<u>Practice note </u>16 – The Difference between Public and Private Notarial Acts

The majority, if not all, of notarial acts completed by New Zealand notaries will be private acts. An explanation of the two types of notarial act is set out in the attached extract from pages 53 and 54 of N. P. Ready's "*Brooke's notary: notarial office and practice in England and overseas*", 10th ed., published 1998.

CHAPTER 5

FORMALITIES OF A NOTARIAL ACT

An act is an instrument recording the due execution of a deed, contract or other writing, or verifying some fact or thing done.[1] An authentic act is an act executed in accordance with legal requirements and certified by the proper officer. A notarial act is the act of a notary public authenticated by his signature and official seal, certifying the due execution in his presence of a deed, contract or other writing, or verifying some fact or thing of which the notary has certain knowledge. Thus, any certificate, attestation, note, entry, endorsement or instrument made, or signed and sealed by a notary public in the execution of the duties of his office is a notarial act. In those countries in which notarial acts have full and automatic recognition, a notarial act is probative, that is to say, whatever is certified by the notary as having been done or said in his presence, is taken to be beyond dispute and proved.

Types of notarial act. Broadly speaking, notarial acts may be divided into two categories, namely those in public form and those in private form. In the case of acts of the former category, the notary is the author of the entire instrument whereby a juridical act is perfected, for example the creation of a contractual relationship, or the grant of a power of attorney or of a right *in rem*.

Notarial acts in public form. Various specimens of notarial acts in public form, commonly termed public instruments, are set out in Chapter 12. As can be seen, a public instrument is in narrative form and commences with a preamble where the notary recites the appearance before him of the parties, their personal particulars and the capacities in which they act; the instrument concludes with a statement by the notary (known as the eschatocol) that the instrument was read over to the parties, signed and, where appropriate, sealed by them in his presence, whereupon the notary sets his own hand and seal to the instrument. Where witnesses are present, this fact is mentioned and the instrument is generally also signed by them. The notary will often certify in the eschatocol that all requirements of the applicable law governing the formal aspects of the instrument have been

[1] "In the Civil Law, *instrumentum* was used to denote the writing in which the contract or act of the party was expressed and of which it was intended to preserve a record. In other legal systems the writing is called an act, although this word in its original and more appropriate use expressed the whole of what was said, done, or agreed between the parties." 2 Burge, *Commentaries on Colonial and Foreign Laws* (1st ed. 1830) p. 699.

complied with. The operative part of the instrument, between the preamble and eschatocol, records the declarations made to the notary by the parties, which, depending on the nature of the transaction, will set out the terms of the contract, power of attorney or other act in law which the public instrument embodies.

Notarial acts in private form. A notarial act in private form is a certificate or attestation under the hand and seal of the notary appended to or placed on a private document signed by one or more parties. This is the form of notarial act most commonly issued by English notaries. As opposed to acts in public form, the notary is not normally the author of the instrument which he is authenticating, nor, subject to what is stated below, need he concern himself with its contents. In some cases, the notary will have been instructed to draw the instrument itself, but often it will have been prepared by a solicitor or by the parties themselves and the notary's role will thus be limited to witnessing the execution of the instrument and appending thereto an appropriate form of certificate. He should of course satisfy himself as to the identity of the parties, that they have the requisite legal capacity, that they execute the instrument voluntarily with full understanding of its terms and that no fraud or illegality is involved. Where a signatory to a document is acting in a representative capacity, the notary should satisfy himself as to the signatory's authority to bind his principal and that any power of attorney under which he purports to act is adequate in form and content.

The form and content of notarial certificates to documents in private form vary widely, depending on the nature of the document authenticated and the country in which the document is to be produced. Whether an English notary authenticates a document in the private or the public form will depend on the nature of the document and the requirements of the jurisdiction in which it is to be used. Instruments in public form enjoy an enhanced evidentiary status in most civil law jurisdictions. Powers of attorney and transfers of real property for use in Spain and Latin America are almost invariably prepared in the form of public instruments, as are ante-nuptial contracts for use in South Africa; other documents for South Africa may, however, be authenticated by means of a notarial certificate. The different forms of proof prescribed for various overseas jurisdictions will be discussed in detail in Chapter 11.