mr Cassey, Trigon would not have wanted too many ventures like this.*

Mr Cassey: No, in my job I probably had an average of 5 or 6 decent sized projects a year and this stands out amongst our big failures I'm afraid.

His Honour: I suppose you learn something from them.

Mr Cassey: You do, yes, move on."

[147] At page 51:

"Mr Thomas ... I just want you to correct, to verify, you weren't aware of the hernia problem were you?

Mr Cassey: No I wasn't."

[148] At page 68 Mr Cassey stated:

"Mr Cassey: My reason for bringing the contract to a close was that, as I said before, the customer had said to us "Look, you have had time over and above the original period you told us it would take to produce the machine and produce satisfactory product to the specification, and at the costings that we have agreed we need." *And he was fed up with us, and he took the job to somebody else. And the paperwork that we had with him was such that if we hadn't performed by that time, he was entitled to do so. So we'd come to the end of the road. The machine had not performed ..."*

[149] Mr Cassey was asked in re-examination on 24 June 2008 to comment on the appellant's suggestion that the hernia was the cause of the termination of the contract. Mr Cassey stated at page 75 of the transcript:

"Mr Tui: Just one final question related to that. If this alleged hernia injury was affecting Mr Thomas' ability to undertake or complete the contract, would you have been informed?

Mr Cassey: Just I believe so. I believe he would have put it up as a reason to me and other people would have probably raised it as well, just to make sure that I was aware of that."

[150] Mr Martin was cross examined by the appellant in relation to the success of the machine. Mr Martin had indicated that following the termination of the project, he and Mr Law had looked over the machine to see whether they could get it to work. On 25 June 2008 Mr Martin stated at page 27:

"Mr Martin: ... We just wanted to run it over, see if we could get it to seal, if we could make things at a production speed, see if we could recover something.

...

Mr Martin: But it was impossible."

[151] The appellant stated that one of the meetings he had with Mr Cassey, prior to the signing of the contract with Trigon on 23 December 1988, was at the AMS workshop. Mr Cassey's response was emphatic and he stated on 24 June 2008 at page 12:

"Mr Thomas: Okay. Well, my salesman actually brought you there, along with Mr Hamlin, but you don't recall ... I put it to you that that is my workshop and the machine in the background on page 19 is the machine that your product was trailed on successfully. You were given successful samples. You don't recall the type of machinery I had in most workshops ...

Mr Cassey: No, I do not - I quite clearly do not recall trials being carried out on one of your machines in separate premises to your own, nor in your workshop, and I do not recall seeing your workshop area. The contact that we had in the Auckland area was limited to the meetings that were held at the offices of Trigon Industries in Sunset Road."

Work/Business Activities 1990 to 1997

[152] ACC accepts that the appellant has an injury to his right wrist. However, its position is that the injury does not cause any limitation to the appellant's use of the right hand and wrist.

[153] Mr Tui submits that the evidence of the appellant's work and business activities from 1990 to 1997 shows that the appellant has made full use of his right hand and wrist over this period, without restriction.

[154] It is submitted that, if I accept the evidence of Mr Masoe, in respect of the appellant's work/business activities and the use of his right wrist, I must uphold the Corporation's primary decision and dismiss this appeal.

[155] The appellant was certified unfit to work from 1990 to 1997 and received weekly compensation for this period. It is put by Mr Tui that during this period, the appellant undertook work and business activities which were entirely inconsistent with the certification of incapacity. I agree.

[156] The appellant did not inform ACC or his medical practitioners, of his involvement in these businesses. ACC was unaware of the appellant's work/business activities until it arranged for private investigators to undertake an investigation into the appellant's circumstances.

[157] The investigation not only revealed extensive business and work activity by the appellant, but also that the appellant was using his right hand and wrist fully. The injury to his right wrist did not hamper or diminish his work/business activities or the use of his right hand.

[158] In the context of the appellant's pre-accident employment, the wrist injury did not prevent the appellant from fully operating a computer, working in an office, supervising and managing employees, running and operating a business, nor holding and carrying light or heavy objects without restriction. He is capable of performing all tasks which he performed at Trigon in 1989.

[159] In fact, during the seven year period the appellant was able to manage and operate several businesses. Frequently, more than one at a time.

[160] When the appellant's involvement in the many companies and businesses was revealed, he had no option but to acknowledge the fact of his involvement in these companies. However, he contends that his involvement was simply financial and he had little, if any, involvement in the day-to-day affairs of the companies. Simply put,

the appellant contends to be wrong the information and evidence obtained by ACC from the many employees and colleagues of the appellant.

[161] Mr Tui set out in some detail the evidence of the appellant's involvement in the companies and businesses for: to provide a proper evidential foundation for ACC's case; the appellant has refused to accept almost the entire evidence against him. In short, detail is necessitated by the appellant's unwillingness to concede the sheer weight and volume of evidence against him.

[162] The prosecution called 43 witnesses at the criminal hearing; and 21 gave evidence in respect of the appellant's business and work activities. Most of these persons worked for or with the appellant in his many companies from 1990 to 1997. The appellant simply called his girlfriend (Miao Lin) and business associate and friend (Dr Miles Wislang) in response.

Evidence for Appellant

[163] The appellant was a bankrupt in 1990 and so could not be involved as a director in 1990 or 1991. In this period he was loosely involved in several businesses, such as a Career Pilot.

[164] At the end of the bankruptcy period, the appellant immediately incorporated, Orac International Ltd with his then girlfriend Cynthia Liu. The two were shareholders and directors of the company. This company was set up to explore the importation of products from China and several household items were imported by the appellant.

[165] In 1993 Orac Publishing Ltd was incorporated, as the vehicle for *"The Migrant News"*, a magazine. The appellant's business activity increased.

[166] In 1994, three more companies were incorporated including Orac NZ Realty Ltd and Orac Migration Services Ltd. The latter became a very busy and reasonably successful operation over the ensuing years.

[167] While only one company was incorporated in 1995 (International Funds Transfer Ltd), 1996 was to prove to be the high point of the appellant's business activity over these years as no less than 10 companies were incorporated that year. Notably, this was at a time when ACC was endeavouring to set up a rehabilitation plan for the appellant and the appellant was keeping his entire business operations secret from ACC. Two more companies were incorporated in 1997. The appellant was a shareholder and director in 15 of the 18 companies he so established and he largely accepts his involvement with most of these companies. However he states that his involvement in them is limited to having a financial interest as a director and shareholder and that he had no day to day role in their affairs or businesses. Allegedly, the companies had employees and managers who ran the business operations.

[168] The appellant seemed to state that he gave occasional advice and fixed the occasional faulty machine of a company. He states that any confusion regarding his role in the businesses stems from the fact that his living accommodation was contained on the work premises from 1994 to 1997 and he did this as he could not afford to rent alternative accommodation because most of his money was being poured into the businesses which were in turn losing money.

[169] In examination in chief, on 27 March 2007, the appellant stated at page 16:

"... So I've been waiting for that prescribed surgery ever since [since 1990]. So I've always been looking to go back to my pre-injury occupation, but while waiting I've been exploring different other ideas ...

... I investigated all sorts of things. Um, there was nothing to stop me learning how to use new programs and things on the computer. Using my left hand. I could learn things ..."

[170] At page 17:

"Q How would you describe your involvement with that enterprise [the businesses with Cynthia Liu].

A Well because I funded it of course I was a shareholder. Um, because there was liability to these types of things, I don't think she had a residency then in that type of thing, so I was a director and a shareholder ...

...

Q ... Did you receive any benefits during the period this operation ran? ...

A Not from her company no. Not from anything.

Q Did you receive any ... benefits of any description?

A Nothing at all. I mean, I even paid rent for our accommodation.

Q And how was the rent. From what source?

A Oh, my ACC entitlements. I paid ah, our accommodation rent and her office space that was rented ... and never got a return on investment for example.

Q Did you take any active participation in this operation?

A Um, there was a normal husband and wife type bedroom talk about the day's events but um, she had all my office furniture. For example from my previous business, so saying "you can have that love" *and there was that type of thing. Um, sometimes we would discuss some ideas that she had, but not in a working type situation at all."*

[171] At page 18:

"Q ... so if you sum up physical benefits that you got from that operation of any sort.

A There was no benefit. Oh, the only thing I was exposed to an environment where, ah, land of opportunity migrants coming in seeking new things to do. Well I was a person seeking new things to do, so there was chat with people of an interested mind. But not."

[172] At page 23:

"Q .. Just probably recapping. What was your task or involvement in this operation at this time [Orac Migration Services Ltd]?

A None."

[173] The appellant's examination in chief continued on 18 June 2007. Again, the appellant attempted to minimise his involvement in, and benefit from the work activities. At page 27 of the transcript the appellant stated:

"Q Did you run a personal account ...?

A I had the same personal account as a child from the Post Office through the ANZ when they took it on. Same account all the way through. The only personal account I had.

Q What money went into that account?

A ACC then WINZ money.

Q Any other money gone in?

A No.

Q Have you got any other personal accounts?

A No.

Q In terms of all these companies that you set up for instance, did you receive any money and payments from any of those companies?

A No.

Q Did those companies pay anything on your behalf to your benefits?

A No. I even paid rent to the company for the office accommodation where I lived which is a section office and apartment.

...

Q In terms of all these companies, did you receive any money?

A No.

Q Or any benefit?

A No."

[174] At the same time the appellant has maximised the extent of his disability arising from the right wrist injury. On 27 March 2007 he stated in examination in chief:

"Q As a result of the injury to your wrist ... What motor skills ... do you possess in your right hand?

A. *Um, very diminished and if I try to do anything I'm going to aggravate the remaining tissue structures and render corrective surgery an impossibility. So I must be very careful not to do things.*

Q *As a result of that injury have you been able to operate the computer equipment that you were previously operating in relation to Trigon and in your company AMS?*

A *Not to the manner I used to at all. Ah, in a very, very marginal way for short periods only but the more I do it aggravates like. You're talking about even holding the remote control out like that type of, which you need for holding your hand out for a keyboard will become within minutes, very painful."*

[175] At page 19:

"Q So in terms of hand manipulation on the keyboard what are you saying about that?

A Very little. Left hand. But I was. Before I could do some things. Some very short things with my left hand, um, but this is a good learning exercise for me so I was trying to learn to use the program."

[176] The appellant's evidence, here, is aptly summarised in the following passages. Firstly, on 27 March 2007 at page 25:

"... There wasn't voice software or there wasn't anything else, I was entirely dependent on someone else to do my hands-on type things. So I had to try and find someone who would do the hands work while I was the ideas person. So I had all manner of ideas and um, there was 18 I think companies in all that were registered to protect the ideas ...

Q Did you receive benefits as a result of these ideas that you had?

A No, in fact a lot of the ideas had been taken up by people and they're actually functioning today.

Q Right.

A Without me. Without me.

Q When you say "no". *I'm talking about benefits, material.*

A No reward of any type. No, no money, no freebie or anything, nothing."

[177] Secondly, on 18 June 2007, at the end of the appellant's examination in chief, at pages 31 and 32:

"... So as one thing was growing I was trying to pay for something to happen integrate with it, but ah, again those people who are running the business ran away with my business and so I was left with nothing again. And that's where the ACC got to the point, sort of said "Well you're working, we've seen you doing things". *Well I was studying. I was learning to do things. I was talking to software people to do something where you could develop some software that I*

could work. And that's as far as I got with what I did. People saw me trying to do things or learning to do things and assumed the worst ...

Q Is there anything further you want to say?

A Wasn't working. I tried my best to find something I could do. I've trusted a lot of people and through perhaps being naive or whatever, people have run away with ideas I've had, but I've never been able to be in a, to gain sufficient involvement to participate in any meaningful way. And consequently, I've lost a lot of money trying to involve myself and find a way for myself. But never earned, never worked.

Q You say you used money that you put into these operations. Where did that money come from?

A That money came from part of what I saved out of my ACC ERC money. My earnings insurance. Instead of having money to spend and enjoy I tried to use it into finding a rehabilitation opportunity.

Q At the time of your injury, how much. What was the extent of your savings?

A Um, well I had a business, I would have had several hundred thousand dollars' worth of machinery ... because of the injury a lot of work in progress couldn't get completed so I lost a lot and because I didn't get the hernia surgery promptly and didn't get the wrist situation attended to quickly, I actually went bankrupt. So you've got to be looking at a zero start here ...

Q So the answer to the question was how much. What was the extent of your savings at the time of your injury?

A I was in debt of course with the bankruptcy situation. I was in a zero situation ..."

[178] The appellant put it that he was simply an ideas man, i.e. the person who either came up with the idea of a business and funded it, but had no involvement in the day to day affairs of any of the businesses. The appellant also put it that he received no financial benefit from any of the business operations and that his injury was such that he could not perform any meaningful activity within any of the operations. Having stood back and absorbed the evidence, I do not accept any of that.

[179] Mr Tui submits that the appellant's evidence is an utter facade; that the appellant relies almost entirely on his own uncorroborated evidence or on documents that simply do not support the interpretation placed on them by the appellant; he has filed more than 2500 pages of documents in this regard and those documents are not filed to support his case but, as has been his strategy all along, to overwhelm and thus attempt to confuse; and the appellant has been involved in numerous businesses and companies from 1990 to 1997. He has been so involved and it was difficult to get a direct and sensible answer from him as a witness.

[180] In order to keep things as simple as possible, but at the same time, still provide sufficient evidential foundation for it's case, the Corporation discussed only three of

the appellant's businesses which operated from 1990 to 1997. The three businesses are:

[a] Career Pilot, which placed migrants into employment and operating from 1990 to 1991;

[b] *"The Migrant News"*, a magazine published by Orac Publishing Ltd from 1993 to 1995; and

[c] Immigration business operated by Orac Migration Services Ltd from 1994 to 1997 and Orac New Zealand International Ltd from 1997 to 2000.

Career Pilot

[181] Career Pilot is the name of the business which operated out of an office in Ulster House, Federal Street, Auckland Central, from late 1990 to approximately July 1991. The business was set up as a partnership between Karen Bridges and the appellant. Their arrangement was, inter alia, that the appellant would receive 60 percent of the profits and Ms Bridges 40 percent. The main activity of the business was an employment consultancy placing migrants into jobs.

[182] There were several employees working out of the office including Mary Jane da Silva-San Diego (Ms da Silva) who used one office. The appellant occupied the other office in which he had his computer.

[183] In his examination in chief, the appellant provided very little detail regarding his involvement with Career Pilot. On 27 March 2007 at page 20 he stated:

"Q And what did you do?

A From the whole time?

Q Yes.

A From 1990?

...

A Well I dated a woman called Karen Bridges. Um, who was a marketing specialist. And she was very intrigued with my knowledge of computers and processing of information and that was all new in those days of course. And databases and so forth. And I suggested a um, a type of commercial venture which or. More of a matching up of people skills and work capabilities that a project manager does. And she was very interested in that for an employment consulting line of business. And she wanted to go partners with me on that. So I thought that was a very worthy thing to be involved in.

Q Did you get involved in it?

A Yes. She employed um, staff, a computer person, office manager all those types of things. And I had some office furniture that could be used and some computers from a business. So she got busy with that. And led that and my participation in that was to explain things to her programmer that she'd employed, but I couldn't program anything. I could tell a

programmer what was needed but I couldn't program. She employed a programmer to make a program from my idea. And so we wrote a letter to ACC that this was going on and I was gong to get $50 a week for having a meeting once a week with this person.

Q *Did you receive those payments?*

A *No, no.*

...

Q *In terms of Ms Bridges' relationship.*

A *She took off with the idea and the company continued on under another name.*

Q *Did you receive any benefit from commencement to her departure?*

A *No. No. She stole my idea.*

Q *What period was that>*

A *That was 1990 through 91."*

[184] On 18 June 2007, the appellant stated at pages 12 and 13:

"... So she [Karen Bridges] wrote to the ACC. Said that she wanted me in for a meeting once a week and she would pay me $50 a meeting and that we expected there would be a discount from my Acc of course for that ...

Q *You talk about $50. Did you receive anything from?*

A *No, no. After a couple of months the relationship fell apart actually. So it didn't actually go ahead ... the business got underway and she took the business to her own premises and it sort of disappeared out of my involvement.*

Q *Was there an issue with ACC at that stage?*

A *Ah, well in the early stage they were informed. I was a shareholder and a director ... No because I had office furniture from my previous business I contributed that. And my computers were there. So I'd go to the premise to learn about Debase 4 and there was occasional discussions with her programmer. And there was those meetings I was talking about."*

[185] The appellant's evidence is in stark contrast to that provided by Ms Bridges, Ms da Silva and Ms Liu at the criminal hearing in 1999.

Karen Bridges

[186] The content of the criminal transcript has been imported into this case and in it Ms Bridges provided a description of the nature of her business relationship with the appellant. She referred to having discussions with him and to their deciding to set up a pilot project placing migrants into jobs.

[187] She said that the appellant made it clear that he was a bankrupt and could not operate a company but could work for somebody else; so they entered into a partnership that she would put up the money and the appellant would run the project. He would have 60 percent share of profit and she 40 percent.

[188] Ms Bridges said that the appellant set up all arrangements but *"any actual formalisation, signing agreements, were done by me. And I paid all expenses in relation to the sublease".* Ms Bridges provided quite some detail about the appellant's involvement in that business. He was at 198 Federal Street, Auckland on a daily basis and *"his part in the project including placing advertisements in the paper, talking to respondents on the telephone, interviewing them, selling the project services to them, signing them up, and working with an agreed employment agency to place them into employment".* She said that the appellant was effectively manager of the project, but they employed an administrator Ms Da Silva, to deal with IRD requirements, accounts and secretarial matters. She said that the appellant regularly used his computer and produced a significant number of documents on it most days.

[189] Ms Bridges said that she was running her own business also at that time, but was in regular touch with the appellant over Career Pilot. After a time they decided that the Career Pilot project was not working and was losing much money of Ms Bridges, so the project was brought to an end. Ms Bridges felt that the plaintiff *"spent most of his time playing with his computer rather than doing things that were specifically related to recruiting and placing migrants".* She knew that the appellant had a wrist disability but not that it may have caused him problems. She did not think that could have affected the appellant's lack of productivity. She referred to him being able to generate typewritten reports and spreadsheets on the computer.

Ms De Silva

[190] Ms da Silva provided specific information about the appellant's daily activities because she worked in the Federal Street office with him on a daily basis. She worked for Career Pilot from the end of 1990 until March 1991 when Ms Bridges left that partnership. Her evidence was generally confirmatory of that from Ms Bridges. She referred to the appellant interviewing migrants and spending much time on his computer developing his ideas. She said he was *"the boss"* at the Federal Street premises.

Ms Liu

[191] Ms Cynthia Liu was the appellant's girlfriend and business associate from 1991 to about June 1995. They lived together for much of that period and were involved in various businesses and companies including Orac International Ltd, Orac Publishing Ltd, and Orac Migration Services Ltd. From the criminal hearing transcript, there is Ms Liu's evidence about the appellant having interviewed her on a couple of occasions in May 1991 when he was with the Career Pilot business that of employment consultant in Federal Street soon after Ms Bridges had left that partnership business. He put it to her that Ms Bridges had run off with that business and his (the appellant's) idea. Ms Liu had been seeking a job in May 1991 and obtained a response from the plaintiff who told her about his immigration business and that he thought there was huge potential in doing business with China.

[192] She referred to the appellant being busy at the Career Pilot office dealing with files and telephone. He offered Ms Liu a partnership regarding consultancy work and with the long term aid of trading with China. The employment consultancy work

seemed to be mainly helping Asian immigrants to New Zealand seek job opportunities. She commenced work at the Federal Street office with the appellant but did not seem to be paid. She regarded the appellant as *"the boss"* in that office. She left after a few months because she was not paid. She said that the appellant was always busy attending telephone calls and dealing with people. Then the business was shifted to the appellant's home in the North Shore and part of that house was set up as an office. She moved into that house with him.

The Stance of the Appellant

[193] In his cross examination before me on 19 June 2007, the appellant would not concede that he interviewed his future long term girlfriend, Ms Liu, in 1991. He also maintained that he only performed a marginal amount of work for the Career Pilot business.

[194] I agree with Mr Tui that generally speaking, the appellant would not answer questions put to him and tended to enter into a rambling and confusing discussion about unrelated matters. There is clear evidence from Ms Bridges and Ms de Silva that the appellant was in charge of the office at Federal Street and ran the Career Pilot business. The appellant contends that, in fact, Ms Bridges managed that business from her other business based in Manukau City. Interestingly the appellant had business cards printed for himself while he was at Career Pilot. These identified him as its *"Operations Manager"*, although he maintains that he was not the Operations Manager of that business and that the card is wrong.

[195] In his evidence and cross examination the appellant endeavoured to minimise or undermine the evidence from Ms Bridges and Ms de Silva of his controlling the Career Pilot enterprise.

[196] Ms Bridges had prepared a letter for the appellant on 25 March 1991 terminating their partnership and providing detailed reasons for that. In short, she put it that the appellant's work performance was inadequate. His response in evidence was that his performance was not up to scratch due to his wrist injury; but Ms Bridges' evidence firmly refutes that. The appellant puts it that, after the termination of the partnership with Ms Bridges, he did not continue to run the business but other employees of Career Pilot did, and he had no role in the ongoing operation of that business. However, I am satisfied by the extensive evidence to the contrary. There was considerable evidence that the manager of Career Pilot was the appellant.

Orac

[197] The appellant was a shareholder and director of Orac Publishing Ltd which published a magazine called *"The Migrant News"* from about mid 1993 to about mid 1995. That was a free magazine written in the Chinese language for the Chinese community. It was paid for by the advertising contained in it. The magazine was intended to be published monthly. A number of staff were employed on it including an editor, graphic designer, and sales people to sell its advertising space. Initially, it was run out of the appellant's home in Auckland's North Shore but, from about April 1994, it operated out of the 7th floor, Media House, 76 Symond Street, Auckland Central.

[198] In his evidence the appellant endeavoured to minimise his role with this newspaper business and put it that it was the project of Cynthia Liu. I am satisfied

from the evidence that the appellant was in charge and responsible for almost every aspect of the operation of that newspaper. There is the evidence of Ms Liu firmly to that effect and the evidence of Mrs P Zimmerman who had sold advertising for the magazine for several months from June 1993. Both those witnesses make it clear that the appellant was totally in charge of, and operated, the business of Orac Publishing Ltd and was the central figure in publishing the magazine. This was confirmed by Mr B White, the National Sales Manager of the company which printed the magazine. He made it clear that the appellant was the only person from whom the printer company took instructions and primarily dealt with; although the printer company did have contact with staff of Orac Publishing also.

[199] There is also documentary evidence to support that role of the appellant at Orac Publishing Ltd. A business card identifies him as *"director"*. There is a letter of employment for an employee signed by the appellant as manager of Orac Publishing Ltd. There are other letters from June and July 1994 prepared by the appellant and signed by him as director of Orac Publishing Ltd. It is clear that he was fully involved and handled the direction and affairs of that company. He signed goods-order forms to the printer from Orac Publishing Ltd and its cheques for significant amounts. There are letters showing that the appellant dealt with customers of that publishing business. Records of weekly sales meetings of that business show that the meetings were held in the conference room at 76 Symond Street, Auckland Central, had been called by the appellant. were facilitated by the appellant, and it is clear from the agendas that the appellant was the person who spoke to most topics at the meetings.

[200] I agree with Mr Tui that the appellant's approach to issues of his business involvement in cross examination were evasive. In my view, the transcript speaks for itself in that respect. Also significant parts of the appellant's evidence before me were inconsistent with the evidence he had given years ago at the hearing of the criminal prosecution against him.

[201] A contention of the appellant is that he kept ACC constantly informed of his business activities, including his activities with Orac Publishing Ltd. However, there has been full disclosure by ACC and there are no documents to that effect. The appellant put it that he had relied on a Mr Cheung, his ACC case manager at material times, to record file notes of conversations of the appellant's advice to Mr Cheung of the appellant's work activities. He put it that this had to be so, because he was unable to write due to his injury. There is quite some evidence that the appellant did not and does not have any difficulty or limitation with writing; and that is the clear conclusion I have come to from observing the appellant in the course of the fairly long hearing before me. Indeed, the medical evidence is to the effect that there was no structural reason why the appellant could not write or use his right hand in the normal way and the only limitation could be in respect of pain. With regard to pain, the medical practitioners are entirely reliant on the appellant's self-reporting. Nevertheless, there is a 18 November 1996 medical report from Mr T Tasman-Jones stating: *"He [the appellant] demonstrated he was able to draw and jot notes over a 30 minute period without limitation"*.

[202] The appellant was a shareholder and director in Orac Migration Services Ltd. That company's business activity was assisting migrants obtain a visa/permit/permanent residence into New Zealand. From early 1994 it operated out of 76 Symond Street, Auckland Central. At the end of January 1997, it moved to the 7th floor, Peace Tower, Saint Martins Lane, Auckland Central; but it went into liquidation in July 1997.

[203] Another company, Orac International Immigration Services Ltd, was incorporated in July 1997 to continue that business and the appellant was its sole director and shareholder and it ran out of the same offices at Peace Tower. However, its lease was terminated by the landlord in August 1997 so the operation then moved to a residential property in Howick, Auckland. The appellant lived at the work premises in Symonds Street and, later, at Saint Martins Lane. The immigration business employed a number of staff including, of course, immigration consultants who received a commission for each client. Particular staff included the appellant, Ms Liu, Mr Masoe and Ms Teh. The company received a fee from the client which fee varied in size from hundreds of dollars to thousands of dollars depending on the nature of the application.

[204] Together with Ms Liu, the appellant was a co-signatory on the bank account for Orac Migration Services Ltd. She left the business in June 1995 so the appellant then became the sole bank signatory until that company went into liquidation. Then he was the sole signatory of the bank account for Orac International Immigration Services Ltd.

[205] In his evidence the appellant distanced himself from the running of that immigration business and described it as Ms Liu's business. He minimised his role to that of, primarily, a financial role with only his peripheral involvement.

[206] Orac Migration Services Ltd operated from the 7th floor at 76 Symond Street, Auckland from March 1996 and the appellant signed the lease to show the lessee as Orac Holdings Ltd. He signed as a director of the latter company. A Mr A McAllister was an employee of the property manager for 76 Symond Street, and his evidence is that he dealt with the appellant regarding all issues arising under that lease. He said that the set-up in the leased premises was that of a typical office and the lease provided that nobody was to live on the premises. At no stage did he deal with Ms Liu. A dispute developed over termination of the lease by the landlord and the appellant handled the dispute for the lessee over December 1996 and January 1997 but the appellant arranged for a new lease at Saint Martins Lane from early February 1997 and vacated the Symond Street premises.

[207] Ms Liu was the appellant's ex live-in girlfriend and was involved full-time with the appellant in the Orac business from its inception until she left in June 1995. She has described his work activities and simply put that the appellant worked full-time at the Orac business and, particularly, dealt with the Immigration Service, and the business soon flourished and the appellant was the overall manager. Inter alia, that meant he handled all money aspects, but Ms Liu felt that his account keeping was messy and that tax returns were not being properly dealt with and she confronted him about that because much money was coming into the company. That led to the appellant starting to accuse her of embezzlement which so upset her that she left the company. She mentioned that, during her time at Orac Migration Services, she travelled with the appellant to China two or three times at the cost of the Orac Migration business. She said that when she left Orac Migration, in June 1995, the business was still doing well and was fairly busy.

[208] There is the evidence of Ms D Chen who was employed as an immigration consultant with Orac Migration Services Ltd from August 1994 to February 1995. When she applied for the job she was interviewed by the appellant and Ms Liu. He was mostly involved in the immigration side of work. Her job was to find her own clients and service them. She believed the appellant to be the person in charge of

the magazine. She said that he worked every day at the business most of the time in his own office and on the computer. He particularly dealt with the Minister of Immigration or people from the Department of Immigration and organised staff seminars. She thought that the business was run by the appellant and Ms Liu. She said that at no stage did the appellant ever mention any injury to his arm or wrist. She felt that *"the boss"* of the business was the appellant. She saw the appellant as responsible for the management of the business but felt a problem was that he was not putting enough time into that.

Mr Masoe

[209] Another important witness is Mr B Masoe. As well as having given evidence at the criminal hearing Mr Masoe gave evidence before me in December 2008. He gives a full account of his involvement with the appellant from 1992 to 1996.

[210] Mr Masoe referred to the appellant visiting him in Western Samoa in 1993 when inter alia, they went to a saw mill operated by Mr Masoe. In the course of that visit the appellant operated a Caterpillar 528 log skidder, which was particularly difficult to steer and required the firm use of both hands. Mr Masoe watched the appellant operate that machine for a distance of at least 50 metres without showing the slightest pain in his wrist or hand, and said that the appellant had no difficulty whatsoever in steering or driving the machine or pulling himself up from the ground into it; and had handled the machine very well.

[211] As Mr Tui noted, that evidence is contrary to the suggestion from the appellant that his 1992 surgery worsened his condition.

[212] Mr Masoe mentioned that, on the same visit to Western Samoa the appellant on one occasion, with some considerable strength, used his right hand to undo nuts on an old milling machine. Mr Masoe particularly noted the strength of the appellant's hand and that he must have a good physical or manual labour background.

[213] Mr Masoe came to New Zealand to live in 1995 and was employed with Orac Migration Services Ltd from April 1995 as an immigration consultant. He said he was employed by the appellant and there were then six full-time consultants, and a Chinese receptionist, and two or three casual immigration consultants. Mr Masoe worked three full-time from April 1995 to about August 1996. He said that the appellant would dedicate his days to Orac Migration Ltd work and his evenings to publishing the Migrant News magazine until it ceased operation in June 1995.

[214] It is clear from Mr Masoe's evidence that the appellant was involved in every facet of the business, including each step in the process of a client's file, the interview of the client, signing of the agreement with the client, taking and receipting the deposit from the client, and typing a covering letter for the immigration application.

[215] Mr Masoe categorically denied that he was ever the manager of Orac Migration Services Ltd and said the appellant was that at all times even when Ms Liu was there. Mr Masoe also said that the appellant used his room at Symond Street for both living accommodation and for working.

[216] Mr Masoe said that he saw no evidence of the appellant having any problems with the use of his right hand and that he used that hand normally and without any sign or evidence of disability. Indeed, Mr Masoe was unaware that the appellant had

ever injured it. Accordingly, he was shocked when an ACC private investigator told him about the appellant's claim for an incapacitated right hand. Mr Masoe said that the appellant seemed to enjoy doing all the physical work around the office himself and that if the appellant could not have used his right hand, the consultants would have needed to have done that physical work.

[217] Mr Masoe said that the appellant was one of the most active and hands on managers he had ever come across. He said that, from his observations, the appellant had no difficulty with any activity which required the use of his right hand or wrist, including using a computer, carrying equipment including computer equipment, or the use of hand tools in and around the office.

[218] Of course, the appellant disputed Mr Masoe's evidence as was clear from his cross examination of Mr Masoe; but the appellant did accept that he operated the skidder and assisted with the removal of the wheel nuts in Western Samoa. He maintained that he only operated the skidder for a very short distance and that it was easy to operate as it was power-steering. A little later in his evidence, the appellant indicated that he had driven the skidder a longer distance and with some difficulty.

[219] At the criminal hearing in 1999, Mr Masoe had said that the appellant worked at the computer in the business for an average of six hours per working day and the appellant then accepted that. In the current case, the appellant does not accept that and seemed to be saying that, he simply sat at the chair by the computer, and by a window, and read material most of the day - often with the computer switched off. He went on to say that it was nonsense that he spent six hours a day at his work desk because *"I didn't have a job"*.

[220] Interestingly, in the course of his evidence on 20 September 2007 before me, the appellant accepted that he had carried quite heavy computers around the office as Mr Masoe had said. The appellant suggested that the nature of his injury still allowed him to grab and hold heavy objects; yet the medical evidence suggests that the appellant's wrist injury is unstable for heavy physical loading.

[221] Also in his evidence that day, the appellant was questioned about the fact that both Ms Liu and Mr Masoe had stated that he was responsible for training staff. He seemed to deny this and mentioned that Ms Liu was disappointed that the appellant's surgery *"was botched and when I had a stroke and those type of things, she was fairly disappointed and eventually bailed, and abandoned me ..."*.

[222] The appellant put it that Mr Masoe was the manager of Orac Migration Ltd from the time Ms Liu left in June 1995 until Ms Masoe left the company in August 1996. Mr Masoe's evidence is to the contrary. In his cross examination, the appellant suggested there was documentation to show that Mr Masoe had referred to himself in that documentation as the manager or person in charge of Orac Migration. Although given time to do so, the appellant could not produce such documentation and was shown a number of documents which referred to Mr Masoe as the *"consultant"* or *"senior consultant"* of Orac Migration Ltd. Nevertheless, the appellant maintained that Mr Masoe acted as *"manager"* of that business.

[223] The appellant endeavoured to refute the evidence of Mr Masoe and made a number of curious allegations against him on 18 June 2007. In cross examination, the appellant misleadingly alleged that Mr Masoe had admitted to embezzling money from Orac Migration Services Ltd in a criminal trial but, when challenged to identify the criminal trial, the appellant retracted that allegation. In fact, Mr Masoe was

convicted in 2001 for conspiring to obtain a New Zealand passport and of obtaining a passport with the intent to defraud. Mr Masoe had acknowledged this conviction in his examination in chief before me on 24 June 2008. He had offered no excuses for his role in those offences to which he had pleaded guilty and assisted the Police with their investigation.

[224] Mr Masoe gave extensive evidence before me and seemed to me to be an honest witness doing his utmost to accurately recall the relevant events from the 1990s.

[225] On 25 June 2008, Mr Masoe was questioned by the appellant in relation to the appellant's role and activities with Orac Migration. Mr Masoe stated at pages 69 and 70, inter alia:

> *"Mr Thomas: Is there any documentation that you can refer to that is in my handwriting?*
>
> *Mr Masoe: I cannot recall right now but in the past there was - most of the writing was done by you.*
>
> *...*
>
> *Mr Masoe: With all honesty, and it saddens me, but with all honesty, you were always on the computer, you managed the company and I cannot say otherwise.*
>
> *Mr Thomas: Okay, if you think I was managing, how much do you think I was managing, all of it, part of it, delegated most of it, what, what are you trying to say?*
>
> *Mr Masoe: As far as the immigration was concerned you managed Orack Migration one hundred percent.*
>
> *Mr Thomas: What was there to manage, physically, what were the tasks with this so-called manager, was there much work involved?*
>
> *Mr Masoe: Yes, there was because you were interviewing all the clients that the agents brought in, the consultants brought in.*
>
> *Mr Thomas: Well, we are going to get to who.*
>
> *His Honour: Mr Thomas, you asked him a question, please let him finish.*
>
> *Mr Masoe: And I think I have also stated that I considered you a very good manager because you even went out of your way to take computers to be repaired, or pick up things or bring up printing paper, all the moving around on the desk, you could fit that all into your time as a manager and which in some cases, not many managers do that type of work.*
>
> *Mr Thomas: And I think it is an accepted fact when Cynthia and then you left, everything collapsed, is that correct, common knowledge?*
>
> *Mr Masoe: No, I have only read that in the criminal case when.*

Mr Thomas: It is common knowledge, it is accepted fact that it basically

Mr Masoe: Well, it is common knowledge by who, because I did not know that.

Mr Thomas: By what is reported

Mr Masoe: I did not know that everything collapsed when I left. If it collapsed, it would have collapsed because you could not control, because that was one of the jobs that I did, was to pacify and satisfy clients and consultants with all the arguments we had about their commissions and the money that you owed clients and everything like that."

[226] On 26 June 2008, Mr Masoe stated at page 26:

Mr Thomas: ... And my only participation was to sign the contract at the end on the say so and advice of the people who were managing things

Mr Masoe: That is completely and utterly wrong, Alan. Nearly every client that came in, the consultants brought them to you and they interpreted for you. You were always in the boardroom, I mean.

[227] At pages 37-38:

Mr Masoe: ... I swear on the bible that that is untrue. I never managed the company. I believe that if Cynthia had run the company, managed the company, they wouldn't have fallen apart. I believe that if I had managed the company it wouldn't have fallen apart. I believe that if Alex managed the company it would have fallen apart because he had no idea of the immigration procedures or the policy.

...

Alan was in full control, managed everything, he had nothing wrong with his hands. Out of those 12 consultants who were there I can vouch that they would all testify that at no stage anybody, even the slightest difficulty, that it wasn't even – it never existed. If anything it was the very opposite.

[228] At pages 46-48:
Mr Thomas: ... And, yes, you saw me talking to immigration clients but you don't know what the conversation was about it would seem. Now I can understand the confusion.

...

Mr Masoe: Because in some cases even when I first started you asked me to sit in while you interviewed clients and I even sat in with you. Now with Mr Huang he couldn't process, Mr Chan he couldn't process. All they could do was introduce the clients to you and interpret and translate on their behalf. Everything, all the money, even the contracts.

Mr Thomas: Well, you are getting off the subject.

...

Mr Masoe: I'm not assuming, Alan, I -

Mr Thomas: How would you know?

...

His Honour: Mr Thomas, if you don't let Mr Masoe answer, I'm going to close this cross-examination completely, and in fact I think it's time to close it anyway, but if you wouldn't mind just finishing that answer Mr Masoe

Mr Masoe: Mr Thomas has asked me how was I sure and I'm answering. In a lot of cases I sat in to listen in, especially when I first started, he's admitted that maybe two weeks after Kathryn T started I left, and now I'm saying that the Thai cases were processed by the immigration company, not by Kathryn T. Kathryn T hadn't even started with the company and it was the immigration company who handled it. Who in the immigration company could handle an immigration case, write or speak fluently or write in a manner which would satisfy immigration policy, it was done by you. [Mr Thomas].

Mr Thomas: ... you would have seen that I was talking to these people but you didn't know what I was talking about, that's what I'm putting to you.

...

Mr Masoe: No, that's incorrect because I had to come in to resolve the issue which was only an immigration issue which you knew from the start that they wouldn't qualify but you made them believe that they would qualify because they were rich ladies and you were also on the side trying to coax them into investing in a tiling company of some sort, but I came in and I sat in there while you were trying to explain to them what had happened with the process that you doing."

[229] In re-examination, Mr Masoe provided the following evidence at pages 61 and 63:

Mr Tui: Mr Masoe, yesterday Mr Thomas was asking you about Friday meetings and whether they were really social get-togethers or boardroom meetings or work meetings. What time on a Friday were these meetings conducted?

Mr Masoe: Early evening, around about say 5 or 6 o'clock.

Mr Tui: Was there drinking involved during the course of the meetings?

Mr Masoe: Not when the meetings started but we all knew that after the formalities then we would have an open drink.

Mr Tui: So once the meeting had finished then there was drinking involved?

Mr Masoe: Yes.

...

Mr Tui: Now one of the points today that Mr Thomas was asking about was how the business went – this is Orack Migration – during the time you were there and after you left. And he suggested to you that the business wasn't as successful after you left. Was it as busy when you left as when you started? You left in August 1996, according to your brief, was it as busy then as when you started in say March-April 1995?

Mr Masoe: I would say yes.

[230] In relation to whether Mr Masoe and Alex had authorisation to sign cheques for Orac Migration, Mr Masoe stated at page 77 on 25 June 2008:

Mr Masoe: There was never any cheque that you – the only time that Alex and I were allowed to sign cheques was the short time that you went to China, and those cheques were all cancelled by you because on your return they were still there because there was no money in the bank.

...

But at no time, when you were there, did anybody else sign the cheques except for yourself.

[231] The appellant questioned Mr Masoe no numerous occasions as to why Mr Masoe considered that the company did not succeed. The appellant was endeavouring to persuade Mr Masoe to agree that the appellant did not put sufficient time into the company or was not sufficiently skilled or knowledgeable to make the company successful. Mr Masoe stated on 25 June 2008 at pages 73-76:

Mr Thomas: Could you recall that I keenly wanted to be more productive?

Mr Masoe: No, I think you were very productive at the time and I did not think you -

Mr Thomas: What did I actually achieve? Cynthia has gone and

Mr Masoe: I think you achieved a very good business. The business was running very well, it is just that you were not honest with the workers, I think that was a downfall.

Mr Thomas: Well, could it be that I was not running things, and there is a misunderstanding by a number of people who thought I should be running things and they wanted to blame me? Do you think that might be a possibility?

Mr Masoe: Alan, I think at this point in time, you know, I have left everything – forgot everything in the past and I would like to help you in some way but I honestly cannot say that you – you were a full hands on manager, you did everything that a manager could do, nobody could do anything without your authority, everything.

...

Mr Thomas: Was I all over the place doing all manner of different things and not focussed, do you think?

Mr Masoe: On the immigration side, I think you were very focussed. I do not think – and that is why you would notice all these documents will show that I did most of the international work and the research, as you were too involved in the managing of the company, of Orack Migration.

...

Mr Thomas: ... What were the actual work task functions? Can you give a list, please? What was necessary to be the manager?

...

Mr Masoe: If you were to give me a – if you are asking for a job description or the roles which you fulfilled, I would say it would be interviewing clients through translators, managing clients' cases.

...

Mr Masoe: Your role? Are you asking me about what your role?

...

Mr Masoe: I am trying to explain here, I am trying to reply to your exact roles that I, honestly, saw you perform in the company as a manager, which I think was the manager's role.

...

Mr Masoe: For all the new consultants who came in, you would interview them, not Cynthia. You would interview them and then appoint them, and then you would assist them in showing them about the policy, and then you would manage the cases. Because I remember very clearly you telling me that you had to manage all cases because the agents or the consultants could not respond if Immigration called or if they wrote back.

You also managed the accounts of the company. And just the general welfare of the company; you hired and fired, you know - like the receptionist, because I think she was the only one being paid a wage - and the ordering of office equipment. And in the board meetings on the Friday you would give all consultants the direction and the goals of the company, Cynthia was not there, she was never there in one of the board meetings that I was in. And you would more or less give the direction of the company, give us your ideas of how to improve consultant sales, and how to improve the company and where you wanted the company to go. And also the troubleshooting of any problematic cases with immigration, and you also dealt with clients. So to put it in a job description, it almost covered everything."

[232] At pages 83-85:

"Mr Masoe: ... the old Chinese consultants are all honourable people, but you lost them because of you just use them and took the money and never paid them – paid us.

Mr Thomas: Well, we can see situations where I've loaned you money, for example, never got it paid back.

...

Mr Masoe: Please don't say you helped, Allan, because you use me for one year without pay, with broken promises, bounced cheques, I'm like everybody else, even like Katherine Tee, you know, she was a nice person, very good, loyal person. Chen Yang, the old gentleman who were there, you know, they were all honourable, very honest people. But because of your – like I said, Allan, I hate being here, I would like to help you out but I just honestly can't say otherwise.

...

Mr Thomas: ... Were I not qualified and experienced and sufficiently skilled to pull off any of these Orack International brilliant ideas? What was the failure, lack of knowledge, experience, of skill? When I come from an engineering situation, was I out of my depth? Make promises, let people down perhaps and

Mr Masoe: I think that was the main thing, just lack of.

Mr Thomas: Having ideas but couldn't pull them off?

Mr Masoe: It was a lack of honesty and people not trusting you and then reneging, you know, as soon as they find out what type of person you were, so things like that."

[233] Mr Masoe confirmed that he was not aware of the appellant's ACC claim or wrist injury. Mr Masoe was unequivocal in this respect. He stated at page 9 on 26 June 2008:

"Mr Thomas: ... ACC were telling me that I am going to have to find something else to do and my rehabilitation was being started, my vocational rehabilitation was started. Now before you said that you didn't know of that, is that correct? This is the end of 95-96.

Mr Masoe: I can swear on the bible again, again and again, Alan, you never ever mentioned your ACC problem to me.

Mr Thomas: Fine, that is okay, you are saying.

Mr Masoe: Except until the time that I saw you with the software."

[234] Mr Masoe's description of the appellant's operation of the skidder in Western Samoa arose incidentally. Mr Masoe stated at page 18 on 26 June 2008:

"Mr Thomas: You referred to me as Mr Bean? Quite a lot

Mr Masoe: It was only the boys in Samoa who referred to you as Mr Bean, the way you jumped onto the scooter and jumping, bouncing all over when you were driving the scooter, that is why they called you Mr Bean."

[235] Similarly, Mr Masoe's recollection regarding the appellant's unscrewing of the nuts on old machine in Western Samoa was particularly pointed. He stated at page 54 on 26 June 2008:

> *"Mr Thomas: Now I saw your guys trying to ... undo the wing nuts and I said that is not the way you do it, it is just too hard for the human body to do that. Stand to the side, grab it like that and use your whole arm as a lever like that, and I showed them how to do it, and they went bang, bang, bang. They hadn't actually done them up very tight.*
>
> *Sorry, they had not done those wing nuts up very tight but I showed them as an engineer the proper way now that is what my recollection is. Is it consistent with your recollection? Was it my left hand?*
>
> *Mr Masoe: No.*
>
> *Mr Thomas: What do you think I did?*
>
> *Mr Masoe: I think it was just you and I when we arrived there and we went straight to the machine and started to undo the wing nuts without.*
>
> *Mr Thomas: You don't remember two or three others watching?*
>
> *Mr Masoe: No.*
>
> *Mr Thomas: And someone else do it. Do you remember me showing you how to.*
>
> *Mr Masoe: No, because all of the boys- none of the boys came with us because they were all in that particular village where the sawmill was. It was just you and I who went back to the.*
>
> *Mr Thomas: I think they were different fellows, in the background, a couple of metres away, they stood back when you came in to it. I had gone out to the look at the machine a little bit ahead of you*
>
> *Mr Masoe: No, I was there when you undid the wing nuts and.*
>
> *...*
>
> *Mr Masoe: maybe you were showing it to me, but I can't recall. All I can recall is what I have in the statement."*

[236] Finally, the appellant had stated in cross-examination, when asked to produce his passport to confirm his alleged 12 month overseas travel, (an explanation provided by the appellant for not having been able to be the manager of Orac Migration), that Mr Masoe had stolen his passport. This was raised by the appellant with Mr Masoe in cross-examination on 26 June 2008. Mr Masoe stated at page 12:

> *"Mr Thomas: Just as a side point, when I came back from overseas, in I think it was June, you asked if you could borrow my passport for some reason on the day that I arrived. What happened to my passport? I never got it back. You don't recall?*
>
> *Mr Masoe: I don't recall and I think you – it's an utter lie, Alan.*

...

Mr Thomas: Okay, you don't recall, all right.

Mr Masoe: Why didn't that issue of your passport ever come up before?

Mr Thomas: I just went and got another one.

Mr Masoe: It never ever came up. If I took your passport why hasn't it ever come up before?

Mr Thomas: I just went and got another one."

[237] Further evidence of Mr Masoe's desire to provide an honest account of these matters is somewhat reflected in the heartfelt statement he offered at the conclusion of his evidence on 26 June 2008. He stated at page 63:

> *"Mr Masoe: I just want to say a few things to Alan when I have the opportunity and I hope – I don't like being here, Alan. I know I would rather not be here but as a duty to New Zealand and I can't tell anything else but the truth. But still I feel it is for your own good that we get this over and done with and I certainly believe that with your intelligence and your capabilities I think you could spend another 10 years and I still believe you can become a millionaire one of these days. You are a very very intelligent person, a very smart person and very hard working person and I think this Court case will serve to put everything to rest so that we can go on and enjoy the rest of the days of our lives."*

Kathryn Teh

[238] Mrs Teh's evidence is at pages 528-562 of the criminal transcript.

[239] Mrs Teh was employed with Orac Migration from April 1996 to December 1996. She was employed with New Zealand Immigration Services prior to this employment. Her position at Orac Migration was as a Case Manager; she processed clients' visa applications and dealt with New Zealand Immigration Services.

[240] Mrs Teh was interviewed by the appellant for the position at Orac Migration. Her salary and terms of contract were agreed as between the appellant and Mrs Teh. Mrs Teh's salary was $35,000 per annum with a commission bonus. The contract was signed on 31 March 1996 and the commencement date of employment was 15 April 1996. Mrs Teh worked full time for Orac Migration up to December 1996.

[241] Mrs Teh stated, in respect of her first day, at pages 534-535:

"A ... Alan showed me where my office was and he had a computer set up there on the desk. And we spent the first couple of hours going through the various – the computer systems that they had in place and also going through some of the applicant – existing applicants' files, talking about various cases.

Q. Who was giving you instructions on these matters?

A. Alan was.

Q. Just him?

A. *Yes.*

Q. *Can you tell us, please, the way the offices at 76 Symond Street were divided up and who was in what office?*

A. *Right. Well they had given me an office there – an office up for myself. And then next door to my office was the conference room ... and to the right side of my office was Alan Thomas' office ..."*

[242] Mrs Teh proceeded to describe the appellant's role at Orac Migration Services at page 535:

"Q. *Tell us what you saw the accused doing when he was at 76 Symond Street.*

A. *He spent a lot of time working on his computer and a lot of time on the phone, and also quite a bit of time interviewing clients."*

[243] At pages 537-540:

"Q. *Do you recall the way clients usually paid, cash or cheque or sort of a split between the two?*

A. *We were dealing with quite a few Asian clients and they often paid by cash. And then there were some people that paid by cheque, as well.*

Q. *Now you mentioned before, the accused spent some time interviewing clients. Did he do that throughout your time working at 76 Symond Street?*

A. *Pretty much throughout the time, yes. There was one period of time, though, just after Ben Masoe had left in August when things started to go downhill and there were quite a few clients coming back unhappy with the service and wanting refunds and things. And I remember for a couple of weeks there he wasn't really seeing anyone. But the rest of the time he was interviewing on a regular basis.*

Q. *Well, if problems arose with any applications or clients were looking for help, or wanting to blame someone, who did the clients want to see?*

A. *Yeah. They were asking for Alan Thomas, the director.*

Q. *Can you help us with staff meetings? Did they take place at all, and who took them if they existed?*

A. *Um yes, yeah. There were quite a few of those. And they were – they were with the um, yeah, with us group of permanent staff, that is Ben, myself and Alan Thomas and Alex, as well. Ah ha. And sometimes he might – Alan Thomas would have a meeting just with Ben or just with myself, depending on what the topic was that was being discussed.*

...

Q. *Did you get a feel for how many clients the accused would interview each day?*

A. It would be – it would be a couple in the morning and a couple in the afternoon or, you know, going into late afternoon, probably 3 or 4 up to about 4 or so a day.

...

Q. Did you ever have the opportunity to determine if the accused had a computer diary, did you see that or did he ever talk to you about that?

A. Yes, yes. I did see it, yeah. Yeah. He – he was using that to record when his interviews were and when he had various meetings, etc.

Q. How often did you see the computer diary? Is that just once or did you see it.

A. Oh, no. On several occasions, yeah.

Q. And when you did see it, was it generally empty or full, his computer diary?

A. No, there was – there were things he did in it every day just about."

[244] At pages 542 and 543:

"Q. When you arrived in at work in the morning, do you recall generally whether the accused would be in the office working?

A. Yes. He would not – he would be there working by the time I arrived, normally, yes. Yeah.

Q. And when you left work at 5 o'clock or so, when you finished up for the day, just in general terms, did you notice whether the accused would still be working at that sort of hour?

A. Yes. Almost always still working at that hour. And as I understand it I think he worked quite a bit later, too.

...

Q. Do you recall what month in 1996 Ben Masoe left?

A. Yes, it was August.

Q. When he left, did some consultants go with him?

A. Most of the consultants weren't with him at that stage and there were only a couple of left with Alan Thomas.

Q. After August 1996, after Ben Masoe had left, how did the business operate with you and the accused?

A. Well, I remember that – that he, the accused had to take on a lot more work than he was doing previously and – that's right, he was even – he was having to do some of the banking and having even more contact with clients, interviewing, having to interview a bit more."

[245] Mrs Teh was cross-examined at the criminal hearing - pages 548 to 561. She stated, inter alia at pages 550-555:

"Q. Did he [Alex Xie] appear to have any management role in the company?

A. Certainly when – when some of the consultants had problems with their computers, he would go and assist them with that. But he was always reporting back to Alan Thomas – it was obvious to me that Alan Thomas was his – immediate boss.

...

Q. As case manager, did you have a sort of supervisory role over the immigration consultants?

A. It wasn't really a supervisory role. I worked alongside them. The processing work was totally my responsibility.

...

His Honour: I will stop you there so I understand that, Mrs Teh. Am I correct in saying the consultant gathered the information from the individual clients, putting it all together to the best of their ability, then you massaged it, for want of a better term, bearing in mind our background so that you put it all together in the shape or form that you would think would be acceptable to the Immigration Service – the –

The Witness: Yes. That's correct.

...

Q. ... if it were a straightforward application, would you need to consult with Mr Thomas?

A. If it was straightforward I wouldn't need to.

Q. Are you able to say over a spread of 10 applicants of all sorts, how many were routine and how many were more difficult?

A. Well, actually the majority, more of them were difficult than easy, actually. I remember we didn't have easy cases, most of the time.

...

Q. As case manager, were you aware of how many people [clients] Alan Thomas brought into Orac Migration?

...

Q. Well, if Mr Thomas says that there was only a very small number, would you accept that's probably accurate?

...

A: … No, I wouldn't agree with that, because there were quite a – most of the overseas clients that were coming through, I believe, were coming direct through Alan Thomas. He had a lot of contacts overseas.

…

Q. What was your impression of Mr Thomas as a manager?

A. He certainly was –was good when it came to – um - as far as the talking side went. As far as having all the answers when asked questions, he seemed to have it all there. But to put it into practice, it didn't seem to work. I mean, he wasn't able to follow through on things."

Nora Chu Young

[246] Mrs Young was the landlord for the premises at the 7th floor of Peace Tower, St Martins Lane leased by Orac from February 1997.

[247] Mrs Young gave evidence at the criminal hearing. It was her evidence that the appellant responded to an advertisement by the landlord for a tenant at Peace Tower and there followed a meeting of which the appellant and Paul Topp-Mitchell attended.

[248] The appellant subsequently signed an agreement to lease on 23 January 1997 on behalf of Orac Holdings Ltd and the appellant also signed the agreement as guarantor. The commencement date of the lease was 1 February 1997. The term of the lease was two years. Four car parks were included in the arrangement and the annual rent was $46,200 plus GST per annum.

[249] Mrs Young gave evidence in respect of her various landlord/tenant dealings in relation to that lease. She stated that there were problems with payments of rent and that the rent was in arrears by August 1997, resulting in the termination of the lease on 27 August 1997. The company was locked out. Only following a meeting, and agreed arrangement with the appellant, on 5 September 1997, was the company permitted back into the premises. The arrangement was that the appellant would pay the arrears of rent and immediately vacate the premise.

[250] The company did not vacate until October 1997.

[251] It was Mrs Young's evidence that she dealt at all times with only the appellant and no one else at Orac Migration (contrary to the appellant's evidence that Paul Topp-Mitchell was largely instrumental in the lease arrangements).

[252] At the Criminal Hearing Mrs Young stated, inter alia at pages 503 and 504:

"Q. Was Mr Thomas alone [at the initial meeting in January 1997 to discuss a lease] or with somebody else.

A. With a man. He introduced me as Paul.

Q. Did he tell you his surname?

A. I can't remember. What I remember is Paul.

Q. And who did you understand Paul to be in relation to Mr Thomas?

A. *I think he's the employee.*

...

Q. *Now during your discussion with him [the appellant], did the man Paul say anything, or did Mr Thomas do all the talking?*

A. *No. Paul haven't – he is quite silent. I talk with Mr Thomas."*

[253] At page 511:

"Q. *After that day [27 August 1997, when the lease was terminated] were there a number of meetings between yourself and Mr Thomas in relation to him recovering his possessions and -*

A. *Yes."*

[254] At pages 514 and 515:

"A. *4th October what he told me. Still haven't found a place, yeah. But I just ask that keep on every time when I meet him, I keep on asked him when he can get back the property to me.*

Q. *Did you make a suggestion to him about how he could pay, or repay you the money he owed?*

A. *Yeah.*

Q. *What did you suggest?*

A. *I suggest he borrow the money from the friends, or mother, and then pay me $500 – if he can of course $500 each month.*

Q. *And what did he say when you suggested he borrow money from friends?*

A. *He say he too hard working. He worked from morning to night time, no time to make friends.*

Q. *Now was that your last contact with Mr Thomas on the 17th of October?*

A. *Yeah.*

...

Q. *Now, during all your dealings with the leasing of your premises, did you ever deal with anybody else at Orac apart from Mr Thomas?*

A. *No. He is the only one.*

Q. *Did you understand him to be the managing director?*

A. *I think so, because he sign everything as a director.*

Q. *Did you ever call Mr Thomas after hours at the building?*

A. *Yeah. Always call him after hours.*

Q. *How late would you be calling him?*

A. *8 o'clock, 9 o'clock, sometimes 10 o'clock.*

Q. *And were you always able to get him?*

A. *Yeah because at day time he always say he's either with meet – and telephone call or with meeting with somebody. That's why I used to call him at night."*

Respondent's bundle/cross-examination of appellant

[255] I agree with Mr Tui that there are a number of documents at Tab D of the respondent's bundle that support the evidence of Ms Liu, Ms Chen, Mr Masoe and Mrs Teh – i.e. that the appellant was intimately involved in and in charge of Orac Migration Services Ltd. The following are examples:

[256] D1: Letter from the appellant to Mr Masoe dated 20 April 1994. This letter was prepared very early on in the development of Orac Migration Services Ltd. Mr Thomas stated, inter alia:

> *"... As you may have suspected I have a lot of work in front of me and I am having to rely on a number of new workers. It is very important that they are working well before I leave for China.*
>
> *...*
>
> *I have appointed three new agents that were going back to China and I have had meetings with the owner of the largest English Language School in New Zealand ..."*

[257] D12: Letter from the appellant to Mr Masoe dated 28 June 1994. In a follow-up letter, again early in the development of Orac Migration Services Ltd, it was clear that the appellant was taking a pivotal role in the development and running of the business. The appellant stated, inter alia:

> *"I have been very busy establishing agents in China in even more locations. I have a delegation of six that I have just dealt with that will be operating in three different provinces in the Inner China areas ..."*

[258] D12d: Facsimile from Ms Liu and the appellant to New Zealand Embassy in Beijing, China dated 18 January 1995. This facsimile was signed jointly by Ms Liu and the appellant. It was prepared following the trip by the two to China in relation to Orac Migration business. A number of client cases are identified in the facsimile.

[259] D15a: Facsimile from the appellant to Luo Yi Qiang dated 24 June 1995. The contents do no not support the appellant's contention that he had only a financial and peripheral role in the company. The appellant stated:

> *"I am personally sending all my agents this fax. It is urgent that we act quickly to protect the interest of our clients.*
>
> *..."*

[260] D15d & D15f: Facsimiles from appellant (and Lisa) in Beijing, China to staff at Orac Migration in New Zealand, dated 26 September 1995 and 2 October 1995. The contents of these facsimiles are particularly damaging to the appellant's appeal. The appellant and Lisa were in Beijing for Orac Migration business. According to the faxes, the two were extremely busy with work-related matters. The facsimile of 26 September 1995 reads, inter alia:

> *"Hi!!! From both of us in crazzzzy China. We are now in Beijing with a cell phone and we'll settle here for one week. We will be working day and night from now until 1st of October.*
>
> *... I hope everything is okay there. If not, Alex ...You can fax me on a daily basis if needed."*

[261] There followed, in the same facsimile, a list of questions and answers for the staff at Orac Migration; all of the enquires were being asked by the appellant, and almost all were work related. The facsimile further read:

> *"We have a few extra clients and are now doing the final processing."*

[262] The facsimile of 2 October 1995 followed a similar pattern; there were also discussions in relation to other business ventures in China.

[263] D27c-d, D27e, D27f, D27g-h, D27i, D27j, These are a number of communications between the appellant and Zhang Tao/Miao Lin. These communications leave the reader in no doubt that the appellant's role and involvement in Orac Migration is full and central. In the appellant's facsimile of 1 July 1996 [D27c] the appellant stated, inter alia:

> *"I am now in New Zealand. I have not come back to a rest but as you can expect I have returned to a high workload and needed some time to bring everything up to date. This has not affected the work that my company is doing for you as my expert staff have everything under control. We are now waiting for the signed Visa application forms and other information to be returned to us as soon as possible. In a few days I will fax you details about what the planned visit is about and who will be met at the New Zealand company that is being visited ..."*

[264] In an email to Ms Lin dated 16 October 1996 [D27e], the appellant stated, inter alia:

> *"... Yes I have been very busy. My staff continues to grow which means I have continually showing people what to do. We are enjoying a lot of success. For example, about 20 people are now ready for their final interview in Beijing. We are currently looking for jobs for about 40 people who are new applicants. I am needing more computers to help with the work.*
>
> *I am now reaching a stage where some of my staff are almost ready to take management responsibility which will reduce my workload. A good manager just makes sure that everybody else is working but all the clients want me to personally look after their case which is not possible of course. With the computer database systems I am still able to supervise every case personally but it is still not possible for me to work on any case unless there is some*

difficulty. The only cases that I am currently working on personally are the invitations for your clients …

…

I am in good health even though I am working long hours."

[265] In an email to Ms Lin dated 21 October 1996 [D27f], the appellant stated, inter alia:

"I have just spoken to the New Zealand Immigration Service in Beijing with regards to their delays …

…

Everything is going very well in New Zealand and my company is very busy these days. Last week I interviewed the Minister of Immigration on the Chinese Radio. My company has a talkback programme once a week on the Chinese radio station and it is quite popular as we discussed immigration matters each week.

[266] In an email to Mr Tao dated 5 November 1996 [27g], the appellant stated inter alia:

"For my side the truth is that I have got the invitations by myself so I can know that everything is 100% as my other staff are not organised to do the inviting work and getting the letters. I will try the other staff from now on with everything double-checked myself from this week. Please add more information.

My business has been through bad times from November 1995 and now good times. We are growing at 30% per month now since I returned from China and this has put a lot of pressure on me."

Financials – for businesses/companies

[267] The evidence from the persons who worked at Orac Migration was that there were large sums of money being received from clients in the hundreds and the thousands of dollars and that that this money was receipted, placed in the safe and banked in the Orac Migration safe. Much of this money was received in cash and some in cheques.

[268] At the time of ACC's investigation, the bank account statements for the various accounts were seized. The bank statements were subsequently provided to Bruce Bryant, Chartered Accountant, who, during the prosecution, prepared a chart of all the company and financial information available [Document D59 of Respondent's Bundle].

[269] Mr Bryant gave evidence in this proceeding as he did at the criminal hearing. He confirmed that the information in the chart was taken from company records and the bank statements for the calendar years identified in the chart. Mr Bryant also noted that the transaction figures were the numbers of deposits/withdrawals over the course of the particular calendar year.

[270] Focusing entirely on Orac Migration (for which there were two bank accounts held – numbers: 13 and 14) it is clear that large sums of money were deposited into

those accounts in 1995 and 1996; 1995: $166,821, 1996: approximately $350,000. The appellant had sole control over the accounts for most of this period.

[271] The evidence from the various witnesses is that Orac Migration was a reasonably busy operation. The amounts, and number of transactions, being deposited through that company's accounts supports this description.

Appellant's personal financial position

[272] The appellant, in effect, suggests that from 1990 to 1997 he has funded the many businesses from his weekly compensation, received no financial return and thus effectively lived hand to mouth. The appellant suggested that he lived at the Symond Street premise because he was too poor to afford rent in alternative accommodation.

[273] The appellant stated on 18 September 2007 at page 40, Tape 1:

> *"Q. Even after she [Cynthia Liu] left Orac Migration in June 95, you still continued to reside on the premises.*
>
> *A. Oh yes. Yes, yes.*
>
> *Q. I put it to you, Mr Thomas, that the reason that you resided in the very premises where your company is operated is because you are intrinsically involved in the operation of the business.*
>
> *A. No, I was poor. One of the conditions of having an office and for Cynthia's business was that we could not afford to have a home to rent and an office."*

[274] Contrary to the appellant's pleas of poverty, it appears that the appellant was in fact receiving good remuneration from Orac Migration. The appellant completed and signed a Statement of Financial Position on 30 November 1994 [**D12b-c of Respondent's Bundle**]. According to the contents, the appellant then had assets of plant and machinery worth $160,000; computers worth $15,000; $20,000 in a Westpac account in New Zealand and $10,000 in a Westpac account in Fiji. Also, the appellant stated that he was receiving a salary of $3,000 and other tax paid income of $2,000 – being a monthly net income of $5,000.

[275] In November 1994, the net weekly compensation being paid to the appellant by ACC was approximately $350 per week, or $1,500 net per month, significantly less than the amount identified as the appellant's income in the Financial Statement.

[276] This document was put to the appellant on 21 September 2007 - at pages 24-27 of Tape 3. The appellant accepted that he completed this document and signed the same. The document was apparently completed to support an application for a credit card. The appellant suggested that, despite signing the document, he did not in fact send it. His reasons for completing the document at page 26 read:

> *"A: And the purpose? And that's what's critical here. I was seeing what it was, I was doing to trial to see what was required of the information to see if I could qualify [for a credit card] so its trying it out to see what I could do and what I had to achieve. Now I was considerably less than when I was ah, pre-injured and ACC are paying about half of what I was pre-injury and*

then seeing what the differences are. Now that's what this document means."

[277]The amount of travel undertaken by the appellant from 1993 to 1996 is consistent with a person having access to large sums of money, well in excess of his weekly compensation – it is of course the appellant's evidence in chief that he received no financial benefit whatsoever from these businesses. His overseas travel includes (this list is not exhaustive):

- 1993 -Western Samoa
- 1993/94 - Fiji (the appellant contends he rented an apartment in Fiji for three months)
- 7-28 September 1994 –USA/Canada
- January 1995 – China
- September/October 1995 – China
- June 1996 - China

[278]The appellant does not appear to recognise the contradiction in his evidence; that he was allegedly poor yet enjoyed a substantial amount of overseas travel.

[279]In an endeavour to suggest he could not have been the manager of Orac Migration, the appellant suggested that he had spent too much time overseas to permit such a role. He stated that he spent almost 12 months overseas travelling – pages 31-33 of Tape 2 on 20 September 2007. The appellant stated that he spent three months in Fiji where he rented an apartment in Suva and Lautoka. At page 33 he stated:

> *"I spent six weeks in the States and in Canada. Um and then ah I've been to China three times, sometimes for six weeks, sometimes for three weeks. So when you add up all of these bits and pieces of time, it cranks up to almost a year."*

[280]The amount of travel does not establish that the appellant was incapable of managing Orac Migration – the trips to China and the United States were work related; the trip to Fiji was in approximately late 1993/early 1994 before the Orac Migration business was created. The amount and nature of the travel simply establishes that the appellant had considerable funds at his disposal to pay for the airfares, the accommodation and the living costs whilst overseas. Such costs could not have met from his modest weekly compensation payments.

Appellant's 'office' at 76 Symond Street

[281]The appellant has been at pains to suggest that the room used by him at Symond Street was for living purposes only and not also a work office. The appellant suggests that there was no work undertaken in that room and even went so far as to suggest that he kept the door closed with a "No admittance" sticker on the door – 18 September 2007 at page 37 of Tape 1.

[282] The evidence from Mr Masoe, Mrs Teh and Ms Liu is to the contrary. They state that the appellant worked from his office, acknowledging that the same room was used as a living quarters (the appellant sleeping on a mezzanine floor slightly below the ceiling level).

[283] There is a facsimile prepared by the appellant on 26 September 1995 [**Document D15d of Respondent's Bundle**], while the appellant was in China. The appellant is writing wrote to his staff in New Zealand. One of the questions he posed on the facsimile by the appellant was:

> *"1.3 – Alan/Alex: Are the phones okay? Are you answering the phone when it rings in my office?"*

[284] The reference to the appellant's 'office' is clear. The words are the appellant's. However, the appellant sought to place a spin on his own words. On 18 September 2007 - at page 51 of Tape 1 – the appellant stated in response to the above words:

> *"Q. ... What's your 'office' Mr Thomas?*
>
> *A. Well, that's what it is often referred to because it was an office building.*
>
> *Q. What is referred to, Mr Thomas?*
>
> *A. That's my accommodation – that was actually my accommodation.*
>
> *Q. So you refer to your accommodation as your 'office'?*
>
> *A. Well I did on that occasion, it would seem, yes.*
>
> *Q. Why should he [Alex] answer your residential phone that's in your living premises?*
>
> *A. I gave him a key to my rooms. Oh, the other thing is – I see what this is about – we never referred to it as my home because I officially wasn't allowed to live there by the landlord and so forth. The landlord knew –*
>
> *Q. Well they did know about it?*
>
> *A. So at all times we referred to my accommodation as my office. The other name that was given was the den of inequity. That was when after Cynthia left I had a couple of girlfriends and so there was terminology that was more comfortable for people. Even Kathryn Teh when she arrived and started working there, she didn't even know I lived there for some months."*

Stephen Davey

[285] On 26 June 2008 the appellant produced an affidavit from Stephen Davey dated 24 June 2008 during the cross-examination of Mr Masoe. The contents of the affidavit concern the period from about June 1996 through to the present time. The contents of the affidavit mirror almost identically the evidence from the appellant provided in his examination in chief.

[286] On 26 June 2008 the appellant assumed that the affidavit would be admitted into evidence without the need to call Mr Davey. The transcript reads at pages 28 and 29, inter alia:

> *"His Honour: All right Mr Thomas why has this been sprung on the Court, is Mr Davey going to give evidence?*
>
> *Mr Thomas: Would an affidavit be sufficient, sir?*
>
> *...*
>
> *Mr Thomas: So can't we just leave it at its face value, is that the way it would happen, I'm not qualified to know what to do, sir."*

[287] The contents of Mr Davey's affidavit are summarised as follows:

[288] Prior to August 1996 Mr Davey had instructed Mr Masoe to assist with obtaining a visa for his wife. Mr Davey provides no details in respect of this instruction. He simply states that he had paid $1,000 to Mr Masoe for the work and the service had allegedly not been carried out.

[289] Mr Davey states that he then went to the Orac Migration office at Symond Street in or about August 1996 to complain. His evidence in respect of this particular event is described at paragraphs 4-15 of the affidavit. Mr Davey alleges that Kathryn Teh attempted to eject him from the office and that on this occasion he met the appellant who advised that he was simply the owner and had no dealings with immigration matters. Mr Davey further alleges that the appellant advised Mrs Teh to treat Mr Davey with respect and with dignity and process the immigration application.

[290] Mr Davey suggests that he understood that Mr Masoe was later dismissed for acts of dishonesty.

[291] From paragraphs 17-19 Mr Davey refers to a subsequent meeting with the appellant in '*his private rooms*' which Mr Davey described *"was clearly his living accommodation"*. At this meeting Mr Davey suggests that he advised the appellant that Mr Masoe and Mrs Teh were working in cahoots and that the appellant had reminded him that Mrs Teh was in charge of the immigration company.

[292] There is then some reference to communications with Paul Topp-Mitchell in early 1997. Mr Davey suggests that Mr Topp-Mitchell had informed Mr Davey that his first duty, on starting at that company, was to dismiss Mrs Teh.

[293] From paragraphs 22-31, Mr Davey refers to a number of communications between himself and the appellant regarding the company's affairs and the appellant's ACC claim. These conversations allegedly took place in early to mid 1997 before the Corporation's primary decision of 18 August 1997.

[294] Paragraphs 32-42 deal with events from the time of the shift to the immigration business to Howick and thereafter. Again, all sorts of assertions are made by Mr Davey regarding the appellant's circumstances. For example at paragraph 34, Mr Davey suggests knowledge of the financial matters pertaining to the appellant's use of his ACC income as well as the company financial affairs from 1995 (a time before Mr Davey knew the appellant).

[295] The circumstances of Mr Davey's involvement with Mr Masoe are explained in Mr Masoe's Second Brief, supported by the documents in the binder used for the cross-examination of Mr Davey.

[296] Mr Davey approached Mr Masoe at Orac Migration when Mr Masoe was working from the Queen Street office. Mr Davey had recently married a Fijian Indian wife. An earlier application for a visitor's visa had been declined by the New Zealand Immigration Service.

[297] Mr Davey had instructed Mr Masoe to write to the New Zealand Immigration Service to ask it to reconsider the earlier declinature of the application.

[298] Mr Masoe received $1,000 for this service. He arranged several meetings with Mr Davey and prepared a detailed letter for the New Zealand Immigration Service dated 13 July 1996 requesting that the New Zealand Immigration Service reconsider its decision. A number of attachments were also provided in support of the request. The request was, however, declined on 30 July 1996.

Reliability of Mr Davey's Evidence

[299] Firstly, it is submitted by Mr Tui that Mr Davey has no relevant evidence to offer in this proceeding as his knowledge of the appellant's circumstances are confined to 2 or 3 brief exchanges with the appellant in 1996.

[300] It become clear by the second day of Mr Davey's cross-examination that he had no personal knowledge of most of the contents of his affidavit. The appellant accepted that he had seen the appellant on two or three occasions in 1996 at the Symond Street office. Mr Davey did not see the appellant once in 1997, prior to the company's shift to Howick; the same occurred in October 1997. Paul Topp-Mitchell was looking after Mr Davey's wife's claim in 1997. Mr Davey accepted he had no dealings with the appellant and did not visit the Orac Migration office at either Symond Street or St Martins Lane in 1997.

[301] The Corporation's primary decision, which is the subject of this appeal, was issued on 18 August 1997. Prior to the primary decision Mr Davey had only seen the appellant on two or three occasions in mid to late 1996. Mr Davey stated in cross-examination on 2 December 2008 (there are no page numbers on the transcript):

> *"Mr Tui: So, you had no real observation of what Mr Thomas could do until two months after, well at least two months after ACC made its decision.*
>
> *Mr Davey: That is correct.*
>
> *Mr Tui: So you know nothing of any relevance about Mr Thomas up until the time ACC made its decision in August 1997.*
>
> *Mr Davey: The only thing I know about that is that when I went to see him he said he doesn't deal with the cases, he has –*
>
> *Mr Tui: That is what you say, that is the most you have ever known.*
>
> *Mr Davey: That is what he told me.*

Mr Tui: That is the most you know about this case, the rest of your evidence is about a matter that happened from October 1997 onwards.

Mr Davey: That is correct."

[302] Mr Tui also submitted that that the affidavit ought to be disregarded in its entirety as the appellant has attested to the accuracy of matters he acknowledged at the hearing he has no knowledge of, and this places in doubt the veracity of the entire document and Mr Davey's credibility on all matters material to this appeal.

[303] Under cross-examination, Mr Davey could not recall many (if not most) of the conversations and events that were described in his affidavit. Following Mr Davey's above concession on 2 December 2008, many paragraphs were deleted from the affidavit as Ms Davey accepted he could not have had any knowledge of the these matters (they were described as having occurred at a time when Mr Davey had no contact with the appellant) – including paragraphs 22, 24-31 of the affidavit.

[304] Mr Davey had signed an affidavit attesting to events and circumstances that he had no personal knowledge of. If Mr Davey had properly read his affidavit, before signing the same, he should not have signed the document. Mr Tui submitted that the entire document ought to be disregarded and that Mr Davey's execution of a document that he clearly had little knowledge of reflects on the appellant's conduct as well. It is clear that the appellant was involved in the preparation of the affidavit (both Mr Davey and the appellant acknowledged the same). The appellant would have been aware that Mr Davey was attesting to the matters not within Mr Davey's personal knowledge.

[305] The Corporation also relies on the second brief of evidence from Benjamin Masoe and the affidavit of Kathryn Teh dated 26 January 2009.

[306] Mrs Teh is no longer residing in New Zealand, she is now in the United States. She left New Zealand in May 2008, only a short time before the appellant produced the affidavit for Mr Davey. As such, Mrs Teh could not be called to give evidence. Mrs Teh is categorical that the appellant was indeed the manager of Orac Migration Services Ltd. In respect to Mr Davey's assertion that the appellant had informed him that he did not get involved in immigration matters, Mrs Teh explains at paragraphs 10 and 11:

"10. I do not agree with the suggestion in Mr Davey's affidavit that Mr Thomas did not get involved in immigration matters. Mr Thomas was very involved in important matters. Further, it was he who would be involved with conflicts like the one described at paragraph 9 of Mr Davey's affidavit. These conflicts arose quite frequently.

11. Mr Thomas did, however, sometimes use the explanation to clients of not being involved with immigration matters in order to let himself off the hook if there was a conflict with a client."

[307] Mrs Teh also refuted any suggestion that she was in cahoots with Mr Masoe or that Paul Topp-Mitchell had dismissed her from her employment at Orac Migration Services Ltd.

[308] Mr Masoe's second brief of evidence was in relation to Mr Davey's allegation that Mr Masoe had not undertaken the service for which he had paid the fee of

$1,000. In relation to the suggestion that Mr Masoe acted in an improper manner by retaining the $1,000 fee rather than providing it to Orac Migration Services Ltd, Mr Masoe explained at paragraphs 54 and 55:

> *"54. As I said in June 2008, I kept the fee paid by Mr Davey. As I said, Mr Thomas owed me about $16,000 in unpaid commissions for previous work and I was trying to recover part of what was owed to me by Mr Thomas. In fact, most of the consultants at Orac Migration left for this reason.*
>
> *55. I cannot say whether I kept $650 or $1,000. If the cheque for $350 was made out to Orac Migration I would have only kept $650, being the amount paid in cash. I would have been owed a commission from Orac Migration for Mr Davey's claim. My commission would have been about 50% of the fee, i.e. $500."*

[309] In relation to the allegation that Mr Masoe had not undertaken the service paid for by Mr Davey, Mr Masoe confirmed he did complete the service. Mr Masoe also provides a detailed explanation of the work involved in the service; including the first meeting, subsequent meetings and preparation of the letter for the Government Department. Mr Masoe stated that the fee of $1,000 was in line with this type of service. He further stated at paragraph 37:

> *"I'm almost certain that the services I was hired to perform and paid for by Mr Davey were completed and that Mr Davey was satisfied with the services as I have no recollection of any outstanding matters owed to Mr Davey."*

[310] Indeed, when Mr Davey was pressed as to his concerns regarding Mr Masoe's service (and why he believed it was not completed), it was clear that Mr Davey's concern was not in respect of Mr Masoe's performance but simply because Mr Masoe did not achieve the result that Mr Davey had hoped. When asked what service Mr Masoe had failed to undertake, Mr Davey repeated that Mr Masoe had failed to obtain the visitor's visa.

Affidavit of Miao Lin

[311] In December 2008 the appellant advised this Court that he intended to rely on an affidavit that he was obtaining from a Miao Lin. In January 2009, I directed that any affidavit from Ms Lin be filed by the end of February 2009. The appellant sought an extension for the same but ultimately the affidavit was not forthcoming. On 2 June 2009 I directed: *"[2] No further oral or affidavit evidence is to be filed by either party in this appeal."* The appellant had sufficient opportunity during the course of the appeal proceedings to obtain an affidavit from Ms Lin but did not do so.

Medical Evidence

Summary

[312] The appellant's case is based on two broad propositions:

[a] The appellant, by his own evidence, allegedly had no day-to-day involvement in any of the businesses identified in this case (or identified in the criminal case) and that his role was simply financial and at best, peripheral but irrelevant; and

[b] The medical evidence is allegedly consistent and supportive of the fact of the appellant's ongoing and continued incapacity. The appellant relies on certifications of the same from his General Practitioner, Dr Wilcox, as well as various specialist medical reports prepared from 1990 onwards.

[313] The main contentions which arise from the appellant's second proposition above, as pursued by the appellant, are:

[a] The medical practitioners who have assessed and treated the appellant from 1990 to 1997 are of the view that the appellant is incapacitated and is unable to use his hand or wrist for light physical duty, including handwriting, typing or using the mouse for any length of time. By way of an example, in cross-examination on 20 September 2007 the appellant stated, at page 10 of Tape 2:

> *"Q. ... Mr Masoe's evidence that he saw you doing a lot of writing with your right hand.*
>
> *A. No, no, very very little writing.*
>
> *Q. So you did, you're saying that you did some but not a lot?*
>
> *A. Extremely little. ... Now, today I would wear my brace except that it is actually too swollen to put it on and that's because I did some underlining yesterday and I'm talking a very, very small amount um, you'd be talking about a paragraph's worth, not even a paragraph's worth of writing and it's swollen."*

[b] Since the appellant's surgery on 28 August 1992, undertaken by Mr Martin Rees, the appellant's right wrist has been a lot worse – examination in chief of appellant on 27 March 2007 at page 13 of transcript and 18 June 2007 at page 14 of transcript.

[c] The appellant had a stroke in August 1993 and he has had serious cognitive problems since. The appellant stated in examination in chief on 27 March 2007 at page 14:

> *"... They made a mistake and they put the. They went up into the carotid artery with this gadget and scraped the inside of the carotid artery and that caused a clot. The clot broke free and it went into my brain and caused a stroke and that made me unconscious. I woke up the next day with slurred speech, confused and so forth. I mean I went to a full stoke. Total seizure, the whole bit .."*

[314] Further, on 28 March 2007 at page 35:

> *"... Now the diminishment* [of the appellant's mind activity] *in total um. It's very subjective to say how much it is but it's probably in the order of 20% especially with the pain medication. Now the brain injury affects particular issues like short-term memory and so forth. But when you're talking pain medication as well, ah, you're diminished a whole lot more ...*
>
> *...*

... The mind situation. It's. I can be very functional one moment and not the next. Ah, if I tire my mind will tire easily and become exhausted. Ah, but I still have at times very good function."

[315] The appellant contends that he has been taking a cocktail of prescribed drugs for his pain and this has had significant consequences on his capacity, especially in relation to his mental capacity. He stated on 27 March 2007 at page 14:

"Q. And as a result of that injury and your wrist injury, did you receive any medication?

A. Yes, yes.

Q. For what?

A. Um, the maximum dose of an opiate for example, Tramol and other types. They wanted to put me on morphine but I refused. Um, and more recently I now have modified. There's all kinds of other types of medications. A whole cocktail of things they've tried me on. Um, but currently, um, um, I think it's probably the maximum dose of a drug called Gabapentin or Nurotonine ... and supplemented with the Tramol."

[316] It seems to me that there is no objective medical evidence to support any of the contentions.

Deliberate inaccurate self-reporting by appellant

[317] All the specialist medical practitioners assess the appellant as being capable structurally/medically of using his right hand and wrist for light physical work, including writing, typing and use of the mouse. The medical practitioners have opined that the appellant was only unfit for heavy physical work. The appellant, however, by his own admission accepts that he can use his hand and wrist for heavy physical work and has in fact done so. He accepted Mr Masoe's evidence that he carried heavy computers with his right hand.

[318] The medical specialists' opinion, in relation to the restrictions and limitations placed on the appellant's use of his right hand/wrist by the wrist injury, were not based on objective medical findings. The opinions were based entirely on self-reporting from the appellant in relation to what he could and could not do. These self-reported symptoms and restrictions included pain, discomfort and the length of time the appellant could cope performing an activity with the right hand affected by the pain and discomfort.

[319] The medical practitioners accepted the appellant's self-reporting at face value. They were simply not aware of the appellant's work/business activities from 1990-1997. More importantly, the medical practitioners were not aware of the appellant's actual use of his right hand over that period. They were therefore ill informed, by the appellant, as to what limitations and restrictions the wrist injury caused the appellant.

August 1992 Surgery

[320] There is no medical evidence to support the appellant's assertion that his wrist injury has been worse since the surgery in August 1992.

[321] Contrary to the appellant's assertion, none of the medical specialists have subsequently suggested that the 1992 surgery made his condition worse. Some simply note that the surgery was not successful in improving the wrist condition (although Mr Rees himself in his contemporaneous medical notes following the surgery indicated that there had been improvement).

1993 Stroke

[322] The suggestion by the appellant that he had a stroke in August 1993 is unsupported by any medical documentation that the appellant has provided. Further, the appellant's alleged widespread cognitive problems did not arise until subsequent to the Corporation's 1997 primary decision.

Cocktail of prescribed Pain Killers

[323] Finally, the suggestion by the appellant that he has been significantly impaired by the consumption of a cocktail of prescribed drugs for pain is misleading. The cocktail of drugs were prescribed by Dr Boas from July 1998, one year after the Corporation's primary decision.

[324] Curiously perhaps, the medical evidence shows that the appellant's condition deteriorated following the Corporation's primary decision. The evidence, in relation to this issue, is found in:

- Appellant's examination in chief in March 2007 and 18 June 2007.
- Cross-examination of appellant on 30 and 31 January 2008.
- Appellant's Summary of Evidence – Medical bundle.
- Further medical reports at Tab F of Respondent's Bundle, F1-6,7-8,9,10,11-12,13-15,17,18, and 19.
- Three medical practitioners gave evidence for the prosecution at the criminal hearing, namely Mr Ross Nicholson (Orthopaedic Surgeon), Mr Martin Rees (Surgeon) and Dr Wilcox (the appellant's General Practitioner).

Specialist Medical Evidence 1990 to 1997

[325] I agree with Mr Tui that the importance of the specialist medical evidence lies in the fact that none of the specialists suggest that the appellant's wrist injury precludes the appellant from undertaking normal activity with the right hand.

[326] The reports from 1990 to 1997 are referred to below in some detail to show that the appellant's reliance on the reports is flawed. The medical opinions that the appellant relies on are in fact opinions that have simply relied on the appellant's inaccurate self-reporting.

Mr Joe Brownlee – Orthopaedic Specialist

[327] Mr Brownlee prepared a report for the Corporation on 1 November 1990 [**B2 of appellant's bundle**]. The Corporation had recently received a claim for cover from the appellant and was considering the appellant's entitlement to cover as well as weekly compensation. Mr Brownlee concluded at page 2 of his report:

> *"Concerning his work capability, once his tennis elbow condition is resolved, I consider he should be fit to work for light work. In the interim, any physical activity, including repetitive tasks such as keyboard work, <u>are reported</u> to cause him pain."* [counsel's underlining]

[328] From the beginning the specialists relied on the appellant's self-reporting of pain to assess his restrictions and capabilities. At the time of Mr Brownlee's assessment, the appellant was involved with Career Pilot; the appellant did not inform Mr Brownlee of this involvement or his activity.

Ross Nicholson - Orthopaedic Surgeon

[329] The Corporation arranged for Mr Nicholson to assess, inter alia, the appellant's fitness for work. During this period, the Corporation had arranged for an investigation into the appellant's work activities by ICIL and ICIL had discovered that the appellant had been attending the Career Pilot office in Federal Street.

[330] Mr Nicholson prepared a report for the Corporation on 21 November 1991 [**Document F1 of the respondent's bundle**]. In relation to the appellant's involvement at Career Pilot Mr Nicholson recorded:

> *"I questioned Mr Thomas about his work activities.*
>
> *He told me that he had been attending business meetings with the employment consultancy firm in an unpaid capacity for a period of about nine months from August-September 1990. This was stopped when he was unable to participate actively in the business."*

[331] The advice from the appellant to Mr Nicholson was inaccurate. It was completely at odds with the evidence provided by Ms Bridges and Ms de Silva of the appellant's role at Career Pilot.

[332] Mr Nicholson opined on page 5:

> *"As a result of the combination of these injuries [to the wrist], Mr Thomas has an unstable wrist.*
>
> *...*
>
> *The symptoms experienced from instability of the wrist vary and again are more likely to be incapacitating in a person who is involved in a manual occupation.*
>
> *I am surprised that Mr Thomas has not tried simple measures such as a wrist or elbow support. To support a painful joint is a normal reaction of lay people and the wide variety of supports stocked by pharmacists indicates that lay people often consult them for advice in these matters.*

I am not convinced that Mr Thomas has made a real effort to assist his rehabilitation. If he experiences difficulty in using the computer mouse in the right hand it would seem to me that it would be worth trying to develop the skill using the left hand, and in any case I am not convinced that the symptoms experienced in the wrist and elbow would prevent using the mouse satisfactorily.

In my opinion Mr Thomas is fit for light work and the type of work in which he was engaged previously would be appropriate."

[333] Mr Nicholson provided evidence for the prosecution at the criminal hearing. His evidence is at pages 492-497 of the criminal transcript. His evidence is consistent with the findings in his 1991 report. He further stated at page 495:

"Q. *And would it be possible for a person with this type of injury to use a computer?*

A. *In general terms, yes. But the degree of instability in one person may give rise to more disability than a similar apparent degree of instability in another person.*

Q. *Yes. But it may be possible for a person with this type of injury to use a computer, the keyboard and the mouse.*

A. *Yes.*

...

Q. *And similarly, would a person with this type of wrist injury be able to write?*

A. *I would anticipate so."*

[334] When questioned in cross-examination about Mr Nicholson's report, the appellant was dismissive of Mr Nicholson's opinion. He went so far as to suggest on 30 January 2008, at page 37 of the transcript, that Mr Nicholson did not even examine him. He stated:

"He didn't carry out a clinical examination.

Q. *I put it to you he did.*

A. *No he didn't. He didn't even touch me. He didn't even look at it. I spent 15 minutes with him, he asked questions predominantly he answered his own questions."*

[335] As is evident from the 1991 report, Mr Nicholson stated that he examined the appellant for the purposes of the report and he detailed his findings on examination at pages 3 and 4 of the report. He also confirmed at the criminal hearing that he examined the appellant - at page 492.

Mr Martin Rees – Plastic and Reconstructive and Hand Surgeon

[336] Mr Rees treated the appellant in 1992. He prepared reports dated 4 March 1992 and 16 March 1992 [**B4 and B5 of appellant's bundle**]. He also undertook surgery on the appellant's wrist in August 1992. He gave evidence for the

prosecution at the criminal hearing. His evidence is found at pages 269-292 of the criminal transcript.

[337] In the initial report of 4 March 1992, Mr Rees noted that from examination and radiological investigation the appellant had ruptured three ligaments. He proceeded to state at pages 2 and 3:

> *"The power of the flexor capi radialis and ulnaris and the extensor carpi ulnaris serve to protect and brace the wrist joint for light work but in heavy work obviously they are not capable of protecting the wrist which tends to sublux and cause pain. I believe this man has a background of low grade pain in the wrist due to its instability and the stretching and rupturing of the various ligaments most of the time.*
>
> ***Management***
>
> *I have now carefully read Mr Nicholson's report and I agree with virtually everything he says, it being a very clear and concise report ..."*

[338] Mr Rees proposed surgery to provide greater stability to the wrist. He proceeded to state at pages 2 and 3:

> *"... I tend to agree that at present this man's hand is flexible and has a good range of movement for light work but obviously is not suited to heavy work. Because of this man's wrist joint instability he gets a lot of aching and discomfort in the wrist and he tells me that even with doing light work like using a computer keyboard or a mouse that this aching discomfort precludes him from using it except for very short periods of about half an hour or so. Clearly this is inadequate if he is to pursue using his computer and keyboard for a living. He does have a normal left hand and should be able to adapt this to using his computer mouse without too much difficulty.*
>
> *...*
>
> ***Summary***
>
> *... He has a grossly unstable wrist which has a normal range of movement for light work but is incapable of being supported and braced adequately to do any heavy work ..."* [counsel's underlining]

[339] Significantly, Mr Rees concurred with Mr Nicholson's findings entirely, opining that the appellant was fit for light duties, but not for heavy physical work. With respect to the appellant's restrictions in relation to use of the computer keyboard and mouse, clearly Mr Rees relied entirely on the appellant's self-reporting of his restrictions.

[340] Mr Rees prepared a further report for the Corporation on 16 March 1992. The report was prepared following receipt of a response from the appellant to Mr Rees' first report. It is clear that the appellant's response was critical. On the basis of the appellant's feedback Mr Rees made changes to his first report. Mr Rees explained, in the first paragraph:

"I gave him [the appellant] my report to make sure I had it right. There are some areas where obviously I haven't given correct weighting and emphasis and I would like to do so with this supplementary report."

[341] Mr Rees proceeded to state:

"I made a statement that I thought he could use his left hand to use the computer mouse. However, the type of mouse which he uses for his particular computer programs using AutoCAD, VersaCAD etc require very accurate and rapid movements of the mouse far beyond the skill levels required for the point and shoot type of exercise that most computer mice are useful. I didn't appreciate this at the time I first saw him and I can now understand the difficulties this man has with his right wrist instability and his inability to do controlled fine movements. Obviously if he was to use his left hand for this type of thing, this would mean using the rest of the keyboard with his right hand which is the defective one in question and undoubtedly it would be very difficult for him to do this. This type of keyboard mouse operation obviously requires the use of two normal hands and this he does not have.

The cold intolerance, aching and instability in his right hand mean that he has great difficulty in using it for repetitive light work for more than half an hour. This obviously severely limits his ability to do anything two-handed. He even has difficulty holding a coffee mug, recently he says that on the weekend he found just how difficult it was just to do up a simple thing like a nut and bolt on an exhaust clamp on a friend's car. He couldn't get his hand and wrist into the difficult position required to get the nut and bolt done up which brought home to him the degree of disability he has in his hand."

[342] It is clear that the appellant's own statements about his capabilities caused Mr Rees to make the above changes. Mr Rees was, quite naturally, accepting the appellant's self-reporting at face value.

[343] Mr Rees emphasized, in his evidence at the criminal hearing, that pain is subjective and medical practitioners are reliant on the self-reporting of a patient. Mr Rees stated:

[344] At page 273 of the criminal transcript, in cross-examination:

"Q. Having looked at the wrist and interviewed Mr Thomas, what degree of pain do you consider would have been present prior to the operation?

A. Well that's a very hard question to answer, actually. Because pain is experienced by one person and not by the person interviewing. One can only accept the say-so of a particular patient as to how much pain they are getting, and people have a wide range of tolerance to pain. What to some people is a lot of pain to others is not much. So I think it is a difficult question to answer. But he told me that he had pain in his wrist and I accepted that."

[345] Further cross-examination at page 277:

"Q. Did you simply accept what he told you his symptoms were?

> A. *Yes. That's what a doctor usually does, we take our patients at face value, we accept what they say."*

[346] Leaving aside the appellant's self-reporting, Mr Rees was of the view that the appellant was able to use his right hand and wrist for light duties which included using the keyboard, mouse and writing. He accepted Mr Nicholson's findings and only watered down aspects of his initial report (regarding the appellant's restrictions) when he received contrary self-reporting information from the appellant.

[347] Mr Rees performed surgery on the appellant on 28 August 1992. The surgical reports and post-surgery correspondence are found at F7-10 of the respondent's bundle of documents.

[348] The appellant has suggested, as stated above, that the 1992 surgery made his wrist worse. On 30 June 2008, at page 45 of the transcript, the appellant suggested that Mr Rees had inadvertently cut a nerve during surgery. Evidence from Mr Rees at the criminal hearing, as well as his clinical notes, do not bear out the appellant's allegations. At page 280 of the criminal transcript Mr Rees stated in cross-examination:

> "Q. *During the course of the operation itself, was there a nerve in the wrist severed by you?*
>
> A. *No. Not to my knowledge. Normally when you operate you go through tissues, the nerves – the fine nerves, the branches going to the tissues they all get severed, that's part of surgery. But the main nerves certainly weren't."*

[349] Mr Rees' post-operative findings in fact suggested that the appellant's condition had improved. He wrote to the Corporation on 4 September and 12 November 1992 [**F9 and 10 of respondent's bundle**]. On 12 November 1992 Mr Rees stated:

> *"He is going to start looking for a job now he is better able to use his right hand following his operation on 28/8/92. Once he has found himself a job he will let you and me know and we can write a final certificate ..."*

[350] At page 271 of the criminal transcript, Mr Rees stated in examination in chief:

> "Q. *Once Mr Thomas had recovered from the operation, would you have expected him to have benefit for light work?*
>
> A. *Yes. Light work to me is, say, lifting less than 5kg and doing writing, computer work, that sort of work. I would have expected him to be able to do that sort of thing for a reasonable period."*

L John Tonkin – General Orthopaedic and Hand Surgeon

[351] Mr Tonkin treated the appellant on several occasions between 1991 and 1995. He prepared a report on 26 March 1995 [**D7 of appellant's bundle**]. Mr Tonkin considered the possibility of performing surgery on the appellant's wrist. He noted at page 1 of his report:

> *"The current position is that Mr Thomas complains of occasional right lateral elbow discomfort. He complains of right dorsal and palmer wrist pain. He has*

difficulty in using a keyboard and decreased dexterity. He has difficulty in performing heavy duties."

[352] Mr Tonkin mooted the possibility of reconstruction to improve the situation and noted that improvement was only possible but a normal outcome was not expected. He opined:

"Regardless of whether or not a reconstruction is performed, Mr Thomas will not have a normal wrist. His ability to perform his activities as a mechanical design engineer will be limited. He has indicated the need to preserve find dexterity skills rather than the need to perform heavy manual work."

[353] Mr Tonkin's opinion, regarding the appellant's ability to perform the activities of a design engineer, was based on information from the appellant.

[354] In March 1995, at the time of Mr Tonkin's report, the appellant was involved with both Orac Publishing Ltd and Orac Migration Services Ltd. He was working full time on these businesses spending significant periods on the computer preparing documents. He offered none of this information to Mr Tonkin.

Occupational Overuse Assessment – Janelle Aitken (Occupational Therapist) and Stephen Jupe (Physiotherapist)

[355] A report was prepared by Ms Aitken and Mr Jupe for the Corporation on 3 April 1996 [**B10 of the appellant's bundle**]. The purpose of the report was to identify the appellant's then functional abilities and to determine his eligibility for assistance with purchase of Dragon software. At this time the Corporation were endeavouring to arrange a rehabilitation plan for the appellant.

[356] This is one of the kinds of documents the appellant relies on as allegedly supporting his contention that he was incapacitated. Instead, (Mr Tui submits) this is a perfect example of the appellant's deliberate manipulation of the medical and health assessors, who have assumed that the information supplied by the appellant was truthful and accurate.

[357] Under the heading Occupational Information, the authors of the report state:

"Alan has been self-employed as a consultant design engineer. This work involved intense Computer Aided design work on CAD programs. This involves repetitive fine motor movements using a mouse and the keyboard. He is also writing. After his injury, Alan found that this work aggravated his wrist and produced significant pain symptoms ... He reports being able to work for a maximum of two hours disbursed intermittently throughout the day, which is not sufficient for him to consider starting his own business or work for someone else. Alan has a range of work options available to him in the future. He has been approached about a business venture starting a company to assist New Zealand immigrants in starting their own businesses. He is very keen to get started with his career again but is limited by his injury.

Presentation

Alan presented with intermittent right elbow, wrist and hand pain, varying in intensity from sharp shooting pains experienced in the dorsum of the hand, to stiffness and aching during and after activity. Alan also complains of localised

fatigue and exhaustion of muscles with minimal activities, such as half hour of typing."

[358] The authors opine under the heading Summary:

> *"Alan's intermittent right elbow, wrist and hand pain restrict his ability to work for any length of time on a computer, which constitutes utilising much of Alan's expertise and skill. The nature of Alan's injury is such that for Alan to resume employment, coping with pain is to be expected as part of his daily lifestyle. In the past, Alan has sought to rehabilitate himself with exercise with minimal gains from much hard work. He has also tried to manufacture ergonomic aids to assist him at his computer to no avail. Considering all these factors gives us reason to recommend the following ..."*

[359] In April 1996, at the time of this assessment and report, Orac Migration Services Ltd was going through one of its busiest periods. The appellant himself was extensively involved in every facet of the operation. He was interviewing clients on a daily basis, spending six hours a day at his computer and heavily involved in running a successful busy operation.

Mr Tim Tasman-Jones – Hand and Upper Limb Surgeon

[360] In September 1996 the Corporation referred the appellant to Mr Tasman-Jones for an assessment in regards to his fitness for work.

[361] Mr Tasman-Jones examined the appellant and prepared a report for the Corporation on 18 November 1996. This report was prepared some eight or nine months before the Corporation's primary decision which is the subject of this appeal. It is the last specialist medical report prepared before the Corporation's primary decision.

[362] Mr Tasman-Jones set out the history of the appellant's injury and proceeded to consider the appellant's then circumstances. In respect to the appellant's complaints (as reported by the appellant) Mr Tasman Jones referred to aching discomfort, pain at various sites in the hand and wrist and forearm and elbow. He noted that *"heavy loading or lifting causes the pain to escalate to 10/10"*. Mr Tasman Jones further noted that:

> *"The pain and aching has improved with the use of simple analgesics such as Panadol although he dislikes taking medication. At present, he is not taking any regular medication ...".*

[363] The restrictions and limitations identified by Mr Tasman Jones (again as self-reported by the appellant) are identified at page 3 as follows:

> *"In association with the pain he has noted weakness, a loss of dexterity, speed and endurance ...*
>
> *The pain/aching/weakness prevents him from working as an engineer. He is unable to perform any manual tasks which require significant pulling, pushing or twisting with the right wrist ... his job requires a significant time working on a computer. Data entry on a computer is restricted to 15-20 minutes before a break is required. Writing is limited to a few sentences at a time. He can only lift objects up to 5kg. Overhead work is extremely difficult.*

Mr Alan Thomas feels he will never make a full recovery and therefore it is unlikely he ever to be able to return fully back to his previous occupation as a design engineer. Being positive, he does feel that he could work in lighter duties particularly if there was only a small amount of computer work or data entry required. He admits if he used a Dictaphone or possibly other aids this might improve his ability to work. However, a major component is drawing with a mouse and this is what he finds particularly difficult and this is what is really preventing him from returning back to his previous work."

[364] In contrast to the appellant's advice to Mr Tasman-Jones, as recorded above, it is helpful to set out the appellant's description of his business/work activities to Miao Lin on 16 October 1996 (approximately one month before the date of Mr Tasman Jones' report). The appellant advised Ms Lin:

"... Yes I have been very busy. My staff continues to grow which means I have continually shown people what to do. We are enjoying a lot of success ...

I am now reaching a stage where some of my staff are almost ready to take management responsibility which will reduce my workload. A good manager just makes sure that everybody else is working that all the clients want me to personally look after their case which is not possible of course. ... I am still able to supervise every case personally but it is still not possible for me to work on any case unless there is some difficulty. The only cases that I am currently working on personally are the invitations for your clients ...

...

I am in good health even though I'm working long hours."

[365] It is difficult to reconcile the two descriptions as being of the same person.

[366] Mr Tasman-Jones set out his findings on examination at page 6, which included:

"Specific Examination of the Hand

The hand was normal to examination with no swelling, scarring or deformity present. There was no tenderness present over the CNC joints, metacarpals, MCP joints, and phalanges, PIP joints, DIP joints of the fingers or IP and DIP joints of the thumb. There was a full range of movement in the fingers and thumb (1-12). Power, sensation and circulation normal. Provocative test for median nerve, ulna nerve and radial nerve compression were all negative."

[367] Mr Tasman Jones proceeded at page 7 to provide his response to the various questions posed in respect to the appellant's fitness for work. Mr Tasman-Jones took the appellant's self-reporting at face value. It formed the basis for Mr Tasman Jones' opinion that the appellant did not have a fitness to work. He stated, inter alia::

"After review today I feel Alan Thomas would be unable to return to previous occupation as a design engineer without significant changes being made at work. Alan is right hand dominant and he informs me that his previous job required a significant period of working on a computer, entering data, designing with a mouse and considerable paperwork. At present, he lacks the endurance to perform these activities. At present he is only able to work on a computer up

to 30 minutes and write for 10-15 minutes. Therefore he would be unable to return back to his previous occupation.

However, there is nothing wrong with Alan's mind as he quickly demonstrated when we discussed the design concepts required for developing an artificial distal radio-ulna joint. He demonstrated he was able to draw and jot notes over a 30 minute period without limitation. Therefore if the work could be altered to reduce significantly the drawing, writing, data entry and mouse work then I am sure he could return back to work.

...

Mr Alan Thomas continues to be troubled by persistent aching in the central and ulna side of the wrist. He has developed a pain syndrome in combination with the injury and as a result the hand function is always going to be limited. In my opinion and the information provided and examination findings, the injury would prevent him from doing heavy lifting, prolonged repetitive movements, using heavy or vibrational tools, and working with a computer for prolonged periods. Heavy and moderate manual work will result in a rapid aggravation of his symptoms. However, Alan has many skills which I am sure would enable him to work in a job or occupation which was light in nature, where repetitive movements, data entry, mouse work are only a small component. With the present level of disability I would expect Alan Thomas to be fit for light duties and would require a review as to what his job options are ..."

[368] Mr Tui puts it that Mr Tasman Jones' conclusions were tainted by the appellant's inaccurate self-reporting. The appellant was at this time undertaking many, if not all, of the activities for Orac Migration Services Ltd that he had informed Mr Tasman Jones he was incapable of performing due to pain and discomfort.

[369] Mr Tui submits that no reliance can be placed on Mr Tasman Jones' conclusions, affected as they are by the inaccurate information supplied by the appellant.

[370] Significantly, however, Mr Tasman Jones confirmed that, medically, the appellant's wrist injury did not preclude him from normal use of the hand for writing and computer keyboard and mouse work. The only limitation, in this regard, was the duration of such hand use – again that opinion depended on the veracity of the information supplied by the patient.

[371] The contents of the above reports were, of course, put to the appellant in cross-examination. He did not accept that the medical practitioners relied on the appellant's self reporting despite the clear indication to the contrary in the reports.

[372] With respect to the fact that Mr Tasman-Jones' clearly noted that he had seen the appellant writing over a 30 minute period without limitation, the appellant's response in cross-examination on 30 January 2008, at pages 49-50:

"Q. So physically Mr Thomas, physically you were quite capable of writing.

A. You've drawn a, you've drawn a really ridiculous conclusion here. There is no possibility that that says that the activity of writing and using a pen continually happened over ah for 30 minutes non-stop. There was a I've actually got by the way I'm pretty sure I will have the little piece of paper

that we discussed. It's a little piece that's 100ml x 100ml and if you counted pen strokes there might be 20 pen strokes on em mean and that happened, during a period of 30 minutes. It wasn't that the was drawing happening for 30 minutes."

[373] In relation to Mr Tasman Jones' statement that the appellant was not taking any medications at that time for pain, the appellant stated in cross-examination on 30 January 2008, at page 70:

"Well I wasn't active then so I didn't need it [the pain killers]. If I rest, like wearing a brace or don't do any work, it doesn't hurt much."

[374] According to the appellant's email to Miao Lin [**Document D27e of Respondent's Bundle**], sent only one month before Mr Tasman-Jones' report, the appellant was not resting and he was in fact very active with his work duties. If there was any occasion for the appellant to be taking medication for a painful wrist, caused by activity, then this was the occasion. However, as stated by Mr Tasman Jones (which the appellant accepts) the appellant was not taking any medication at that time.

[375] I accept that the appellant's wrist condition was static from 1990 to 1997 (despite the appellant's suggestion that he had suffered a deterioration following the 1992 surgery and following an alleged stroke in August 1993). Further, there is no contemporaneous medical evidence to show that the appellant's condition changed materially from the time of Mr Tasman Jones' report in November 1996 to the time of the Corporation's primary decision, 9 Months later.

Dr Jonathan Wilcox - the appellant's General Practitioner

[376] Dr Wilcox provided evidence for the prosecution at the criminal hearing. His evidence is found at page 362-385 of the criminal transcript. Dr Wilcox was the appellant's general practitioner from about 1982 to approximately 2000. He certified the appellant unfit for most of the period from 1990 to 1997. In examination in chief, Dr Wilcox was questioned about the appellant's involvement and activities with the various companies, including Orac Migration Services Ltd. Dr Wilcox stated at pages 366-368, inter alia:

"A. ... I had to go on the patient's description of how he was managing.

Q. Would you have declared Mr Thomas unfit for any type of work and thus entitling him to ACC if you understood him to be involved in managerial and consultancy work to be attending an office five days a week and employing staff?

A. No. We do encourage patients to look into vocational opportunities and we certainly have done that in the past, and acting as sort of vocational advice, I guess, helping ACC to try and encourage openings for self-employment, particularly when the job market is very, very difficult. So we often encourage patients to look for ideas and explore opportunities. But certainly not in the sort of – in a productive capacity.

...

Q. Did he ever tell you that he had helped set up companies, employment consultancy type companies?

A. No. In fact he may possibly have purely from memory referred to the possibility of looking into possible types of businesses. But I wouldn't have gone into it in any more detail than that.

Q. Was the discussion more about possible ventures further down the track rather than –

A. That's correct.

Q. - What he was doing at that time.

A. That's correct.

Q. At any stage when you wrote the certificates did you understand Mr Thomas to be actually working in a business?

A. No.

Q. In fact, on the 21st of May 1996, and please refer to your notes if it helps, but did you actually have a discussion with him about career options?

A. That's correct.

Q. Did Mr Thomas give you the impression that he was working in any productive capacity at all during that discussion?

A. I wouldn't think so, from my notes.

Q. From what he told you, did you believe he was working or not working?

A. No, I mean I certainly wouldn't have written a certificate if I thought he was actually working productively. It's a difficult issue where we sometimes encourage patients to look at the possibility of building up a business. We normally would refer them to ACC in the first instance to discuss the way they can do this with full knowledge and disclosure going from a non-productive to a productive capacity. It is a very difficult area I would think.

Q. Did he ever tell you that he'd set up an immigration consultancy business?

A. No."

[377] The appellant disputed his own GP's evidence when these matters were put to the appellant in cross-examination. The appellant stated on 30 January 2008, at page 75:

"Q. You never told Dr Wilcox at any time of your involvement in any of the businesses from 1990-97 did you?

A. Yes.

Q. It was his evidence in the Criminal Hearing that you did not tell him about the businesses.

A. *He was told about the various business ideas and so forth, and he's also told about Cynthia's business and he became Cynthia's doctor. And he was intimately acquainted with her business.*

Q. *It was Dr Wilcox's evidence (page 367) that you never told him about the businesses you were involved in.*

A. *Sorry, where are we looking at now?*

...

A. *He knew of the activities. Um, I wasn't there to discuss business but in relation to the things I was trying to do the investigation into various projects I was interested in and whether or not I could do things, just like the, Ian Westwood letter, my doctor was intimately involved with my rehabilitation ..."*

[378]The appellant's own general practitioner then, who certified the appellant unfit for most of the seven year period, acknowledged that he would not have issued a certification for the appellant if he had been aware of the appellant's correct level of activity from 1990 to 1997.

Stroke – August 1993

[379] In relation to the right wrist condition, the appellant suggests that he suffered a stroke in August 1993 whilst having treatment for his right wrist injury. He contends that as a result of the stroke he has suffered cognitive problems including slurring and that this has generally contributed to his incapacity and inability to return to his pre-accident employment.

[380]The appellant has also suggested that he has cover from the Corporation for a stroke. On 28 March 2007, the appellant stated in examination in chief, at page 39 of the transcript, that he had documentation establishing that he had cover for the brain injury arising from the alleged stroke. Mr Tui asserts that the appellant is wrong and that the appellant has sought cover from the Corporation for the alleged 1993 stroke. Also, the appellant has presented no medical evidence, from 1993, to support his contention that a stroke was suffered that year. For this reason, the appellant's claim for cover for the alleged stroke has not been accepted by the Corporation. In a letter dated 21 February 2006 [**Document F20 of respondent's bundle**] at page 2 [**D21**] the Corporation advised the appellant:

> *"If your claimed stoke was as a result of treatment, you received for a personal injury for which you have cover, then cover and entitlements will be considered on that existing personal injury claim.*
>
> ...
>
> *To assist in the determination of cover for your stroke condition, ACC will need all notes from the general practitioner, and any specialist you have seen, in relation to any past cerebrovascular or cardiovascular problems. ACC will also need your consent to seek information regarding the claim. Please provide me with such consent, which you may expressly limit to any past cerebrovascular or cardiovascular problems, and provide me with the names of all medical practitioners that you have seen, in relation to any such conditions."*

[381]The information sought from the appellant was not forthcoming and accordingly on 6 April 2006 [**F24 of the Respondent's bundle**] the Corporation wrote to the appellant to advise, inter alia:

> *"On 21 February 2006, I requested certain medical documents and information from you in order to consider any entitlements you may have arising from the alleged stroke. Until this information is received, ACC cannot consider your eligibility to cover for any stroke."*

[382]The appellant does not have cover for an alleged stroke and has not produced any evidence to demonstrate that he has suffered a stroke in 1993 and that the same was a result of treatment for the 1989 wrist injury.

[383]It appears that the appellant relies on the reports from Dr R A Boas, Pain Management Specialist in support of the appellant's contention that he suffered a stroke. On 28 March 2007, at page 62 of that transcript, the appellant stated that Dr Boas' report of 8 October 1999 [B19 of the appellant's bundle] confirmed the existence of a brain injury arising from a stroke in 1993.

[384]Dr Boas treated the appellant from 3 July 1998 and prepared a number of reports in 1998 and 1999. Dr Boas' reports are dated: 3 July 1998, [**F13**], 22 January 1999 [**F17**], 18 March 1999 [**F18**] and 8 October 1999 [**B19 of appellant's bundle**].

[385]On 3 July 1998, Dr Boas noted a number of problems suffered by the appellant, three of which were related to the right wrist. Dr Boas referred to headaches, a sense of exhaustion and a sense of depression and despair. He also noted:

> *"4. Consequent to the angiogram Mr Thomas says he has periods of facial numbness, twitching in the eye and sensory disturbances which fluctuate from time to time but essentially involve the right side of the face and head. This tends to be aggravated when the right upper girdle pain is worse."*

[386]In a subsequent report dated 8 October 1999, Dr Boas stated:

> *"... Persistent neurological changes were then further investigated with an angiogram at Middlemore Hospital which led to some untoward cerebral vascular response and additional symptomatic and functional changes. These changes included speech slurring, further numbness on the right side, altered gait and mental deficits which persisted for some days but did not require any specific therapy or further investigation as I understand.*
>
> *..."*

[387]The above passage appears to be the medical comment the appellant relies on in support of the alleged fact of a 1993 stroke.

[388]Dr Boas did not suggest in the 1999 report (or in any of the reports available from Dr Boas) that the appellant had suffered a stroke in 1993.

[389]Certainly, there is no evidence the appellant has suffered ongoing cognitive problems over the period from 1993 to 1997.

Pain Medication

[390]The appellant contends he has been severely impaired and restricted by a cocktail of pain medications taken for his wrist pain. He contends that one serious consequence has been the diminishment of his cognitive ability arising from the medications.

[391]The cocktail of drugs the appellant refers to was in fact commencement following the treatment from Dr Boas in July 1998. The particular cocktail prescribed is set out in Dr Boas' report of 3 July 1998 [**F13 of respondent's bundle**] at page 3 of that document. The cocktail was prescribed almost a year after the Corporation's primary decision was issued ceasing the appellant's weekly compensation.

[392]Immediately prior to the Corporation's decision, in August 1997, the appellant was not receiving any prescribed drugs for pain.

[393]At the time of Mr Tasman-Jones' report in November 1996, Mr Tasman-Jones noted that the appellant then was not receiving any pain medication either.

Post 1998 Medical Reports

[394]The appellant has produced a number of reports from 1998 which he relies on in this appeal. Some of these reports are discussed below.

[395]The primary problem with these reports is that condition treated and assessed from 1998 bears no resemblance to the appellant's condition prior to the primary decision. The only problem identified by the medical practitioners up to the time of the primary decision was localised to the wrist. Following the primary decision the appellant's symptoms were widespread and the appellant started on a cocktail of pain killers. The reports from 1998 are therefore of no assistance to the appellant's condition in 1997.

[396]The reports are discussed below:

Dr Boas

[397]Dr Boas' report of 3 July 1998 [**F13 of respondent's bundle**] identifies no less than seven conditions suffered by the appellant. Dr Boas provided a treatment plan which included a cocktail of prescribed drugs for pain. Eleven months after the Corporation issued its decision, and one month after criminal charges were laid against the appellant, his condition suddenly became significantly worse.

[398]The appellant was presenting himself as a far more disabled person. It is submitted that given this unexplained transformation it would be dangerous to attach any weight to the medical reports post 1998.

Dr Gil Newburn – Neuro-psychiatrist dated 20 January 2000

[399]This report was prepared following the appellant's conviction in the District Court and prepared more than two years after the Corporation's 1997 primary decision. The appellant approached Dr Newburn for the assessment. The purpose appears to have been in relation to the appellant's complaint that he was unable to properly instruct his lawyer during the hearing. Dr Newburn noted a range of symptoms including chronic pain, constant fatigue, a reduction in concentration,

impaired memory and increasing irritability. These symptoms were not present in 1997.

Dr Geraint Emrys – Specialist Occupational Physician dated 8 February 2000

[400]The report was obtained by the appellant to support his contention that he could not undertake his pre-accident employment. Again the report was prepared two years after the Corporation had issued its decision and after the appellant had commenced his cocktail of prescribed painkillers. Dr Emrys listed five documents that were provided to him by the appellant to assist with the report. Dr Emrys noted at page 2:

> *"Mr Thomas has provided the details in this report. His history has been taken at face value ..."*

[401]The appellant advised Dr Emrys that he was the owner of various companies. However, he described many of these as inactive and at page 3 Dr Emrys noted the appellant's advice that the appellant employed a manager to run the existing companies - that the appellant's only task was to sign a cheque every few days or so.

[402]Dr Emrys was not advised of the appellant's actual role in the companies and therefore was unaware of the appellant's true capabilities. At page 5 under the heading *Discussion and Opinion*, Dr Emrys noted that the appellant, *"requires to take significant levels of analgesics in order to mask the persistent pain that he feels within this limb"*.

[403]Dr Emrys proceeded to opine that the appellant was not able to return to his pre-accident employment. Dr Emrys did not receive accurate information from the appellant regarding his actual activities and capabilities. Dr Emrys' relied on the fact that the appellant was taking a cocktail of drugs which had in fact commenced from July 1998.

Clayton Brown – Orthopaedic Surgeon dated 4 December 2001

[404]The only orthopaedic documentation provided by the appellant in the period after 1999 is from Mr Brown. Whilst Mr Brown recommended surgery in 2001 (as did Mr Tonkin in 1995) he offers no input on the appellant's functions and limitations.

[405]Mr Tui submits that I cannot find the appellant to be a truthful witness and that the most reliable evidence, in respect of the factual issues in this appeal, is from the appellant's work colleagues from 1990 to 1997. I agree. Regrettably, from my experience I found the appellant to be a very confusing and unconvincing witness; and it is difficult to believe that his evidence to the Court is honestly intended on any issue of substance. I also observe that it is not necessary to rely on evidence at the criminal trial to deal with the appeal before me.

Disclosure

[406]It is the Corporation's position that the appellant did not inform any of its officers of the appellant's involvement with the companies that he set up and operated from 1990 through to 1997.

[407]The Corporation only learnt of the appellant's involvement in Career Pilot upon the inadvertent receipt of a medical certificate by facsimile with the name *"Career*

Pilot" on the facsimile. A subsequent investigation by private investigators revealed more details in 1991 but the Corporation did not then have a full picture of the appellant's involvement in that business.

[408] Similarly, the Corporation was not informed at any time by the appellant of his involvement in any of the companies including Orac Publishing Ltd and Orac Migration Services Ltd. Again, an inadvertent event in August 1996 led the Corporation to be in receipt of information regarding Orac Migration Services Ltd, which then led to a second private investigation being commenced.

[409] Mr Tui notes that, as with the appellant's failure to properly disclose his full activities and capabilities to the various medical assessors, the failure to inform the Corporation is equally significant. Proper disclosure would have inevitably resulted in the earlier cessation of the appellant's payments of weekly compensation.

[410] The failure to disclose this information is material on another level. If, as the appellant suggests, his involvement with these companies was financial, minor and only peripheral then why (Mr Tui asks) did he not simply inform the Corporation (and the medical practitioners) of this involvement?

[411] Again, if the fact of this involvement had no impact on his continued entitlement to weekly compensation, why did the appellant not inform the Corporation that he was in fact living on the office premises at Symond Street from 1994 to 1997 and at St Martins Lane in 1997?

[412] Mr Tui submits that the clear and inescapable explanation is that the appellant was simply trying to conceal this information as he was aware that disclosure would impact adversely on the medical assessment of his incapacity and in respect of his continued entitlement to weekly compensation. That is also what I conclude from the evidence.

Appellant's Version of the Facts

[413] It is the appellant's contention that he informed the Corporation of his involvement in all the companies in a timely manner.

[414] Specifically, the appellant suggests that he from 1994 he informed his two case managers, Eric Cheung and Janice Lorier of the fact of his involvement and the fact that he was living at both the Symond Street office and the St Martins Lane office. In cross-examination on 18 June 2007, as to the extent of his disclosure, the appellant stated at page 38:

> *"Q. Did you inform ACC in 1994 that you were involved with Orac Migration?*
>
> *A. Yes.*
>
> *Q. I put it to you, Mr Thomas, that*
>
> *A. The case manager's name is Eric Cheung. And there is a substantial file that has."*

[415] In short, the appellant alleges that he informed Mr Cheung from 1994 of his involvement in his many companies, including Orac Publishing Ltd and Orac Migration. He suggested that Mr Cheung recorded detailed file notes of these conversations as the appellant was unable to provide such details in writing due to

his wrist injury. Further, the appellant suggests that these file notes were kept in a folder but that that folder is no longer on the Corporation's file and is either missing or has been deliberately removed by the Corporation.

[416] With respect to the time that Ms Lorier was the case manager, the appellant suggests that he also informed her constantly but that Ms Lorier did not seem to properly understand what he was informing her of.

Eric Cheung

[417] In relation to his communications with Mr Cheung the appellant stated, inter alia, on 21 September 2007, at pages 30-32:

> *"Q. ... In none of the documents that Eric Cheung or anyone from ACC indicate that they are aware of your involvement in Orac Migration or any of the Orac companies.*
>
> *A. They were invited to the office, um other people of Government agencies such as Social Welfare were more than happy to come along but ACC bizarrely wouldn't come.*
>
> *Q. Well how can they be invited to an office that they don't know exists, Mr Thomas?*
>
> *A. They did.*
>
> *Q. You didn't even let them know that you were living at Symond Street office.*
>
> *A. They did, they did know it existed.*
>
> *...*
>
> *A. ... I did have a number of meetings with Eric Cheung. He made a quite substantial file of notes, he transferred my file to the Henderson branch because I was living in 76 Symond Street and he said he wanted a fixed address, because they didn't want the box number any more, they wanted the fixed address at a residential address, or I said 'You can't send anything to the office because there's, there's not the postal system, has to be the box number', so that, he said, well they knew that a long time but that had to change. And they first of all went to ah, to well no it went to it went to the box number first then it went to the my mother's one and because it was an address in Henderson, that's where my mother lived and I lived sometimes um they changed it to the Henderson branch. And that was the reason, and the reason they changed it was because they knew where I was living.*
>
> *Q. Just making this clear, Mr Thomas, there are no documents on ACC's file recording these alleged communications between you and Mr Cheung. Correct?*
>
> *A. No."*

[418] As is evident from the above explanation from the appellant, he is endeavouring to suggest that Mr Cheung was informed fully and frankly of all his activities and that

Mr Cheung recorded these in file notes maintained in a file which no longer is available. The Corporation does not accept this contention and asserts there is a pattern by the appellant of relying on documentation that he alleges has been deliberately removed or withheld from him. That is what I infer.

[419] Over the period from 1993-95 there was not much activity on the appellant's claim file. The appellant received weekly compensation. There was little communication between the appellant and the Corporation. The appellant's file was managed from the Corporation's Takapuna branch.

[420] In 1994 Arlene Booth, Case Manager, was responsible for the management of the file. There are various documents on the Corporation's claim file prepared by her including handwritten file notes dated 6 October and 10 October 1994. The initial file note refers to difficulty contacting the appellant and the subsequent file note refers to a new address for the appellant of 86 Rangitira Road, Birkdale. Ms Booth appears to have been the appellant's case manager up until February or March 1995.

[421] Mr Cheung appears to have become the case manager from April 1995. One of the first records from Mr Cheung, on the file, are file notes on an ACC claim activity sheet dated 12 and 13 April 1995. A file note for 13 April prepared by "Eric" reads:

> *"Telephone contact made with Alan through his mum. Sounded enthusiastic towards the booming economy and claimed would like to take his share in it. Thinking of starting a business. Advised that a job might better meet his immediate need.*
>
> *I'll wait for the specialist report before referring him to Job Connection, after all, if he runs his own business, the chance to accommodate his disability is higher."*

[422] At the time the appellant was advising Mr Cheung of starting a business, in April 1995, he was already running Orac Migration Services Ltd and Orac Publishing Ltd. He had returned from China some 4 four months earlier from a business trip.

[423] In July 1995 Mr Cheung had difficulty communicating with the appellant. Ultimately, Mr Cheung was able to get in contact with the appellant on 28 July 1995. A file note prepared by Mr Cheung on this date reads:

> *"Alan called me after I called his mum. He does not have a fixed abode. He lives in Henderson with his mum normally, but spent a lot of time in his friend's place, a girl friend's place (Howick).*
>
> *...*
>
> *Action:*
>
> *1. Use 93A Awaroa Road, Henderson as fixed address ..."*

[424] On the same date Mr Cheung sent a letter to the appellant at the new address in Henderson. Given that the appellant's alleged fixed abode was in Henderson, Mr Cheung proceeded on the same date to transfer the appellant's file from the Takapuna office to the Henderson branch. In August 1995, Ms Lorier assumed responsibility for the management of the file. Ms Lorier worked out of the Henderson branch.

[425] Turning to the appellant's evidence. Firstly, Mr Cheung was the case manager it appears from about April 1995 to July 1995. It does not appear that he was the case manager in 1994. Accordingly, the appellant's advice that he informed Mr Cheung of his involvement with Orac Migration Services Ltd and other companies in 1994 must be wrong.

[426] Secondly, the suggestion that the appellant did inform Mr Cheung of his involvement with the companies, when he was the case manager, is not supported by the contents of the document on the Corporation's file. File notes from 12 and 13 April 1995 refer to the prospect of starting a business. However, it is clear from the information above, these businesses were already then running.

[427] Thirdly, the appellant's suggestion that he informed Mr Cheung that he was living at Symond Street is not supported by the documentation on the file. There is no reference in the file note of 28 July 1995 to the appellant living in Symond Street. The only addresses then provided by the appellant as to where he was living, was with his mother in Henderson and his girlfriend in Howick.

Janice Lorier

[428] Ms Lorier was the appellant's Case Manager from August 1995 to mid 1997. The communications between the Corporation and the appellant for this period are contained at Tab E of the respondent's bundle.

[429] It is clear from this documentation that the appellant did not inform Ms Lorier or anyone at the Corporation of his involvement with the companies or the fact that he was residing on the premises of these businesses. Instead, the appellant maintained to the Corporation that he was researching ideas and proposals when, in fact, he was actually running and operating businesses.

[430] The documentation at Tab E is summarised as follows:

First meeting between Ms Lorier and the appellant – 23 November 1995

[431] Ms Lorier became the case manager in August 1995 and the first meeting with the appellant was on 23 November 1995. A file note was prepared by Ms Lorier of this meeting and the matters discussed (E7). Ms Lorier noted that she interviewed the appellant for over an hour. She stated, inter alia:

> *"It was difficult to elucidate where Mr Thomas actually resides at present. He indicated 93A Awaroa Road as a temporary address.*
>
> *...*
>
> *Mr Thomas indicated he has and can do some work but I could not obtain a clear indication as to what work and where. Mr Thomas indicated he has done some work for Trigon Plastics in Hamilton as an employee ..."*

[432] This document [E7] was referred to by the appellant on 21 September 2007 at pages 33 and 34 of the transcript. The appellant suggested that he did in fact inform Ms Lorier on 23 November 1995 of his involvement in the numerous companies. He stated at page 34:

"Q. Yet she [Ms Lorier] didn't record it.

A. Well no, she was told of all the different projects that I was involved in ... She, she's just hopeless. She's a hopelessly mixed up woman and she was crying. She actually cried because she thought she was going to get fired because they were changing around things, half way through the interview. She mostly talked about herself."

Letter from appellant to ACC dated 1 April 1996

[433] This four page letter from the appellant represented the appellant's first opportunity to put matters straight and to inform the Corporation, through Ms Lorier, of the fact of his involvement with the companies and where he was residing. Notwithstanding, the appellant failed to do both. The address recorded on the first page of his letter is the Awaroa Road address, being his mother's address. There is no reference in the letter to the fact that he was residing at the Symond Street premise. The appellant made no reference to Orac Migration Services Ltd, Orac Publishing Ltd or any of the companies he was then or previously involved with. The contents of the letter read as a proposal for future endeavours and indicate that the appellant has been involved in no work activity in the previous six year period. The letter reads, inter alia:

"It has been some time since my accident and I have been receiving payments for an extended period without a return to work in sight ... A second opinion suggests that another operation may be needed. This being the case I am faced with another year or two away from the workforce and still without a reasonable assurance of a return to work. The damage may not be repairable to the point of going back to work.

I must seek out new opportunities ...

... I wanted to get back to work at the earliest time. Therefore it is reasonable to explore the opportunities the new technology offers.

Business Plan

As I have been involved with a migrant Chinese lady for the last four years I have found myself being called upon to provide much-needed advice to friends and friends of friends ...

The new immigration policy requires that a business migrant become a tax-paying resident in order to remain in New Zealand as a condition of their residence ... I am both capable and interested in these activities all of which can be carries out on a consultative contractual basis.

The bottom line and for that position would be as a specialised employment consultant for migrants. Under the new points system a migrant is considerably advantaged if they have a job offer. Though this is not my favourite activity it would bridge a gap until I found a new spot for myself in the workplace that I could enjoy and succeed.

Without formal market research a cash flow forecast cannot be supplied. Without the help of Dragon Dictate a full business plan would also be difficult.

...

I have been out of work on ACC for over five years ...

I have very limited writing ability. I am computer literate on many programs but have a very low work endurance with both keyboard and mouse.

...

Conclusion

Find a suitable working opportunity so will offer the flexibility to allow for a learning curve. The only type of work that could be realistically achieved could be a self-employed position. The type of work would need to be of a consulting type with little or no overheads. As most of my working life has been of a self-employed type with 15-20 workers and many more subcontractors this presents no real obstacle.

...

... I trust you may give my proposals due consideration and that I may have your comments in the near future."

[434]The suggestion that the appellant could, in the future, be involved in an immigration business (that he was then running) reflects the level of the appellant's deceit. The appellant did not accept that this letter was put forward as a proposal. He stated at page 38: *"... It's, it's, to really just reiterate what was already said in our meetings. Just an overview. Just like a brief overview of our discussions."*

[435]The appellant was cross-examined in respect to the contents of his letter of 1 April 1996. He stated on 21 September 2007, at page 38:

"Q. *... Don't you think it would have been relevant to point out in the same letter that there was a business already created and running which you owned?*

A. *Well, that was discussed and this letter is in the context of my rehabilitation and what I might do. Not about what other things were.*

Q. *On the context of that particular rehabilitation, why couldn't you work within Orac Migration?*

A. *Sorry? We said that.*

Q. *Well, why isn't the company put in that letter?*

A. *Because I couldn't. From the current format of the company there is no job for me within Orac Migration.*

Q. *But, Mr Thomas, you're suggesting in that same letter that you want to create a company, a separate company, a separate business undertaking the same work activity – immigration?*

A. *Well yes, this was clarified many years ago and reclarified with, with Miss Lorier. Um, it makes it far easier for the ACC to get a stand-alone unit or*

something with clarity. They really prefer someone to be an employee so they can, so they can clearly distinguish what you do and what you earned for those."

Letter from ACC to appellant dated 1 May 1996 (F17)

[436] The appellant suggested his letter of 1 April 1996 was not a proposal, but Ms Lorier considered in her response of 1 May 1996 that it was a proposal. She described it as a proposal.

Statutory Declaration by appellant dated 21 May 1996

[437] The appellant completed a statutory declaration, at the insistence of the Corporation, in relation to his previous work and income activities. The statutory declaration reads:

"I have not been working or creating an income for work carried out at any time over the last year. I have however been collecting information and preparing a business plan with the aim to start a business. The ACC remains my sole means of support."

[438] I agree that the contents of the statutory declaration are false. The appellant had been working for Orac Migration and Orac Publishing Ltd, not to mention the other companies and businesses he was involved with. He had control of large sums of money.

Meeting with appellant on 23 March 1996

[439] A file note was prepared by Ms Lorier of this meeting (E20). Again, the appellant suggested to Ms Lorier that he was actively pursuing business opportunities rather than actually running a business. Ms Lorier recorded, inter alia:

"Mr Thomas advises he is actively seeking work opportunities, not jobs and has advertised for work.

He says he feels out of date with computer technology, as he has been off work since 1989 ...

...

Mr Thomas stated he can type for 10 to 20 minutes and do some handwriting. He finds using a mouse difficult."

Letter from Brian Cranstone-Hunt dated 8 August 1996 (E22)

[440] In August 1996 the Corporation referred the appellant to Brian Cranstone-Hunt to assist with vocational placement. This letter to the Corporation was Mr Cranstone-Hunt's first reporting letter following a meeting with the appellant. From the outset, the appellant lied to the Corporation's agent. He stated, inter alia that, *"He lives with his mother"*. In fact, in August 1996 the appellant was living at the premises in Symond Street.

Letter from appellant to Mr Cranstone-Hunt dated 14 August 1996 (E23)

[441] This is another proposal prepared by the appellant, but this time sent to Mr Cranstone-Hunt. It is prepared very much in the same style as the earlier letter to Ms Lorier dated 1 April 1996 but there is a lot more detail, and rather than being a 4 page proposal it is an 11 page proposal. The nub of the proposal was that the appellant was seeking to get involved in potential businesses and enterprises in the future rather than acknowledging or disclosing his then business activities. The appellant identified business opportunities to become involved in, as including a "Chinese newspaper or magazine" (no mention was made of Orac Publishing Ltd or the Migrant News), a reference to international funds transfer (the company having in fact been set up in 1995) and again an immigration consultancy (without mention of Orac Migration Services Ltd).

ACC Internal Memorandum from Jan Lorier to Examining Officer dated 28 August 1996 (E36)

[442] On this date, Ms Lorier referred the claim to the Corporation's Fraud Unit to consider commencing a fraud investigation. The reasons are set out in the memorandum and read:

> *"On 15/08/96 Mr Cranstone-Hunt attempted to contact Mr Thomas between 9.00am and 1.00pm, at the contact number he obtained from Alan's mother, the contact number being: 377 8293, which was answered by a person stating the business was ? Aurick and ... He was told Mr Thomas was out on appointments. Mr Thomas is meeting with an employment agency on 2/9/96 but will not disclose its name ..."*

[443] The phone number 377 8293 is the phone number for Orac Migration Services Ltd – refer to D1. The spelling of 'Aurick' is clearly Orac. If the appellant was correct and he had informed Ms Lorier of his involvement in these companies, this information would not have been of concern to the Corporation and would not have led to the commencement of a private investigation.

Letter from appellant to Ms Lorier dated 6 May 1997 (E46)

[444] This is the third proposal prepared by the appellant. Its contents are very similar to the second proposal sent to Mr Cranstone-Hunt. The significant point being that up to May 1997, the appellant was continuing with his charade and deceit.

[445] In July 1997, the appellant was informed of the private investigation.

[446] The appellant would have this Court believe that he informed the Corporation at all times of his involvement with the various business companies. I accept that he did not. The contents of the Corporation's files attest to this. I also agree with Mr Tui that those contents also attest to the fact that the appellant has endeavoured to deceive the Corporation, avoid detection and generally attempt to continue with his fraudulent activity of running various businesses under the radar of the Corporation's knowledge.

[447] The appellant deliberately and actively sought to convey to the Corporation that he was and had been out of work for a considerably long period, that he had severe

restrictions in terms of his work capability, and he was living, most of the time, with his mother.

Response to Appellant

[448] The following documents have been filed for the appellant:

- Submissions of Appellant prepared by Mr Cooke dated 23 March 2007
- Addendum to Para 61 filed by Mr Cooke in March 2007
- A decision by the District Court in *Burnett* Decision No. 210/07

Submissions of appellant dated 23 March 2007

[449] Under the heading *Background*, allegations are made in relation to the effect of two review decisions issued in 1992.

[450] In relation to the decision by Mr Smith regarding the appellant's then entitlement to weekly compensation, the appellant states that that decision is binding on the Corporation and the appellant is therefore entitled to weekly compensation from the period 1990 to September 1992.

[451] However, the issue in this appeal is not the appellant's entitlement to weekly compensation for that two year period; but the appellant's entitlement to weekly compensation from August 1997.

[452] With respect to Mr Carter's 1992 review decision, regarding the appellant's entitlement to funding from the Corporation for surgery, it is asserted for the appellant that the Corporation has failed to provide such surgery in accordance with the reviewer's direction. On or about 20 March 1992 Mr Rees completed an application for funding to the Corporation for surgery to the right wrist. In a decision dated 23 March 1992 the Corporation declined the application. The appellant applied for a review and the matter came before Mr Carter on 3 July 1992. He issued a decision on 15 July 1992, allowing the review. The surgery was undertaken by Mr Rees on 28 August 1992. Accordingly, the suggestion that the Corporation has not complied with the review decision, is inaccurate.

[453] If the appellant wishes to undergo further surgery the appropriate course is for him, through his treating surgeon, to advise the Corporation of the same and make a formal application for funding. I understand that the appellant has been advised of this on numerous occasions. However that matter is irrelevant to this proceeding.

[454] In terms of various submissions for the appellant, the Corporation accepts the appellant has cover for the 1989 injury. The issue of the appellant's earner status at the time of injury is not at issue in this proceeding. The Corporation does not suggest that the appellant has been assessed for vocational independence. As stated above, surgery from 1992 was in fact carried out (and the matter is, in any event, irrelevant to this proceeding).

[455] Paragraphs 24-43 of the appellant's submissions discuss the law and several case authorities. The appellant suggests that the Corporation must have undertaken some enquiry or investigation to satisfy itself that the appellant was no longer entitled

to ongoing weekly compensation and that the onus was on the Corporation to justify such a decision. The Corporation arranged for an investigation by private investigators. It relied on the results of this investigation to issue its primary decision.

[456] Irrespective of which party carries the onus, it is the Corporation's position that the evidence is overwhelmingly in support of the Corporation's primary decision. I agree.

[457] At paragraphs 44-56 there is some discussion over the effect of certain District Court and review decisions on this appeal, as well as the effect of the decision by Morris DCJ; but none of these decisions are binding on this Court.

[458] At paragraph 53 it is contended that the Corporation's position is that the appellant will never be entitled to weekly compensation as a consequence of the earlier criminal proceeding. That is not correct and is not ACC's position. If the appellant suffers a new period of incapacity and he is an earner immediately before the commencement of the new period of incapacity, then he will have an entitlement to weekly compensation.

[459] At paragraph 57 it is contended that the review decision from Mr Carter in 1992 set out a *"course of action [for the Corporation] to follow to return Mr Thomas to his pre-injury employment"*. It is contended by the appellant that the Corporation has not followed that course. The only issue before Mr Carter was the appellant's entitlement to funding for the surgery identified by Mr Rees.

[460] Paragraphs 60-61 appear to relate to the primary decision letter and whether the decision was made under ss.37A or 51. It appears from paragraph 62 that the appellant accepts, as the Corporation asserts, that the issue in this appeal is confined to the appellant's incapacity as at August 1997.

[461] The events described at paragraph 61 are inaccurate. It is contended at paragraph 61 that the Corporation provided disclosure to the reviewer of certain documents from its fraud investigation but the same was not allegedly provided to the appellant. Paragraph 61 reads:

> *"... after the hearing, ACC selected some information to provide to the reviewer who read this information behind closed doors and refused to supply such to Mr Thomas. The reviewer then issued a decision based on the information, which was examined behind closed doors. Therefore, Mr Thomas was denied his right to be heard and could not refute or explain the information..."*

[462] The 1998 review decision by Mr Smith is at F27 of the respondent's bundle. The Corporation provided disclosure of a number of documents from the fraud file at the end of January 1998. Copies were, in fact, supplied to the appellant by the reviewer in early February 1998 and the appellant provided a written response to the reviewer on 9 February 1998 - all of these events are recorded in the reviewer's decision.

Addendum to paragraph 61

[463] Mr Tui submitted that this document is of no assistance whatsoever to this appeal and the issues raised are simply procedural. It appears that its entire purpose revolves around the contention that the decision made by the Corporation in August 1997 was under s.51 and not s.37A.

[464]The Corporation does not defend this appeal, or its decision on the basis of it having been made under s.51. The only issue the Corporation raises is whether the appellant was incapacitated as at August 1997, in accordance with s.37 of the 1992 Act. I agree with Mr Tui that is the essential issue for determination in this appeal.

Permanent Incapacity under s.60 of 1982 Act

[465]The appellant suggests, throughout his submissions, that he has a permanent incapacity under s.60 of the Accident Compensation Act 1982 ("the 1982 Act"). He suggests that he is therefore entitled to weekly compensation under this provision.

[466]The appellant has not been assessed as having a permanent incapacity under s.60. The Corporation issued a primary decision to this effect on 17 November 2005. Such decision was upheld at 219/2007. Beattie DCJ held, inter alia, at page 4:

> *"[13] Accordingly, I find that the respondent was correct to decline the appellant's application for a section 60 assessment as it did, and the review decision determining the correctness of that decision is upheld."*

Decision of Burnett – (No. 210/07)

[467]The appellant appears to place great stock in this District Court decision as somehow being on point in this appeal. He suggests that the decision, if followed, must result in the appeal being allowed. The material facts in *Burnett* have no similarity to the material facts in the present appeal.

[468]In *Burnett* the appellant had been convicted of several charges of using a document for pecuniary advantage in relation to receiving weekly compensation when he was engaged in various forms of employment. The amount of weekly compensation paid to the appellant for the period covered by the fraudulent charges, was $87,665.82.

[469]Subsequent to the sentencing for the conviction, the Corporation issued a decision establishing a $87,665.82 debt. The Corporation did not, prior to this, issue a primary decision determining that the appellant was not entitled to weekly compensation for the said period. It simply relied on the fact of the conviction. However, the Court found that as the Corporation had not issued a decision determining that the claimant was not entitled to weekly compensation for the period in question, a debt could not be raised. It was premature to raise a debt until a decision had been made determining that no entitlement ought to have been paid. The Court determined, inter alia:

> *"[11]Without either of those two procedures being implemented [i.e. determination that the appellant was no longer incapacitated or initiating the vocational independence assessment procedures] and decisions made, I find, as a matter of law, that the appellant must be taken as still being incapacitated within the meaning of the Act and thereby prima facie entitled to receive the weekly compensation that was assessed as being his entitlement back in 1995.*
>
> *...*
>
> *[16] In summary, therefore, I find that the respondent's decision of 1 December 2005 cannot be sustained and it is hereby quashed. The quashing of that decision does not mean that the appellant does not have any obligation of*

repayment to the respondent for any amount of weekly compensation paid to him in the period October 2000 to July 2004 [being the period of the four charges], it simply means that the way in which that sum is calculated was not in accordance with the requirements of the Act, and any sum due by the appellant to the respondent can only be the amount calculated after applying the abatement principles contained in the Act."

[470]The Court simply determined that there is a proper process to follow when raising a debt. The first step is for the Corporation to issue a decision determining that there was no entitlement to the compensation in the first instance. It allows a claimant to challenge that decision if need be. Once the decision is made, the Corporation is entitled to recover the debt pursuant to the provisions in the Act.

[471]In the present appeal, the Corporation has not issued a decision looking to recover a debt. The Corporation has issued a decision determining that the appellant was not incapacitated in August 1997 and thus not entitled to weekly compensation.

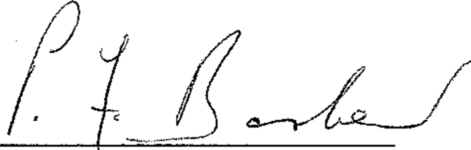
Conclusion

[472]I have allowed this appeal hearing to be unusually (perhaps unduly) lengthy in an effort to be absolutely fair to the appellant who is a man of extensive talent and industry and very persistent. His very detailed compilation of evidence, documents, and submissions show his intelligence and capabilities. However, he seems so obsessed with his perceived entitlements from ACC that, on that issue, he becomes irrational. As indicated above, I do not assess him as a credible witness but I am confident that all other witnesses were truthful and fair and as accurate as possible in their evidence.

[473]The best evidence is that about the appellant's activities from 1990 to 1997. The witnesses provided first hand details of their observations of the appellant's activities in various businesses over those years. Witnesses worked for and with the appellant in the various businesses and had direct knowledge of the appellant's role and day-to-day activities in these businesses.

[474]When I stand back and absorb the detailed evidence adduced to me, I am in no doubt that, as at 18 August 1997, the appellant was not incapacitated from performing the type of work he undertook prior to 27 December 1989. He was not incapacitated, or unable, by reason of personal injury, to engage in his pre-accident employment. Also, as at 18 August 1997, the appellant was working full-time as a controlling executive as described above. On the balance of probabilities, the Corporation was entitled to be satisfied, from the information then available to it and in its possession, that the appellant was not entitled to continue receiving entitlements and that they should be suspended.

For the reasons I have set out above, this appeal fails and is dismissed. I understand that, in the event of dismissal of the appeal, ACC seeks costs. That is a rare application in appeals against ACC (and Review) decisions and needs to be argued. Accordingly, I reserve leave to apply.



Judge P F Barber
District Court Judge
WELLINGTON