The New Zealand
LAW JOURNAL

1 February 1977 No 2

HUMAN RIGHTS COMMISSION BILL

Early last year the Minister of Justice expressed surprise that there had been no comment from the legal profession on the proposed establishment of a Human Rights Commission. Then there was little to comment on but the name. Now however, the Human Rights Commission Bill has been introduced and it is another matter altogether.

This Bill proposes the establishment of two bodies. The first is the Human Rights Commission itself and it will consist of a Human Rights Commissioner, the Chief Ombudsman, the Race Relations Conciliator and three other Human Rights Commissioners to be appointed by the Governor-General on the recommendation of the Minister of Justice. The second is the Equal Opportunities Tribunal which will consist of a Chairman and two other persons appointed by him for the purposes of each hearing from a panel maintained by the Minister and consisting of not more than 12 persons. This panel approach to tribunal membership has much to commend it as the Chairman will provide an essential measure of continuity and direction while the wider potential membership should ensure both a freshness of opinion and New Zealand wide involvement in the work of the Tribunal.

Before turning to the specific functions of the Commission and Tribunal there is one observation which should be made if for no other reason than there have been a number of articles in this journal over the past months advocating the establishment of a permanent law reform commission. The Human Rights Commission is charged with specific law reform functions. It is directed to work towards the repeal of discriminatory laws and also to report to the Prime Minister on the desirability of legislative, administrative or other action, to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights. While being nowhere near a full scale law reform commission at least this Commission will be responsible for providing initiatives in an area where initiatives have been sadly lacking.

The other functions of the Commission could broadly be described as promotion and conciliation. Into the promotion category falls the encouraging of human rights activities and respect for human rights, inquiring into and reporting on matters relating to privacy and reporting to the Prime Minister on various matters relating to human rights. It is in the fields of unlawful discrimination and the activities of industrial, professional and trade associations that the Commission acts as a conciliator and if conciliation fails it is the body that is primarily responsible for bringing proceedings before the Equal Opportunities Tribunal or, if appropriate, the Industrial Court.

Turning first to the promotional activities of the Commission, one feature of the Bill is the prominent role of the Prime Minister. It is the Prime Minister and not the Minister of Justice to whom reports are made and the Prime Minister who is empowered to call for reports. Furthermore it is the Prime Minister who may prevent disclosure of information to the Commission by certifying that it might prejudice the security, defence, or international relations of New Zealand rather than the Attorney-General (who has this power in respect of the Ombudsmen). Some will regard this as an indication that the Prime Minister wishes to retain some measure of control over the activities of the Commission, some will regard it as demonstrating the importance and status of the Commission in the eyes of the Government and others will wait to hear what the Minister of Justice has to say about it as the Bill progresses.

Publicising its activities and reports will, one hopes, be an important facet of the Commission's operations. The Bill does anything but discourage

publicity. It empowers the Commission to make public statements in relation to any matters affecting human rights or privacy, to publish reports relating to the exercise of its functions or to any particular case, and directs it to report to the Minister of Justice annually. That report is to be laid before Parliament. There exists however, one potential area of confusion. Under cl 5 (1) (d) (iii) the Prime Minister may call for a report on the implications of any proposed legislation or policy of the Government which may affect human rights and under cl 58 (2) the Prime Minister may request a report on matters relating to privacy. Clause 74 permits the publication of reports made to the Prime Minister except for those two categories. Clause 69 empowers the Commission to publicise reports relating to the exercise of its functions "Whether or not the matters to be dealt with in any such report have been the subject of a report to the Minister or Prime Minister". The addition of the words "and irrespective of whether the report was made under s 5 (1) (d) (iii) or s 58 (2) of this Act" would make it certain that the Commission could comment on matters even though the Prime Minister had called for a report, although the report itself could not be publicised.

It is hard to see why reports called for by the Prime Minister should not be published except possibly that sometimes publication could disclose a legislative programme prematurely. What must be avoided, though, is any possibility that by calling for a report a Prime Minister could gag future comment by the Commission on that topic. the Commission must preserve a position from which it may comment on the Government activities as they affect human rights – especially where the Government's activities are contrary to the Commission's recommendations or advice.

Privacy is the subject of a separate part of the Bill. Briefly, the Commission is charged with inquiring into and reporting to the Prime Minister on the need for or desirability of taking legislative, administrative or other action to protect the privacy of the individual. It is not empowered to investigate complaints. There are two schools of thought on privacy legislation. One considers that there is a need for general legislation protecting privacy, the other considers that it is better to deal with specific situations as they arise. For a discussion of the alternatives see "Privacy and the Law" by Professor G W Palmer [1975] NZLJ 747. The author prefers the latter view as obviously does the Minister of Justice.

Because the Commission has been given this role in relation to privacy it would perhaps be worth including an amendment to the Wanganui Computer Centre Act 1976 in the First Schedule to the Bill. Under that Act those eligible for appointment as the Wanganui Computer Centre Privacy Commissioner include the Ombudsman. Logically, should not the Human Rights Commissioner also be eligible?

In addition to its advisory and promotional functions the Commission has important duties in relation to new offences involving unlawful discrimination. Discrimination on the grounds of sex, marital status, or religious or ethical belief is declared to be unlawful in respect of employment, membership of professional or trade associations, access to public places vehicles and facilities, provision of goods and services, accommodation, education and a number of other matters. There are exceptions where necessary.

Where discrimination is complained of then the Commission is charged with investigating that complaint. If it considers that the complaint is justified then it is directed to endeavour to secure a settlement or where appropriate obtain a satisfactory assurance against repetition. Failing that, civil proceedings may be initiated before the Equal Opportunities Tribunal.

These proceedings will normally be initiated and conducted by the Commission but may be brought by the aggrieved person if the Commission agrees or declines to take proceedings or considers that there has been no breach.

It was mentioned earlier that the proceedings before the Tribunal are civil proceedings and consistently with that the Tribunal must be satisfied on the balance of probabilities that there has been a breach of the discrimination provisions. Its powers, once a breach has been established, include making a declaration that the defendant has committed a breach, the making of restraining orders, ordering particular action to redress any loss, awarding damages for pecuniary loss and loss of any benefit the aggrieved person might reasonably have expected and for humiliation, loss of dignity and injured feelings (but limited to $1,000).

The determination of the Tribunal is final on any question of fact but there is provision for an appeal to the Supreme Court on questions of law. The determination of the Supreme Court is expressed to be final – a provision that will require some explaining.

The above is but a brief outline of the most far reaching legislative proprosals in the field of human rights since the creation of the office of Ombudsman. The Human Rights Commission may well prove to be the first step towards a full-time law reform commission and in the field of legislation and administration should do much to ensure that the individual person is not forgotten.

FAMILY LAW

MATRIMONIAL PROPERTY AND HALDANE'S CASE

By JB ROBERTSON, *a Dunedin Practitioner*

The Privy Council decision delivered on 11 October 1976 in *Haldane v Haldane (a)* will undoubtedly be the source of much learned discourse and comment. Before the close scrutiny and analysis begins and the possibility that we "might lose sight of the wood for the trees" *(b)* it is important to note what the decision establishes, and indicate some of the issues which still remain unresolved.

With single determination, in the interpretation of what they described as a statute that "is extraordinarily difficult to construe" (p 4) their Lordships returned to the provisions of s 5 (j) of the Acts Interpretation Act 1924. They sought to ascertain the background against which the Act was passed and the contemporary influences and currents which were then prevailing. First they noted the traditional common law position relating to married women which denied "the concept of marriage as a partnership of free equals in which the partners performed complementary functions" (p 5) and saw the injustices arising from this position "as a mischief which called for a remedy" (p 6).

Secondly; the Court noted that in 1963 the idea that the Court had an unfettered discretion to make such property adjustments between spouses as might be just, was enjoying its highest expectations. This concept was being most effectively advanced by Denning LJ *(c)* and although subsequently overruled in the House of Lords *(d)* it was a potent factor at the time that the New Zealand legislation was enacted.

Thirdly; their Lordships noted the provisions of the Family Protection Act 1908 and the powers which had been given to provide for the women whose deceased husband had failed to make reasonable testamentary provision, as a further factor indicative of Parliament's intention.

Finally, their Lordships noted the patent inequality on its face of the Court of Appeal decision in the instant case where after 29 years of marriage and having borne 5 children in 7 years a wife was awarded $5,000 and the husband left with $113,500. This recognition of "resultant disparity" (p 6) is a refreshing approach and one which it is hoped will commend itself in other situations where a technical and legalistic approach clearly produces inequitable results.

The decision of Tompkins J in *Keswick v Keswick* [1968] NZLR 6 was seen by the Judicial Committee as a case of prime importance because it appeared to them that the 1968 amendment to the Matrimonial Property Act had been made in consequence of that decision. From that perspective, in determining the meaning of the Act, their Lordships found that "the legislature intended that the usual domestic contributions of an ordinary housewife, and not only the exceptional contributions of a thrifty and frugal one, were for consideration" (p 8). Their Lordships found that Parliament had intended that consideration should be given to the *indirect* effect of a wife's domestic contribution to the augmentation or preservation of the husband's assets, together with any direct contribution.

Having noted the summary of the law by McCarthy P in the Court of Appeal in *Haldane's* case [1975] 1 NZLR 672, as he distilled it from the majority decision in *E v E* (North P, Turner J), the Privy Council dismissed the notion that "any limitations in the Court's power to do justice under the Matrimonial Property Act . . . do not necessarily apply if resort is also had to the Matrimonial Proceedings Act" *(e)*. Similarly, and it is respectfully submitted correctly, they found there is no easy avenue of escape by recourse to the Proceedings Act. The legislature is presumed to intend justice. The Property Act must stand on its own feet in this regard; it cannot rely on the Proceedings Act as a crutch" (p 10). This clear separation of the Acts does nonetheless throw into stark relief the need for legislative attention to the discrepancies between them and the urgent need for an overall code dealing with all property questions without the present unhelpful dichotomy of approach.

It is now clear that contributions are the jurisdictional basis upon which an order may be made and that without evidence of some contribution the Court cannot consider the claim. Once this is established however, the Court *shall*

(a) [1976] 2 NZLR 715.
(b) Per Wild CJ *E v E* [1971] NZLR 859, 865.
(c) *Hine v Hine* [1962] 1 WLR 1124.
(d) *Pettitt v Pettitt* [1970] AC 777.
(e) Per Richmond J *Gleeson v Gleeson* (6 August 1975).

have regard to the contribution in respect of the matrimonial home and *may* have regard to it in any other situation. It is also clear that the necessary contribution need only be "that of an ordinary housewife in her domestic sphere", even although this is only "an indirect contribution to its retention as an asset within the family".

The contributions *in* the matrimonial home may therefore be a contribution *to* the matrimonial home, and their Lordships held, to any other asset, because that contribution relieves the husband from performing domestic duties personally or from paying for them to be performed. This sort of contribution can arise even although the asset is initially a gift or a bequest to the other spouse because of the enhancing or preservation of that asset arising from the domestic contribution. Their Lordships found no difficulty with the requirement of s 6 that regard to respective contributions is mandatory in respect of a matrimonial home yet only discretionary in respect of other matrimonial property. The writer would respectfully submit that as "contribution in some form is a prerequisite for an order", it would be wise if the matter were discretionary in all cases. This is particularly so as the Matrimonial Property Act does not contain any definition of the term "matrimonial home", and if the Matrimonial Proceedings Act is not to be called in aid to provide a definition *(f)* the present split would appear unsatisfactory.

The second central factor would appear to be the rejection of the asset by asset approach expounded by the Court of Appeal in *E v E* subject of course only to the provisions of s 6 (2) *(g)* relating to common intention. Although the concept of global orders as propounded by the learned Chief Justice in the minority decision of the Court of Appeal in *E v E* is now the law, the jurisdictional requirement of contribution to an asset indicates that there must be an asset by asset determination to establish what can be included within the totality of assets in respect of which a global order can be made. There is therefore a change in emphasis and the removal of the need for establishing an award in respect of each piece of property. This however does not remove the need for a proper assessment of what part of the total assets is susceptable to consideration and in respect of which a global order may be made.

The brief comment on the question of wrongful conduct is most welcome, and will it is hoped ensure the elimination of lengthy affidavits "raking up . . . minutiae of ancient domestic grievance" (p 12) except where misconduct such as "sluttishness or extravagance on the part of the wife or reckless gambling by a husband" is of a "gross and palpable" type. This is a clear indication to the profession that whatever the desires of their clients to sling mud, the lawyer's duty as an officer of the Court precludes him from cluttering the Court records with unedifying and irrelevant trivia.

Having thus considered the background and intent of the legislation the Judicial Committee restored the decision at first instance of the learned Chief Justice where the wife was in effect granted $19,000 out of the husband's total assets of $118,500. This was a marriage of 29 years of which there were five children, and it is interesting to note that the Privy Council said "His final order seems to their Lordships a just one and in any case there was no appeal against it by the wife". One is left wondering whether a different decision may have been reached had there been a cross appeal by the wife from the original order, for viewing the totality of the situation it is difficult to perceive this result as adopting a "benevolent approach" *(h)*.

The decision however clearly indicates that the general domestic services and household management of a wife during the time that the marriage subsisted and the assets are developed are contributions such as give the Court jurisdiction to make such order as is just. Consistent with all the reported New Zealand decisions on the matter the Privy Council rejected any doctrine of "a community of surplus".

The real effect of the judgment will however await further decisions in New Zealand. If there is now an acceptance by the profession and the judiciary, of the general purport and intention of the Act, then it is probable that the dramatic surgery of the Matrimonial Proceedings Bill 1975 may not be necessary to ensure that justice is done in this area. If however, a reactionary approach and resort to a sterile and legalistic interpretation of the decision undermines its clear thrust, then Parliament must inevitably intervene to ensure that its intentions are in fact implemented. One of the prime areas for attack is that "the onus of proof lies on a claimant" (p 2). This is not unreasonable providing artificial barriers are not created which inhibit the making of orders which are just in all the circumstances. The present decision permits the flexibility which is essential to ensure that justice is done. Even if many within

(f) Matrimonial home defined in s 55, Matrimonial Proceedings Act 1963 for the purposes of that Act.

(g) "the Judge or Magistrates shall not exercise the powers conferred . . . so as to defeat any common intention which he is satisfied was expressed by the husband and the wife". This provision has received a narrow interpretation by the Courts. *Mason v Mason* [1976] 1 NZLR 385; *Jones v Jones* [1975] 2 NZLR 346.

(h) Per McCarthy P, *Haldane v Haldane* supra.

the ranks of the legal profession "are disposed to think that the moder view that marriage is a partnership can be pushed too far" *(i)* it would appear that this notion is at the heart of our matrimonial property legislation and should therefore be recognised and implemented. For too long the economic value of a wife and mother has been underestimated and those concerned with a fair deal for the woman in the family scene can only welcome this decision of the Privy Council.

One postscript that is a cause for some concern is the last sentence of the decision, "the husband must pay the costs of the appeal to the Court of Appeal and of this appeal" Although many may feel as Mr Justice Woodhouse did, that Mr Haldane "might have been expected to regard the outcome of this litigation [the decision of the learned Chief Justice] as especially fortunate from his point of "view" ([1975] 1 NZLR 672, 683), the fact remains that a final determination as to the meaning of the Matrimonial Property Act was long overdue and "the Attorney-General certified for legal aid purposes that a question of law of exceptional public importance was involved" (p 3). In the light of this, it appears as the wife was legally aided, the very substantial costs incurred by her might well have been met from the public purse and not added to what will inevitably be not inconsiderable costs incurred by the husband himself. If we are to maintain the right of appeal to the Privy Council it is important to ensure that this does not create unreasonable economic demands particularly on a party who is an unwilling participant in that forum.

(i) Per North P in *E v E* supra at 883.

TAXATION

INTEREST FREE LOANS: GIFTS?

By DOUG WILSON, *a Wellington practitioner.*

The question whether an interest-free loan was a gift, and if so to what extent and in what circumstances, was recently considered by the Court of Appeal. The decision in *Rossiter v Commissioner of Inland Revenue* 2 TRNZ 1 was delivered on 27 October 1976. The Court comprised Richmond P (who delivered a short concurring judgment), Cooke and Woodhouse JJ (who set out their reasons at length).

This note is intended to give an outline of the facts and reasoning, and a brief indication of some of the problems which the decision raises.

The Facts

Mr Rossiter ("the objector") sold his farm to his son. Part of the purchase price was raised by first mortgage from an independent source. The balance was secured by a second mortgage of $41,500 to the objector dated 31 July 1972. The case was argued on the basis that the $41,500 represented a loan from the objector to his son.

The terms of the second mortgage were:

(a) That $10,000 was to bear interest at 5 percent and was to be repaid on 30 June 1982

(b) The balance of $31,500 was non-interest bearing and was repayable as follows: Payments of $500 were to be made half-yearly for 10 years (until 30 June 1982) when the balance was to be repaid. objector's son had the right to make earlier repayments in multiples of $1,000 on the $31,500;

In addition the objector sold his live and dead stock to his son as at 30 June 1972 for $16,360.10 payable without interest on or before 30 June 1977. It was admitted by the objector that the present value of the stock exceeded the stated sum, and he duly filed a gift duty statement regarding the inadequacy of consideration – some $4,990.60.

The Commissioner formed the opinion that there was an inadequacy of consideration disclosed in each transaction and issued an assessment accordingly.

The assessment

(a) The second mortgage – The Commissioner ignored the $10,000 on which interest was payable. The balance was discounted to present value.

(b) The stock – The principal sum was discounted to present value.

(c) The amended assessment put the total value of the gifts at $19,111.29.

(d) In discounting to present value the Commissioner used the rate of 5 percent which was used as to part of the moneys in the second mortgage, and which is used in the present value annuity tables in the second schedule to the Estate and Gift Duty Act 1968, ("the Act"). Cooke J remarked that the Commissioner was not obliged to adopt this rate, and pointed out that the

objector could hardly consider it unreasonable.

The Commissioner contended that the transactions were effected by the objector for an inadequate consideration and that to the extent of the inadequacy the objector had made dutiable gifts within the meaning of the Act. The objector objected. On the disallowance of the objection he requested the Commissioner to state a case. The case was removed to the Court of Appeal pursuant to s 93 of the Act.

The decision

Both Cooke and Woodhouse JJ clearly accepted that what was involved was a two-part enquiry. First, was there a disposition within s 2 (2) of the Act? The Commissioner relied on the general opening words of the definition not on any of the paras (a) to (f). Both Judges were of opinion that the transactions involving the loan and the sale of the stock were dispositions.

Woodhouse J would have found a disposition under the general words even if the farm transaction were regarded as "a simple transfer or alienation of the land for a stipulated money consideration which permitted payment on terms . . ." rather than (as it had been argued) "the transfer of the land on the one hand with an accompanying loan of money on the other."

Second, having found a disposition, the question whether there is a gift within s 2 (2) of the Act is as to the adequacy of consideration. On the facts both transactions fell to be considered on the same grounds. Cooke J reasoned that as the Commissioner was satisfied that the purchase price corresponded to the present value on the farm, "the consideration would have been fully adequate if all payable forthwith. . ." As it was not, "Manifestly a right to receive a specified sum at a future date is less valuable than a right to receive the same sum forthwith".

Woodhouse J said the question was "whether the son's right to defer payment of part of the consideration produced for him an advantage which was balanced by consideration flowing from him in favour of his father." He noted the present value was accepted, and made the same observation as Cooke J, that if all the price had been paid at once, the consideration would have been equally balanced.

He continued "but the payment was postponed and I think it is clear that then the one consideration was not balanced by the other. An immediate receipt of property, whether land or money, carries an advantage which obviously is diminished to the extent that receipt is deferred; and the consequential advantage to the other party can easily be calculated against the arranged period of delay until the transfer or payment is to be made."

For these reasons they felt that there were clearly gifts within the meaning of the Act, and the valuation of those gifts was a reasonable one. *Commissioner of Stamp Duty v Card* [1940] NZLR 637 was argued. In *Card's* case there was a loan by a father to a son of £2000 at 5 percent secured by mortgage. There was a provision that future advances should be free of interest and all advances were to be repaid in 5 years. On the day the mortgage was executed there was a further advance of £5000. There were subsequent advances. The Commissioner argued that when there was a present loan of money without interest there was a gift of the principal sum.

Myers CJ and Ostler J felt that there was no disposition but for different reasons. Disposition as then defined in s 39 of the Death Duties Act 1921 gave the now general words no primacy. If there was a disposition, Ostler J felt that the promise to repay was full consideration. Smith J felt that there was a disposition, and that the promise to repay was full consideration. Fair J felt that there was a disposition and there was a gift to the extent of the interest forgone. With respect one can argue that the decisions in *Card's* case have been poorly defended. The Commissioner apparently argued in three stages: (a) That there was a disposition; (b) That it was for inadequate consideration and thus a gift was disclosed. (c) That s 49 of the Death Duties Act 1921 applied, and accordingly that the whole value of the disposed property was to be treated as a gift. Counsel for Card conceded that if any element of a gift was disclosed that s 49 applied. It may well be that had he not added the third step the Commissioner would have succeeded. Myers CJ (see p 647) would arguably have been receptive to an argument that there was a gift to the extent of the interest forgone – and Fair J found such a gift. As a result of counsel's concession Fair J had to bring the whole sum into the "gift". Section 49 is the section now amended and enacted as s 70 of the Act. The section has had s 70 (1) added to allow the deduction of cash payable, in assessing the value of a gift thereunder. Accordingly that extension of *Card* is no longer open.

To the extent that *Card* was relevant Cooke and Woodhouse JJ preferred the dissenting views of Smith and Fair JJ. In any event they were reluctant to allow counsel to construct a binding precedent out of such unpromising material. They also approved the decision in *McGain v C of T* (1966) 116 CLR 172 where the High Court of Australia approved a decision of Taylor J at first instance ((1965) 112 CLR 523) which declined to "follow" *Card*.

Cooke J felt that there was a distinction

between "simple" and "complex" transactions. He said "For gift duty purposes I do not think these loans should be isolated from the composite transactions of which they were part-and-parcel. It makes no practical difference in the present case, but it could make a difference in a more complicated case. Suppose valuable covenants by the purchaser, such as a covenant to provide a home for the vendor. Or suppose that the total purchase price, payable partly in cash forthwith and partly by repayment of an interest-free loan, exceeds the current market value of the property sold. In such cases, I think, the whole consideration for the disposition of the property would have to be taken into account in ascertaining whether there was any element of gift."

This statement raises several problems. First, the example of a covenant to provide a home for the vendor is just such a non pecuniary "benefit" as might bring s 70 of the Act into operation. Since s 49 played a part in the decision in *Card's* case some discussion of this aspect would have been helpful. If the benefit does not bring s 70 into operation difficult questions of valuation could arise.

Second, where the purchase price payable exceeds present value and does not include a interest element it is arguable that the Commissioner could, by choosing an "appropriate" interest rate construct a gift by either vendor or purchaser. That is, to the extent that the present value exceeds, or falls short of, the total consideration when "properly" discounted.

The readiness of the Court and the objector to accept the rate here adopted should not be allowed to obscure the fact that difficulties of valuation could arise. Also, if a given rate is "appropriate" for certain types of property or risk, what is to prevent the Commissioner from turning an armslength transaction into a gift?

The cautious conveyancer, when drawing free to interest mortgages for family dealings will no doubt usually make them payable "on demand". Cooke J inferentially excepted the practice, saying "when the loan is not repayable on demand and there is no interest, the promise to repay is clearly not the fair equivalent of the loan."

If for some reason a fixed term is felt to be desirable, the decision in *Rossiter* ought not to pose too many difficulties. One suggestion is the practice considered in *Re Marshall* [1965] NZLR 851. There a provision in a mortgage specified a rate of interest, which was payable if called for in writing by a given date each year. It was held that the failure to call for interest was not a disposition of property, or a gift. It is to be noted however that that decision considered the situation after the event. The judgments in *Rossiter* suggest that it is the balancing of the rights at the time of the disposition which is important in assessing the adequacy of consideration, and this may alter the force of the *Re Marshall* arguments somewhat. By s 68 of the Act, s 23 (2) would probably apply.

As to the central issue of the case, whether a right to receive property in the future is necessarily less valuable than a present right to it, the various positions which can be adopted are arguably little more than expressions of opinion. The practical effects of inflation on money values are only too well known, as is the current difficulty (and expense) of obtaining finance.

Given those factors, it is not difficult to see how the Court of Appeal arrived at the conclusion that an inadequacy of consideration was disclosed.

Discretionary powers – If a judgment required, before it could be made, the existence of some facts, then, although the evaluation of those facts was for the minister alone, the Court must inquire whether those facts existed and had been taken into account, whether the judgment had been made on a proper self-direction as to those facts, and whether it had not been made on other facts which ought not to have been taken into account. If those requirements were not met, then the exercise of judgment, however bona fide it might be became capable of challenge.

The lesson to be learned is that the dialogue commonly accepted between Bench and Bar has dangers which no doubt make silence the counsel of perfection. It is a counsel which is hard to learn and, to speak of my own experience, is never fully learned. But it will be a sad day when the comments of a Judge, during pre-trial procedures or during the course of a trial, are taken to reflect on that integrity which has fitted him for the office which he holds. He is justified in proceeding upon the basis and in the confidence that his integrity is beyond question. That confidence may lead him into words or conduct in Court which fall short of that model of conduct we would all aspire to but which none of us attain. Then it is fair and right that his words or conduct should be disapproved. But let it be remembered that it is confidence in his own integrity which supports him, not only in his judgment but in all his words and conduct, both that which may be approved and that which may be disapproved. Let none by conjecture or base imputation undermine that confidence, however much they may criticize his judgment or the way he conducts his Court. To do so is to shake the foundations of justice. From the dissenting judgment of Gibbs J in *R v Mr Justice R S Watson, Ex p Armstrong* (1976) 9 ALR 551, 592

PRACTICE NOTE

Interest on judgment for costs

(a) Interest on judgment generally – Interest on money claimed in an action may be demandable as of right as where the contract sued on provides for interest. There are two principal statutory provisions dealing with the allowance of interest: s 87 of the Judicature Act 1908 as to the period between the arising of the cause of action and judgment and R 305, from judgment until satisfaction. Section 87 gives the Court a discretion, in any proceedings "for the recovery of any debt or damages" where interest is not payable as of right, to order to be included in the judgment interest as the prescribed rate (at present 7½ percent) for the whole or any part of the period between the arising of the cause of action and the date of judgment. An example of the manner of exercise of this discretion is *Hrstich v Hrstich* [1954] NZLR 934 where the plaintiff sued for £2000, the alleged contents of a safe deposit box opened by and retained by defendants. Barrowclough CJ observed (p 938) that it was part of plaintiff's scheme to defraud the Revenue and that the money was to be held by defendants in some secret place where it could not be expected to earn interest. Plaintiff's claim for interest from the cause of action was not allowed but interest was granted from service of the writ. In *Blackley v National Mutual* [1973] 1 NZLR 618 it was observed that the discretion conferred by the section is not a discretion conferred by the principles of equity but was a statutory discretion to be exercised with regard to the controlling principle underlying the legislation, which is that a successful plaintiff should be compensated for the loss involved in being kept out of his money by an unsuccessful defendant; the claim being against an insurer for money payable on the death of the life assured, and succeeding, interest was allowed after a month from the death. Interest on a judgment for costs would normally not fall to be considered under the section, as costs would not in ordinary circumstances be awarded until, or after judgment, is given: and if costs are awarded in an interlocutory application irrespective of final result, the amount involved is not likely to prompt a claim for interest on them if not paid.

Apart from s 87 there is R 305 declaring that the judgment may award interest to the date of giving judgment but as s 87 deals with the same matter in fuller form and is an enactment and not a mere rule, the Court is likely to prefer to consider the section, not the rule. The rule is not being repeated in the proposed draft Code.

(b) Interest on costs – But the question of interest on costs could arise under R 305 which provides that every judgment debt shall carry interest at 5 percent "from the time of judgment being given" until satisfied. If a party is awarded costs subject to taxation, when should interest commence to run; from the date of the judgment or from the date the costs are taxed and ordered to be paid?

The comment in Sim's Practice and Procedure (11th ed) 226 is that interest is payable on the costs of an action from the date of the judgment, and not from the date of the allocatur (ie when the amount of the costs is certified by the taxing registrar) and authority is quoted in support. At the date of the judgment however the amount of the taxed costs will not be ascertained and it seems unreasonable that the party liable for costs should have to pay interest before the amount on which the interest to be charged is known, and retrospectively when it is known.

In England the statutory provision corresponding to our R 305 (Judgments Act 1838, s 17) provides that every judgment debt shall carry interest . . . from the date of entering up the judgment. For present purposes this is similar to R 305 which speaks of the time judgment is given.

The point was in issue in *Keith v Keith* (The Times 3 November 1976) where the Court of Appeal held with respect to an order for costs in ancillary proceedings in the Family Division that interest ran from the registrar's order for payment after their taxation, and not from the date of the original order. The wife was granted a divorce decree which was made absolute in October 1972. She later applied for financial provision which was ordered for her in May 1974 and the husband was also ordered to pay the costs of her application. A bill of costs amounting to some £34,000 was lodged, and reduced on taxation to £16,651 and on 18 August 1975 the husband was ordered to pay the taxed costs within 28 days, which he did. The wife however sought interest on the costs from May 1974 when the award was made, but failed. Lord Denning traces the history of the legislation and remarks on the difference that arose between common law and equity, common law running interest from the time of the

judgment but equity dating it from the time when the amount payable was ascertained and fell due. There was some uncertainty following the Judicature Act 1873 and the Courts of Chancery moved to the common law position, but with the revision of the rules in 1965 the position in equity could be resumed, or adopted. A note in 1976 1 SC Practice 997 that interest ran from the date of the judgment was wrong and should be altered. "The modern rule should be that interest on costs ran from the date of the master's certificate of taxation, quantifying the amount, or such other date as might be ordered as the date on which payment was to be made". Stephenson and Orr LJJ concurred.

It is suggested that a New Zealand Court would follow this decision and apply it wherever the amount of a judgment needs later quantification; time for interest thereon not running before quantification.

Gordon Cain.

NEW ZEALAND FUGITIVE OFFENDERS AMENDMENT ACT 1976

Implications for trans-Tasman fugitive offenders

R BURNETT *a Senior Lecturer in law at Australian National University examines a lack of reciprocity on New Zealand's part in regard to extradition between New Zealand and Australia.*

In July 1976 the New Zealand Parliament rushed through the Fugitive Offenders Amendment Act to meet the situation created by judicial decisions which had the effect of making it impossible to extradite persons wanted for trial in other Commonwealth countries. The following note outlines how this situation arose and comments on the 1976 legislation in relation to Australia.

Ten years before the 1976 decision by a New Zealand Supreme Court Judge rendering the 1881 Act inoperative in New Zealand law, Commonwealth Law Ministers met in London to discuss alternatives to the 1881 Fugitive Offenders Act which had since that date, applied throughout the British Empire as the basis of extradition between Her Majesty's dominions and possessions.

Extradition is a sensitive matter since it involves one country surrendering a person within its borders to the authorities of another. Generally, it is governed by formal treaty with provisions designed to protect people who have obtained political asylum, or are likely to be prosecuted for offences which would not be regarded as crimes by the country asked to surrender the 'fugitive'. Often the treaty provides that a country shall not be obliged to surrender its own citizens to another State.

In Commonwealth countries there had traditionally been a distinction between extradition between Commonwealth countries and extradition to 'foreign' countries. There is nothing novel in the notion of preferential arrangements dealing with this subject between groups of countries *(a)*. The problem in 1966 was not that it was in any way improper to have such preferential arrangements but whether and in what form they should be continued between a group of countries which had radically changed constitutionally since 1881. The essence of the problem was that the arrangements set up under the 1881 Act were based on the notion of common allegiance to the British Crown whose executive powers in this and other areas were confined to the Governors of the dominions and possessions of Her Majesty. For this reason and because in many of Her Majesty's possessions the Governor was not only the official channel of communication between his territory and Whitehall but might also be the only person in the administration who could comprehend the complexities of the documentation involved, 'Governors' were given wide responsibilities for the administration of the Act.

The discussions in London were long overdue, for the situation had been reached where the Courts of republics like India had denied the application of the 1881 Act on the ground that India was no longer one of Her Majesty's dominions *(b)*. The Law Ministers rejected the notion of a multilateral treaty in favour of preserving the traditional commonwealth practice

(a) Shearer, *Extradition in International Law* (1967).
(b) Op cit, p 56

of enacting reciprocal preferential legislation in each country. They drew up a model scheme which it was agreed each country would implement. In those countries where the Act still applied it would continue to do so until new legislation to give effect to the scheme was brought down. The question whether or not the Act of 1881 applied in any particular country was ultimately one for the Courts of that country to determine and it appears to have been assumed that it continued to apply to Her Majesty's dominions and possessions as distinct from republics. Certainly that must have been the understanding of the New Zealand authorities because they took no steps to implement the scheme. The 1881 Act was regarded as law in New Zealand; it was assumed that the Courts and similar authorities would construe its language liberally so as to give it a sensible meaning reflecting modern conditions. Thus for "Governor" read "Governor-General" and so on.

The Magistrates' Courts in New Zealand being the Courts primarily responsible for dealing with fugitive offenders obviously accepted this view and continued to meet requests, especially from Australia and the United Kingdom for the return of wanted persons.

The Australasian relationship was a special preferential one deriving from the days before federation and continued afterwards by the British orders in Council made under part II of the 1881 Act *(c)*. These arrangements permitted a simplified system of return of wanted persons between neighbouring British dominions and possessions. The procedure is known as "backed warrants". Under it, the Magistrate in the returning jurisdiction does not require that a prima facie case be made out – he simply has to be satisfied that the documents are issued in the proper form and that there be no case of mistaken identity.

Australia was the first Commonwealth country to give effect to the 1966 scheme by enacting the Extradition (Commonwealth Countries) Act 1966. So far as New Zealand is concerned, it preserved the special arrangements. In the upshot, once the Magistrate is satisfied as to the documentation, the only substantive ground on which he can examine the case is contained in s 26. Under this provision the Magistrate before whom the wanted person is brought has the power to look at the case and to dismiss it, or to make what order he considers just, in circumstances where he is satisfied that his intervention is justified on the basis of the:

(a) trivial nature of the offence;
(b) that the accusation is not made in good faith or in the interests of justice;
(c) the passage of time since the offence is alleged to have been committed.

Both the wanted person and the "prosecution" have a right of appeal against the Magistrate's decision under this power. The appeal is by way of rehearing so that new evidence may be called to the attention of the superior Court. This provision is similar to that contained in part III of the Service and Execution of Process Act 1901-73 (Cth) which governs extradition between Australian states and territories.

If the offender fails to prevent an order being made for his extradition to New Zealand he can apply for habeas corpus to enable a further review by a Supreme Court and he has yet a further chance of evading the New Zealand authorities. If they fail to get him out of the country within a month, he can apply to the Courts which must release him unless reasonable cause can be shown for his continued detention.

Obviously, the likelihood of a Magistrate finding for the prisoner under s 26 is slight *(d)* and he has no further power to decline to endorse a New Zealand warrant if the documents are in order, for part III of the Australian Act applies to offences against the law in New Zealand without defining which of those offences are extraditable.

The other side of the coin – the surrender by New Zealand of offenders wanted by the Australian authorities, is dealt with in the Australian Act by stating that the fugitive offender from New Zealand may be delivered to the proper Australian authorities to be dealt with according to law *(e)*. The Act does not prescribe the procedures by which Australian authorities should apply for the extradition of a wanted person from New Zealand, nor does it place any limitation on the type of offence in respect of which extradition from New Zealand to Australia may be sought. It can be concluded that Australia gives and expects from New Zealand reciprocal preferential treatment in extradition.

This concession to New Zealand is in both procedure and substance a marked modification of the new procedures and substance adopted by Australia in 1966 in respect of extradition to and from other Commonwealth countries. To appreciate the differences it is necessary to look not

---

(c) SR & O 1925 No 1031 placed a group of pacific countries and territories including Australia, New Zealand, Fiji and the British Solomon Islands in one group for this purpose. This Order in Council has not been repealed by New Zealand.

(d) *Zacharia v Republic of Cyprus* [1963] AC 634 Complaint that accusation not made in good faith and in interests of justice, s 10, 1881 Act (UK) rejected by the Court but accepted by the Executive. cf Opas, "Extradition of Fugitive Offenders", (1968) 42 ALJ 87.

(e) Section 30.

only at the provisions of the Australian Extradition (Commonwealth Countries) Act 1966-73 which are designed to protect persons from prosecution on grounds of their race, religion and the like, and from prosecution for political offences by the requesting country, but also at the limited list of offences in respect of which extradition can be demanded.

Undoubtedly Part III of the Act reflects the political wish that simplified extradition arrangements with New Zealand should be continued. It is interesting to note that initially the new Australian legislation applied Part III to other Pacific countries originally included in the same preferential group selected in 1925 but this concession was terminated in 1968. Papua New Guinea was also placed in the 'other Commonwealth countries' category on attaining independence *(f)*.

It would seem that the Australian authorities must have assumed that the old 1881 procedures would be kept in force between Australia and New Zealand even though s 6 of the 1966 Act excludes the operation of the 1881 Act from Australian law. It also seems that the State police and not the Commonwealth police in Australia handle extradition; a factor which lends weight to the notion that rightly or wrongly, extradition between Australia and New Zealand is still handled by Australian authorities as if it was a matter of extradition between two Australian States. It has been left to New Zealand to decide what documentation is required to extradite a person to Australia and as already mentioned, inferior Courts in New Zealand generously interpreted the old 1881 Act to make it relate to modern conditions.

This legally dubious but convenient situation on both sides of the Tasman was disturbed by two unreported decisions delivered by single Judges of the New Zealand Supreme Court in 1975 and 1976 in habeas corpus proceedings *(g)*. Both cases concerned the same accused who were wanted in the United Kingdom to stand trial for alleged fraudulent dealings concerning the sale of New Zealand meat in Britain. Both applications were successful.

The United Kingdom had followed Australia's example and passed the Fugitive Offenders Act 1967 to give effect to the 1966 scheme but the New Zealand Judges were concerned with the operation of the 1881 Act in New Zealand law in 1975-76. The initial habeas corpus proceeding turned on interpretation of s 29 of the 1881 Act in its application to signed documentation which had been submitted to a London Magistrate and accepted by him as the basis for issuing a warrant. The documentation amounted to some 1200 pages supporting a statement of a Detective Inspector of the London Police Force Fraud Squad. Were the documents "depositions" within the meaning of s 29? The Judge held that s 29 required that the "depositions" must be taken "in like manner as a Magistrate might take the same if such person were present and accused of the offence before him" in accordance with local law and practice. He thought the word "deposition" could, depending on the circumstances, include any affidavit affirmation or statement made upon oath as above defined. Obviously then the thrust of these provisions was that there might be different ways of taking depositions in various British possessions and that these might include the taking of affidavits or statements made upon oath *(h)*. The New Zealand Judge was satisfied that in the case before him the current United Kingdom practice required that material submitted to him in support of the warrant be taken in the form of depositions. He was not satisfied that this had been the case. The Judge was careful to point out that the procedure adopted by the United Kingdom police could have been sufficient to have supported a warrant issued under the intercolonial backing of warrants system authorised by Part II of the 1881 Act because in such proceedings the Magistrate issuing the warrant has a discretion whether or not he will take depositions at all *(i)*. The substantial difference is that in a Part II proceeding, the authority "backing" or endorsing the warrant does not have to be satisfied that a prima facie case has been made out so that it is not necessary for the authority issuing the warrant to attach statements establishing a prima facie case. On the other hand, if the issuing Magistrate does decide to issue "depositions" in a Part II proceeding then it is not sufficient for the requesting country to produce documentation which is nothing more than unsworn police statements. On this basis technical difficulties experienced in dealing with the return of offenders to Britain should be less likely to arise in the case of people wanted by Australia.

The Judge discharged the prisoners with the careful caveat that he was not prepared to comment on other submissions advanced on behalf of the prisoners in view of the possibility that proceedings in the United Kingdom might be brought de novo.

The United Kingdom authorities took up this last hint and the warrants of committal were issued in New Zealand by a Magistrate on the basis of fresh documents from Britain in respect of the

(f) Commonwealth SR 1975 No 211

(g) *R v Superintendent of Mt Eden Prison Ex p Best & Ashman* 1975. *R v Superintendent of Mt Eden Prison, Ex p Ashman & Best* 1976.

(h) *Ex parte Glasson* (1918) SR NSW 230.

(i) *MacArthur v Williams* (1936) 55 CLR 324.

two accused. Writs of habeas corpus were also issued afresh and the prisoners again discharged in April 1976. Wilson J heard the second applications and in his reserved decision he began by rejecting arguments that the rearrest and recommittal of the accused in respect of the same offences was contrary to the Habeas Corpus Act 1679. He took the view that the first case did not go to the merits of the committal but was a matter of procedure *(j)*.

The principal argument which he did accept from counsel for the accused was far more far reaching in its implications, if long over-due. He traced the history of the Act of 1881 and the constitutional changes which had occurred since. He reached what might seem to the layman who knows that New Zealand is one of Her Majesty's Dominions the somewhat startling conclusion that New Zealand is not such, for the purposes of the Act, vis-a-vis another Dominion. References in the 1881 Act to "part of Her Majesty's dominions" do not catch New Zealand unless New Zealand falls within the same hat as the Queen assumes when she is operating as Queen of the United Kingdom. The queen, he pointed out, when acting in right of New Zealand is legally a different entity from the Queen in right of the United Kingdom. In summary, England, where the alleged offence was committed is one part of Her Majesty's dominions while New Zealand is not another part thereof; New Zealand is a different and separate Dominion. He reached this conclusion by reference to a decision on a statute not in pari materia *(k)*. A more apposite reference would have been to decisions of the British Court of Appeal in dealing with passport cases such as *R v Secretary of State for the Home Department, Ex p Shadea Bhurosah* [1967] 3 All ER 831, which have made the same distinction between the various parts of Her Majesty's dominions. His selection of precedent led him to base his decision on the ground that in the case of extradition to the United Kingdom the reference to "part of Her Majesty's dominions" must mean a region over which the Queen "of the United Kingdom" exercises territorial sovereignty. The legal argument turning on sovereignty is indeed one of the pivotal reasons for the 1966 scheme but the judgment is not assisted by his suggestion that evidence of New Zealand establishing her independence is provided by her involvement in the Vietnam "war" nor by the suggestion that British entry into the European Community is of legal significance in New Zealand Courts as evidence of the constitutional and political severence of the United Kingdom and New Zealand.

It is however difficult not to agree with his view that it is absurd that a penal statute in these terms should still be on the New Zealand statute books when almost without exception each section deals with situations which have no counterpart in 1976 and require considerable glosses in order to make them function.

Whatever the legal merits of the decision, it followed that the 1881 Act was inoperative in New Zealand except in respect of a Dominion and its colonial possessions which might have a separate legal structure from the parent. Certainly as between Australia and New Zealand there was no longer any reciprocity from the New Zealand side; Australia is clearly a different sovereign entity from New Zealand both under Wilson J's view and in international law even though both are also dominions.

The decision left the New Zealand authorities in a position of considerable embarrassment. There is no appeal in New Zealand against a decision in favour of the accused under the Habeas Corpus Act, and whatever Crown Law officers might have felt about the merits of the case it was difficult to test it. Until overruled, it must be followed by the Magistrates' Courts which exercise primary jurisdiction in extradition cases. The operation of extradition between Commonwealth countries depends on reciprocity and New Zealand could no longer provide it. Worse, there were at least two persons accused of serious offences in Australia whose extradition was sought by the Australian State police. It was impossible to return them since there was apparently no legal basis for doing so, and to bring their cases before a Magistrate would obviously mean that these men would be released upon the New Zealand community.

Faced with becoming a haven for Commonwealth criminals, the New Zealand Government rushed through patchwork legislation designed as a stop-gap pending substantive reform law on the subject.

So far as Australia is concerned, however, no effect has been made in the New Zealand Fugitive Offenders Amendment Act 1976 to single out Australia for any special treatment. This is not to say that the backed warrant scheme has been abolished; on the contrary, the Act of 1976 preserves the status quo in so far as a distinction is maintained between parts I and II of the 1881 Act and the old British Order in Council of 12 October 1925 is declared to be in force thus it may be hoped ensuring that the simplified scheme operates as between Australia and New Zealand. However, New Zealand falls down in relation to Australia in the new s 29A (2). Under this section

(j) *R v Governor of Brixton Prison, ex parte Stallman* [1912] 3 KB 424.

(k) *R v Crewe* [1910] 2 KB 576, 622

the return of a fugitive or a person accused shall not be permitted where the purpose of the request for return is:

(i) prosecuting or punishing him for an offence of a political character; or

(ii) prosecuting or punishing him on account of his race, religion, nationality, or political opinions; or

(iii) if the fugitive or accused person is returned he may be prejudiced at his trial, or punished, detained, or restricted in his personal liberty, by reason of his race, religion, nationality, or political opinions.

Under the Australian legislation these restrictions apply to every Commonwealth country except New Zealand. In the New Zealand legislation they were the result of pressure from the opposition party based on its study of the British Fugitive Offenders Act. A compromise was agreed upon while the Bill was being rushed through the Statutes Revision Committee. It is obvious that no thought was given to the special Australian arrangements even though officials at least are well aware that the majority of "fugitive offender" cases occur between the two countries. The political concern was that repressive regimes in Africa which had been attracting a great deal of publicity at the time, should not be able to extradite people in the circumstances spelled out in s 29A. What was not appreciated was that in any case where these issues are raised English judicial decisions indicate that the Magistrate must decide on the question. If he decides against the accused it is open to counsel to seek a writ of habeas corpus on the basis that the Magistrate has wrongly given himself jurisdiction by deciding that the crime is not, for example, of a "political character" *(l)*. It seems highly unlikely that Australia would seek to extradite a person on the grounds set out in s 29A (2). The exclusion of such a provision in relation to New Zealand in the equivalent Australian legislation is sufficient demonstration that in this field at least the so called "Anzac relationship" makes it quite inappropriate for the two countries to treat each other's political process with the degree of suspicion justifying such a caveat. Nonetheless the existence of the loophole will lead inevitably to claims under it which the Courts will be forced to consider. This consideration will in turn defeat the purpose of the preferential arrangement with Australia; the speedy apprehension and return of persons wanted across the Tasman who could easily "go bush" if left at large.

The New Zealand legislation also attempts to meet other criticisms made by the Bench in the two Habeas Corpus proceedings. Affidavits and statements made on oath as well as formal depositions will be admissible as the basis for return of fugitive offenders; and a Schedule to the amending Act attempts to remove some of the historical anomalies, including a new definition of "superior Court" by reference to "any Court that has jurisdiction to try an accused person on indictment and includes any other Court recognised in that country as a superior Court".

Immediately after the new legislation came into force two persons wanted for trial in Australia were brought before the Auckland Magistrate's Court *(m)*. Counsel for one of the two men, a camera operator wanted for armed robbery in Queensland, argued that the Act was still defective because it did not deal with the role of a Magistrate in extradition proceedings. No full report was given of the argument but the Magistrate, with Counsel's agreement on the basis that it was in the interest of his client, ordered the accused's extradition. Obviously the New Zealand lawyers have become aware of the need to look closely at the geriatric Act and more arguments based on technical defects as well as s 29A can be expected. As Wilson J stated in his 1976 judgment, delivered shortly before he retired from the bench, "In New Zealand it still subsists like an unburied corpse which I have been compelled to refuse to convert into a zombie. It is for the government to ask Parliament to convert it into a functional statute . . ."

The New Zealand Government was not prepared to bury the corpse. Instead it has attempted resurrection and the substantive reform may take a low priority in 1977 if the remedial legislation seems to work.

For the reasons stated above, so far as Australia is concerned, there seems little likelihood that in the immediate future Australia would seek extradition of a person from New Zealand in order to prosecute him on the ground of his nationality or political, racial or religious beliefs. But this does not mean that argument based on these grounds will not be raised and cause delay in the extradition procedure.

It would be desirable for the Australian Attorneys-General at their next meeting with their New Zealand counterpart to take the opportunity of pointing out the lack of reciprocity on this issue with a view to ensuring that both sides of the Tasman have a clear understanding of what is involved and that New Zealand accords Australia full reciprocity in extradition of fugitive offenders.

(l) *R v Castioni* [1891] 1 QB 149; *Re Kolczynski* [1955] 1 QB 541.

(m) *Dominion*, 17 August 1976.

CREDIT CARDS IN NEW ZEALAND: SOME POTENTIAL PROBLEMS

By J F CORKERY, *Assistant Lecturer, University of Otago.*

It is only in the last decade that the credit card transaction has caught on in the North American and European consumer markets and the so-called "plastic money revolution" *(a)* has yet to gain significant momentum in New Zealand. Here there seems to be a resistance to the use of cards, a certain conservatism that inhibits the consumer from putting himself into temptation to consume. Credit cards, it is argued, tempt the cardholder to overspend, and to overspend at the expensive places. The advantages of the medium – its versatility, convenience and international acceptability – have yet to capture the cash-carrying and cheque-writing New Zealander. Even so there are the first signs of a swing to cards with department store charge cards, cheque guarantee cards, and lately international tripartite *(b)* "travel and entertainment" cards, gaining popularity.

Credit card companies are new to New Zealand. Although Diners has operated since 1956 and the American Express card has been accepted here since 1958, strong promotion of tripartite cards has only come in the last two or three years. And as yet the full bank credit card (as distinct from the "travel and entertainment" card) has not been introduced to this country, although the banks are with their many outlets, partially computerised procedures and existing ancillary service departments, the natural institutions to hasten the credit card boom. Ready-built merchant bases among their customers, strong financial backing and long experience in handling consumer credit have allowed banking conglomerates to launch the successful Eurocard in the Common Market, Bank Americard and Master Charge in the United States, Barclaycard and Access in the United Kingdom and Bankcard in Australia. All these schemes in their respective countries have far outstripped, in membership and profits, the traditional "travel and entertainment" operators; Diners, American Express and Carte Blanche. Such successes have not yet tempted New Zealand banks into similar schemes, although some of the more sophisticated bank cheque guarantee and identification schemes – such as Mastercard and Walescard – are probing the fringes of full tripartite schemes *(c)*. A full bankcard operation may not be all that far away in this country. However bankers considering a large-scale co-operative bank card venture might be wary of the anti-monopoly provisions of the Commerce Act 1975.

Unlike the United Kingdom *(d)* and many of the American states *(e)* New Zealand has not enacted statutory provisions dealing specifically with credit cards. Perhaps there is no need; international tripartite cards have been used throughout Australasia over the past decade and they have yet to become involved in officially reported litigation. Even in the United States there are few reported decisions. In part this is a tribute to the conciliation powers of card companies and their fear of adverse publicity. But recently the steady increase in fraudulent activity in general and the boom in the use of cards has compelled virtually all credit card-using countries to introduce legislation specifically regulating their use. Might New Zealand in time feel similarly compelled? Are there potential legal problems which might require legislative action? Does our present law adequately deal with the use (and misuse) of credit cards? These are the central questions of this brief inquiry.

(1) The legal nature of the merchant/vendor-cardholder relationship: Does the Sale of Goods Act 1908 apply?

It would offend economic reality to argue that there is no contractual privity between the

(a) See Kennedy "The Plastic Jungle" (1969) 31 Montana LR 29. In 1973 bank credit card accounts in the US totalled 35 million according to *Banking* Sept 1974, 118, 119.

(b) "Tripartite" because of the three parties involved: issuer company, merchant vendor and cardholder.

(c) An account of NZ operations is given by Birchfield, "Credit Cards: two's company three's a crowd" (1975) No 4 *NBR Marketplace* 13.

(d) Consumer Credit Act 1974.

(e) With, for example, the California Penal Code, ss 484d to 484l.

merchant/vendor of the goods sold and the purchaser although one commentator has suggested that such a finding "might just be possible" *(f)*. One could, for example, argue that the merchant/vendor supplies the cardholder with goods and services because the merchant has contracted with the issuer to do so, and that the cardholder signs the sales slip (which merely being evidence of the sale does not incorporate any contract) and pays the issuer because of his contract with the issuer, the transaction being completed when the issuer, true to his contract, pays the merchant *(g)*. Using this reasoning one could argue that there is no contractual privity between the cardholder and the merchant.

But the essence of the credit card transaction is the purchase of goods and services by the cardholder from the merchant/vendor – the cardholder standing in the role of buyer, the merchant in the role of seller. "Money consideration" such as satisfies the definition of a contract of sale in s 3 of the Sale of Goods Act 1908 does pass from cardholder/purchaser to merchant/vendor, with the difference that the merchant looks first to the issuer for payment, the issuer having the recourse, in turn, against the cardholder, as contracted. Suggested alternative views – that the issuer is the true "buyer" who in turn sells the goods and services to the cardholder, or that the merchant is merely the issuer's agent in the sale – cannot match the common sense of the first interpretation. Furthermore, North American cases habitually refer to the merchant as the "seller" and to the cardholder as "buyer", and all commentators presuppose the existence of rights and obligations between merchant and cardholder. As in North America, it is probable that the New Zealand Courts would accept the cardholder/merchant relationship as a sale of goods contract, ie that there is contractual privity between the parties. And, in so far as "goods" as distinct from "services" are purchased, the Sale of Goods Act 1908 should govern the sales aspect of the transaction *(h)*.

On the assumption that this privity exists, other consequences necessarily follow. Being governed by the Sale of Goods Act 1908, the merchant gives implied warranties and conditions of merchantable quality and of fitness for purpose to the cardholder purchaser, who in turn has the usual remedies of rescission or an action in damages in case of a breach of these warranties and conditions. These remedies may be important to the cardholder as invariably he is contractually bound to pay the issuer regardless of disputes with the merchant. On the other hand, the merchant, if for some reason his attempts to gain payment from the issuer are frustrated – the issuer becoming insolvent for one unlikely example – will still be able to claim against the cardholder. In doing so the merchant may be in breach of his contract with the issuer *(i)*, but at best the insolvent issuer would probably only gain nominal damages in an action concerning his breach. Furthermore the fact that the cardholder may have already reimbursed the insolvent issuer for the purchases would not operate as a bar to the merchant's claim. The stable financial position and conservatism of the three New Zealand companies makes the above series of events most unlikely, although card issuing companies have not been immune from insolvency in North America *(j)*.

(2) What are the respective rights and responsibilities of the issuing company and the cardholder?

(i) Liability of the cardholder for unauthorised use

Diners and American Express set maximum liability limits for the cardholder in the event of unauthorised use of his card, and in practice it seems that even these modest limits ($100 for Diners; $50 for American Express) would rarely be enforced *(k)*. All three companies' contracts provide that cardholder liability ceases once the company has been informed (verbally *and* in writing *(l)*) of the loss or theft.

Generally, with the exception of the ubiquitous waiver-of-defence clauses (discussed later) the other contractual terms, which by the nature of the contract are imposed on the cardholder, seem reasonable. As yet fraudulent use of credit cards is a minor problem in New Zealand *(m)*, so

(f) Chappenden "Credit Cards: Some Legal Problems" (1974) 48 ALJ 306, 307.

(g) When exactly the cardholder "pays" for his purchase is an important consideration for taxation. A US decision (see reported (1973) 21 UCLA LR 1380) ruled that the taxpayer/cardholder could deduct a credit card payment only at the time he pays the issuer.

(h) Cf (1971) 81 Yale LJ 287, 292, f 22.

(i) Diners and American Express both provide in their merchant establishment agreements that the merchant shall not bill the cardholder directly.

(j) See also Sharma "Credit Cards in Australia: Some Predictable Legal Problems" (1972) 3 Lawasia 106, 107 who tentatively suggests that the issuer could be viewed as the guarantor or indemnifier for the cardholder.

(k) Section 84 of the Consumer Credit Act 1974 (UK) limits liability to £30.

(l) In *Uni-Serv Corp v Vitiello* 53 Misc 2d 396, 278 NYS 2d 969 (Civ Ct NY 1967) failure to inform the issuer verbally *and* in writing meant the cardholder was held liable for unauthorised use occurring after the verbal notice.

(m) A survey by the writer indicated a low level of fraudulent use of credit cards (although one company refused to answer the questions on this matter).

the relatively low liability limits of the two leading companies are not as magnanimous as they might at first seem. Surprisingly the Carte Blanche literature does not mention a liability limit and a potential applicant to that company might reasonably be apprehensive about his possible liability for unauthorised use of his card from the time he loses his card until the time he notifies the company of the loss or theft *(n)*. This time gap could be lengthy, especially if the cardholder does not make regular use of his card and thus may have little opportunity to notice his loss. But, in common with the other two companies, Carte Blanche would be reluctant, barring exceptional circumstances, to enforce the cardholder's liability strictly. Adverse publicity could harm the company more than the recovery of the defrauded amount would warrant.

The $50 or $100 liability limits probably are most valued by companies because some negative value is placed on the card for the cardholder – the possibility of paying out the set amount deters the cardholder from carelessness in the use and control of his card. North American authorities conflict as to whether an issuer wishing to enforce a cardholder's liability provision – up to the set limit, or in the case of Carte Blanche up to an indefinite limit – will, by a simple enforcement of the contractual clause, be successful.

In *Union Oil of California v Lull (o)* – which might be regarded as the locus classicus of credit card fraud cases – the Court, working on the presumption that the issuer was the assignee of the merchants' rights and obligations, and analogising the instant situation with that of the bank passbook *(p)*, found that the issuer's right to recovery from the cardholder was conditional on the assignor/retailer members of the oil company card scheme exercising reasonable diligence in protecting the cardholder's interest. In other words the Court required the issuer to prove that its merchant or retailer members had acted with "due care" in ascertaining the identity and authority of the person presenting the card before extending credit to him. Neither the provisions in the relevant cardholder/issuer written contract, nor negligence by a cardholder, was held to absolve the issuer or the retailers of this duty, its satisfactory performance being a question for the jury, on a reasonable man test, with the burden of proof falling on the issuer. Proving that a merchant or his employees and servants exercised due care is a tall order, and to convince a jury the issuer would need to show that fairly rigorous checks had been made – for example, the perusal of identification papers and the careful comparison of signatures.

An analogy may be drawn here between this burden or duty placed on the issuer and that placed on a collecting banker by s 5 of the Cheques Act 1960, the duty being to act in good faith and without negligence. Should the issuer prove that he had discharged his duty of care, and neither party had been negligent, the cardholder would bear the loss under the contract until he gave notice. However it would be rare for neither party to have been negligent, for loss of the card itself imputes negligence, as, indeed, does the failure to notice a loss *(q)*.

Extrapolating a strong rule of law from the comparatively few United States decisions is nearly impossible, although two divergent lines of cases are discernible. On the one hand there is the *Union Oil* line of cases, and on the other hand there are decisions such as *Texaco v Goldstein (r)* that regard liability-until-notice provisions generally as reasonable, and such clauses are interpreted literally. In *Texaco* the Court ruled that the oil company issuer carried no burden of due care because he was too distant from the sale transaction, and because such a high duty of diligence would impair the functioning of a vital industry. A pragmatic view was taken in 1967 by Berry J in *Uni-Serv Corporation v Vitiello (l)* where a defendant cardholder having expressly

---

(n) In comparison to cheques, cards do not stand up well in terms of safety. The CA in *National Bank of NZ v Walpole and Patterson* [1975] 2 NZLR 7 reaffirmed that the prima facie risk of a cheque forgery rests on the banker. However anyone who loses his card – if he does not immediately report his loss – is contractually liable at least for the first $50. So, although forgery is more difficult with a card, it is still inaccurate for Diners to advertise that "a lost Diners Card is like a lost cheque book".

(o) 220 Ore 412, 349 P 2d 243 (Ore S Ct 1960).

(p) The passbook analogy was also used in *Armstrong v US* 171 F Supp 835 (ED Pa 1959).

(q) Both *Gulf Refining v Williams Roofing* 208 Ark 362, 186 SW 2d 790 (1945) (where Gulf was held to have no greater rights against the cardholder than the negligent/fraudulent petrol retailers) and the *Union Oil* case were cited approvingly in an unreported Californian decision *Diners' Club v Whited* (noted in (1967) 21 U Miami LR 822-4, and in (1966) 19 Vand LR 1078-9). The implied recognition of the "assignment" theory so strong in the other 2 cases was again evident, the California Appellate Dept stating that "any negligence of the merchants would be chargeable to The Diners' Club". Because none of the merchants had at any time asked the imposter to identify himself the issuer was held not to have fulfilled its duty of care.

(r) 34 Misc 2d 751, aff'd 39 Misc 2d 552, 241 NYS 2d 495 (1963): *Union Oil* was distinguished.

agreed to pay for any purchases made with the card until the plaintiff received written notification of its loss was held accountable for unauthorised purchases by a thief.

On balance though, it appears that the Oregon Supreme Court's finding in *Union Oil*, holding that a risk-allocation clause need not be strictly construed, was the most equitable decision, and a New Zealand Court might well feel moved to interpret the standard liability-until-notice provisions included in local contracts in the broader spirit of this tort concept of relative fault, rather than in the terms of strict compliance exhibited in *Texaco*. Such an approach will have welcome side effects – it should spur the issuer on to find ever better methods of identifying and providing credit clearance for cardholders, and will encourage merchant vendors to be increasingly vigilant in examining identity. While the issuer then faces the obvious difficulties of affirmatively proving that due care has been exercised, the cardholder's relative vulnerability demands such a finding. The issuer can also better spread his losses and minimise his costs, and above all, the issuer is the only party who can effectively innovate new methods as precautions against fraud. Keeping in mind then the unilateral nature of the cardholder/issuer contract, the poor bargaining strength of the cardholder, and the universal sympathy for the passive party to commercial contracts, the *Union Oil* decision seems both equitable and realistic. The United States Congress in its Truth-in-Lending Act, has, in effect, adopted the "*Union Oil* rule", for the burden of showing that "the use of the card was authorised or that the conditions of liability . . . have been met" rests on the issuer *(s)*.

A recent commentator (fn (f) at 310) has suggested that a plausible cause of action against the issuer might lie in tort, or even in contract. Assuming for the present discussion that no waiver-of-defence clause impedes the cardholder's right of action, such a proceeding would rely on the cardholder establishing some association between the issuer and the quality of goods and services purchased. Could it be argued, for instance, that an issuer induced a cardholder to deal with a merchant by selecting certain merchants to participate in the scheme, then by allowing the merchant to display the issuer's insignia in the merchant's premises *(t)*, advertising the merchant's wares in card company literature, and listing the merchant's name in the company's directory? Perhaps the Court might indeed hold the issuer jointly liable with the merchant for breaches of the sales contract, especially as they pursue a mutually advantageous venture on a permanent business relationship, the issuer's discount being a direct financial benefit from the underlying sales transaction.

Perhaps there is also the possibility of an action against the issuer in negligence in reliance on the vaunted *Hedley Byrne (u)* principle, as explained by the Privy Council in *MLC v Evatt* [1971] AC 793. Could it be said in fulfilment of the *Evatt* criteria, that an issuing company holds itself out as possessing the necessary skill or competence to advise cardholders on the quality of merchandise sold at merchant member establishments? Can it be said that a cardholder reasonably relies on the issuer's skill in investigating and selecting merchants as members of the scheme, thus imposing a duty of care on the issuer, the party possessing that skill? If so, a cardholder could argue, for instance, that the issuer was in breach of his duty in failing to thoroughly investigate the business practices and products of all merchants participating in the scheme and is liable to the cardholder for loss suffered as a result of purchasing defective products from a merchant member. The advertising of a merchant's name in company directories and in monthly literature, and even the acceptance of a merchant into a card scheme, might be interpreted as a representation that the merchandise is of good quality. Such an argument might also find support in the conscientious efforts of card companies to cultivate an image of integrity, class and sophistication, in the joint economic benefit accruing to merchant and issuer, (Evatt at 809F) and in the fact that, unlike newspapers, a card company does not advertise any merchant or product indiscriminately, ostensibly restricting itself to "the best restaurants" *(v)*, to the "better class hotels, . . . and shops" *(w)*. On this basis liability for negligent misrepresentation, although unlikely, cannot be discounted.

(ii) *How do the ubiquitous "waiver-of-defence" clauses affect the cardholder-issuer relationship?*

Normally a customer in a credit sale is in a more favoured position than a cash buyer, as should the goods or services purchased prove defective or otherwise unsatisfactory the credit customer can always refuse to pay the outstanding

(s) 15 USC para 1643 (b) 1970.

(t) Cf Reiter (1973) 21 UCLA LR 278, 297; see also *Hanberry v Hearst Corp* 276 Cal App 2d 680 (1969).

(u) *Hedley Byrne & Co v Heller* [1964] AC 465 (HL).

(v) American Express advertisement, *Time* 30 Sept 1974.

(w) Diners Club brochure issued to merchant members.

balance. The buyer, it might be said, holds a tactical advantage, for the merchant not the buyer must initiate legal proceedings to enforce the sales contract to recover the outstanding debt. In contrast, in a cash deal, if a merchant proves intransigent, the cash buyer himself must go to the inconvenience and expense of instituting a legal action to enforce his rights, so many complaints simply lapse. It is, then, a matter of concern to cardholders that, by contract, they may be in no better position than cash buyers. All three New Zealand companies include standard waiver-of-defence clauses in their cardholder agreements, disclaiming liability for defective goods purchased from merchant establishments and stipulating that the cardholder's obligation to pay the issuer is unaffected by any dispute between cardholder and merchant. Taking cl 9 of the American Express provisions as an example:

> "The Company shall not be liable for any act or omission of any establishment including but without limitation any refusal to honour the Card or any defect or deficiency in any goods or services purchased with this Card. The Member will be solely responsible for any claim or dispute with any establishment and the existence of any such claim or dispute shall not relieve the Member . . . of obligation to pay all charges."

Thus, by contract the credit purchaser's bargaining advantage – his right to withhold payment – is struck down, and the cardholder, not the merchant, must take the initiative. It seems inequitable that the cardholder could be denied the usual consumer defences against the issuer, especially if the issuer may demand payment of charges regardless of any deficiencies in the goods and services supplied. And, insulated from cardholder's action, the issuer has less incentive to carefully vet its merchants members and encourage them to deal fairly with cardholders.

Not unnaturally the stronger party in any contractual relationship tries to protect itself against every possible liability, and in what might be termed unilaterally "imposed" contracts this is achieved by getting the weaker and often legally naive party to sign away his common law, and, where possible, his statutory rights. The potential for abuse of the consumer's rights is written into such contracts where the traditional remedies of the dissatisfied customer are removed. As with the insurance contract, the hire purchase contract, the "ticket" contract and many others, the contractual terms and conditions of the issuer/cardholder contracts are not negotiated by both parties, but are unilaterally imposed by the stronger on a take-it-or-leave-it basis. While it has long been axiomatic to the law of contract that the contracting parties can make what terms they choose, of late the rigidity of the rule has been challenged by several English Court of Appeal decisions. Not inappropriately Lord Denning has led the assault, arguing in *Lloyds Bank v Bundy (x)* that "as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall." From a study of old equitable remedies he extracted a statement of principle:

> ". . . English law gives relief to one who, without independent advice enters into a contract on terms which are very unfair . . ., when his bargaining power is grievously impaired by reason of his own needs or desires or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other" (p 765).

Such generous interpretation of precedent by his Lordship would scarcely help the cardholder whose card has been fraudulently used. Even the Carte Blanche holder, if faced with four-figure liability, could not plead "undue . . . influence or pressures brought to bear on him by or for the benefit of others", although he might plausibly be able to establish the other elements of Lord Denning's formula. The requirements of such a remedy are strict and the holder of a card, considered a luxury in modern society, would be most unlikely to benefit even under a relaxed interpretation. With the common law Courts reluctant to enter the sphere of freedom of contract, we may have to look to the Legislature to enact a provision similar to that in the United States' Commercial Code (s 2-302) empowering the Courts to strike down unconscionable and inequitable contractual conditions.

There are two other possible solutions to this problem. First the legislature could rewrite the Sale of Goods implied warranties and conditions and eliminate any contracting out of the terms – which would involve repealing s 56 and replacing it with specific provisions, analogous to s 51 of the Hire Purchase Act 1971, forbidding the negativing or variation of implied terms. However if the New Zealand Courts adopt the "direct obligation"

(x) [1974] 3 All ER 757, 763. A L Terry discusses this and later cases [1975] NZLJ 197.

(y) Several analysts (for example Maffly and McDonald (1960) 48 Cal LR 459, the pioneer work on this matter) have, through a study of US case law, concluded that the issuer gets his right to payment either directly from the cardholder through their written contract, or indirectly as an assignee of the merchant's right to payment. If the "direct obligation" theory is accepted then the scope of the cardholder's possible defences and counterclaims against the issuer is considerably reduced.

theory (whereby the cardholder's obligation to pay for goods and services purchased with the card is created directly by the issuer/cardholder contract and not by an assignment of the merchant's right to receive payment to the issuer) in preference to the "assignment" theory of the issuer's rights to payment *(y)* then this suggested statutory amendment would not affect the cardholder's position vis-a-vis the issuer. If, on the other hand, the "assignment" theory were accepted, the assignee issuer would receive the right to collect payment, but this would be subject to existing defences and counterclaims, including the implied warranties and conditions of the Sale of Goods Act 1908, (or of the Hire Purchase Act 1971, if that statute were appropriate). Under the alternative theory, prima facie the possible defences against the merchant would not avail the cardholder against the issuer, that is if the Courts interpret the contract between issuer and cardholder rigidly and without treating the whole arrangement as they would a normal two-party sale.

The alternative and perhaps preferable course of action would be to legislate to prohibit the issuer contracting out of his possible liability for defective merchandise, and go even further to remove possible doubt by specifically providing that the conditions and warranties written into the Sale of Goods Act 1908 apply not only to the cardholder/merchant dealing but also to the cardholder/issuer relationship. This might at first seem an onerous and unfair burden for the issuer, but two of the three card companies in this country stipulate in their contracts with merchant establishments that, in the event of "complaint" or "claim" respecting goods and services purchased at the establishments, the merchants must reimburse the company in full for the amount the cardholder refuses to pay out. Thus the issuer has a means of passing on responsibility for defective goods to the party who sold the goods, and if necessary and possible the merchant may in turn claim against the manufacturer. No doubt issuer companies will argue that, even though the issuer's intervention is not guaranteed, in practice the cardholder never suffers if his complaint is well-founded. But should the cardholder have to rely on the benevolence of the card company for fair treatment and for respect of his rights as a consumer? If his rights were enshrined in statute the cardholder, usually the most vulnerable of the three parties in this unique tripartite relationship, would be guaranteed protection.

For their part, issuers might justly claim that it is the cardholder/purchaser's duty to protect his own interests, especially as only he has the ability to inspect merchandise at the point of sale. Issuers might argue that they have no direct control over the quality and fitness for purpose of goods supplied by a merchant, a dealer or his employees. While that may be true, it is also true that by writing in these waiver terms the issuer is denying the cardholder the best method of control he had over the fitness for purpose and quality of the merchandise after the sale, for whatever the quality of the merchandise, the cardholder is still contractually bound to pay for it, whether or not he has any viable right of recourse against the merchant. Perhaps though a note of caution should be struck. A barrage of consumer defences could unreasonably increase the issuer's costs in what is a relatively narrow profit margin enterprise, seriously lessen the attraction of credit cards to small merchants, and perhaps considerably reduce the availability of consumer credit supplied by card companies.

(iii) *When is the cardholder-issuer contract completed: a question of offer and acceptance?*

The time of completion of the credit card contract is of concern to both applicant and company, for in some cases the respective liabilities of the parties in the event of unauthorised use of the card hinges on the completion of the agreement *(z)*. Advertisements in newspapers and magazines, unsolicited card company literature and "take-one" receptacles in merchant establishments invite written applications for members of the company. Such inducements and advertisements can be considered only invitations to treat, no more. An aspiring card member then goes on to fill out either a request for further information – which still may be classified as merely an invitation to treat – or he completes a fairly comprehensive advertisement form or an official application form. Such forms typically are rather detailed, demanding the applicant's banker's name and address, his income and employer's name, his assets and other credit references. Usually such a form contains either the terms of membership printed in full, or a reference to the terms and conditions. The forwarding of a completed application form of this nature surely constitutes an offer by the applicant to contract with the company. Such application is more than a mere invitation to treat, although the Court in *Texaco Inc v Goldstein (r)* held that the application was merely an invitation to do

(Z) In *Uni-Serv Corp v Frede* 50 Misc 2d 823, 271 NYS 2d 478, aff'd 279 NYS 2d 510 (1967) this matter was at issue.

business, the issuance of the card itself constituting the offer; "the contract [becoming] entire when defendant retained the card and thereafter made use of it." In *Read v Gulf Oil Corporation (a)*, *Texaco* was affirmed, but specifically on the facts of the case. There, printed on the back of the cards, was the sentence: "Acceptance . . . implies responsibility for all service and merchandise obtained thereby." But no such wording appears on the back of solicited cards in New Zealand. Furthermore the wording of some of the currently advertised company application forms bears out the application/offer conclusion: "I hereby apply for the issue to me of a Diners Club Credit Card and I agree to be bound by the terms and conditions printed [on the application form]"; "The undersigned hereby requests that an account be opened for the undersigned and Card(s) issued as herein . . .". (American Express).

Assuming that a signed application forwarded to the issuer constitutes a valid offer, when is acceptance by the issuer complete? Is it when the issuer posts the card *(b)*, or when the offeror takes receipt of the card, or when the card is delivered to the offeror's address, or when the offeror signs the card *(c)*, or when the offeror uses the card? *(d)* One would normally assume that an acceptance is complete once it is actually communicated to the offeror, but one must keep in mind the acceptance by post exception, whereby an offer made by letter through the post is accepted and the contract completed "the moment the letter accepting the offer is posted, even though it never reaches its destination" *(e)* providing that ". . . the offeror contemplated and intended that his offer might be accepted by the doing of that act" *(f)*. This now hallowed principle, no doubt originally founded on expediency, has been applied recently in New South Wales *(g)*, so age has not weakened the rule. And prima facie a postal and even a personally exchanged application for card membership invites and anticipates a postal acceptance.

The acceptance by post theory transposed to the credit card situation seems plainly inequitable in its possible consequences. Any loss of the card in the post, or theft of the card before the addressee received it, could expose the new cardholder to risk of liability for unauthorised use of the card (fn 1 ante). And, not having received the card, the addressee would be unaware of his loss and thus would not know to inform the issuer and terminate his responsibility. The considerations of urgency, business convenience and necessity that produced the postal exception do not apply in such a matter as the concluding of a cardholder-issuer contract. This is yet another situation where the standard rules of contract and the credit card arrangement are ill-fitted. Certainly the more equitable finding in the circumstances of a solicited posting would be that acceptance was complete once it had been communicated to the addressee, and this invariably would mean that the addressee has to receive the card, not merely have it posted to him.

Once the contract is completed the applicant impliedly has accepted all the terms and conditions of the contract, even if he has neither read them nor would have understood them if he had. Normally an applicant for membership will have had an opportunity to sight the conditions which may be printed in an advertisement or on the reverse side of an application form. Where the terms and conditions are not so included in the application, the applicant invariably signs a declaration that he agrees to be bound by the company's terms and conditions (whatever they are) and is given notice of where these might be read. Generally card companies make an effort to bring the conditions to the notice of applicants, first in their standard application forms and then again by referring on the back of the card itself, often in tiny print only though, to terms contained either "in the Listings Directory" or in literature accompanying the card. But despite such notice very few cardholders will read these conditions, and even fewer will understand the often complex legalese. Rarely will a cardholder be aware of his potential liability in the event of unauthorised use of his card, yet such misconceptions and ignorance do not avail the cardholder in Court. As O'Connell J put it in *Union Oil Co of California v Lull (h)*:

> ". . . the fact that there is a wide-spread misconception on the part of the cardholders as to their liability does not warrant us in rephrasing the contract to accommodate the misunderstanding. The plaintiff company was entitled to the terms of its bargain with those

(a) 114 Ga App 21, 150 SE 2d 319 (1966).

(b) Savikas and Shandling (1967) 16 De Paul LR 389 409 suggest that if A applies for a card and the company sends it, "If it were intercepted, A would be liable under the terms of the contract".

(c) As in *Shell Oil v Krusen* (1951); noted by Murray (1967) 21 U Miami LR 821-2.

(d) As in *Texaco*, supra note r; see also post note k.

(e) Per Lindley J in *Byrne v Van Tienhoven* (1880) 5 CPD 344, 348.

(f) Per Dixon CJ and Fullagar J in *Tallerman & Co v Nathan's Merchandise* (1957) 98 CLR 93, 111.

(g) *Bresson v Squires* [1974] 2 NSWLR 460, 462, per Bowen CJ.

(h) 220 Ore 412, 349 P 2d 243 (Ore S Ct 1960) The "duty to read" is well discussed in the light of US law in Macaulay (1966) 19 Vand LR 1051. Macaulay (1966) 19 Vand LR 1051.

who elected to use its credit cards, assuming of course, as we have, that the bargain was fairly made."

(3) The problem of mass-mailing of unsolicited credit cards: overseas experience

The question of what constitutes acceptance arises again in the event of a mass-mailing of unsolicited credit cards, a controversial card company promotion method. Some extraordinary mix-ups occurred, for example, after the 1974 launching of the Australian Bankcard when nearly 1.5 million cards were mailed out to reputedly creditworthy Australians. Cards were addressed to children, to dead persons, to bank debtors who had long subsisted on overdraft, and to persons who had long since changed their addresses *(i)*. One customer reported receiving no less than nine cards through the post, and newspaper headlines told of envelopes containing Bankcards lying in suburban streets and of cards being sent to wrong addresses. The Bankcard staff had also allocated each addressee a maximum credit limit ranging from $300 to $1000 and, adding insult to injury, these limits often seemed arbitrary and illogical. Equal-earning wives received lower ratings than husbands, and many customers were posted several cards each with a different limit *(j)*.

This fiasco had many predecessors. Almost everywhere the bank credit card has been introduced there has been a mass-mailing of cards aimed at a rapid penetration of the market. One of the first, the Midwest Bank Card, was sent out in 1966, Master Charge tried it in New England in 1969, and Bank Americard has also indulged. Perhaps the most recent model for the Bankcard launching was the massive take-off of Access Card in Britain in 1972. Everywhere the method proved successful in the long run, despite the initial cost and embarrassment, and despite the temptation thrown before would-be criminals. Such encouragement to crime, the petulance of some offended by their low credit rating, and the annoyance of many at the salesman-type approach of the venture led to public outcry and eventually legislation in all bank card countries. This legislation, which so firmly bolts the stable door after the biggest horses have fled, will be discussed later. Here the contractual implications of mass-mailing unsolicited credit cards will be briefly considered.

It is trite law that an offeror may not impose acceptance on an offeree by, for example, stipulating that the offeree's silence will be interpreted as acceptance. Nor is mere possession of an unsolicited credit card which arrives through the mail sufficient for acceptance, but should the offeree display some external manifestation of assent, some dominion or control over the card, then he may be deemed to have impliedly accepted the issuer's offer, and the terms accompanying the card. What then constitutes such an acceptance? Obviously voluntary use of the card would be acceptance of the offer by the cardholder. But would some lesser act, for example the filing of the card in a wallet, using the card as proof of identity when cashing a cheque, or signing the signature panel on the card, amount to acceptance? The Australian Bankcard mail literature is ambiguous on the point. The copy of the conditions of acceptance are prefaced by the statement; "Please read the conditions of use and if acceptable sign your Bankcard without delay". This imputes that signing means assent and acceptance of the contract, but the Bankcard itself reads on its back: "By use of this card you agree to the conditions accompanying the card . . ." While either action might be held sufficient acceptance *(k)*, the latter is the more explicit statement and with the current judicial partiality for the plight of the consumer and wariness of what appear to be imposed bargains, the Courts could be disposed to view the contract as being completed with the first use of the card and not just with the signing. But this is an open question, and the mere action of filing a card in a wallet indicates an assertion of some dominion or control over the card and technically fulfils the standard tests of acceptance. If such an action does indeed constitute sufficient acceptance then the Bankcard promoters were perhaps unwittingly devious when, in the advertising literature sent along with the Bankcard, they casually invited the addressee to "[s]lip your Bankcard into your pocket or purse along with your cash."

Unhappily for reluctant addressees it seems that the Unsolicited Goods and Services Act 1975, although it applies to the unsolicited mailing of credit cards, will not hamper the operations of mass-mailers. Section 3, the "sanction" section as

(i) See vivid accounts in *Daily Mirror* 10 Oct 1974, *The Australian* 11 Oct 1974.

(j) The *Sydney Morning Herald* 10 Oct 1974 reported: "A Kirawee father said that his 14 year old son with $12.63 in his school savings account received a Bankcard and a credit rating of $400. "My rating was only $300", the father said. A Balmain couple with a joint account each received cards, the husband with a rating of $500 and the wife $300. "It caused a stir", the husband said.

(k) Section 66 (2) of the Consumer Credit Act 1974 (UK): "The debtor accepts a credit-token when – (a) it is signed, or (b) a receipt for its is signed, or (c) it is first used, either by the debtor himself or by a person who, pursuant to the agreement, is authorised by him to use it."

far as unsolicited mailing is concerned, deals with unsolicited "goods", an undefined term in the Act. Referring for guidance, as the judiciary is wont to do, to other statutes in similar fields of law (here to the Sale of Goods Act 1908 and the Hire Purchase Act 1971) one finds that the definitions of "goods" in these Acts specifically exclude "money or things in action". While a credit card is certainly not "money", is it then a "chose in action"? This term has a history of variable definition, but all types of property included as choses in action have in common the characteristic of not being subjects of actual physical possession *(l)*. While the debt that can be incurred by use of a credit card is a chose in action the credit card itself is a chose in possession.

Even if the Unsolicited Goods and Services Act 1975 does apply to the credit card transaction, it would not dampen an issuer's operation. According to s 3, after three months from the receipt, or after 30 days from the date of the statutorily prescribed notice being given to the sender (that notice being given not less than 30 days before the expiration of 3 months from delivery), the plastic card would become the property of the addressee, "as if [it] were an unconditional gift to him, and any right of the sender to the goods shall be extinguished." The awkwardness of trying to fit the credit card transaction into the saletype situation envisaged by the framers of the Act becomes apparent here. The loss of a small piece of plastic would not be a source of concern to an issuer. And should the addressee, after the required time within which he gains ownership, decide to use the card and thereby accept the contract he would be bound by the terms of the contract, one of which terms invariably is that the credit card is or remains the property of the issuer. Does such acceptance of the contract by the cardholder imply a revesting of ownership in the card in the issuer? In any event the Unsolicited Goods and Services Act 1975 would not deter an adventurous card company from carrying out a mass-mailing scheme.

(4) The case for legislative intervention

In many jurisdictions the problems of unsolicited mailing of bank cards, the contractual imposition of liability for unauthorised use, and waiver-of-defence clauses have been the subject of legislation. On the face of it there appear to be sound reasons for action by the Legislature, although New Zealand must be wary of too hasty adoption of law that may not fit her social or legal context. Is there then a need in New Zealand for similar legislation? Do the ills of unsolicited mailing and contractual liability demand such decisive cure?

(a) *Unsolicited cards*

Many addressees are undoubtedly annoyed to receive unsolicited mail of any type and some were incensed by the uninvited credit assessment handed out by the Bankcard people in Australia. These are intrusions, albeit minor, on the individual's privacy. But, as issuers would hasten to point out, unsolicited mailing sweeps aside apathy, forces the addressee to consider the advantages of cards, allows a rapid penetration of the market for the company or bank group, ensuring the success of the card. This hastening of the cashless age, they assert, is of joint benefit to issuer and consumer alike. They might add that despite the initial confusion the bank card acceptance rate is reputedly very high, and invariably only a small percentage of addressees return the cards to the issuer *(m)*.

Savikas and Shandling, two American academics, argue that (fn b at 408) "[l]egislative concern over unsolicited cards is not warranted ... The public that receives such cards unsolicited need only discard them as it does any other unwanted mail." Their statement may be open to question as an "involuntary" bailee – if indeed a bailment without consent is possible *(n)* – must not act negligently with goods that come within his control, nor act in such a manner that denies the rights and ownership of the true owner. While such a bailee (presuming that an involuntary bailment is possible) has no duty cast on him to "warehouse" and care for unsolicited goods *(o)*, he is not entitled – under pain of strict liability for conversion – to carelessly toss the goods out into the street. This seems an onerous burden to press upon an unwilling or at least an involuntary addressee, but common law requires him to not deal with the goods in a manner that is inconsistent with the rights of property and possession of the true owner, or, as Gresson J phrased it, act in a manner "incompatible with the owner's right of dominion (fn *(n)* at 909). So an addressee may be liable – the law not being clear enough on this matter to comment with certainty – if he passes on his card to a potentially fraudulent user, or even if he throws the card away in disgust, thereby allowing another to recover and use it. But while he may well be liable for conversion of the plastic card itself, can a negligent

(l) *6 Halsbury's Laws of England* (4th ed) para 1.

(m) Richardson *Electric Money* (1970) 80, reports that the Bank of America issued 2½ million cards in 1959 and by late-1960 cancellations had reduced active cardholders to 1½ million.

(n) See dicta of Gresson J in *Helson v McKenzies Ltd* [1950] NZLR 878, 922.

addressee be liable for subsequent frauds committed with the card? An analogy might be drawn here with the issues in *Stansbie v Troman* [1948] 1 All ER 599 CA where a painter/decorator was held liable in negligence for failing to lock the door of an unoccupied house thus allowing a thief easy access. Like the decorator Stansbie, the addressee of an unsolicited card, by passing it on directly or indirectly to another, may through his negligence be responsible for any subsequent loss resulting from misuse of the card. The intervention of another's criminal actions does not automatically break the chain of causation, and the giving away of an unwanted credit card is no less positive an act of negligence than leaving a door unlocked.

If the legislature favours legislating against unsolicited mailing of cards then there are abundant examples of effective provisions. In British Columbia the Consumer Protection Act 1967 *(p)* absolves the addressee from responsibility for any card he does not request – regardless of whether or not he has used the card – unless he expressly states in writing his intention of retaining the card. Ontario enacted similar provisions *(q)*, except that if the addressee signs and uses the card he loses his immunity. Both State and Federal legislatures in the United States have acted to ban unsolicited mailings and the United Kingdom legislation is adamant that "it is an offence to give a person a credit-token if he has not asked for it" *(r)*. Following the mass-mailing adventure of the nine Australian banks, the Federal Attorney-General of the time, Senator Murphy, now a Judge of the High Court of Australia, hurried through an amendment to the Trade Practices Act banning the issuance of unsolicited cards, the deterrent being a fine of up to $50,000.

No doubt fully informed of the controversial mailings worldwide, and wary of tarnishing their at present unsullied reputations, the three New Zealand companies would probably be loath to attempt similar ventures here. Predictably, when questionnaired on the matter, all three deplored unsolicited mailings, and two companies agreed that some legislative action was required to prevent a similar occurrence here. But the danger, here as in other countries, is not from the established, upper-crust "travel and entertainment" companies but from the bank card, launched to capture a wider membership. New Zealand has yet to experience such a venture.

(b) *Liability for unauthorised use*

Another matter which might benefit from legislative interference is contractual imposition of liability on the cardholder for unauthorised use of a card. Naturally enough, card companies fear the prospect of paying out for the consuming spree of a fraudulent user, and by placing a fairly high liability on the cardholder they try to ensure that he treats the loss of his card with due seriousness. But to set no before-notice liability limit (as Carte Blanche does), places a potentially unbearable burden on the cardholder. Large and financially well-established companies are better able to hand on the fraud loss, either by spreading it among many cardholders (by increasing the subscription rate), or by insuring themselves (or encouraging cardholders to do so) against all losses resulting from fraudulent use. Both Diners and Carte Blanche in the United States offer a cheap insurance to cardmembers to cover possible liability for fraudulent use of their cards *(s)*. None of the New Zealand companies offers a similar insurance.

After studying cardholder liability, the United Kingdom legislature *(t)* set an upper liability limit for a cardholder of £30 (or the contract limit if lower), while the United States amended the Consumer Credit Act in 1971 to limit the cardholder's liability for unauthorised use to $50 *(u)*. In both cases notice to the company of theft or loss terminates even this modest liability. If similar legislation were enacted in this country the Diners $100 liability limit would be halved, and the Carte Blanche card-user would have the security of limited liability. In addition the legislative adoption of the "*Union Oil* rule" discussed above would protect the cardholder against liability for the negligence of others. In practice the cardholder rarely is charged for unauthorised use anyway and so companies might argue that such legislation is unnecessary. But should a cardholder's liability for unauthorised use be left entirely to the discretion of reputable existing companies? While now the exercise of companies' discretion favours the cardholder, there is no guarantee that this will continue to be the case. Legislation would ensure it.

(o) See Bramwell B in *Hiort v Bott* (1874) LR 9 Ex 86, 90.

(p) Stat BC 1967, as am s 14A: see Ziegel (1973) 36 MLR 479, 490.

(q) The Consumer Protection Act, Rev Stat Ont 1970 c 82, as am s 46 (2).

(r) Section 51 of the Consumer Credit Act 1974 (UK).

(s) See discussed in (1966) 19 Vand LR 1093.

(t) Section 84 (1) of the Consumer Credit Act 1974.

(u) CCPA s 133, 15 USCA C41, s 1643.

(c) *Waiver-of-defence clauses*

A final suggestion is either that the legislature amend the Sale of Goods Act and specifically ensure that the statute applies to the credit card transaction as discussed above, or that this country adopt a statutory shield against waiver-of-defence clauses similar to that introduced into the California Civil Code *(v)*. The enactment, whereby a cardholder/purchaser retains against the issuer the same defences which he had against the vendor, overrides contractual apportionment of liability and issuer escape clauses and strengthens the cardholder's position. He has all the advantages of the cash buyer, plus the unique advantages of the credit card user. Some analysts feel that legislation against waiver-of-defence clauses weights the card transaction too heavily in favour of the consumer *(w)*. In practice, they say – and with some truth – merchants act with integrity and are willing to remedy defects and replace unsatisfactory goods. Why then should issuers resent the removal of waiver-of-defence clauses?

In the end it is a matter of balancing the cost to the issuer against the advantages to the consumer; of balancing the actual cost of accepting responsibility for defective goods and services and of thoroughly investigating potential merchant members against the advantages of the consumer's suggested statutory leverage, through the issuer, against the merchant; and, most importantly, of balancing the issuer's impotence at the point-of-sale against the consumer's right to get what he bargained for. One point is clear – it is patently inequitable that an issuer should be able to extract recompense for defective or unsatisfactory goods and services.

(v) Para 1747; 9 West Supp 1972.
(w) See, for example, Matthew Hale (1972) 5 Uniform Comm Code LJ 164, 171-2.

CORRESPONDENCE

Sir,

Married to the State

Might I respectfully correct Mrs Vaver in her article "Married to the State" appearing at [1976] NZLJ 490.

In the third paragraph of the article she states "Although the Act provides an elaborate appeal structure those intimately concerned are by the nature of their economic situation unlikely to have the resources to challenge a decision to ensure that the section is being applied reasonably, uniformly and justly by all officers."

The writer recently took an appeal to the Tribunal on behalf of a divorced woman who had had her benefit cancelled because of an alleged domestic relationship. She successfully applied for and was granted legal aid in respect of the appeal. The writer's travelling expenses to and from Wellington were approved by the Legal Aid Committee as a disbursement and the appellant's expenses have been paid by the Social Security Commission because of the fact that the Tribunal requested the appellant's attendance at the hearing. It appears that if Counsel for an appellant considers it necessary that the appellant give viva voce evidence before the Tribunal then her attendance will be requested.

Yours faithfully,
A J P More
Timaru

Sir

Control of noise

May I make a small contribution to the information on legal control of noise which was provided in G P Curry's most interesting article [1976] NZLJ 517.

Under s 29 (4)(c) of the Civil Aviation Act 1964, regulations made under this section may confer on the Director of the Civil Aviation Division power to issue, in such manner as may be prescribed in the Civil Aviation Regulations 1956 (Reprint SR 1974/275), instructions, orders or requirements providing inter alia *for the abatement of noise made by aircraft.*

In Civil Aviation Safety Order No 2, issued by the Director under Civil Aviation reg 8A and 185, various noise abatement procedures have been introduced in order "to avoid possible nuisance to the populated areas" in the vicinity of Auckland International Airport, over Auckland City, and surrounding Wellington International Airport.

Certain curfews have also been introduced, such as: flying training from Auckland International Airport must not be carried out between 2300 hours and 0600 hours (NZST), and aircraft operations at Wellington International Airport are normally prohibited between the hours of midnight and 6.00 a m, but international arrivals may be permitted until 0100 hours.

Under Civil Aviation reg 103 the Director has prescribed certain altitude and flight levels in Civil Aviation Safety Order No 1.

Yours faithfully
P P Heller
Part-time Lecturer
in Air and Space Law
Auckland University