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THE PATH OF JUSTICE

Included in the influx of overseas visitors who crowded into Christchurch for the 1974 Commonwealth Games was the former middle-distance runner, Mr Tom Sargant, OBE, JP, Secretary and co-founder of JUSTICE, the British section of the International Commission of Jurists. Christchurch members of the New Zealand Legal Association were able to meet him at a special function and he also found time for a brief visit to the capital.

Mr Sargant impressed those fortunate enough to meet him as a remarkable individual; one who has gathered round him in JUSTICE a bevy of Britain's most distinguished lawyers and one who sees no cause for complacency in the organisation's pursuit of guarantees for basic human rights in Britain. "There was a time when each year we thought, 'What on earth can there be left for us to do *next* year?' But now we know from experience that there's *always* something to be done, something that needs looking in to," he said.

JUSTICE has an impressive list of "somethings", going back to its 1962 report on Compensation for Criminal Acts of Violence—a report which led to the enactment of our Criminal Injuries Compensation Act 1963, which in turn led to reform in Britain.

Why has JUSTICE in Britain achieved so much, and its counterpart in New Zealand seemingly so comparatively little? Certainly the ICJ here has tended to work behind the scenes and to achieve its ends in a less public fashion than has JUSTICE, but the dynamic qualities of JUSTICE really stem from the circumstances of its formation.

"During the South African treason trials and the trials that followed the Russian invasion of Hungary, an all-party group of lawyers got together with the aim of getting observers into the countries concerned, and to sit in on the trials. We couldn't get anyone into Hungary, but Gerald Gardiner [now Lord Gardiner] went out to South Africa," Mr Sargant recalled.

"It had always been Peter Benenson's hope to get an all-political party group of lawyers together, but once he had he felt that it wasn't going to last beyond the trials. He'd talked me in to getting involved, and when he left to form Amnesty International, I decided to stay on and give it a try. I wasn't overly confident, but I'd always had an interest in law reform. I'd fought two elections for Labour and this was what I really wanted to do. Peter's feeling had been that the Liberals and Labour could work together, but that the Tories would kill us off.

"Happily that hasn't proved to be the case, and everyone in fact co-operates to the full so that there's been a noticeable lack of party politicking. We are, after all, concerned with basic human rights."

But his organisation has been involved in much more than preparing intelligent, well-argued cases for reform. It has attracted complaints about lawyers and even about the attitude of the Law Society to individual complaints. And being comprised in the main of lawyers, JUSTICE has been able to redress the grievances of many. Occasionally it becomes involved in individual cases, as part of the organisation's function is to make the system work. Where the system has failed, whether because of defects in the law, judicial error, police malpractice or counsels' incompetence, JUSTICE has worked for pardons and for new

trials. Indeed, Mr Sargant had appeared on BBC television just before leaving for Christchurch as JUSTICE presses to see justice done in the case of the Luton postmaster murder.

For JUSTICE has always taken a very broad approach to its responsibilities, and, though a branch of the ICJ, it seems clear that the section would have come into existence even without the parent body. "The ICJ was being formed just as JUSTICE was about to get off the ground," recalled Mr Sargant, "and the obvious thing to do seemed to be to combine both activities within the one organisation."

What of the situation where lawyers, among them politicians and Judges, get involved in matters of controversy? "We avoid any real problems by our constitution. This welcomes the membership of Judges (and they play a constructive role in helping committees and commenting on draft reports) but at the same time they're disqualified by their judicial office from holding office in JUSTICE. In the same way, members of the Cabinet cannot hold office with us, though of course their membership can be very helpful. This has its disadvantages—when there's a change of Government we regularly lose Council members because of it—but it's also essential to the well-being and the independence of the organisation. By having them as members, we have their support; and by not permitting them to be office-bearers, any possible public embarrassment is avoided if they're bound to take a different line from us." The Council, he added, is carefully selected to represent a balance of political views.

Aside from his readiness to work for years for only nominal remuneration, the remarkable thing about Tom Sargant is his lack of a law degree—though he sits as a Magistrate and confesses that through association he's acquired a working knowledge of the mechanics of the law. Of being on the bench he remarks: "If there's one thing I dislike it's a plea of guilty. Then you've never got a chance to find out what really happened. You're just presented with conflicting variations by each side and are left to take a blind choice."

Does this indicate dissatisfaction with the adversary system?

"More and more of our committees are coming to the conclusion that the adversary system as we know it today is not the last word," he said. "The fact that it's survived for centuries doesn't mean it can't be ripe for overhaul. Obviously we're going to have to examine it closely sooner or later."

[Membership of JUSTICE is open to New Zealand practitioners and those whose callings are associated with the law, such as probation officers, social workers, etc. Membership forms are available from The Secretary, 12 Crane Court, Fleet Street, London EC4, United Kingdom.

Membership forms for the New Zealand Section of the International Commission of Jurists are available from L Greig Esq, PO Box 1291, Wellington.]

SUMMARY OF RECENT LAW

AGENCY

Contract—"As trustees for a company to be formed"—Persons so contracting liable—Taking of possession by company does not ratify contract—Trusts—Trustees—Beneficiary entering into possession of trust assets takes burden as well as benefit, but liable only to extent of trust assets and not personally liable in excess of trust assets. The plaintiff entered into a written agreement for the sale of a business with the first defendants who were described therein as the purchaser "as trustees for a company to be formed". The agreement provided inter alia that it was conditional on the purchaser being granted a loan by a specific company and a bank overdraft to be secured by a first debenture over the assets of the company to be formed by the purchaser; and the vendor agreed to advance to the purchaser a specified sum to be secured by a second debenture over the company's assets. No company was in existence at the time of the agreement but the second defendant was subsequently incorporated on 14 March 1972. After incorporation the second defendant did not enter into a new agreement with the plaintiff, nor did it enter into an agreement with the plaintiff and the first defendants adopting the agreement. On 18 March 1972 the vendor gave possession to the defendants at which time neither the deposit nor the payment on the giving of possession were made in accordance with the terms of the agreement. On 17 April 1972 the defendants vacated the premises and the plaintiff re-entered. Subsequently the plaintiff resold the business at a loss and claimed damages for the loss and expenses incurred. *Held*, 1 The company by taking possession did not thereby ratify the contract. (*Re Northumberland Avenue Hotel Co* (1886) 33 Ch D 16, applied.) 2 Where a person contracts for the intended benefit of a company not then in existence, he may, and generally does, become liable to perform that contract himself unless on the true construction of the

contract it appears that the person purporting to sign on behalf of the company to be formed was not intended to personally bound. (*Kelner v Baxter* (1866) LR 2 CP 174, and *Black v Smallwood* (1966) 117 CLR 52, considered and applied.) *Rita Joan Dairies Ltd v Thomson and Others* (Supreme Court, Auckland. 6, 26 July 1973. Wilson J).

INSURANCE—FIRE

Cover note issued subject to usual conditions of company's fire policy for 3 months certain "unless Notice of Cancellation be given in the meantime" with water damage endorsement—Water damage ensued—Company unilaterally cancelling policy forthwith not in accordance with usual cancellation condition in its fire policy wherein cancellation took effect 7 days after notice—Further water damage within 7 days—Company liable. The plaintiff had obtained a cover note for the insurance of his stock in trade, furniture and fittings in the following terms: "You are hereby held covered against loss subject to the usual conditions of this company's fire policy from 11/7/1969 until 4 p.m. on 11/10/69 unless Notice of Cancellation be given in the meantime". It was noted that there was a water damage endorsement covering loss to the extent of $20,000. On 25 July 1969, and again on 10 August 1969, damage occurred by rainwater coming from the upper part of the building. On Friday, 15 August 1969, written notice was received by the plaintiff that the water damage insurance had been cancelled because an inspection of the building had revealed that the roof and guttering were in a poor state of repair. Clause 10 of the company's fire policy provided for notice of cancellation of the policy and that cancellation should take effect 7 days after posting or delivery of such notice. On 16 August 1969 there was heavy rain and further damage occurred. The plaintiff claimed indemnity for the latter damage under the cover note. *Held,* 1 Clause 10 of the policy, which provided for notice of cancellation of the policy, applied not only to the cancellation of the whole policy but also the cancellation of one of the risks designated in the policy. 2 The expression "unless Notice of Cancellation be given in the meantime" merely drew attention to cl 10 of the company's fire policy. (*Mackie v European Assurance Society* (1869) 21 LT 102, and *Levy v Scottish Employers' Insurance Co* (1901) 17 TLR 229, distinguished.) 3 The above-mentioned expression being ambiguous, it must be construed contra proferentem. The notice of cancellation delivered on 15 August did not become effective until 22 August, and accordingly the damage caused on 16 August was covered by the cover note. *Smith v National Mutual Fire Insurance Co Ltd* (Supreme Court, Auckland. 27 June; 11 July 1973. Mahon J).

MASTER AND SERVANT—INDUSTRIAL INJURIES AND WORKMEN'S COMPENSATION

Accident arising out of and in the course of employment—Whether death result of accident or suicide—Onus on employer to prove suicide—Standard of proof—Workers' Compensation Act, 1956 s 3 (1). The driver of a steam roller was killed when run over by the roller during the course of his employment. On a dependant's claim for compensation under the Workers' Compensation Act 1956 the question was whether the deceased had been killed as a result of an accident or of suicide. *Held,* The onus of proof lay on the defendant employer to show that the death was due to suicide, and the standard of proof was high though not as high as in a criminal case. *Public Trustee v Polson* [1968] NZLR 1064, *Spiratos v Australasian United Steam Navigation Co Ltd* (1955) 93 CLR 317, *Atkinson v Wanganui City Corporation* [1957] NZLR 1166, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; [1956] 3 All ER 970, *Bater v Bater* [1951] P 35; [1950] 2 All ER 458, *W V Middleditch and Son v Hinds* [1963] NZLR 570, and *Corbett v New Zealand Society of Accountants' Fidelity Fund* [1970] NZLR 952, referred to.) *McKenna v Wairarapa South County* (Compensation Court, Wellington. 19, 29 June 1973. Blair J).

LEGAL LITERATURE

Esprit De Law by Anthony Nicholson (Wolfe). 411 pp. $11.40.

This book deserves an honoured place on the lawyer's bookshelf beside *Portrait of a Profession.* But the portrait it paints is of the law in action. With whimsical quotes from law reports and a barristerial inclination to see the humorous side of every situation, the author's firm grasp of legal history is leavened in the most delightful—and at the same time, most devastating—way.

Who would recall that in Henry Tudor's time a man whose annual income was under 40 shillings could get free legal aid? Or that the right was not well used because an Elizabethan statute provided that if a person who sued in forma pauperis lost, "he shall be punished with whipping and pillory".

Much though the law and lawyers are lampooned, the treatment is generally sympathetic and often constructive. Nor is the author's wisdom limited to the courtroom scene—topics canvassed include husband and wife, hire purchase, bailor and bailee, master and servant, mortgages, leases, conveyancing, the English constitution, trusts, wills (did you know that Jarman, author of the treatise on wills that still bears his name, actually died intestate?).

The only criticism is of the erratic styling of case references, though there is room for joy in their being included at all.

JDP

HIRE PURCHASE STABILISATION REGULATIONS— SOME RECENT DEVELOPMENTS

It is an understatement to say that the Hire Purchase and Credit Sales Stabilisation Regulations 1957 (as amended) have proved troublesome to interpret. The volume of litigation that they have attracted is abundant demonstration of this. The aim of this paper is to review what appears to be the present state of the law regarding the interpretation of regs 8 and 10, in so far as they relate to hire purchase arrangements. Some specific drafting techniques and arguments raised in Court will be discussed, and some possible future developments suggested.

Transactions rendered illegal and void by the regulations

Regulation 3 requires that all hire purchase agreements comply with the provisions of the First Schedule, inter alia as to the minimum deposit and maximum period of credit. Regulation 8 provides as follows:

A person shall not—

(a) Enter into any transaction, or make any contract or arrangement, purporting to do, whether presently or at some future time or upon the happening of any event or contingency, anything that contravenes or will contravene the provisions of these regulations; or

(b) Enter into any transaction or make any contract or arrangement, whether orally or in writing, for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, avoiding or preventing the operation of these regulations in any respect.

In addition to being thus rendered illegal by reg 8, any such hire purchase agreement or other transaction is declared void by reg 10. What, then, are the transactions caught by regs 8 and 10?

(1) *As hire purchase agreements.*—It is clear that the definition of "hire purchase agreement"(*a*) covers true hire purchase agreements (the *Helby v Matthews* type). It is well established(*b*) that it also covers agreements of the conditional sale (*Lee v Butler*) type. What is perhaps a little surprising, however, is that it may cover agreements that would not normally be regarded as being hire purchase agreements at all. For example, in *Ford v Credit Services Investments Ltd* [1970] NZLR 130, the plaintiff agreed to buy a car for £765. He handed over a trade-in valued at £265 and a deposit of £50, and agreed to pay the balance within seven days. He was thereupon given possession of the car, although no property was to pass until payment was made in full. It was held that the transaction was void, since it undoubtedly fell within the definition of hire purchase agreement(*c*) and the requisite minimum deposit had not been paid at the time of the agreement.

(2) *As arrangements under reg 8 (b).*—Although not amounting to a hire purchase agreement, an arrangement may be caught by reg 8 (b). The scope of this provision was considered by the Court of Appeal in *Credit Services Investments Ltd v Quartel* [1970] NZLR 933 and *Credit Services Investments Ltd v Carroll* [1973] 1 NZLR 246. The test to be applied was stated by Richmond J thus (at p 255):

> "The first step is to inquire whether the transaction is one which is in its nature capable of being regarded as having as its purpose or effect, in any way, whether directly or indirectly, to defeat evade avoid or prevent the operation of the Regulations in some respect. If it is not, that ends the matter. It is only if the transaction is capable of being so regarded that the question will arise whether or not that really was the "end in view" and it will be in this latter context relevant to consider whether the transaction and the manner of its implementation is capable of explanation by reference to ordinary commercial practice without imputing to it the particular purpose of circumventing the Regulations."

(*a*) Regulation 2 defines "hire purchase agreement" as an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, whether on the performance of any act by the parties to the agreement or any of them or in any other circumstances; . . .

(*b*) *Motor Mart Ltd v Webb* [1958] NZLR 773.

(*c*) It could not be a credit sale, the period of credit being less than nine months.

In *Quartel's* case, the respondent entered into a leasing agreement for a car for a two year period, the total rental being $720. The lease provided that at the end of the hiring period, the appellant would sell the car at the best price it could reasonably obtain either by public auction or through a dealer. A "residual value" for the car was fixed at $640; if the disposal price was less than the residual value, the respondent was to make up the deficiency; if more, the appellant was to account to the respondent for the excess. Thus the appellant was ensured of realising in all $1360 for the car, no more, no less, and the respondent was in an unbeatable position should he wish to buy the car at its "residual value". It was held that this was not a hire purchase agreement since it could not be said that the property "will or may pass to the bailee" *under the agreement.* However, the Court was satisfied that there was an "understanding" between the parties that the respondent would be able to buy at the residual value. It was held, therefore, that the transaction was caught by reg 8 (b), the Court adopting the test propounded by the Privy Council when construing a similarly worded taxation provision(*d*), ie, was the arrangement capable of explanation by reference to any ordinary business dealing?

The *Quartel* decision threw open the floodgates for any "leasing" agreement that was clearly beyond the financial means of the "hirer" to be regarded as infringing reg 8 (b)(*e*). However, the Court of Appeal's judgment in *Carroll's* case has somewhat restricted the ambit of its earlier decision. The terms of the lease were similar to those in *Quartel's* case, but with the additional provision that under no circumstances was the respondent to be able to buy the car at the end of the hiring period, either personally or through a nominee. The other material differences were that the appellant had carefully explained the terms of the lease to the respondent and that although the respondent was nevertheless under the impression that he would be able to buy at the residual value, that was a "unilateral" understanding, induced by a third party, not by the appellant, Applying the test set out ante, the Court of Appeal held that there was no infringement of the Regulations. Considerations of ordinary commercial usage only became relevant once it was established that the transaction was capable of being regarded as having the purpose or effect of defeating the operation of the Regulations. Here there was no evidence of any arrangement, outside the lease, *between the parties* (the third party (the dealer), who had told the respondent that he would be able to buy the car, could not be regarded on the facts as the appellant's agent). Thus the lease must be considered alone, and, as such, it constituted no threat to the regulations and was not caught by reg 8 (b).

Subsequent decisions of the Supreme Court have demonstrated clearly that the existence of a "no sale to lessee" clause and acknowledgement in a lease in no way limits the Court to considering the document alone. Provided there is sufficient evidence of a wider arrangement or understanding between the lessee and the lessor or its agent, the transaction may be found to contravene reg 8 (b). For example, in *Evans v Credit Services Investments Ltd*(*f*), on an identically worded lease, Woodhouse J had no difficulty in distinguishing *Carroll's* case because on the evidence before him, he had

> "not the slightest doubt that the plaintiff believed that he had entered upon a transaction whereby he would slowly acquire the car as a capital asset, he was actively encouraged in that understanding by [the defendant's agent], and he certainly would not have embarked upon it otherwise."

Recovery of monies paid

Any hire purchase agreement or other transaction entered into in contravention of the Regulations is declared by reg 10 to be void. The regulation continues:

> "provided that all money paid and the value of any other consideration provided by the buyer under any agreement or on any sale shall be recoverable as a debt due to him from the bailor or vendor"(*g*).

(1) *Meaning of "buyer".*—By Regulation 2:

> " 'Buyer' includes a prospective buyer; and also includes a bailee or prospective bailee under a hire purchase agreement".

Clearly, this is wide enough to cover the purchaser under a hire purchase agreement of either the *Lee v Butler* or *Helby v Matthews*

(*d*) *Newton v The Commissioner of Taxation of the Commonwealth of Australia* [1958] AC 450.

(*e*) See eg the wide view taken by Perry J in *De Ath v Cord Motors Ltd,* Supreme Court, Auckland, 16 December 1971. A868/71; [1972] Recent Law 163.

(*f*) Supreme Court, Auckland, 12 October 1972. A358/72; [1973] Recent Law 35. See also *Grey v Kingsway Autos Ltd,* infra.

(*g*) The amendment effected by SR 1970/199 has been omitted, being irrelevant for present purposes.

type. But what of arrangements caught under reg 8 (b)? The question was fully considered by McMullin J in *Associated Group Securities Ltd v Marsanyi*(*h*), though his observations may well be the subject of further argument in the light of the dicta of the Court of Appeal in *Grey v Kingsway Autos Ltd,* discussed post. The transaction in *Marsanyi's* case was held to infringe reg 8 (b), but it was contended on behalf of the appellant that the respondent was nevertheless unable to recover the monies paid because he was not a "buyer".

His Honour held that the second half of the definition could have no application since the agreement itself was not a hire purchase agreement but merely a simple bailment under which the respondent had no right of purchase. Neither could he have been an actual buyer, because he never bought(*i*). But was he a "prospective buyer"? After referring to the dictionary definition of "prospective", his Honour concluded:

> "I do not say that the entertainment of a vague possibility that a party may purchase that property at some time in the future will make him a 'prospective purchaser', but a contemplation brought about by an offer by the lessor, which offer resulted at the subsequent date in the lessee endeavouring to exercise his rights under it, brings him within the definition of 'prospective purchaser' ".

In all the earlier cases in which there has been held to have been a contravention of reg 8 (b), the aptness of the word "buyer" appears to have been accepted without argument(*j*).

(2) *Meaning of "bailor or vendor".*—Two days later McMullin J followed up this line of reasoning by considering the meaning of the words "bailor or vendor" (which are not defined in the regulations). The case was *Robert Northe Carriers Ltd v Cord Motors and Another*(*k*), again involving a leasing agreement and oral understanding which were together held to contravene reg 8 (b). After repeating his earlier interpretation of "buyer", his Honour continued:

> "Cord Motors was a vendor in that if there is to be a prospective buyer there must also be a prospective vendor in respect of the sale in prospect. But if I be wrong on that conclusion, then Cord Motors was a bailor from whom the plaintiff received each of the cars which were the subject of the lease . . ."(*l*).

(3) *The tripartite situation.*—In the normal tripartite dealer-finance company-customer situation, the Court is often faced with the difficult problem of deciding from whom the customer is entitled to recover under reg 10. The situation may take either of two basic forms. In the first, the agreement (hire purchase or lease) is made between the customer and the dealer, but the dealer subsequently assigns his interest to the finance company. The alternative is that although the dealer takes part in arranging the transactian, the actual agreement is made between the customer and the finance company.

The Court will sometimes have difficulty in eliciting from the facts which of these two situations exist. The person named in the document as the vendor/lessor will normally give a clear indication, but in the *Northe* case and in *Ransfield v Cord Motors and Anor*(*m*), the name of the lessor had not been entered at the time of execution by the lessee(*n*). Was the dealer to be regarded as principal in his own right or as agent for the finance company? In each case the Court referred to the decision of the House of Lords in *Branwhite v Worcester Works Finance Ltd* [1968] 3 All ER 104, in which a majority of their Lordships had held that their was no presumption that in a hire purchase transaction the dealer acted as agent for the finance company. A strong minority judgment in favour of such a presumption was given by Lord Wilberforce and Lord Reid. In both *Northe's* case and *Ransfield's* case, the Court held that no agency had been proved, McMullin J feeling obliged to adopt a factual approach in accordance with the majority of the House of Lords and Henry J considering that, on the facts before him the same result was obtained under either approach.

(a) Situation 1—Where the dealer is the original party. Where the dealer is held to have been a principal, who subsequently makes an assignment of the agreement, the position regarding recovery of monies paid is clear.

(*h*) Supreme Court, Auckland. 6 February 1973. M285/72; [1973] Recent Law 58.

(*i*) The same line of reasoning on these points was used in *Grey's* case, infra.

(*j*) eg, *Quartel's* case, supra.

(*k*) Supreme Court, Auckland. 8 February 1973. A193/72; [1973] Recent Law 59.

(*l*) Both these interpretations may be the subject of further argument in the light of *Grey's* case, infra.

(*m*) Supreme Court, Auckland. 13 April 1973. A247/72, Henry J; [1973] Recent Law 115.

(*n*) In both cases, the name of a "paper" company, controlled by the first defendant, had subsequently been inserted as lessor. Neither McMullin J nor Henry J had any hesitation in ignoring the insertion for all practical purposes.

(i) Recovery from the dealer. The dealer is liable to the customer under reg 10 not only for money or other consideration which he personally may have received from the customer, but also for any sums that the customer may have paid direct to the finance company following the assignment(*o*). Normally, of course, the dealer will have received a lump sum from the finance company on the assignment, but, in the words of McMullin J:

> "Even if, however, it had not received that consideration, it would not lie in the mouth of a dealer who had been guilty of a breach of the Regulations to complain if he is divested by the Regulations of monies which he had hoped to gain from their breach"(*p*).

(ii) Recovery from the finance company. On the other hand; no recovery may be obtained in the assignment situation from the finance company. In *Hawke's Bay Credit Corporation v Official Assignee* [1964] NZLR 154(*q*) the Court rejected such a claim by the customer against the finance company, holding that the words "bailor or vendor" could not be construed as including an assignee.

(b) Situation 2—Where the finance company is the original party.

(i) Recovery from the finance company. In the second type of situation, where the finance company is the vendor/lessor under the original agreement, the customer will be entitled to recover from the finance company under reg 10, provided of course, that a breach of the Regulations has been proved. Where the document is a hire purchase agreement, any contravention of reg 8 (a) will be ascertained on normal principles. Where the document is a lease, but the finance company has personally entered into the supplementary oral arrangement to sell, then contravention of reg 8 (b) will be thus established. But where the supplementary oral arrangement has been made by the dealer, the question of agency is once again raised. For if, as in the *Carroll* case, the dealer cannot be regarded as having made the arrangement as agent of the finance company, there will be no contravention of the Regulations.

In *Evans'* case, Woodhouse J had to consider whether the dealer who had told the customer that he could buy at the end of the lease, did so as agent of the finance company. While recognising "the high persuasive authority of the *Branwhite* decision" in the normal hire purchase transaction, his Honour was able to find on the facts before him that the dealer acted as agent at all relevant times(*r*). The dealer had negotiated to finality, without prior reference to the finance company, all the essential details of the transactiaon so far as the customer was concerned; it displayed the car; it agreed to take the trade-in offered; it arranged the terms of payment; it gave the assurances as to the customer's eventual purchase; it produced the forms supplied by the finance company; and it completed the whole arrangement by accepting the trade-in and giving the customer possession of the car.

(ii) Recovery from the dealer. As for the question whether recovery may be obtained from the dealer, the present state of the law is debatable. In each case, a detailed examination of his dealings with the customer seems to be necessary. If he is found to be the agent of the finance company, then the general law of agency would seem to demand that the principal alone, unless undisclosed(*s*), be treated as the "bailor or vendor"(*t*). The position where the dealer was not the agent of the vendor was considered by the Court of Appeal in *Grey v Kingsway Autos Ltd* [1973] NZLR 625, the most recent decision on the Regulations. The customer inspected a car at the dealer's premises. The value of the trade-in tendered by the customer was less than the requisite minimum deposit. The dealer told him that he could "buy" the car by means of a lease agreement. Thereupon they both went to the finance company's office. The finance company's employee told the customer, just as the dealer had done, that he could buy

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(*o*) *Northe's* case and *Ransfield's* case, supra.

(*p*) *Northe's* case, supra.

(*q*) The assignee cannot, of course, enforce the agreement: *Luhrs v Baird Investments Ltd* [1958] NZLR 820.

(*r*) The varied approach to the relationship between Cord Motors and Credit Services in the four decisions mentioned in this article is interesting. In the first (*De Ath*) the existence of the agency was not contested; in the second (*Evans*) it was denied but found to be proved; and in the last two (*Northe* and *Ransfield*) the denial was successful. Yet in each case the general course of events was, superficially at least, the same! Perhaps an important factor was that in the first two cases, unlike the last two, the lease was in the name of Credit Services.

(*s*) See per McMullin J in *Northe's* case.

(*t*) See per Perry J in *De Ath's* case. See also per Henry J in *Ransfield's* case, though in the light of the earlier decisions on the relationship between Cord Motors and Credit Services (supra), his Honour's refusal to allow the plaintiff to have recourse against Cord Motors for costs awarded to Credit Services on the ground that, "This was not a case where plaintiff might fail if he chose the wrong defendant. He dealt with first defendant," seems on the face of it rather harsh.

the car for a nominal sum at the end of the lease. The customer then signed the leasing agreement with the finance company and, at the same time, the dealer gave the finance company a change of ownership form relating to the car and received a cheque in payment. In the Supreme Court(*u*), it was held that the customer was entitled to obtain recovery under reg 10 from the finance company, but not from the dealer. This was aptly described by Henry J as "probably a barren victory", since the finance company was by then in liquidation. Accordingly, the customer appealed.

The Court of Appeal agreed with the ruling of Henry J that "the whole arrangement was a composite transaction, each part being dependent upon each of the other parties carrying out all matters referable to him or it." It also agreed that this composite transaction contravened reg 8 (b), the facts being clearly distinguishable from those in *Carroll's* case.

In order to succeed in the appeal, the customer had to show that the dealer was the "bailor or vendor" within reg 10. A number of arguments were advanced in support of this contention. Firstly, it was alleged that the entire tripartite transaction amounted to a hire purchase agreement, reliance being placed on the extended definition given by reg 2 (2)(*v*). However, the learned Magistrate before whom the case was originally tried had found as a fact (with which the Court of Appeal saw no reason to interfere) that the statements that the customer would be able to buy at the end of the lease did not amount to a contractual term. Accordingly there was no "agreement" sufficient to constitute a hire purchase agreement.

The second contention was that the lease was a sham, masking the true nature of the transaction. As Henry J had done, the Court of Appeal declined to accept this argument.

> "We think that, on the evidence, the parties clearly intended a real sale of the car by Kingsway Autos to the finance company, followed by a real three year lease of the car to Mr Grey."

The customer had abandoned any idea of a straight out purchase from the dealer and had agreed to take his chance of acquiring the car at the end of the lease in accordance with the statements made to him.

A further argument put forward on behalf of the customer was dependent on the Court accepting a submission that since the whole transaction was void, no property had passed from the dealer to the finance company. Without deciding the point, the Court was prepared so to assume for present purposes. That being so, the argument ran, the Court should completely disregard the actual arrangements between the parties. Thus, the dealer, having both ownership and possession of the car, in law and in fact, became a "bailor" when it handed it over to the customer for his use. The Court rejected this argument, having no doubt that the actual arrangements between the parties could not be *completely* disregarded. To do so, it felt, would be to render meaningless the use of the definitive article ("*the* buyer" and "*the* bailor or vendor") in a context dealing with the recovery of money paid "under any agreement or on any sale".

> "The proviso can only be applied as the result of an examination of the legal relationships which the parties in effect intended to create."

The Court then went on to explain why, in its opinion, there could be no recovery in the situation before it. The words "buyer" and "bailor or vendor" were clearly used in Regulation 10 in a correlative sense. Therefore, even if it were assumed that the customer was a prospective buyer and that "vendor" included a prospective vendor, the customer could only succeed as against someone who was in prospect as a vendor to *him*. This, of course, was the finance company and not the dealer.

Clayton Motors Ltd v Aiolupotea(*w*), a case in the Supreme Court decided two months prior to the Court of Appeal's decision in *Grey's* case, involved a prima facie similar situation. In the Magistrate's Court, judgment had been given against both the dealer and the finance company. The dealer appealed. Moller J found against him. The crucial distinction would appear to have been that whereas the customer in *Grey's* case had "abandoned any idea of a straight-out purchase" from the dealer, in *Aiolupotea's* case he had made at least an "arrangement" of a kind prohibited by reg 8 (b) as construed in *Carroll's* case. "What he did *on that day* can be looked at separately

(*u*) Supreme Court, Auckland. 29 April 1971 M866/70. Henry J; [1971] Recent Law 265.

(*v*) "Where by virtue of two or more agreements none of which by itself constitutes a hire purchase agreement . . ., there is a transaction which is in substance or effect a hire purchase agreement . . . as herein before defined, the agreements shall be treated for the purposes of these regulations as a single agreement made at the time when the last of those agreements was made."

(*w*) Supreme Court, Auckland. 24 May 1973. M425/72. Moller J.

from the rest", ie, the subsequent lease transaction. His Honour then concluded by finding that the customer was clearly a "buyer" and the dealer was at least a "bailor" in that he handed over possession of the car to the customer(*x*).

Attempts to avoid the scope of the regulations

(1) *Drafting techniques.*—(a) Lease. It is clearly established that, even though it may circumnavigate reg 8 (a), the use of a lease is not, as such, sufficient to avoid contravention of reg 8 (b)(*y*).

(b) "No sale to hirer" clause. Again, it is clear that this, as such, does not obviate reg 8 (b)(*z*). But in the light of the Court of Appeal's judgment in *Carroll's* case, it does seem that it may have some evidential value in rebutting any allegations by the customer of a collateral understanding or arrangement(*a*). In *Aiolupotea's* case, the customer had signed a separate "Statement by lessee" in which he purported to acknowledge that he understood that he was only a lessee and thus had no rights to purchase the car. Bergin SM, before whom the original hearing took place(*b*), felt himself in no way precluded by the existence of such a document from finding a contravention of reg 8 (b).

(c) "Offer only" clause. The regulations are inconvenient from the dealer's point of view, not only because they preclude a sale to a customer who cannot raise the necessary deposit, but also because they cause practical difficulties even where the deposit is forthcoming. The customer will be keen to take immediate delivery of the car, whereas the dealer, and particularly the finance company, would much prefer to have time, without running the risk of losing the sale, in which to calculate the financial details precisely and investigate the customer's creditworthiness(*c*). An agreement in which, at the time of execution, the amount of the instalments is left blank for later completion does not comply with the requirements of the First Schedule(*d*). In *Alliance Finance Corporation (NZ) Limited v Hurley*(*e*) the customer, at the time of taking delivery of the car, signed a printed form addressed to the finance company. It constituted an offer to buy the car on the terms set out in the schedule and was expressed to be irrevocable for a period of 21 days (the stated consideration being the finance company's investigation of the customer's suitability as a conditional purchaser). There was also an acknowledgment by the customer that during this period or until acceptance (whichever was earlier) he held the car as bailee only of the dealer. At the time of signature, the customer paid less than the necessary deposit. Two days later he paid the balance due as deposit and three days after that the finance company accepted his "offer". Wild CJ held that the regulations had been breached, since para 3 of the First Schedule required the necessary deposit to be paid "at the time of the signing of the agreement". This he construed as referring to the signing by the customer of the actual document itself.

(d) Acknowledgment of compliance. It is well established that the contents of a hire purchase agreement, such as the amount of the deposit stated to have been paid, cannot estop the customer from later alleging that the true facts constituted a breach of the regulations(*f*). The same rule presumably applies to "acknowledgments" by the customer of compliance with the Regulations. The current standard hire purchase form of one of the larger finance companies contains a clause whereby the customer warrants that he has not contravened the regulations. It is difficult to see how, for at least two reasons, this provision can be of any assistance to the dealer. Firstly, the enforcement of such a clause, by way of an award of damages, would render nugatory the effect of reg 10, and, secondly, if there is a breach of the regulations, the agreement, including the clause in question, is void.

(2) *Specific arguments.*—(a) Relating to the agreement. (i) Oral "arrangement" not legally binding. It has been stated on a number of occasions(*g*) that the words "transaction" and

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(*x*) Following a dictum of T A Gresson J in *Hawke's Bay Credit Corporation Ltd v Official Assignee,* supra at p 155: "Prima facie a bailor of a chattel is the person who delivers over possession of it to another, and thus creates the bailment." See post the observations of the Court of Appeal in *Grey's* case on this wide interpretation.

(*y*) *Quartel's* case, supra.

(*z*) eg, *Marsanyi's* case, supra.

(*a*) The Court of Appeal felt that Perry J in *De Ath's* case had interpreted the *Quartel* decision rather too widely.

(*b*) Magistrate's Court, Auckland. 29 May 1972. Plaint No 10965/71.

(*c*) See the comments by Farmer, [1970] NZLJ 153.

(*d*) *Cotton v Central District Finance Corporation Ltd* [1965] NZLR 992 (CA); *Portland Finance Ltd v Cameo Motors Ltd* [1966] NZLR 571 (CA).

(*e*) Supreme Court, Invercargill. 7 September 1971. M1507. Wild CJ; [1972] Recent Law 6.

(*f*) *Luhrs v Baird Investments Ltd,* supra.

(*g*) eg, *Quartel* (per North P at p 947), *Evans* (per Woodhouse J) and *Northe* (per McMullin J).

"arrangement" in reg 8 (b) are not confined to contractual terms in a strict legal sense. Whether or not they are enforceable at law is immaterial. (ii) Parol evidence rule. In *Northe's* case, it was argued on behalf of the dealer that the parol evidence rule precluded the admission in evidence of any collateral verbal arrangement in contradiction of the lease document. McMullin J was not prepared to accept this.

> "While it is a general principle of interpretation of contracts that oral evidence is not admissible to vary any written document, I do not think that this rule can have any application to a "transaction" of the kind contemplated by the Regulations. The reason for the general rule is that the intention of the parties to a *contract* is best gathered from the form in which they have expressed it. But a *transaction* may consist not merely of a single contract but of a number of contracts or arrangements falling short of a contract. Thus to prove the whole transaction or arrangement oral evidence must be admissible"(*h*).

However, his Honour recognised that contradictory oral evidence should only be received with caution.

(iii) Arrangement to sell to the third party. The oral arrangement in *Marsanyi's* case was for a terminal sale to the customer's wife. McMullin J had no hesitation in dismissing this as a "suggested subterfuge" and treating the customer as the "buyer" under an arrangement that contravened reg 8 (b). But what if such an arrangement were found to intend a genuine sale? It is hard to see how this could contravene the regulations, even if there were a further arrangement between the third party and the customer, provided its existence was unknown to the finance company or dealer.

(iv) De minimis rule. The requirements of the regulations must be strictly complied with. Thus in *Turner v B V Wright Ltd* [1969] NZLR 1073, the fact that the deposit actually paid by the customer fell only £5 short of the requisite minimum deposit (the remaining £5 being paid the following day) resulted in the dealer suffering the full consequences of a contravention of the Regulations. The de minimis rule has no application(*i*).

(b) Relating to recovery under reg 10. (i) Allowance for user. The effect of reg 10, of course, is to give the customer free use of the car throughout the period that it was in his possession. The question naturally arises, therefore, whether the customer, although entitled to recover back the contract monies, is nevertheless liable to pay a reasonable sum for his user. This matter was considered by the Supreme Court in *Broadlands Finance Ltd v June*(*j*). The finance company based its claim for an allowance for user on three grounds. The first submission was that as the finance company was the owner of the car and entitled to possession of it at all relevant times, it did not have to rely on the illegal agreement in order to assert this right. It was therefore entitled to recover compensation in the form of a fair rental or for diminution in value because of the customer's possession for 18 months. Wild CJ rejected this submission both on the ground that this would for the most part nullify the statutory right given to the customer by the proviso to reg 10, and also because the finance company could not show how the customer came to have possession without relying on the illegal agreement. The second submission, that the customer was liable in conversion, was rejected because the finance company had consented to the customer's having possession for use by her. The final claim was that the customer was liable under an implied agreement to pay for her use, or on a quantum meruit. This, too, was unsuccessful, because no such promise could be implied where the transaction was intended to be a sale(*k*).

(ii) Illegal Contracts Act 1970, s 7. Under the Act, the Court has a discretion to grant such relief to a party to an illegal contract as it thinks just. Is there any hope of the finance company obtaining relief under this provision where the customer's case is without merit? The obstacle is that this power to grant relief is "subject to the express provisions of any other enactment". The point does not appear to have been argued in the Supreme Court, but in the Magistrate's Court it has been held that the existence of the proviso to reg 10 precludes relief being granted(*l*). It is, of course, always open to the Court to refuse to award costs to an unmeritorious customer.

(*h*) *Carroll's* case, supra, indicates a similar approach. See per Richmond J at p 254.

(*i*) In *Hurley's* case, supra, Wild CJ appears to have considered that an effective one-day extension of the maximum period of credit would not have been fatal to the agreement, but this seems inconsistent with all the other authorities.

(*j*) Supreme Court, Wellington. 25 May 1970. M148/69. Wild CJ; [1970] NZLJ 390.

(*k*) Following *Traders' Finance Corporation Ltd v MacLeod* [1967] 2 NSWR 204 (CA).

(*l*) *Harland v Nu-Plan Motors (NZ) Ltd*. Auckland, 5 May 1971. Plaint No 9799/70. Gilliland SM.

(iii) Payments under lease, not under the arrangement. One of the arguments addressed to the Court in *Northe's* case was that even if the transaction as a whole contravened reg 8 (b), the customer was not entitled to recover back his payments, since they should be regarded as having been made under the lease, which was lawful in itself. Rejecting this argument, McMullin J held that the dealer could not "isolate them and appropriate them to the lease document alone if the basis on which they were made constituted as a whole an arrangement which was an illegal transaction".

(iv) Ultra vires. Although admittedly not fully argued, it was suggested in *Marsanyi's* case that reg 8 (b) and the proviso to reg 10 were ultra vires the Economic Stabilisation Act 1948. The Court saw no basis on which it could accept this submission(*m*), pointing out that the Regulations are not concerned with the maintenance of equities between one party and another.

Possible future developments

(1) *Narrower interpretation of the proviso to reg 10.*—The customer's chances of obtaining an unexpected windfall because of the Regulations appear to have reached their zenith in the period immediately following the *Quartel* decision. Both of the subsequent decision of the Court of Appeal, *Carroll* and *Grey,* have put limitations on the ability of the customer to recover. Dicta in *Grey's* case point the way to a still more restrictive interpretation of the proviso to reg 10. Having disposed of the case actually before it, the Court went on to deal with "certain other matters to which we think it desirable at least to draw attention", concerning the true construction of the proviso to Regulation 10. Although careful to disclaim any intention of actually deciding the point, the Court put forward a construction which it clearly felt had some merit.

> "The proviso to reg 10 is so worded as to limit the right of recovery therein created to money paid or the value of any other consideration provided by the buyer *under any agreement or on any sale.* The ordinary purpose of a proviso in a section of a statute or in a regulation is to make further provision of some kind as regards the same subject matter as had already been dealt with in the earlier words of the section or regulation. It seems at least arguable, therefore, that when the present proviso speaks of 'any agreement' and 'any sale', it is referring only to the type of 'agreement' and 'sale' which the earlier words of the section declared to be void. Those earlier words referred to 'the agreement, loan, sale or other transaction' and, in their turn, appear to relate back specifically to the situations described in clauses (a) to (d). On such a reading of reg 10 the 'agreement' which is rendered void is necessarily a 'hire purchase agreement' or a 'credit sale agreement' and the 'sale' referred to is one which contravenes reg 6 (3)."

The effect of such an interpretation would be that the customer would be able to recover in the case of a hire purchase agreement caught by reg 8 (a), but not in the case of an arrangement caught by reg 8 (b), the words "other transaction" being conspicuous by their absence from the proviso. It would mean that the customer in the *Quartel, De Ath, Evans, Marsanyi, Northe* and *Aiolupotea* cases would not have succeeded in recovering his payments. Nor could the customer in *Grey* have succeeded even against the finance company. It would not, however, have affected the *Turner, Ford, June* or *Hurley* decisions.

The interpretation has much to commend it. The word "bailor" would thereby clearly constitute a reference solely to a hire purchase agreement(*n*), and preclude the more general sense given to it in *Northe* and *Aiolupotea.* The word "vendor" would refer solely to a credit sale agreement. The word "buyer", as defined in reg 2, would constitute a correlative reference to hire purchase agreements and credit sale agreements. At first sight, this would appear to leave the words "prospective buyer" without a meaning, but this can be explained by the fact that "buyer" also appears in reg 6 (3) where the extension to "prospective buyer" is clearly appropriate. One possible line of attack on the Court of Appeal's suggested interpretation is that if the proviso were intended to apply only in this limited sense, it would, perhaps, have been more natural for it to read "all money paid . . . by the buyer under *the* agreement or on *the* sale."

If the Court of Appeal's argument is adopted, it will obviously be in the customer's interest, in the lease cases, to attempt in future to show a breach of reg 8 (a) rather than merely being content as in the past to show a breach of reg 8 (b). To do this, he will have to show that the collateral oral arrangement to buy

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(*m*) See Vaver, [1973] NZLJ 157.

(*n*) Regulation 2 defines "hire purchase agreement" solely in terms of a bailment.

(*o*) The decision in *Quartel's* case, supra, clearly precludes reliance on the lease alone.

amounted to what, but for the illegality, was a legally enforceable contract(*o*). In many cases, this may not be as difficult as it at first seems In *Ransfield's* case, Henry J appears to have reached such a conclusion of his own initiative. After finding as a fact that the customer entered into a contract with the dealer, that its terms *included* all the terms of the lease, and that it was further agreed that the customer would have the right of purchase, his Honour continued:

> "If there was an agreement whereby the goods were bailed to the Plaintiff (as they were) under which he 'may buy' the car, then there would be a breach of the said Regulations in that the minimum deposit was not paid. An agreement giving such a right must be proved. I have found that it was proved. . . ."

Though there may be difficulties concerning the parol evidence rule where the lease expressly negatives any agreement to buy, it would still seem open to the Court to have found a breach of reg 8 (a) on facts such as those in *Northe's* case(*p*).

(2) *Illegal Contracts Act 1970.*—The second point mentioned by the Court of Appeal in *Grey's* case was that if this more restrictive interpretation of the proviso to reg 10 is adopted, "it may in appropriate cases nevertheless be open to the Court to exercise some at least of its powers under s 7 of the Illegal Contracts Act 1970 in cases to which the special remedy does not apply." Clearly, if the proviso in reg 10 concerns only contracts caught by reg 8 (a), there is no "express provision" precluding the operation of the Illegal Contracts Act where reg 8 (b) is breached. But that would not appear to be the end of the matter. Section 7 of the Act applies only to illegal "contracts". Where the purchase arrangements are contractual, the transaction is caught by reg 8 (a). Where they are caught by reg 8 (b), it will normally be because there is merely a purchase "understanding", not amounting to a "contract" in the legal sense of the word. The Illegal Contracts Act contains no provisions relating to illegal "understandings". The argument that the lease is a contract, even though the purchase arrangements are a mere "understanding", would not appear to assist, since the lease, by itself, is not illegal. However, it may well be held that the lease is tainted with illegality.

(3) *Non Est Factum.*—If the narrower approach indicated by the Court of Appeal is adopted, and the purchase arrangements cannot be shown to be of a "contractual" nature, it may still be possible, in appropriate cases, for the customer to recover back his payments quite independently of the Regulations by a plea of non est factum. In *Aiolupotea's* case,

> "The picture presented by the evidence is one of two trusting Samoan people handicapped by lack of English and unfamiliarity with business procedures setting out to buy a vehicle and prepared to do whatever was required of them to pay off a balance after credit for a trade-in and finishing up with something entirely different, viz, a lease which would involve a total outlay of $3144 plus maintenance in respect of a vehicle having a cash price of $1700 but without eventual ownership"(*q*).

Such a situation must surely afford at least the basis for a successful plea of *non est factum* in line with the principles enunciated by the House of Lords in *Saunders v Anglia Building Society* [1971] AC 1004.

(4) *Motorcar Hiring Regulations.*—It remains to be seen what effect the Economic Stabilisation (Motorcar Hiring Regulations 1971 ("the 1971 regulations") will have on the steady flow of cases resulting from agreements entered into prior to the commencement of these regulations in June 1971. Has their control of leasing agreements reduced the incentive for car dealers and finance companies to attempt to utilise this form of agreement in lieu of a hire purchase agreement? Firstly, the 1971 regulations prohibit leases for longer than three years(*r*) and prohibit any lease in the case of a car more than five years old. Secondly, they require an advance rental of at least 15 percent of the cash price. Thirdly they prescribe the calculation of the residual value on a 20 percent per annum diminishing value basis. Their effect must undoubtedly be to reduce the attraction that a leasing agreement could previously possess, but an impecunious "purchaser" could still in many cases find himself "assisted" by a lease that did not contravene the 1971 regulations. And there is always the possibility that the 1957 regulations could revert to their earlier, more restrictive form.

The 1957 regulations and the Hire Purchase Act 1971

The relationship between the regulations and the Act has yet to be explored by the Courts. The two clearly have different aims in view,

(*p*) See Vaver, op cit at p 158.
(*q*) Per Bergin SM.
(*r*) This seems to be the intention behind the somewhat ambiguously worded reg 3 (2).

and yet there are some respects in which their requirements overlap. For example, both require the agreement to be in writing. Breach of this requirement results in the agreement being illegal and void under the Regulations, yet merely "unenforceable by the vendor" under the Act. Further, by s. 52 of the Act:

> "The fact that a contract has been entered into in contravention of any of the provisions of this Act . . . shall not—
> "(a) Make that contract illegal; or
> "(b) Except as expressly provided in this Act, make that contract or any provision of that contract unenforceable or of no effect."

Here clearly are the seeds of conflict(*s*), though it has been recognised by the Court of Appeal that "void" and "of no effect" may not necessarily have the same meaning(*t*). The solution would appear to be that although "the fact" that a contract contravenes the Act is not enough to render it illegal and of no effect, this "fact" does not stand in isolation where there is also a contravention of the Regulations. Thus, in the latter instance, s 52 will not prevent the contract from being illegal and void.

Where an agreement is void under the Regulations, does this have the effect of rendering all the provisions of the Act inoperative? Two examples will be taken to illustrate the potential difficulties. It seems clear that breach of the regulations will preclude any action by the purchaser for breach of the terms implied by s 11-14 of the Act. There can be no breach of a void contract. This fact will not normally, of course, unduly disturb the purchaser, since he will be entitled to recover back all payments by virtue of the proviso to reg 10.

Section 44 of the Act makes it an offence for a purchaser fraudulently to sell or dispose of "goods comprised in a hire purchase agreement". Does the fact that the regulations have been contravened constitute a defence? It would seem not, particularly in view of the Court of Appeal's rejection in *Grey's* case of the argument that the void agreement must be disregarded *for all purposes*. Other sections also pose potential problems(*u*).

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(*s*) See Shea, (1972) 5 NZULR 175.
(*t*) *Grey's* case, supra.
(*u*) Consider, eg, ss 26 (1) and 43.

CONTROL OF PUBLICLY OWNED PROPERTY THROUGH DISTRICT SCHEMES

When referring to publicly owned property, a division can be made between property owned by the Crown on the one hand, and property owned by other public bodies such as local councils and local authorities which have control of property under their particular empowering statutes. In the latter category there immediately come to mind the more important local authorities, namely Hospital, Harbour, Electricity, Fire and Power Boards and each of these bodies will no doubt own property for the purpose of carrying out public works. It is proposed in this article to consider first the position relating to the Crown and then the position relating to other public authorities whether local or national in scope.

Position of the Crown

It is well known that the Crown is not bound by any statute unless expressly so provided(*a*) or unless it is clear through necessary application that the Crown should be bound(*b*). The application of this principle can be seen in *Lower Hutt City v Attorney-General* [1965] NZLR 65 where the Court held that plumbers engaged on a construction of houses for the Ministry of Works were not required to obtain permits under the bylaws for their work from the local authority. Accordingly there is no control under building bylaws of property development where the Crown is the developer. Under the Town and Country Planning Act 1953, there is no general reference to the Crown being bound or not bound by the Act but in s 2A, the Crown is said to be subject to District Planning Schemes where the Minister has issued a requirement notice under s 21 (6) with respect to a development scheme under the Housing Act 1955. However, the application of s 2A is limited in the sense that large-scale State housing developments are not being

(*a*) Acts Interpretation Act 1924, s 5 (k).
(*b*) *Province of Bombay v Municipality of Bombay* [1947] AC 58.

undertaken today as a matter of policy and it appears clear that under the Housing Act the Crown could proceed with a development without issuing a requirement to the local authority in any event(*c*). If the housing development was subject to the District Planning Scheme there could also arise problems of interpretation in deciding whether all dwellings and buildings erected by the Crown were part of the development as anticipated under s 6 of the Housing Act or whether the buildings, for example, shops, were built under independent Crown powers through the Public Works Act. In the latter event a District Scheme would no longer apply.

In speaking of the Crown, there is an element of uncertainty as to who constitutes the Crown in certain areas. The Crown Proceedings Act 1950, s 2 (2) states that any reference to the Crown under that Act shall include a reference to any Government Department or officer of the Crown where the Department or officer or the Attorney-General is a party. It is therefore apparent that a Government Department such as the State Advances Corporation is to be considered the Crown but it is equally clear that a corporation such as the Broadcasting Corporation is probably not to be considered the Crown for legal purposes(*d*).

Referring to several Planning Appeal Board decisions in this area, in *Hutt Valley Electric Power Board v Porirua City* (1967) 3 NZTCPA 34, the Board accepted that the Post Office was a Crown Department and accordingly it was not competent for a District Scheme to provide in an ordinance that telephone lines should be placed underground and that the Council should be given notice before the commencement of any works. On the other hand the Board found that the Hutt Valley Electric Power Board was not the Crown Department or within the protection of the Crown and as an ordinary local authority even created under statute, it was subject to the control of the District Scheme. The effect of a District Scheme not being able to directly control the use of Crown property was endorsed by Mr Kealy SM in *Ministry of Works v Ashburton City* (1967) 3 NZTCPA 84 where he ordered the deletion from the District Scheme of a designation placed on Crown railway land relating to a reserve for a proposed car park. The Chairman said that as the Council had no legal method of ever acquiring the land against the Crown it was fruitless to place the designation on the Crown property. On the other hand, it would appear that through the obligation on Councils to provide an underlying zoning for designated property pursuant to s 33A of the Town Planning Act, land which is designated as used by the Crown may be subject to an underlying zoning which will take effect should the Crown vacate the property or should an ordinary person become an occupier through taking a lease from the Crown. This problem was considered in *Ministry of Railways v Auckland City* (1969) 3 NZTCPA 214 where Mr Luxford SM ruled that the appropriate underlying zone for a railway yards was residential even though the Government Department wanted a manufacturing zone. The effect thus of the underlying zone would be to prevent any leasing of the property by the Railways for a purpose which was not consistent either with the designated purpose of railways or with the underlying zoning. With respect to use of a Government property by a private person, the private person's obligation to observe either the designated purpose or the underlying zoning would not appear to depend on whether the person was an occupier within the meaning of the Rating Act 1967. Under that statute, the immunity of the Crown from rating liability is lost when there is lease for a term of over one year and the lessee accordingly becomes liable(*e*), but under s 36 of the *Town Planning Act,* an offence can be committed by any person presumably whatever his status where he uses land in a manner not authorised by the Scheme.

It is interesting to note the conclusions of the Committee of Inquiry into Housing in New Zealand with respect to the obligations of the Crown under District Schemes. The evidence given by the Housing Division explained that the Crown was reluctant to be bound by the provisions of District Schemes for one obvious reason in that it objected to paying cash contributions often based on 20 percent of the purchase price of sections in subdivisions. The Commission considered that the Crown as the fountain of justice should not claim exemption from the rules applying to the ordinary citizen and it should set an example by accepting the obligations and fully participating in District Planning Schemes. For those reasons the Commission recommended that subject to the adequacy of appeal rights the Crown should be totally bound by local authority subdivisional

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(*c*) Housing Act 1955, ss 5, 6, 7, 8, 9.
(*d*) Cf State Advances Corporation Act 1965, ss 11, 22; Broadcasting Corporation Act 1961, ss 19, 53.
(*e*) Rating Act 1967, s 4.

requirements and planning schemes(*f*). It would follow also that the Crown should be bound by the obligations under bylaws in respect of building and works permits.

There is one situation, however, where the Crown will at least come under the jurisdiction of the Appeal Board and that is where it exercises the requirement notice procedure in s 21 of the Act either by making requirements upon the preparation or review of a scheme or upon serving notice under the provisions of subs. (8) after the scheme becomes operative. This subsection was amended in 1972 to require the local authority to then advertise a change in its scheme to incorporate the requirement, and under s 26A (2) the Council itself on hearing initial objections is prohibited from altering or deleting the requirement so made, at least without the consent of the Minister or local authority as the case may be. However, where the objector, which could be the local Council itself, appeals against the requirement, it is now clear under s 26 (1B) that the Board has jurisdiction to vary or delete the planning requirement of the Minister. Examples of such action can be found in *Waimairi County v Ministry of Works* (1969) 3 NZTCPA 184 in which the Board considered a requirement relating to a designation of land for a school to be contrary to good planning principles as it would breach the "urban fence" even though the cost of equivalent land in the urban area would be considerable. One wonders, however, whether after receiving the decision of the Board, the Ministry of Works on behalf of the Education Department could simply ignore the decision of the Board and proceed to develop the property as a school under its paramount powers in the Public Works Act 1928. The only restriction would appear to be that of public outcry or political pressure. Similarly in *Kapene v Ministry of Works* (1970) NZTCPA 292 the Board deleted a proposed main road line on the basis that the route chosen by the Department was uncertain and had not been fully investigated and might not be in fact ever carried out. Again one has to balance up the desirability of notifying an owner of a possible public work and giving notice more importantly to unwitting purchasers of the property, with the converse problem of not blighting property too far in advance when there exists a possibility that the public work might not be carried out.

Where the Crown does choose to use the requirement procedure and to designate an area for a future public work, then it will be subject to the compensation provisions of s 47 and s 47A of the Act, and in itself the obligation to take property at the order of the Board before the Crown is ready to proceed might be a factor in determining whether the Crown uses the procedure. The present approach recommended by the writer is that the Crown should use the designation procedure with respect to motorway development and should purchase properties where the owners suffer hardship as a result of the proposals.

Local Authorities

In dealing with local authorities, which in this country number approximately 641 (refer 1973 Government Statistics), a distinction can be made between the City, Borough and County Councils which are planning authorities under the Town and Country Planning Act 1953 and the other local authorities defined as such under s 2.

With respect to the planning authorities, it is now clear from the decision in *Pahiatua Borough v Sinclair* [1964] NZLR 499 that a planning authority is bound by the provisions of its own scheme and is in no different position from any other land owner or occupier except for certain procedural differences where changes or variations in schemes are to be made. Section 33 (2) also places the planning authority not only under an obligation to observe its own scheme but also under an obligation to enforce the observation of the scheme by other persons including other local authorities. This obligation was driven home in the decision of the Supreme Court in *New Zealand Institute of Agricultural Science v Paparua County* [1969] NZLR 653 where the general obligations to observe not only the provisions of the scheme but also the powers under the statute (in particular those under s 38) were emphasised. Section 38 relates to possible detrimental works being constructed prior to a scheme becoming operative, but the principle that the Council must be aware of and must act in the public interest with respect to its statutory powers has greater application in areas where there are operative schemes with reference to s 34A which enables the Council to control to a degree objectionable elements in the district. The scope of the powers available under this section have been discussed in a number of cases including *Firth Industries Ltd v Franklin County Council* (1971) 4 NZTCPA 199 and it is clear that a Council has considerable scope in mapping out improve-

(*f*) Commission of Inquiry (Cooke), Housing in New Zealand (1971), p 179.

ments to counter objectionable elements short of requiring a person to close down his total business. It appears to be assumed that to close a use completely would be going beyond what is reasonable as indicated in *Henderson v Waipa County* (1967] NZLR 685. Accordingly the power given to a planning authority under this section may be of considerable importance where the objectionable element is due to the activities of another statutory local authority such as a Harbour Board where the activity is within the jurisdiction of the authority. Again, however, the Crown itself is exempt from the provisions of s 34A and is given certain minor exemptions from the pollution control which can be exercised under the Clean Air Act 1972.

Ordinance Control

As indicated in the *Hutt Valley Electric Power Board case* (1967) 3 NZTCPA 34, the Appeal Board found that the Power Board was not part of the Crown and accordingly could be subject under the local ordinances to provisions requiring power lines to be reticulated underground in new subdivisions and for certain notice to be given to the Council prior to works being carried out. The actual form of ordinance in that case was modified in *Wairapa Electric Power Board v Featherston Borough* (1971) 4 NZTCPA 183 to provide for an appeal right where the provision was in effect imposed upon subdivision, to the Board pursuant to s 351H of the Municipal Corporations Act 1954. More interesting is the 1971 case, *Timaru City Council v South Canterbury Electric Power Board* (1971) 4 NZTCPA 213 where the Power Board attempted to place itself in a special position with relation to obligations under the ordinances. The Power Board considered that its works should be given predominant use status in all areas and should be exempt from bulk and location requirements and should not be subject to any other restrictions including obligations to place wires underground. It is pleasing to note that the Appeal Board considered that it would be contrary to the public interest to give special preference to Power Board works and the provisions were accordingly upheld. This indicates that the consideration of the public amenities and the public interest is now to the forefront of planning rather than the grass roots attitude that services should be provided with complete disregard to the environmental consequences. The Appeal Board considered the Power Authority had sufficient scope under its privileges in s 21 (9) of the Town Planning Act. This latter section provides that where the local authority is planning to construct a public work which also amounts to a public utility, then the public utility is deemed a predominant use in every zone in the district subject only to appeal by the Council with respect to the siting of the work. The ultimate effect of this privilege was demonstrated in the Supreme Court decision in *Hamilton City v Waipa County* [1969] NZLR 867 where the Court found that a sewerage works was a public utility and the City Council had power under the Municipal Corporations Act 1954 to take land outside its own district for this purpose, and accordingly it could virtually place the public works anywhere in the Waipa County area subject only to appeal regarding site.

Location of Public Works

The powers given under s 21 (9) and the powers of making a requirement for the purpose of designating property for public works to be carried out by or through local authorities have been considered by the Appeal Boards in a number of more recent cases. The problem which has arisen has been one of the degree to which the Appeal Board should investigate the siting and need for the public work with a view to its acceptance or rejection or resiting. The modern approach has ben set by Mr Turner SM in *Donald Reid and Co v Dunedin City* (1971) 4 NZTCPA 75, decided in 1971, where he held on behalf of the No. 1 Board that the only issue to be determined was whether there was prima facie justification for the work, and if so, whether the designation was reasonably required to give notice of the work to the public and should therefore be imposed to limit other private development pending the execution of the work. The particular case related to the siting of an overhead railway bridge and the Board took the view that all public works of this nature involved a compromise between public policy, cost, and planning and that the matter was best determined by the body having financial responsibility, at least where the work was of a structural kind. The approach was endorsed by the same Board in *McMillan v Dunedin City* (1971) NZTCPA 81 with respect to proposals to widen a road and to take a front line of property for the purpose, there being a prima facie justification for the works. This approach was followed by the same board in *Kearney's Properties Ltd v Wellington City Council* (1972) 4 NZTCPA 194 relating to the prima facie need for a service lane, and although the approach was accepted another Board under Mr Carson SM in *Chapman House Ltd v Upper*

Hutt City (1972) 4 NZTCPA 199, the latter Board found on evidence that the designation of land for a service lane was not warranted. The cautious approach in *Kearney's Properties Ltd* can be compared with the more active approach in *Kearney's Properties Ltd* can be compared with the more active approach of Mr Luxford SM in *John Duthie & Co v Wellington City* (1970) 3 NZTCPA 297, where he had little hesitation in deleting proposed service lanes as not being sound on town planning principles.

The shortcoming of the Boards accepting generally that a local authority can best determine the site of its own developments is seen in *Bay View Estate Ltd v Wellington Fire Board* (1971) 4 NZTCPA 185 where a proposed designation of an area in a new subdivision for a fire station and adjacent dwellings was challenged. The Board considered that the only issue was whether the proposed site was a suitable site for the designated purpose and virtually refused to consider the detrimental effect of the fire station on the adjoining residential development. The Board did however delete the designation as relating to the attached fire service houses and accordingly left the matter in the unsatisfactory situation where there could be a fire station but no one living in the vicinity to staff the building or at least to be on close call after hours. In the writer's view the Board failed in this case to take up the obvious planning responsibility which it has and it failed to take a positive role in deciding whether or not the Fire Board was justified in choosing the particular site as against a number of other sites which could have been used had the Fire Board adequately investigated the matter. However, in the most recent decision, *Thames Club Inc v Thames Borough* (1973) 4 NZTCPA 456, the Board under Mr Turner SM appears to have taken a more active approach in stating with reference to a proposed public library site that it would not permit the work to go ahead where there were a large number of other sites and on town planning principles the proposed site had not been sufficiently investigated. It is the writer's view that the Appeal Board should take a lead in regulating the siting of public utilities and should not assume that the local authority has any expertise in the matter, as in the majority of cases the local authority will be guided solely by financial and practical considerations and will not be particularly concerned with any town planning consequences.

Regulation of Public Reserves

With respect to public reserves, the adequacy of reserves in any area is largely a matter for the local Council although under the Counties Amendment Act 1961 there are more stringent controls on the amount of land to be set aside for reserve purposes and the Housing Commission in its Report indicated a minimum ratio of 10 acres per 1000 population density as a guide (supra, p 167). In the 1972 case, *Mercantile Group Ltd v Manukau City Council* (1972) 4 NZTCPA 166 the Appeal Board affirmed the general rule that 10 percent in area should be set aside in each subdivision for reserve purposes and that Councils should in future be careful to observe their statutory duties in this respect rather than simply taking a monetary contribution instead.

However, where the adequacy of reserve space has arisen under an objection to a district scheme by a member of the public for the purpose of requiring greater provision by the local planning authority, the Appeal Board has again taken a cautious approach. In *Lewis v Mt Roskill Borough* (1972) 4 NZTCPA 247 the Board ruled that it would not force a Council to designate or zone a greater area of reserve space than it was willing to accept or purchase in the future out of its own funds unless some guaranteed financial undertaking could be given by the objector or some other person. Accordingly this decision indicated that a Council which failed to provide adequate reserve space would not be obliged to remedy the situation and again it can be said that the Board should have taken a more active role despite the political and economic consequences. However, the problem of adequate reserve space was tackled in a positive way later in *Whangaparoa Horticultural Society v Waitemata County* (1972) 4 NZTCPA 329 where the issue was whether a sufficient foreshore reserve was proposed along Stanmore Bay with reference to likely subdivision. Here the Board, on the admission of the County Planning officer, was prepared to hold that a greater area should be designated for reserve purposes but even so it acknowledged that when the time came to purchase the land the Council would be free at this stage to change the scheme if it did not desire to take the designated area. One can only repeat again that the Appeal Board as the expert in the field should take a leading role in requiring local planning authorities to set aside sufficient space for future public needs.

Preservation of Historic Structures and Buildings of Interest

The Town Planning Act states that the preservation of objects and places of historical or scientific interest or natural beauty should be dealt with in a district scheme and the model ordinance provides in a tentative manner for the listing of such structures or works or places(*g*). However the model provisions are wholly inadequate when it comes to the question of deciding how a private owner should be compensated and whether the public should have some guaranteed access to the preserved works, especially if they are to be maintained on ratepayer money. The Appeal Board in *Regent Theatre v Dunedin City* (1971) 4 NZTCPA 101 in 1971 indicated sympathy for the designation of such structures. In the particular case it was dealing with the interior of a cinema and the Board was prepared to uphold the limitation on the basis that the scheme provided for public acquisition if necessary or partial financial compensation when the aims of the owners and the community conflicted. It was assumed therefore that the Council would acquire the structure pursuant to its powers under the Act or it would subsidise the owner to maintain the centre and no doubt impose certain conditions as well. More recently in *Arundale Centre Inc v Waitemata County* (1972) 4 NZTCPA 344 the Board elaborated on the provisions desirable in schemes with respect to an historic building known as Orewa House. Here the Board required the Council to include in its scheme a provision for public notice to be given of any proposal to delete the designation of the structure and for submissions to be invited from persons having a special interest in the property. This provision indicates a concern to inform the Preservation Societies of the existence of such buildings and to give these groups in particular the opportunity of negotiating with Councils for the preservation of the structures. Accordingly, subject only to financial limitations, there would appear to be some scope for control by local authorities of these structures and trees to prevent destruction before the authority can consider acquisition of the property for public use.

Conclusions

In this article an endeavour has been made to map out the position of the Crown with respect to District Schemes and to indicate the degree of control possible over Crown property. In contrast, the Town Planning Act requires planning authorities to observe the provisions of the district schemes and also requires planning authorities to ensure that other public authorities in the area observe the provisions of the schemes. With respect to the siting of public works through the designation procedure, it is considered that the approach of the Appeal Board has been unduly cautious and this observation is also made with respect to requiring planning authorities to take up areas for public reserves. On the other hand the Appeal Board has indicated a ready approach to support the preservation of historic structures notwithstanding the lack of guidance in the Town and Country Planning Act 1953. Overall it appears that there is probably sufficient control available of publicly owned land under the Planning Act in New Zealand, at least to an extent which appears to be acceptable to the authorities and the community in general.

K A PALMER

(*g*) Section 20 (1), Second Schedule, cl 2; 1960 Regulations, 4th Schedule, model ordinance vii, cl 1.

AUTOMATISM AND INSANITY

If a person performs apparently criminal acts while in a state of automatism, so that he is unable to appreciate the nature and quality of his conduct, then if the automatism resulted from a disease of the mind the appropriate verdict is a qualified acquittal on the ground of insanity, but if there is no such disease of the mind the appropriate verdict is an unqualified acquittal (*Bratty v Attorney-General for Northern Ireland* [1963] AC 386; *R v Cottle* [1958] NZLR 999).

The principal theoretical difficulty with this distinction lies in the obscurity surrounding the concept of "disease of the mind", a matter which was alluded to in an earlier note in the JOURNAL at [1973] NZLJ 81. The English Court of Appeal had occasion to further explore this somewhat esoteric problem in *R v Quick* [1973] 3 All ER 347, where Lawton LJ found that the Court had been led into a "quagmire of law seldom entered nowadays save by those in desperate need for some kind of a defence". The victim in this case was a paraplegic spastic patient in a mental hospital who had suffered severe injuries which had been inflicted by the defendant, a nurse at the hospital. The defen-

dant was charged with assault occasioning actual bodily harm, but he claimed he could not remember the incident. No doubt such a claim would not by itself require or justify leaving the issue of automatism to the jury (cf *Hill v Baxter* [1958] 1 All ER 193; *Bratty,* supra; *Cottle,* supra), but there was other evidence which the Crown accepted was enough to genuinely raise the issue. The defendant was a diabetic and a doctor testified that on a number of occasions he had been admitted to hospital either unconscious or semi-conscious due to hypoglycaemia (a condition resulting from the presence of more insulin in the bloodstream than the amount of sugar there can cope with). In this state it was possible for a person to perform violent actions "without being able to control himself or without knowing at the time what he was doing or having any recollection afterwards of what he had done" ([1973] 3 All ER at 350, per Lawton LJ). On previous occasions the defendant had behaved violently when his blood sugar had got too low and the doctor thought that on the day in question the defendant's own conduct (which included taking insulin as prescribed, eating very little, and drinking "whisky and a quarter bottle of rum") might have caused a severe fall in blood sugar. The trial Judge ruled that if the jury accepted this evidence the verdict should be "not guilty by reason of insanity", but the defendant had no desire to rely on such a defence so he thereupon changed his plea to one of guilty. The Court of Appeal, however, concluded that the evidence did not disclose any disease of the mind, with the result that the trial Judge's ruling had been wrong and, the proviso being inapplicable, the defendant's conviction was therefore quashed and an acquittal entered (cf *R v Clarke* [1972] 1 All ER 219). It can hardly be doubted that in New Zealand the most that an appellant could hope for in such a case would be a retrial.

The Court of Appeal accepted the proposition of Devlin J in *R v Kemp* [1957] 1 QB 399, 407 that a mental disorder may be a disease of the mind whether it is "curable or incurable . . . temporary or permanent", and it also accepted that it may be caused by some physical disorder (such as arteriosclerosis) which does not cause any deterioration of the brain cells. On the other hand Devlin J had also used language which seemed to suggest that how any particular "mental derangement" was caused is "of no importance to the law". The Court thought this needed qualification. Similarly, the Court was not prepared to accept as entirely accurate the well-known dictum of Lord Denning that "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind" (*Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 412). These propositions, the Court concluded, must be qualified along the lines suggested by the New Zealand Court of Appeal in *Cottle* [1958] NZLR 999, and by Sholl J in *Carter* [1959] VR 105, where it had been suggested that a temporary malfunctioning of the mind caused by some "outside agency", such as a blow, hypnotism, alcohol or a narcotic was not a disease of the mind. In summarising its conclusions the Court said:

> ". . . the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease" ([1973] 3 All ER 347, 356, per Lawton LJ).

Thus, it is of primary importance to ask whether a malfunctioning can "fairly" (or in "common sense") be said to be caused by a "disease"—a conclusion which, incidentally, is consistent with the ultimate conclusion of Devlin J in *Kemp* [1956] 3 All ER 249, 254, when his Lordship said that what was essential was that there had been "a defect of reason which had been caused by a disease affecting the mind", and that "hardening of the arteries is a disease which is . . . capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning and understanding, and is thus a disease of the mind within the meaning of the [M'Naghten Rules]". Apart from cases involving "outside agencies", the need for a condition which can be fairly described as a "disease" will apparently explain why the Courts generally assume that a sleepwalker would not have to rely on the defence of insanity to excuse apparently criminal acts performed in a state of somnambulism (see eg, North J in *Cottle* [1958] NZLR 999, 1026).

The somewhat restricted concept of a "disease of the mind" which is adopted in *Quick* is consistent with earlier authority, but the Court was also much influenced by the feeling that anyone other than a lawyer would regard it as absurd to hold a person to have been insane merely because, for example, he had "acted" while anaesthetised, or while concussed

(cf *R v Clarke* [1972] 1 All ER 219, 221). It is doubtless desirable that the legal concept of insanity should be in reasonable conformity with the views of the doctors, but the result in *Quick* may be thought to suggest that the law in this area is rather weak: it may be doubted whether it is satisfactory that the law is apparently unable to impose any restraint on a man who is shown to be prone to recurring bouts of uncontrolled violence. Thus, in some jurisdictions the complete defence of automatism has been removed in virtually all cases of "unconscious action", so that the Executive can supervise the conduct of the "offender" even though his condition does not amount to insanity (see, e.g, Feltoe, (1971) 11 Rhodesian Law Journal, 19; cf the judgment in *HM Advocat v Fraser* (1878) 4 Couper 70, discussed by Nigel Walker, *Crime and Insanity in England,* 169-170). It is understandable that the Courts should be skeptical of pleas of automatism, and that they should be concerned that the defence might enable dangerous people to remain at large, and thus it is not surprising that in *Quick* the Court sought to spell out certain limits to the defence. The Court expressed these limits in the following terms: "A self-induced incapacity will not excuse (see *R v Lipman* [1970] 1 QB 152) nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin" ([1973] 3 All ER at 356 per Lawton LJ). On the facts in this case the defendant may have found it difficult to avoid the effect of these limitations—his condition might have resulted from his intake of alcohol, or from not following medical instructions concerning meals, or he might have realised that a hypoglycaemic episode was imminent but failed to take remedial action which was available to him—but the Court could not be sure that the defence would in fact have been destroyed by any of these factors. Difficult questions of fact of this nature may arise in any particular case, but the above propositions in *Quick* also raise debatable questions of principle. Where an offence is so defined as to require some particular state of mind, be it intention, recklessness or whatever, it is extremely difficult to see how a person can be guilty of that offence if in fact he never had that state of mind: even though his conduct may have resulted from a "self-induced" incapacity, or one which he ought to have foreseen, an essential element of the alleged offence is absent. It is true that in the context of intoxication the Courts persist with the view that the effect of drink or drugs voluntarily consumed can only provide a defence to offences requiring a "specific intent" (*Bolton v Crawley* [1972] Crim LR 222; cf *MacPherson* [1973] Crim LR 457), but the Judges seem to be equally resolute in declining to define this concept and no explanation has been offered as to why other states of mind may apparently be demed to be incapable of being negatived by the effects of alcohol, narcotics and the like. Where an offence does not require any particular state of mind on the part of the defendant the view that a "self-induced", or negligently induced, state of automatism will not excuse does not raise such an acute problem, although even here the doctrine requires a qualification to the general rule that a person will be criminally liable only for voluntary acts or omissions; and even where the offence is one which usually requires negligence on the part of the defendant it seems that the Courts assume that it suffices that the state of automatism was foreseeable, rather than requiring that the harm actually caused was foreseeable at a time when the defendant was still responsible for his actions. Finally, it is clear that in the judgment of the Court in *Quick* a "self-induced" incapacity which "will not excuse" does not include an incapacity resulting from the use of a drug in accordance with medical instructions, although it is assumed it will include other cases where alcohol or a narcotic is absorbed (cf the distinction drawn by the Canadian Supreme Court in *King* (1962) 35 DR (2d) 386). In thus distinguishing cases on the basis that the defendant has or has not been following medical instructions the Court appears to be employing a rather vague concept of fault which is difficult to explain in terms of *mens rea* or negligence, the concepts which have been traditionally employed to determine the limits of criminal liability. Pursuant to this distinction it would seem that a person's liability for an unintended, unforeseen and possibly unforeseeable harm is made to depend on the motive with which he consumed the substance which subsequently induces a state of automatism.

G F ORCHARD

So the Deity decreed it—"God forbid that it should be imagined that an attorney, or a counsel, or even a Judge is bound to know all the law." Chief Justice Abbott in *Montriou v Jeffreys* (1825) 2 C & P 113.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING...": 4

Drafted by Scilicet *Engrossed by Neville Lodge*

"Are you sure you have this right, Mrs Willing? I've never heard of a petition for restitution of convivial nights."

RECOVERY OF EXTRAORDINARY LOSSES ON BREACH OF CONTRACT

Although the House of Lords in *The Heron II* [1969] 1 AC 350 could not agree upon any uniform terminology, the test of remoteness of damage in the law of contract may be stated as follows—the party in breach of contract will be liable for the loss suffered which he ought to have contemplated as not unlikely to result from his breach. One difficulty in applying this test which has not yet been finally resolved arises where a loss, although reasonably within the contemplation of the party in breach, turns out to be far greater in amount than could have been contemplated. In this situation, is recovery of full damages barred because the degree or amount of damage was beyond the bounds of reasonable contemplation?

A convenient starting point for a consideration of this question is the actual decision of the House of Lords in *The Heron II*. A ship was chartered to carry a cargo of sugar from Constanza to Basrah. At the time of contracting, the charterers intended to sell the sugar as soon as it reached Basrah. The shipowner knew that the charterers were sugar merchants and that there was a sugar market in Basrah, but did not know that they intended to sell the sugar immediately upon its arrival. The shipowner, in breach of contract, deviated from the voyage and the ship reached Basrah nine days late, during which time the market price of sugar fell. The House of Lords held that the charterers were entitled to damages for the resulting loss. The shipowner should have contemplated that, if the ship was delayed, it was not unlikely that the value of the goods on board would decline. Accordingly, the charterers recovered the difference between the price of the sugar at its destination when it should have been delivered and its price when it was in fact delivered.

It is not proposed to deal with this decision in any detail here other than to ask the question, what would have been the position if the market fluctuation had been extraordinary or exceptional? The House of Lords was not concerned with damage of a greater degree than could have been anticipated, but rather with whether the type of damage, loss of market value, was within the contemplation of the parties.

Treitel (*Law of Contract,* 3rd ed, p 804n) tentatively suggests that "perhaps quite extraordinary market fluctuations are excluded" and by analogy with the well known case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, this would seem at first sight to be the correct view. In that case, it was held that, although the defendants ought to have contemplated that the plaintiffs were liable to suffer a loss of business profits in respect of dyeing contracts as a result of their delay in delivering a boiler, they were not liable for the loss of the exceptional profits that the plaintiffs would have earned on the "highly lucrative" dyeing contracts. Accordingly, the plaintiffs only recovered a general sum in respect of dyeing contracts which could reasonably have been expected.

Treitel's suggestion is also supported by the American authorities. Corbin (*Contracts,* para 1012) summarises the position as follows:

> "What is required is . . . that the injury actually suffered must be one of a kind that the defendant had reason to foresee *and of an amount that is not beyond the bounds of reasonable prediction.*"

However, there have been two recent English cases which support the contrary view that if the market fluctuation in *The Heron II* had been exceptional, the plaintiffs would still have been entitled to full compensation. In *Vacwell Engineering Co v DBH Chemicals Ltd* [1971] 1 QB 88 and *Wroth v Tyler* [1973] 2 WLR 405 it was held that in the law of contract, as in the law of torts, it is not necessary to establish that the party in breach ought to have contemplated the precise degree or amount of damage, so long as the *type* or *kind* of damage ought to have been contemplated.

In the former case, the defendants supplied a certain chemical to the plaintiffs. They failed in breach of contract to warn the plaintiffs of the danger of explosion if the chemical came into contact with water, with the result that a violent explosion occurred causing serious damage to the plaintiffs' property. It was held by Rees J that this damage was not too remote although only a minor explosion involving minor damage was reasonably foreseeable.

In *Wroth v Tyler* the defendant in breach of contract refused to complete the sale of his bungalow to the plaintiffs. The contract price

was £6000, but the market value of the bungalow had in the meantime risen dramatically to £11,500. Prima facie the plaintiffs were entitled to recover as damages the difference of £5,500, but the defendant contended that the loss was too remote. The case was considered on the basis that, at the time the contract was made, the parties had contemplated that there would be some rise in house prices, although not one in the region of 100 percent. Counsel for the defendant argued that the plaintiffs must establish not merely a contemplation of a particular head of damage but also of the amount under that head. Since the parties contemplated a rise in house prices, but not one approaching that which in fact took place, the full amount could not be recovered. Megarry J rejected this argument and held that, in order to establish a claim for damages for breach of contract, it was only necessary to show a contemplation of circumstances which embraced the head or type of damage in question. There was no need to demonstrate a contemplation of the quantum of damages under that head or type. Accordingly, since the type of loss was foreseeable, the measure of damages was the difference between the contract price and the then market value, viz., £5,500.

In principle, these cases seem to be correct. A similar view is also taken by McGregor on *Damages* (13th ed, 1972) paras 188-189. However, the distinctions drawn are difficult to apply in practice. When will the extent of a loss render it different in kind from the contemplated loss? The difficulty is accentuated if one tries to reconcile these recent cases with the *Victoria Laundry* case. If they are right then there is a strong argument that the *Victoria Laundry* case was wrongly decided. Yet this is almost an outrageous suggestion because that case has been approved unanimously by text writers and is usually cited as the classic illustration of what losses can and cannot be recovered for breach of contract.

How does this dilemma come about? As stated earlier, it was held in the *Victoria Laundry* case that the plaintiffs could recover a general sum in respect of loss of business profits on dyeing contracts, but they could not recover for the loss of the "exceptional" profits on the "highly lucrative" dyeing contracts. It can be argued that this is wrong because the defendants could foresee that some loss of business profits from dyeing contracts could occur by failing to deliver the boiler on time and so long as the *head* or *kind* of damage is foreseeable, that is enough. It can, no doubt, also be argued that the loss of exceptional profits from the highly lucrative dyeing contracts was a different kind of loss from the loss of ordinary business profits. That seems to be how the court regarded it, although it was helped to this conclusion by the fact that the losses were separately pleaded.

It is difficult to accept this latter argument. The loss of some business profits from dyeing contracts was in the contemplation of the defendants and the fact that a loss is higher than normal should not make it a loss which is different in kind. The position was basically the same in *Vacwell Engineering Co v BDH Chemicals Ltd* and *Wroth v Tyler*. In each case the fact that the loss was much greater than contemplated did not make it different in kind.

Of course it is not suggested that in every case where the contemplated loss is a "loss of profits" the actual loss of profits ought to be recoverable in full. That would, in effect, be to remove the remoteness requirement altogether, for the damage arising from a commercial contract will almost invariably be loss of profits of one sort or another. There will be clear cases where the difference between the contemplated and actual losses of profits is such that the latter is a different kind of loss. Consider, for example, the situation which arose in *Cory v Thames Ironworks Co* (1868) LR 3 QB 181. The plaintiff coal merchants bought the hull of a large floating boom derrick from the defendants. They intended to place in the hull hydraulic cranes for the purpose of transhipping their coals direct from the colliers into the barges. This was a use entirely novel and unknown to the defendants. In fact, the defendants assumed that the plaintiffs intended to use the hull for a coal store, which was its most obvious use for coal merchants. The hull was delivered late and the plaintiffs lost profits of £4,000. Had the hull been used for its ordinary purpose, the loss would have been only £420. The case concerned whether the plaintiffs could recover the latter sum, for they conceded that they could not claim £4000.

The facts of *Cory's* case provide a good illustration of a situation where the contemplated and actual profit-making ventures were different in kind. The contemplated loss of profits from being unable to use the hull as a coal store was clearly a different head or kind of damage from the actual loss of profits from being unable to use the hull for the transhipping operation. However, it is suggested that these facts are far removed from the *Victoria*

Laundry case, where both the contemplated and actual damage was the loss of business profits from being unable to secure dyeing contracts.

If the occasion arises, the Courts will probably uphold the view that in the *Victoria Laundry* case the loss of the exceptional profits from the highly lucrative dyeing contracts was a different kind of damage from the loss of ordinary business profits from dyeing contracts. Although that appears to the writer to be an unsatisfactory conclusion, the concepts involved are flexible enough to enable it to be supported.

The problem of determining whether something is different in *kind* or merely different in *degree* only is, of course, not new to the law of contract. It arises, for example, in the law of mistake, where some of the cases are equally difficult to reconcile. Whether a mistake common to both parties is sufficient at common law to avoid a contract depends upon whether the mistake renders the subject matter of the contract different in kind or merely affects the quality or attributes of that subject matter, and none of the cases supply any formula for distinguishing between the two. It is apparent that before it can be decided whether there has been a change in the kind of the subject matter of a contract, it is necessary to decide upon the degree of particularity with which you identify the subject matter. The more general the description the less likely the mistake will be operative. A court is thus enabled to implement its value judgment as to which party ought to bear the loss without apparent difficulty.

Lord Atkin in *Bell v Lever Bros Ltd* [1932] AC 161, 224 gave the following illustration of a contract which was not void for mistake:

> "A buys a picture from B, both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty."

In other words, he regarded the mistake as relating only to an attribute. A similar view was adopted by the Court of Appeal in *Leaf v International Galleries* [1950] 2 KB 86, when these actual facts arose for decision. However, if the subject-matter of this contract was stated initially to be, not simply "a picture", but an "old master", then the mistake would clearly render the subject-matter different in kind.

The position is similar in the law of damages, although problems have not previously arisen to the same extent. Whether the extent of a loss will render that loss different in kind from that which was contemplated will sometimes depend upon the particularity with which the contemplated loss is stated. Take the facts of the *Victoria Laundry* case again. If the contemplated loss is described generally as "business profits from dyeing contracts" then the fact that the actual extent of the loss is much larger than could have been expected cannot make the loss different in kind. If, on the other hand, the contemplated loss is described more specifically as "ordinary business profits from dyeing contracts", it is easier to argue that "exceptional profits from highly lucrative dyeing contracts" is a different kind of loss.

The members of the House of Lords in *The Heron II* went to great lengths to emphasise that liability for damages in contract is narrower than tort liability; unusual damage is more likely to be recoverable in tort than in contract. Perhaps, in view of this, all that can be concluded is that the courts, when assessing damages for breach of contract are going to be more willing than when assessing damages in tort to regard differences in amount between the reasonably contemplated and actual loss as rendering the latter different in kind. This will be particularly so when the extraordinary loss results not from some outside events such as market fluctuations, but from circumstances under the control of the plaintiff or action taken by him in pursuance of the contract. In this situation, the attitude of the courts will be that the circumstances giving rise to the likelihood of extra loss must be communicated to the other party and the policy decision to limit the recovery of damages can be implemented by holding the extra loss to be different in kind.

D W McLAUCHLAN

REGULATIONS

Regulations Gazetted 5 to 18 February 1974 are as follows:

Coinage Regulations 1967, Amendment No 5 (SR 1974/16)

Economic Stabilisation (Conservation of Petroleum) Regulations 1974, Amendment No 1 (SR 1974/20)

Economic Stabilisation Regulations 1973, Amendment No 5 (SR 1974/26)

Excise Duty (Whisky) Order 1974 (SR 1974/17)

Passenger Service Vehicle Construction Regulations 1954, Amendment No 10 (SR 1974/21)

Periodic Detention Order 1974 (SR 1974/22)

Secondary School Grants Regulations 1974 (SR 1974/23)

Shipping (Load Line Convention Countries) Order 1974 (SR 1974/18)

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Work Centre (Tauranga) Notice 1974 (SR 1974/19)

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