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CREDIT CONTRACTS

The report of the Contracts and Commercial Law Reform Committee has been long in the making – eight years and eleven months more or less as those skilled in property transactions would have it. The delay has not been without benefit though, in enabling the Committee to consider the report of the Crowther Committee on Consumer Credit (UK Cmmd 4596) and to view the effects of consumer credit legislation enacted in the early 1970s in Australia and the United Kingdom. Coupled with a consideration of the practical effects of United States legislation this has led the Committee to "confirm our conviction that the new type of legislation enacted or proposed in those and other countries is extremely complicated and difficult to apply or enforce in New Zealand".

What should consumer credit legislation seek to do? Basically to ensure that credit contracts are fair and that a "moneylender", or "financier" to use the term suggested by the committee, is prevented from using his superior bargaining position to dictate harsh terms. Our present legislation tackles consumer credit in a piecemeal fashion through the much abused (and rightly so) Moneylenders Act 1908, the Hire Purchase Act 1971, the Sale of Goods Act 1908 and the Property Law Act 1952 to name but a few. This results in different transactions attracting a varying range of controls. The committee proposes that in place of this diversity there should be one Act covering all arrangements involving the extension of credit, whether by way of chattel security, hire purchase, mortgage, roll-over finance or what have you.

As intimated earlier, other jurisdictions have used elaborate and detailed legislation designed to cover the wide diversity of credit arrangements and usually this legislative control is coupled with some form of supervision by a governmental agency. The Committee does not favour this approach. Instead it has preferred to avoid "excessive standardisation and controls" and rather seeks to achieve a balance of fairness between debtor and creditor by giving the courts "wide power to review any credit transaction which appeared harsh and unconscionable at its inception or in the method of performance". A number of reasons are given for this preference but the most compelling is the observation that "it would appear that the complicated nature of the [overseas] provisions is self-defeating. Consumers are either indifferent to the reforms introduced, or alternatively, find it impossible to make full use of them."

One criticism often levelled at legislation leaving areas of conflict to the Court for resolution, is that it has emerged from a body, which unable to see an answer, is simply passing the buck. In this case though the Committee recommends guidelines and the reality of the matter is that individual cases will be so varied as to make it impossible to legislate for all. Hence the need for a residual discretion.

As well as thinking that "the Court should have jurisdiction to examine all the terms of credit

contracts, and to grant relief against harsh and unconscionable *terms*" the Committee saw occasions when the terms of a contract, which in themselves were not harsh and unconscionable, might be exercised in a harsh and unconscionable manner. This was felt to be undesirable ("it may be 'excellent to have a giant's strength' by obtaining wide-reaching terms in a contract itself, but it may be 'tyrannous to use it as a giant' by unconscionably applying such terms") and the Committee has suggested that the supervisory power of the Court be extended into this area also. Particular examples considered include the refusal to accept early repayment unless interest is paid to the end of the term, the retention of excessive security when a partial release is requested, and the manner in which a power of forfeiture or sale is exercised.

One issue central to any form of consumer protection is access to information and it is in this area that the Moneylenders Act 1908 functions at its worst. The "note or memorandum" required to precede any advance must specify the date on which the loan is made, and thus the possibility of further advances or variations of the contract is excluded; it must specify the interest charged in terms of a yearly rate and thus arrangements with moneylenders involving compound interest or profit sharing are regarded as impossible; and it must specify "all the terms of the contract", it being a moot point whether terms implied by statute must be included. Needless to say the disclosure requirements recommended by the Committee are not so restraining and have been developed in the awareness that if there are dangers in being told too little, there are equal dangers in being told too much. As the report says "disclosure of contractual terms is meaningful only in so far as it conveys to the debtor information which he is capable of understanding" and later "disclosure in terms comprehensible only to a mathematical expert is, in our opinion, useless." However, there is difficulty in deciding not only what should be disclosed, but also when – and each question is coloured by the Committee's view that one object of disclosure should be "to ensure that, before commitment, the debtor has the information to enable him to compare the terms of the various sources of credit available to him". An obvious problem lies in expressing the cost of credit (interest charges etc) in a manner adequate to enable a debtor to make a comparison. It was submitted that this would be impossible. The Committee have appended a substantial mathematical section demonstrating the contrary.

As to the time of disclosure the present Moneylenders Act requirement that a "memorandum" be signed before the advance is made is regarded as pointless, it being felt that something in the order of three days rather than three minutes is required for comprehension and comparison. Consequently the Committee recommends that "where statutory disclosure is made at least three days before the formation of a controlled credit contract, the contract will have full force and effect" but otherwise "the debtor may rescind within three days after disclosure by refunding the credit he has received with interest until payment".

There are problems with this approach so far as enabling a comparison with other finance sources is concerned. The debtor will know the terms and costs associated with one proposal but he is still faced with the problem of obtaining comparative quotes from other financiers. However the proposed requirement does fulfil the important function of ensuring reasonable notice of essential terms of the contract before an irrevocable commitment has been made.

One last recommendation deserving mention concerns removal of the requirement that moneylenders be licensed. "We propose that rather than license many thousands of honest traders for the sake of a few unscrupulous persons the law should make direct provision whereby the dishonest and unfair operator can be put out of the business."

This comment on the Committee's report is by no means comprehensive. The report is imaginative, thoroughly practical, and when implemented will give rise to a number of changes in legal practice. It could well be that mortgage advances will never be arranged in quite the same way again.

Tony Black

"As it is said, if one must continue to regard the English language as inadequate – res ipsa loquitur" per Barwick CJ in *Nominal Defendant v Haslbauer* (1967) 117 CLR 448, 451.

S F and the law – "There was no restraining this impetuous young man. Quite in vain did several lawyers point out to him that, if justice really existed, there would be no need for law and lawmakers, and thus one of mankind's noblest conceptions would be obliterated, and an entire occupational group would be thrown out of work. For it is the essence of the law, they told him, that abuses and outrages should exist, since these discrepancies served as proof and validation of the necessity of law, and of justice itself." Robert Sheckley, *Mindswap.*

CASE AND COMMENT

Wardship of Court and The drug scene

The judgment of Barker J in *S v S and S* (delivered on 17 December 1976, Hamilton Registry, M No 178/76) is an interesting one which will assist practitioners who have to deal with custody cases where the competing parents have been involved with drugs.

The mother had applied to a Magistrate's Court for a custody order in respect of the parties' only child, aged nearly two years at the time the case came before his Honour. An interim order was made in her favour in March 1976. The Magistrate also issued warrants in her favour for possession of the child who was, at that time, in the temporary physical custody of the father, who was the applicant's husband. In July 1976, another Magistrate, pursuant to s 4 (2) of the Guardianship Act 1968, considered that the custody proceedings would be more appropriately or expeditiously dealt with by the Supreme Court and he removed the custody application to the Supreme Court accordingly. His reasons for so doing were as follows:

> "(a) it is my experience that a custody case that comes to a hearing is fought to a finish and that, because of the emotional issues involved, the parent who fails to obtain custody is almost invariably totally unable to accept the Court's decision. The inevitable result is that virtually every custody case heard by a Magistrate goes to appeal; (b) because of the provisions of s 31 (1) [of the 1968 Act,] the evidence before the Magistrate and the findings of fact by him are of no assistance to the Judge, who must ignore the lower Court evidence and decision and hear the whole matter de novo; (c) the net result of the hearing of the custody case in the Magistrate's Court therefore is frequently as follows: (i) depending upon whether or not legal aid has been granted, the hearing will have cost the litigant and/or the taxpayer (usually the latter) a considerable sum of money; (ii) it is futile, illogical and utterly disheartening for the lower Court to sit through distressing and time-consuming custody cases, knowing in advance that a rehearing will follow, however painstaking his efforts to arrive at a proper decision; (iii) most important of all, the lower Court proceedings constitute an unnecessary emotional upset for the contestants themselves and to say their wounds are largely self-inflicted is only a partial answer, and, if they are old enough, to the unfortunate children who are the subject of such proceedings. [In some cases, though not in this one, where the child was very young, the strain on the children of knowing they are subject to two sets of proceedings must be very great and very damaging, however tactful everybody may be]; (d) it has been said that . . . the lower Court hearing has the value of clearing the issues for the parties prior to the Supreme Court rehearing by way of appeal. I do not believe that Court hearings are designed for such a purpose or that the value, if any, of such a function outweighed its evils, nor that valuable sitting time should be so taken up."

One may very well sympathise and agree with these sentiments, as, indeed, did the learned Judge. Nevertheless Barker J made the following helpful observations:

> "However, . . . in my experience, this Court is frequently assisted by a prior hearing in the Magistrate's Court. It may well be that a party who, before the hearing is commenced in the Magistrate's Court, indicates that, if unsuccessful, he or she will not accept the Magistrate's decision, may well think differently at the conclusion of that case, particularly if, say, cross-examination has not gone well for him or her, or the decision is so overwhelmingly justified on the evidence that no responsible counsel could advise an appeal. In a recent custody dispute which came to me by way of appeal from the Magistrate's Court, the setting was bitter. The applicants were the maternal grandparents – members of the Exclusive Brethren sect, seeking custody of their deceased daughter's child, against his father, who had deserted the sect and embraced the Baptist denomination. The Magistrate there heard numerous witnesses, and his decision, although not accepted by the grandparents, did 'clear the air'; it crystallised the issues, and made counsel and the parties aware of the futility of cross-examining numerous deponents, whose evidence was of peripheral value to the Court. I have no doubt, in this case, that there could have been a similar clearing of the issues, although I

would expect that the unsuccessful party before the Magistrate would nevertheless have appealed".

His Honour said, however, that it was appropriate that the matter be determined in the Supreme Court because, at his suggestion, counsel for the mother applied in the alternative for an order under s 9 of the 1968 Act that the child be made a ward of Court, with the mother being appointed as the Court's agent. (A child can become a ward of Court only by order of the Supreme Court, of course). By way of footnote, Barker J added that, because of the pressure of business in the Hamilton and Auckland registries, it would be rare indeed that a custody case would be more expeditiously dealt with in the Supreme Court than in the Magistrate's Court. He considered it impossible to generalise as to which cases should be removed from a Magistrate's Court and which should not, though the present case was, in his view, properly before him.

The case itself generated an intensity of feeling. The background of the father and mother, to put it briefly, was a sad one, and they had married despite an unsatisfactory relationship between them. They had lived a somewhat bohemian and nomadic existence before and after their marriage. The husband had quite serious drug convictions overseas and both spouses were fined in this country when convicted under the Narcotics Act 1965 for cannabis offences. They separated towards the end of 1975. The mother had a fairly casual liaison with a married man with children, and he, too, was said to have drug convictions. The mother lived in an isolated cottage but hoped to get suitable accommodation in Hamilton. Unhappily, she did not get on too well with her mother, the one person who struck his Honour as being likely to have a stabilising influence. The father's work plans were very vague, unsatisfactory and unrealistic, but he sought custody of the child and alleged that he would be assisted by his parents in caring for the child and that he was now a reformed character who had seen the error of his ways – as to which his Honour was not convinced. Moreover, the father had a partner who "admitted to some involvement with the drug scene" (though he had no convictions) and was, to put it no higher, acquainted with a woman who had been involved with drugs, including hard drugs. The former may (though it was not expressly found as a fact) have fed the mother and the child with food containing narcotics. The father's parents (who had not cared for a young child for many years) were not enthusiastic about taking on a child of tender years but were prepared to do it for their son's sake and as a lesser evil than having the child brought up by the mother. In other words, they preferred espousing their son's cause rather than benefiting the child, fond of it though they were. The father's father had no time at all for the mother and was likely to do little to facilitate access if she were not given custody. Further, if the child were to go to its grandparents' lonely home, there would be disruption. For instance, it would miss out on the many educational and cultural advantages of a city such as Hamilton. The husband's sister, moreover, who did not get on with her parents, did not impress his Honour, who thought she had a not altogether wholesome influence on the child's mother. Further, the father had not seen the child for more than two or three occasions since the separation and must accordingly have lost some contact with him, and, in the ultimate analysis, could not give the necessary security and stability.

Barker J felt the mother should not at present be given full rights of custody and guardianship and that the father's and grandparents' claim to the child must wholly fail. He made the child a ward of Court having regard to the uncertainty of the wife's future with the man mentioned above; to the susceptibility of the wife to outside influences and her inability to make appropriate major decisions about the child's future education and upbringing on her own. His Honour proceeded to say that, until such time as the situation sorted itself out, she obtained a permanent residence and showed that she had shed her companions with drug records and had gained some stability in her personal life, it would be as helpful to her as to the child to have the responsibility for major decisions about the child resting with the Supreme Court. Should it turn out that her circumstances changed, then he would "be only too happy" to rescind the wardship order and substitute for it a guardianship order. To allow the Court to carry out its functions as guardian, the learned Judge directed that, until further order of the Court, a welfare report was to be prepared for the Court each December, or at such other times as might be directed, on the child's circumstances. He also directed the mother to apply for further directions in the event of the filing of a divorce petition and when the child attained the age of 4 years and 9 months, so that an appropriate order could be made about his schooling. Pending further order of the Court, the child was not to leave the country.

Finally, Barker J said that he considered that the father was entitled to access, though he would not lay down precise terms. Counsel evidently intimated that it might be possible for the parties to work out some terms, initially, perhaps, with supervision from the Department of Social Welfare. He therefore reserved the question of

access with liberty to either party to apply to him on short notice.

The case may usefully be compared with *Re A (An Infant)* [1972] NZLR 1086 and *McKean v McKean* (M 82/76, Dunedin Registry, Judgment 16 August 1976, and noted by the present writer in [1977] NZLJ 54), which Barker J cited with approval in the present case.

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TAXATION

TAYLES v CIR: SECTION 108 AFTER THE PRIVY COUNCIL IN ASHTON AND EUROPA OIL

Introduction

On 15 February 1977 Jeffries J gave judgment in *Tayles v CIR* (1977) 2 TRNZ 115 on appeal from the Taxation Review Authority (5 NZTBR Case 51), in favour of the Commissioner. *Tayles* is the first case to come before the Supreme Court of New Zealand since the Privy Council decisions in *Ashton & Wheelans v CIR* [1975] 2 NZLR 717 and *Europa Oil New Zealand Limited (No 2) v CIR* [1976] 1 NZLR 546.

Jeffries J's judgment is worthy of comment for three reasons in particular. The first is his Honour's treatment of the obvious conflict between the "sole or principal purpose" test adopted by the Privy Council in *Mangin v CIR* [1971] NZLR 591 and the "any purposes and effects" test stated in *Ashton* compared with the "one of the main purposes" criteria adopted in *Europa (No 2)*. Secondly, and perhaps more important, however, are the statements made by Jeffries J as to what factors he considered relevant when determining the application of section 108 in a given fact situation in the face of the taxpayer's plea of "ordinary business or family dealing". Finally, the case is noteworthy because it breaks new ground as to what kind of transaction is subject to s 108. *Tayles'* case represents a considerable extension of the ambit of the section.

Facts

The taxpayers were brothers. Each farmed separate properties in Southland. Each brother settled a family trust in favour of the other's family. Each husband and wife were trustees of the trust expressed to be in favour of their particular family. Shortly after the trustees of, for example, the A E Tayles Family Trust, entered into a unit partnership with A E Tayles. A E Tayles agreed with the trustees to bail certain livestock, vehicles, implements and plant. The partnership's capital was $50,600.

This capital was divided into shares – of three classes – A E Tayles holding all the shares which gave control of the partnership. The third class – held by the trust – entitled the trustees to the balance of the income after the taxpayer himself received his fixed cumulative preferential dividend of 5 percent. A E Tayles declared his equity in his farm valued at $48,500 a capital asset of the partnership and received the equivalent $48,500 in shares in the unit partnership. The trust was able to pay for its shares in cash because A E Tayles gifted sufficient funds to it.

The taxpayer was employed at a modest salary to manage the business of the partnership. One aspect of the facts should be noted at the outset. The beneficial interest in the farm was transferred effectively to the unit partners absolutely. Thus the benefit passing to the trust was enduring. This of course, is a basic principle in formulating any estate planning scheme. However, the Commissioner regarded the schemes as tax avoidance arrangements. He invoked section 108 and regarded, for income tax assessment purposes, the arrangement between the trustees and the partners as void. Accordingly he assessed all the profits including profits from the partnerships' shares, the salary, rent and dividends back to each taxpayer. The taxpayers' objections were disallowed by the Taxation Review Authority.

Judgment

Like most s 108 cases, Jeffries J turned first to Lord Denning's judgment in *Newton v FCT* [1958] AC 450 (JC). He laid emphasis on the "implementation test". Both the taxpayer's and the Commissioner's counsel relied upon the Privy Council's judgment in *Ashton's* case to support their opposing submissions.

In dealing with the submissions, Jeffries J began by saying:

> "When a person ... sets out to alter his property arrangements for the future he cannot ever, in all honesty, do so without consideration for the effect on the contemplated arrangements of the tax laws. In my opinion he loses no ground in conceding the effect of the tax law was an ingredient in his plan, and he gains none by denying it".

His Honour joins good company in this statement. This was exactly the concession made by the taxpayer in *Loader v CIR* [1974] 2 NZLR 472. As Lord Upjohn said in *IRC v Brebner* ([1967] 2 AC 18, 30):

> "... when the question of carrying out a genuine commercial transaction ... is considered, the fact that there are two ways of carrying it out, – one by paying the maximum amount of tax, the other by paying no, or much less, tax – it would be quite wrong, as a *necessary* consequence to draw the inference that in adopting the latter course one of the main objects is for the purposes of the section avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved".

Turning to the facts, his Honour saw an "arrangement". Addressing himself to the second question – The purpose of the arrangement – his Honour saw a multiplicity of reasons being supported by the evidence. They were:

(1) As each of the appellant taxpayers were in their fifties, his Honour thought an elaborate estate planning exercise to be both justified and sensible.

(2) Each of the taxpayers was a farmer. Each had young children. It was a reasonable and proper expectation that the taxpayers would make provision, as far as possible, to enable members of their own family to take over the family farm.

(3) The inter-generation transfer of property is much assisted by fixed price levels; if a vehicle of easy transfer can be arranged whilst providing a hedge against inflation so much the better.

(4) Income splitting.

The taxpayers' argument was that there was no principal or main purpose of income splitting; the arrangement was attractive for the other reasons and the reduction in tax was merely an incident to the achievement of the other purposes. Evidence was given by the taxpayers' solicitor who "unhesitatingly accepted full responsibility, in so many words, for the entire scheme". The reasons given for the scheme were that it provided:

> "... a scheme whereby a Southland farmer could keep his farm operating successfully as a family unit. It was a method for a son to succeed to his father's farm without a crippling debt to serve, or having been given preferential treatment over other siblings. Mr Smith claimed the unit partnership enabled fractions of ownership to be transferred readily. He conceded that the limited liability company provided such an amenity, but felt that the company structure had little to offer the farmer.... [L]imited liability had negligible attraction to a farming operation".

The admissibility of this evidence is questionable: *Ashton v CIR.* Yet, having regard to it, in support of the taxpayers' argument of "ordinary business or family dealing": his Honour saw no difficulty in finding support for the Commissioner's conclusion that a principal purpose was tax avoidance. This was hardly surprising if the matter is looked at using 1977 standards. The 5 percent preference shares apparently served no real business or commercial purpose to the trust or the partnership. The interest rate was, it seemed, so low as to attract suspicion. When coupled with the large surplus of income left after all appropriations, the artificiality produced by the share structure and interest rate was plain. The effect was to split income. In the absence of any satisfactory explanation of business or family dealing the "tax avoidance" inference was inevitable.

> Considering "family dealing" Jeffries J said: "In a dealing within a family it is common to find tempered the strict mercantile rules that are common to find in the market place. The modifications range from unalloyed generosity to slight mitigation of the strict rules.... In these cases the schemes are formalised and legally binding... The vagueness of the term ... cannot be used as a cover for all or any type of transaction within a family.... [T]empering some risk, and some amelioration are acceptable in a family dealing, *but not abandonment of commercial practice, apparent mercantile foolishness or marked artificially"* (emphasis added).

This was the preface to his Honour saying that the section must apply to the taxpayers because each passed to the partnership their respective equities in the farms: the only large income earning asset they had. Whether or not this of itself was unobjectionable, each trust's $2,000 shareholding in the first income year gave approximately a 200 percent return on capital to them. The taxpayer's solicitor did not mention splitting of income as a reason for the scheme, nor it seems, did he refer to it as an effect, when giving evidence. Indeed, as Jeffries J remarked: "When this was drawn to his attention by counsel [for the Commissioner] his reaction had the tone of disinterested astonishment".

Viewing the evidence objectively, his Honour regarded the scheme as unreal and caught by the section. The taxpayers themselves got no real benefit (other than tax relief) which could not have been achieved just as simply in other ways using the unit partnership. The unit partnership concept itself was unchallenged by the Commissioner.

Much of his Honour's reasoning is based on the benefit of hindsight. The plan was looked at by the Commissioner, and the learned Judge, from an "income" perspective only. Three aspects should, however, be noted. Firstly, there is the

question of the 5 percent interest rate. The scheme was effected in 1965. At that time the market rate of interest was nowhere near today's 11 or 12 percent. It seems that the prevailing first mortgage rates were about 6 or 7 percent, and then only where there was a demand for finance. In terms of the circumstances of the times it was clearly arguable that 5 percent was a reasonable return for each taxpayer to receive on the preference units. The interest rate preferred those contributors who had put up the substantial proportion of the partnership assets. The interest rate was not unreal. It was quite close to prevailing market rates on borrowed money. Also, the taxpayers' solicitor put in substantial evidence that 5 percent was the average rate of return for farm income from the farmer's total investment. The evidence suggested that the solicitor had done some research into this question over a period and, in developing the unit partnership scheme, had relied on the results of that research. This evidence was unchallenged by the Commissioner. It is clearly set out in the Review Authority's decision but the learned Judge did not refer to it.

It is submitted that if the learned Judge felt unable to accept this evidence entirely (there is no suggestion that he did) at least it falls squarely within the explanation of family dealing. Jeffries J said, "Tempering some risk, and some amelioration are acceptable, but not abandonment of commercial practice. . . ." Secondly, there is the estate planning aspect. Most of the s 108 cases – from *Elmiger, Mangin* and *Udy* through to *Gerard* and *Ashton* – are characterised by one particular feature. They all involved *short term* transfers of high income producing assets or quickly wasting assets. *Tayles* is quite different. The real income earner – the farm – was held on trust for the unit partners. It thus satisfied the test applied to the other cases when the Courts were dealing with the estate planning question in the light of the "family dealing" plea. If the taxpayer wished to provide for the welfare of his family, the Courts have required the trusts to gain *an enduring benefit.* The *Tayles* trusts got it. Further weight to this feature is added by the fact that each taxpayer's main asset was frozen in money terms; another essential in an estate planning exercise. Finally, the taxpayers' each had a guaranteed income of $4,000. This was not far removed from their incomes which they had derived in the years leading up to the re-arrangement. There was no way that the taxpayers could ensure that the trusts got *any* income at all. The fluctuations in farm incomes are notorious. The results of the previous income years were put in evidence. The evidence was that $4,000 was the average return for each taxpayer, as income, for the previous years. The object was to ensure that neither taxpayer would be any worse off after the arrangement. Again, this evidence, before the Review Authority is not referred to by Jeffries J.

At best, the 200 percent return could be described as fortuitous. It could have just as easily worked the other way. The judgment reflects two themes. There is the heavy emphasis on the question of income without real regard to the other features – particularly estate planning – of the scheme. Secondly, there is the constant application of what appears to be commercial considerations – such as interest rates – used today. The scheme was, however, effected in 1965. The case stated was confined to the early income years. The Privy Council's judgment in *Ashton and Wheelans* was emphatic on this issue. The Court is not entitled to have regard to subsequent events to determine the issue of whether the arrangement discloses tax avoidance as a purpose. The high rates of return occurred but not in every year. In any event, this evidence is irrelevant; the question must be determined at the date of implementation.

Finally, it is to be noted that the taxpayers did not rely on an argument which could have caused the Commissioner some difficulty. The taxpayers were in a position to argue that, even if s 108 did apply, the Commissioner could not disclose a taxable situation without reconstruction. Section 108 was an annihilating provision only; the Commissioner required a proper statutory power to allow reconstruction. This was the basis of the decision in *Gerard v CIR* [1974] 2 NZLR 279 (CA) in the taxpayer's favour and the point was re-emphasised in *Europa Oil (No 2).* The learned Judge implied in his judgment that the question was not taken because the case was argued on the section as it was before 1968. The taxpayers saw the words "absolutely void" as meaning just that. In 1968 these words were clarified by the addition of the words "as against the Commissioner for income tax purposes" in an amendment. The suggestion is that the words "absolutely void", without the qualification introduced by the amendment, precluded the taxpayers' argument.

With respect, that cannot be correct. According to the Privy Council in *Mangin,* the 1968 amendment did "no more than declare the existing law". Whether or not that is correct (as questioned by Cooke J in *Loader*) it has never stopped taxpayers advancing the reconstruction issue. It was really the only argument in *Gerard* and a second argument in *Ashton and Wheelans.* It has never been suggested that the reconstruction argument is not open to taxpayers assessed under the pre-1968 section. Reconstruction was open

because the trusts were cross-settlements. Each trust was settled by a brother for the benefit of the other brother's family. The trust income was received by the trustees – the taxpayer *and* his wife. If the income is to be taxed as the taxpayer's alone, it involves ignoring the fact that it was received jointly with the wife as trustee. This is clearly reconstruction and is prohibited in *Gerard.*

It may be that the taxpayers considered that the reconstruction argument was now precluded by the approach taken by Viscount Dilhorne in *Ashton and Wheelans* for the Privy Council. If that was the rationale for not advancing it, there are two comments to be made. Firstly, the Privy Council's *Ashton* judgment simply does not refer to the detailed argument addressed on the issue. The decision is characterised by some assertions which, with respect, cannot be reconciled with previous decisions and "reconstruction" seems to be a central theme. Secondly, there is the conflict between *Ashton* and *Gerard* in the Court of Appeal. In the absence of any reasoning supporting the approach of either the Court of Appeal or the Privy Council in *Ashton,* it is the writer's submission that a Court would still be entitled to follow the approach taken in *Gerard,* which was in accordance with earlier decisions. The argument was certainly open. It is unfortunate that it was not advanced.

The Ashton: Europa conflict

The Commissioner argued that there was a material conflict between *Ashton* and *Europa (No 2)* as to the proper test where the evidence discloses several purposes tax avoidance being one of them. It is against the factual background that the Commissioner sought to have the Ashton "any purposes and effects" test applied. If the Court was not satisfied that tax avoidance was a "main purpose" the Commissioner was relying on *Ashton's* "any purpose" test.

His Honour said:

> "... [A] consistent thread runs from *Newton* through *Mangin* and restated in *Europa (No 2)* in these words ... 'the section does not strike down transactions which do not have as their main purpose or one of their main purposes tax avoidance'."

His Honour stated that his conclusions were based on the *Europa (No 2)* test, which, as far as the Commissioner is concerned, is somewhat stiffer than the *Ashton* ruling. With respect to Jeffries J, it is clear that *Mangin's* case deliberately modified the *Newton* test. The only consistent thread, after *Mangin,* is inconsistency. The "sole or principal purpose test" was formulated from *Elmiger* and stated by Turner J in *Mangin.* It was expressly approved by the Privy Council in that case. It is irreconcilable with *Ashton* and with *Europa (No 2).* The "one of the main purposes" test is a retreat from *Mangin.*

Conclusion

Tayles is in many respects similar to *Loader v CIR. Loader's* case concerned an earthmoving contractor. In 1963, Loader decided to rearrange his business activities and, at the same time, plan his estate for duty purposes. The rearrangement involved forming a limited liability company and a trust. The majority of the earthmoving equipment was sold to the trust by way of purchase price outstanding payable upon demand. In turn the trust bailed the equipment to the Company. The overall effect was that the taxpayer earned less and the trust derived a substantial income. In the face of s 108, the taxpayer called expert evidence. Cooke J accepted that the company served a valuable purpose – limited liability – in a financially risky business. Such things as securing debenture finance were also mentioned. The arrangement froze the value of the income-earning assets as far as Loader was concerned; increases in value and inflation accrued to the trust. The taxpayer accepted that tax saving was an ingredient also.

Cooke J, after considering the evidence said (p 477):

> "From the documents it may be inferred that estate duty and tax saving may well each have been included in the purposes of the arrangement, but I see nothing in the documents or the arrangement as a whole or the manner in which it operated to warrant an inference that tax saving was either the principal purpose or one of a number of equally important principal purposes. On the overt acts test, the more obvious conclusion is that it was an incidental or subsidiary purpose. . . . . I am satisfied that an arrangement on the general lines adopted would have been desirable irrespective of taxation advantages . . ."

Loader's case may be questioned because of the important concessions made by counsel for the Commissioner at the hearing. Nevertheless, both *Loader* and *Tayles* have remarkable similarities. It seems clear that both arrangements were desirable whether or not tax savings were achieved. In neither was there any guarantee of income tax consequences. Both had all the features of a thorough estate planning exercise. It is difficult to see the justification for such different results.

It would seem that the *Europa (No 2)* test must prevail in preference to *Ashton.* It is reasonably clear that Jeffries J would have so held if necessary.

Geoff Harley.

EVIDENCE

A FURTHER COMMENT ON THE JUDICIAL DISCRETION TO EXCLUDE IMPROPERLY OBTAINED EVIDENCE

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In two recent articles in the New Zealand Law Journal commentators have expressed fears of potential inconsistencies in the exercise of the judicial discretion to exclude evidence illegally or improperly obtained *(a)*. One of the commentators points to a process whereby a discretionary power frequently exercised becomes regulated by its own special rules and begins to lose its discretionary nature. The other comments on the smallness of New Zealand society and suggests that as a consequence judicial inconsistencies in the exercise of the discretion will be minimal.

While there may be much merit in these comments it appears that there is little reason for fearing inconsistencies. Indeed, recent cases would suggest a considerable degree of uniformity in the exercise of the judicial discretion. It is consistently described by the Courts as being applicable to the controlling of illegal or improper methods of obtaining evidence. It is equally consistently not exercised. It would appear that there are few recent reported decisions of the discretion being exercised so as to exclude prosecution evidence.

In the confession cases of *Convery* [1968] NZLR 426 and *Naniseni* [1971] NZLR 269 the Court of Appeal held that a Court could in the exercise of its discretion refuse to admit a confession, even though voluntary, on the grounds that it was obtained by unfair means. In the former Turner J stated "... the Court may consider not only the case immediately before it, but also the necessity of maintaining effective control over police procedure in the generality of cases ..." (438). However in neither case was the Court prepared to find that there had been anything sufficiently improper to warrant the exclusion of evidence.

In *Daily v Police* [1966] NZLR 1048 the Chief Justice accepted that where evidence had been obtained by misrepresentation or similar unfair means it could be excluded by the exercise of the discretion. However, even though the accused did not consent to the taking of a blood sample and was not warned that an analysis of it might be given in evidence, the discretion was not so exercised.

In the recent entrapment cases of *Capner* [1975] 1 NZLR 411 and *O'Shannessy* (unreported, Wellington, 8 October 1973, CA 78/73) the discretion was acknowledged by the Court of Appeal to be the appropriate means of controlling police instigation of crime. Despite the unsavory fact situations and the unacceptable methods of obtaining evidence employed, in neither case was the Court (or the trial Courts) prepared to exclude the evidence of the undercover agents involved. (See Barlow for an outline of the facts of these two cases.)

On a slightly different note, but one indicative of the present attitude of the Courts, the situation of illegal search and seizure arose in the cases of *McFarlane v Sharp* [1972] NZLR 64 and 838 and *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728. While the Court of Appeal did not consider the discretion it would appear from the judgments that the police were free to proceed on the basis of evidence obtained by unlawful search and seizure. In the latter, for example, the search warrant was held to be so fundamentally deficient as to amount to a miscarriage of justice. It was quashed as a result. However, while the Court was prepared to order that the police were not entitled to retain possession of any records, files or materials seized and removed from the appellant's premises pursuant to the warrant, it refused to order the same in relation to any copy, photocopy, microfilm, note, record, tape recording or other permanent record taken or made therefrom on the ground that it had no authority to do so. Further, the Court refused to declare that the information contained in the records, files or other materials was the confidential property of the appellant and that no part of such information might be disclosed by the police to any person and that no person named in the same might be contacted or approached directly or indirectly by the police. This application was refused on the ground that it was open to the police to justify their retention and use of these materials other than on the basis of the warrant. The applicant was left only the remedy in detinue – of little or any use in these circumstances.

It appears that there are three reported

(a) N L A Barlow, "Recent Developments in New Zealand in the Law relating to Entrapment" [1976] NZLJ 304 and 328, 331; Dr G F Orchard, "A Rejection of Unfairly Obtained Evidence: A Commentary on *Hall v Police*" [1976] NZLJ 434, 437.

exceptions to the Courts' practice of refusing to exercise the discretion – two involving confessions or statements (*The King v Phillips* [1949] NZLR 316; *R v Graham, Puhipuhi et al* [1973] Recent Law 139) and the third being the most recent case of *Police v Hall* [1976] 2 NZLR 678.

The discretion would thus appear to be in practice an extremely narrow one in New Zealand. This is also true of the discretion in other jurisdiction. For example, Professor Heydon observes that (up to 1973) there were only four reported cases in the Commonwealth outside Scotland where appeal Courts have said the Court's discretion should have been exercised to exclude evidence *(b)*.

The ramification of the lack of use of the discretion is obvious. The discretion is based on public policy, the thrust of which is two pronged: the protection of accused persons from unfairness and the judicial control of certain areas of police practices relating to the conducting of a criminal investigation. If the Court is to control improper practices, whether they be illegal search and seizures, confessions or statements induced by trick, misrepresentation or force or threat of force, or incitement of crime in a manner amounting to entrapment, then it must act in such a manner as to render the use of such practices unprofitable for the police. The fruits of such practices must be denied a place in the case of the prosecution. If the discretion is to have any substance and effect then it is clear that it needs to be exercised more frequently so as to exclude much more evidence improperly obtained than is the case at present, especially in entrapment situations. Empty descriptions of the residual power are ineffectual if the Courts either refuse to classify the police behaviour in question as unacceptable or decline to reject the evidence obtained.

The issue of control ot enforcement procedures goes deeper than the attitudes held toward the individual accused, who often is clearly guilty. The issue of guilt must be kept separate from that of the police conduct involved.

In the final analysis what is at stake is the rule of law on which our society is based. Society, through the agency of the law, aims at achieving a desired level of social order. But the use of the law as the instrument of order disguises the fact that the two can be in conflict. The thrust for order places emphasis on efficiency, whereas the rule of law implies some restraint on the methods employed to achieve that order. It is the role of the Courts to uphold the rule of law and to balance effectively the interests of all involved, not only those of the police, but also those of the individual and of society as a whole. If the reported cases are any indication then the judiciary in New Zealand has consistently failed to achieve this balance (*Hall* and *Graham, Puhipuhi et al* excepted.)

At this point it is interesting to note the relative success of the Scottish Courts in developing a more balanced approach *(c)*. Lord Cooper's often cited dictum in *Lawrie v Muir* [1950] SLT 37, 39-40 illustrates the difference in emphasis and attitude which leads to a greater willingness to exercise the discretion:

> "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. *On the other hand the interest of the State cannot be magnified to the point of causing all the safe-guards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods"* (emphasis added).

To effect this balance the presumption of admissibility of evidence, if properly obtained, is reversed. Thus, although ". . . an irregularity in the obtaining of evidence does not *necessarily* make that evidence inadmissible . . . . [i]rregularities

(b) J D Heydon, "Illegally Obtained Evidence" [1973] Crim LR 603 and 690, 605.

(c) See Glanville Williams, "Evidence Obtained By Illegal Means" [1955] Crim LR 339; J W R Gray, "The Admissibility of Evidence Illegally Obtained in Scotland" [1966] Jur Rev 89; J T C, "Evidence Obtained By Means Considered Irregular" [1969] Jur Rev 55.

(d) This approach has also been recommended in Australia in *The Law Reform Commission, Report No 2, Criminal Investigation.* Canberra: Australian Government Printing Service, 1975, 141 para 398. It has also been advocated in J A Smillie, "McFarlane v Sharp: Affirmation or Extension of Police Powers of Search and Seizure" (1975) 6 NZULR 271, 286. See also J D Heydon, "The Problems of Entrapment" (1973) 32 Cam LJ 268.

require to be excused, and infringements of the law in relation to these matters are not lightly condoned" (ibid, 40).

Translated to the New Zealand situation such an approach would result in a shift from the positive exercise of the discretion to exclude evidence improperly obtained to a positive exercise to admit such evidence *(d)*. Thus the onus of proof would be on the party wishing to have the evidence admitted to show that the circumstances were such that the evidence, notwithstanding that it was improperly obtained, should be admitted. By having to exercise its discretion to admit the Courts would be confronted with the conflicting interests in a manner which would appear to be more conducive to a balanced inquiry.

A number of factors considered in the Scottish Courts can be listed as relevant to this inquiry *(e)*:

(1) Did the irregularity occur as a vital part of a deliberate attempt to get the evidence, or did it happen accidentally?

(2) How serious is the illegality? Is there a deliberate policy of consistent breach of the law? Would admission of the evidence encourage that breach?

(3) Were there circumstances of urgency or emergency? Was it necessary to remove the evidence illegally to preserve it?

(4) Were those responsible for the illegal conduct public officials subject to various forms of control or merely private individuals?

(5) Was the breach an infringement of a carefully devised statutory procedure which Parliament for good reasons intended to be followed in detail?

(6) How serious was the offence being investigated?

Heydon lists a seventh factor: "How important are the particular means used in the detection of the type of crime committed?" It is this writer's view however that this is not a proper consideration for the Courts. It is for the Courts to ensure that the rule of law is obeyed by all, including those charged with the responsibility of enforcing it. It is for the legislature to exempt those enforcing the law from the rule of law if it deems that such exemption is necessary to enable effective enforcement practices. An example of this can be found in the Gaming Act 1908, s 54 of which states:

> "No constable and no person acting under instructions from any commissioned officer of Police shall, while on duty, be deemed to be an offender or accomplice in the commission of any offence against the Gaming Acts, although such constable or other person might but for this section have been deemed to be such an offender or accomplice" *(f)*.

Supervision of police practices ultimately depends on the willingness of the judiciary critically to review the actions of the executive. Each case turns on its own facts. Under the present discretion counsel must be prepared to argue on a voir dire for exclusion of improperly obtained evidence. Each Judge must be prepared to pursue the Court's function of an independent force supervising the actions of the executive as they affect the individual and the community.

A recent English decision demonstrates such willingness and its ramifications *(g)*. In *Ameer and Lucas* (The Sunday Times (London), 1 August 1976) the Court decided that a police informer had acted as an agent provacateur. As a result, other evidence given by two police officers also participating in the trap was excluded by the trial Judge, Mr Justice Bernard Gillis, in the exercise of his discretion. The defendants were freed as a result. In a further case six people accused of conspiracy to supply cannabis were found not guilty after prosecution offered no evidence on these charges (The Sunday Times (London), 7 November 1976). It seems that the same informer involved in *Ameer and Lucas* was again the chief

(e) See Heydon, ante, note (b), 608-610.

(f) See also the Narcotics Act 1965 s 6(3) which authorises possession of a narcotic by any person in the service of the Crown for the purposes of the investigation of any offence or suspected offence or the prosecution of any person. This has been expanded in the Misuse of Drugs Act 1975 s 8 to include procurement; but note that using or selling are not included in the exemption. See also the numerous statutory provisions authorising search without warrant.

(g) Indeed, since this article was written there has been a decision in New Zealand illustrating similar willingness: *R v Pethig* (unreported, Auckland, 16 December 1976, SC T255/76). In this case of entrapment, Mahon J acknowledged that by its decision in *Capner* (supra) the Court of Appeal had "... declined for the second time to enter upon a definition of the principles which should control the admission of evidence where the accused has been charged as a result of police undercover detection." The learned Judge found as a fact that two transactions of drug dealing would not have been entered into by the accused but for the encouragement and the financial assistance provided by the undercover officer. He concluded: "It is not sufficient for the Crown to prove that the accused had a proclivity for this type of offence. The question is whether the accused without encouragement would have committed the specific offences charged in the indictment, and I have answered that question in the negative .... Having regard to the findings which I have made, I think it is a case where I must without hesitation exercise my discretionary power to exclude the officer's evidence ...."

architect in the commission of the conspiracy. Hence the effect of Gillis J's decision was not confined solely to the original case and prosecuting counsel took note of the policy expressed in that judgment, the conclusion of which reads:

> The exercise of discretion to exclude evidence is a very grave exercise of the court's authority. There is no doubt that discretion is an established part of law and that it is right in the interests of justice that this power should exist. It is a salutory safeguard in a free society, a safeguard which stipulates standards for police officers to follow."

This is one example where a Court clearly felt that there can be a greater lawlessness than that attributable to criminals.

PRACTICE NOTE

Detention, preservation and inspection of property

Under R 478 the Court may make an order for the detention, preservation or inspection of any property which is the subject of the action or in respect of which any material question may arise in the action, and may authorise entry on land or building in possession of a party; and authorise the taking of samples, observations etc as necessary for the purpose of obtaining information or evidence. The corresponding English R is O 29 r 2 which has specific provision, not in our R, that application is to be by summons, or with notice.

Both English and New Zealand courts have had recent occasion to consider this R and some of the decisions indicate significant developments in the area.

First, as to detention. In *Beck v Value Capital Ltd* [1974] 3 All ER 437 Goulding J held that the Court, under both its inherent jurisdiction and under O 29 r 2, could take charge of a document material to the case once it comes into the hands of the Court, if necessary for the purposes of justice, notwithstanding the existence of possible rights in third parties, but not in blind disregard of those rights. The document in question had been the subject of interlocutory proceedings; it had not been proved nor put in in evidence, and was on loan from persons not parties to the action. There were justifiable allegations that it may have been altered (with the inference that it could be further altered). In the circumstances an order was made detaining the document in Court until judgment or further order.

Next as to preservation; in *EMI Ltd v Pandit* [1975] 1 All ER 418 an ex parte application was made for an order for inspection of documents relevant to plaintiff's action for infringement of copyright, defendant having filed an affidavit that he had no relevant documents in his possession. Plaintiff was able to demonstrate with great force that this assertion was false and that if the application were made on notice to defendant, the material sought would very likely disappear. The draft order sought to authorise persons named by plaintiff to enter named premises between 8 am and 9 pm to inspect and photograph pre-recorded tapes and other infringing material, invoices and correspondence, and to remove articles for inspection and testing. Templeman J observed that this would appear to involve trespass of property and invasion of privacy, but after examining the authorities concluded that justice required the intervention of the Court in the manner sought, and without notice, otherwise plaintiff would be substantially deprived of a remedy. An order was accordingly made limited as to times of entry and as to the number of persons to be authorised by plaintiff to enter. Plaintiff had offered to undertake not to enter the premises forcibly, but the Court preferred to make a mandatory injunction ordering defendant to allow plaintiff or his men to enter; if defendant disobeyed, he would be in contempt.

The principle was confirmed, with refinements, by the Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779, another copyright infringement case, Lord Denning MR observing 782h: "Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say 'Get out' . . . None of us would wish to whittle down that principle in the slightest. But the order sought in this case is not a search warrant . . . It only authorises entry and inspection by permission of the defendants . . . it brings pressure on the defendants to give permission . . . if they do not give permission they are guilty of contempt of court . . .;" (783e): such an order should only be made ex parte where it is essential that the plaintiff should have inspection

so that justice can be done between the parties; and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden or taken beyond the jurisdiction, and so the ends of justice be defeated; and when the inspection would do no real harm to the defendant or his case. But on service of the order plaintiff should be attended by his solicitor and defendants given an opportunity of considering it and consulting their own solicitor; if they wish to apply to discharge the order as having been improperly obtained, they must be allowed to do so. If defendants refuse permission to enter or inspect, plaintiffs must not force their way in; they must accept the refusal and bring it to the notice of the court afterwards if need be on application to commit.

The Court of Appeal was thus willing to sanction an ex parte order only in an extreme case where there was grave danger of property being smuggled away or of vital evidence being destroyed.

There was no allegation of false affidavits in *Anton Piller.* In *Universal City Studios v Mukhtar* [1976] 2 All ER 330. Templeman J observed, 332j, however that it was plain that the defendants in *Anton Piller* were not acting in good faith. In the case before him there was mere, albeit plausible, suspicion. Plaintiffs, hearing their copyright, trade mark and other rights in the film 'Jaws' were being infringed by A selling unlicensed Jaws T shirts, challenged A who said he was unaware of plaintiffs' rights, and ceased selling them but shortly afterwards B and C were found selling them. B gave the same explanation as A; and the stocks on B's shelves disappeared and C's stocks increased. Plaintiffs issued a writ against C for breach of copyright and sought an ex parte order against C to prevent the disappearance of the articles from C's premises. The *Anton Piller* principle applied; even if C were wholly ignorant of plaintiffs' rights, C should not object to handing over the articles for safe custody; an order was accordingly made on the ex parte application.

Passing to the local scene, in *Donselaar v Mosen* [1976] 2 NZLR 191 the Court of Appeal had before it an appeal against an ex parte order made in the Supreme Court authorising respondent, or sheriff's officer to enter defendant's premises and take into custody books of account and records relating to work performed by respondent for appellants under certain contracts in dispute. McCarthy P observed, 192, 'In making his ex parte order and later varying it, O'Regan J seems to have acted under R 478 . . . in order to preserve from destruction by the appellants certain records of the appellants which were claimed by the respondent to provide vital information relating to his claim'. The appeal was advanced on the ground that R 478 did not apply because the records were not 'property which is the subject of the action or in respect of which any material question may arise in the action' (the wording of R 478). The Court had grave doubts whether a case was made out which satisfied the terms of R 478; the affidavit in support of the motion was slender and it was difficult to ascertain which, if any, material question would arise in the action relating to the particular records but the Court had no doubt that under inherent jurisdiction an order could be made preserving evidentiary material here, if that were necessary in the interests of justice. But the order of the Supreme Court was too embracing and some material held by the sheriff had no relation to work performed and in issue. The order was accordingly varied to limit its application to strictly relevant material; for the return of material already inspected; and setting a time limit for examination and return of the remainder.

Recent English authority is not referred to in the judgment but the decision follows the general principles adopted in *Anton Piller,* although there it was regarded as essential to show there would be a grave danger of the property being done away with or evidence destroyed if notice were required. Evidence of this before O'Regan J does not appear from the report to have been strong and probably in any future application for an ex parte order of this type the Court would insist on the *Anton Piller* tests being applied.

Summary: Under R 478 and/or under inherent jurisdiction the Court may, on an ex parte application, order, on terms, that another party to the action permit applicant to enter his premises and inspect material or evidence relevant to the action but applicant must satisfy the Court (i) that justice will be done by making the order (ii) that there is a grave danger of the material being destroyed or rendered unavailable if notice of the application were first given and (iii) inspection would do no real harm to the party served or his case; and the party served should be given reasonable opportunity to consider his position before complying with the order and if he wishes to apply to have the order set aside he must move immediately. If removal of material is sought and ordered it seems this would best be done under control of the Court and with the material being brought into official custody, If it is feared that the party served may destroy the material while he has his 'opportunity to consider', immediate removal into custody of the Court, with reasonable safeguards, would presumably be ordered.

Gordon Cain

COURTS

FIRST SUBMISSIONS BY THE NEW ZEALAND LAW SOCIETY TO THE ROYAL COMMISSION ON THE COURTS — PART II

5. The Court of Appeal

Court of Appeal: (In the event of the Judicial Committee of the Privy Council remaining the final appellate tribunal)

5.1 The Society believes that the number of Judges of the Court of Appeal should be increased on a permanent basis. Its view is founded on two principal grounds. First, both the basic function and the standing of the Court has been adversely affected by constant changes in its membership. This has been largely occasioned by the use of Supreme Court Judges. Secondly, the work of the Court has increased significantly.

5.2 In the Society's opinion, the Court should be manned to the extent necessary for it to operate as an entirely independent Court of Appeal. Supreme Court Judges should not be used to make up its membership other than in exceptional circumstances. This would be consistent with the philosophy on which the Court was founded in 1957. Giving Supreme Court Judges a "turn" on the Court of Appeal, however, seems to have become a matter of administrative policy — a policy which is pursued irrespective of the individual Judge's ability in appellate work. It is a situation which has largely developed because the permanent members of the Court take sabbatical leave, are given leave of absence to conduct commissions of inquiry or are absent because of illness or some other good cause.

5.3 The chain of events leading up to the establishment of a Court of Appeal can be traced from the minutes of the meetings of the Council of the Society. It may be helpful to give a brief sketch of the background as it emerges from these records.

5.4 In 1947 a Bill to establish a permanent Court of Appeal was submitted by the Attorney-General of the day to the Society and the Judges for consideration. Stressing the need to exercise great care in making suitable appointments the Society generally approved the provisions of the Bill but the Judges forwarded a memorandum to the Attorney-General objecting to the whole proposal.

5.5 In 1949 the Attorney-General prepared an amended draft Bill. Although the Society suggested certain amendments to the draft it approved the proposal. But the Chief Justice wrote to the Attorney-General on behalf of the Judges again opposing any substantial change in the constitution of the Court. The President of the Society then wrote to the Attorney-General responding to the Judges' objections and reiterating the Society's opinion that the establishment of a separate Court of Appeal would be in the public interest.

Part I of the Law Society's submissions appeared at [1977] NZLJ 130.

5.6 On 27 November 1953 the Society's minutes record that the Standing Committee of the Council had handed to the Attorney-General a statement emphasising the need to relieve the strain of work on the Judges and calling for the appointment of additional Judges. Among other things, the Standing Committee asked the Attorney-General to consider a plan to relieve the Judges of some poriton of their Court of Appeal work which, it was recognised, had been a contributing factor in producing undue strain.

5.7 Later at the same meeting a report from the Council of the Auckland District Law Society was considered. The Auckland Council reported that a letter had been received from a number of practising barristers requesting that urgent representations be made to the Attorney-General seeking the creation of a separate Court of Appeal. It was stated in the report that for many years members of the legal profession had been seriously concerned about the Court of Appeal as it was then constituted. In most cases the Court was in effect the final Court to which litigants could resort and it was therefore regarded as important that it should be a strong Court possessing the confidence of both the public and the profession.

5.8 The report of the Auckland Council also emphasised the fact that although the then Court of Appeal was comprised of up to five puisne Judges, not every Judge was good at appellate work. A Judge might carry out his duties admirably at first instance but lack the kind of ability required by a Judge who is to hear and decide appeals from other Judges. The view was expressed that it was likely that the judgments of the Court of Appeal, manned by Judges appointed because of their qualification to be appellate Judges, would be regarded as being more authoritative.

5.9 On 2 April 1954 the Council was advised that an amendment of the Judicature Act was in hand which would have the effect of increasing the strength of the Court of Appeal without departing from the system of having Supreme Court Judges combine as the Court. The President of the Society advised the Attorney-General that while this proposal would result in some alleviation of the burden of work borne by Supreme Court Judges in the Court of Appeal it did not meet the Society's request for the establishment of a permanent and separate Court. During the early part of the following year discussions took place between the Attorney-General and the President and members of the Society's Standing Committee at which the President urged that, in the interests of the administration of justice and for the public benefit, the matter called for a firm decision on the part of the Attorney-General.

5.10 It may also be observed that the profession endorsed "the establishment of a separate Court of Appeal consisting of Judges permanently appointed thereto" at the Triennial Law Conference held in 1954. This resolution followed two papers delivered by Mr L P Leary QC and the late Sir Timothy Cleary, then Mr T P Cleary.

5.11 Mr L P Leary QC is reported as saying: "I suggest such continuous and abrupt changing of the personnel of the Court of Appeal would lead to grievous results in the consistency of judicial thought and common understanding of appellate problems must suffer" ((1954) 30 NZLJ 113).

5.12 Mr T P Cleary said: "The greatest contribution which a Court of Appeal can make to the development of the law will come only when its members work together with reasonable continuity so that they may attain uniformity of approach to their problems" (ibid, 116).

He quoted Sir Raymond Evershed as saying: "If, therefore, the real purpose of an appellate Court is to be achieved, it is essential to do so by getting what I may call a *combined judicial operation.* Two heads, it is said, are better than one, but only if they work truly together. *Otherwise, the individual opinion of each of three appellate Judges may have no obvious primacy over the view of the trial Judge.* If, therefore, the members of the appellate Court are constantly having to change ... then those Judges constituting the Court would not sit together often enough to acquire the faculty of working, not individually, but in co-operation with their brethren" (italics added; ibid, 116).

5.13 In addition, the advantages of having a Court composed of Judges appointed because of their particular aptitude for appellate work was reiterated. It was also confirmed in the papers that the Judges (with the exception of Sir David Smith who had retired) remained opposed to the proposal for a permanent and separate Court of Appeal.

5.14 Nonetheless, a permanent Court of Appeal consisting of three members was established by an amendment to the Judicature Act in 1957. The Court commenced sitting at Wellington on 17 February 1958.

5.15 Irrespective of the opposition which the Chief Justice of the time and the Supreme Court Judges maintained over a lengthy period it is now undeniable that the establishment of the permanent and separate Court of Appeal was a major step forward and represented a vast improvement in the judicial system of this country.

5.16 It cannot be said, however, that the Court has fully achieved its original purpose. The Society believes that Sir Alexander Turner's observations on the need for continuity in the Court of Appeal on the occasion of his retirement are compelling and correct. It considers it to be a matter of the utmost importance that the original objectives in establishing a permanent and separate Court of Appeal be restored.

5.17 Having referred to the reputation and standing achieved by the Court of Appeal since its inception, Sir Alexander Turner adverted to the factors which had contributed to this state of affairs and said: "The first factor has been the *permanent and continuous association of three of the best lawyers in the country, held together as a team,* and speaking, if not with one voice, at least after ample opportunities for conference and discussion, and the reconciliation of conflicting views. The *steady collaboration of the same three members of the Court, month after month and year after year, has in my opinion played a tremendous part in building the reputation and usefulness of the Court, ensuring consistency in the trend of its decision.* To this factor must be added another. It is that the Court of Appeal is recognised by its constituting Act as the Court of Appeal, and not as just a department of the Supreme Court, such that members of the two Courts may be interchanged between them by administrative authority as convenience may seem to dictate" (italics added).

And again: "... Court of Appeal Judges should not sit on the Supreme Court except in cases of extraordinary sudden emergency, and ... they should not be put under any pressure to do so. *Neither should Supreme Court Judges be able to be nominated into this Court for temporary periods of duty, as a matter simply of administrative convenience"* (italics added; [1973]

NZLJ 322, 325-326).

5.18 Experience had indicated that only an increase in the number of the permanent Judges of the Court of Appeal can ensure that the original objectives in establishing the Court are attained and that the reputation and standing of the Court is advanced.

5.19 Apart from this overriding consideration the Society believes that the increased workload now undertaken by the Court of Appeal justifies additional permanent Judges. The statistics made available to the Society reveal that the number of civil appeals heard by the Court increased from 38 in 1964 to 68 in 1973. In the same period the number of criminal appeals completed increased from 78 to 149. The total sitting days in both civil and criminal appeals expanded from 121 in 1964 to 154 in 1973. (It is to be noted that the relationship between the number of sitting days to the number of cases heard in 1973 will not be the same as in the previous years because of the introduction of the procedure requiring a written synopsis of submissions to be filed in Court.)

5.20 This increase in the Court's workload is significant. Civil appeals almost doubled and criminal appeals more than doubled over the stated period. It is to be borne in mind that the number of cases dealt with in the earlier years of the Court's existence was considered appropriate to a Court comprised of three Judges. Clearly, the burden is now too heavy for a higher appellate Court and unless the position is rectified the quality and authority of the Court's judgments, as well as the image and standing of the Court itself, must suffer.

5.21 The Society considers that the number of Judges on the Court of Appeal (in addition to the Chief Justice) should be increased to a total of four or possibly five. In any event, it considers that three members should sit to hear all appeals.

5.22 Whether or not the Court should comprise four or five members would depend on the workload of the Court. The Society's present thinking is that four permanent members would be sufficient but it accepts that the evidence and information available to the Commission may show that the higher number is preferable. Certainly, the number should be such as to avoid the necessity of assigning Supreme Court Judges to sit on the Court of Appeal and to achieve the degree of permanence and continuity orginally contemplated. It should also be such as to restore the Judges' workload to the proportions which existed in the past and to restrict the number of sitting days of each member to a more acceptable level.

Court of Appeal: (In the event of the Court being the final appellate tribunal)

5.23 If the right of appeal to the Judicial Committee of the Privy Council is abandoned or withdrawn the Society considers that the Court should then consist of not less than five and possibly up to seven members. Irrespective of the number of Judges comprising the Court it contemplates that all major appeals would be heard by five members of the Court. Less substantive matters could be disposed of by three members only.

5.24 The Society believes that a greater number of Judges on the Court of Appeal is necessary if that Court is to be the final appellate tribunal. Five members of the Judicial Committee presently meet to consider appeals from this country and a lesser number should not be contemplated for a final appellate tribunal constituted within New Zealand. No less than that number would ensure the overall ability and depth of experience necessary for the task and responsibility of being the final appellate court. Furthermore, members must have ample time to consider appeals and write the judgments of the Court. A frenetic pace, too many sitting days in Court and inadequate time to prepare and consider judgments would all militate against the Court being able to achieve the standard required of a final Court of Appeal. Indeed, it is because it would be the final appellate tribunal that it is that much more important that the Court should deliver authoritative decisions and command the respect of the public and the profession.

The Society considered but does not favour the introduction of a third tier for appellate work. However, it would reserve its position on this aspect for argument if and when the right of appeal to the Judicial Committee is abolished.

5.25 As already indicated, the Society envisages a final Court of Appeal comprising seven members if it is concluded that the workload and responsibility of the Court warrant that number. It would, however, be reluctant to endorse a larger Court. Any greater number could prejudice the "combined judicial operation" referred to by Sir Raymond Evershed (see para 5.12 above). Seven Judges, however, particularly when five are required to sit as the Court in all but the less substantive matters, should be able to achieve a workable collaboration leading to consistency and common understanding in judicial thought.

Criminal appeals

5.26 The Society has rejected the notion of a separate division of the Court of Appeal to hear appeals in criminal matters. It considers that issues in criminal law, as well as issues in private and

public law, should be considered and determined by Judges of the same high standard and doubts that this could be achieved in New Zealand with a separate Criminal Division of the Court of Appeal. However, with an enlarged number of members on the Court those Judges having special expertise in this area could be allocated a greater number of criminal appeals.

5.27 The Society also considers that an exception could be made in this case to the general rule that Supreme Court Judges should not be assigned to the Court of Appeal. On a number of occasions appeals in criminal matters could be heard by two or more permanent Judges and one Judge enlisted from the Supreme Court. Current experience at first instance may well be of value in the consideration and determination of appeals on criminal matters and that experience would be assured by the intermittent presence of a Supreme Court Judge. The Society therefore considers that the Judicature Act should be amended so as to provide that the Chief Justice could, with the approval of the President, appoint Supreme Court Judges to sit in the Court of Appeal in respect of criminal appeals.

Separate administration

5.28 The Society agrees with the argument advanced by Sir Alexander Turner to the effect that Court of Appeal Judges should not be required, except in cases of special emergency, to sit in the Supreme Court. As Sir Alexander observed: "The Court of Appeal should be the Court of Appeal. It should determine its own programme, make its own fixtures, and devote itself to its own work, uninterrupted, except possibly in cases of the greatest emergency, by any requirements arising from the work or organisation of the Supreme Court, and its members should be safe from pressing requests to relieve here or there on grounds of the requirements of the Supreme Court fixture programme" ([1973] NZLJ 326).

5.29 Except to the extent indicated in respect of criminal appeals, the Society agrees that the work, organisation and membership of the Court of Appeal should be kept separate. Save in exceptional circumstances, therefore, Court of Appeal Judges should not be called upon to sit in the Supreme Court.

Sitting outside Wellington

5.30 The Society considers that it would be desirable for the Court of Appeal occasionally to sit outside Wellington. It is not suggested that the Court should become peripatetic but only that it should from time to time sit in the other main centres. Even then, it is appreciated, the insufficient number of Courtrooms and the inadequacy of Court facilities may pose a problem. Nevertheless, it would be of some benefit if the Court was at times seen by the public to function outside the Capital. The occasional visit to another centre would be more than a courtesy; the local publicity which would accompany the visit would focus attention on the Court and its appellate role and make the Court more appreciably a part of the administration of justice in this country. An increased number of Judges would also facilitate the Court's ability to sit outside Wellington.

Appointment to the Court

5.31 It is accepted that appointments to the Court of Appeal will, in the main, continue to be made from the Supreme Court Bench. However, because the Society believes the argument that certain Judges are better fitted for appellate work than others still holds good, it would urge that the policy of not excluding outstanding members of the bar from direct appointment to the Court of Appeal should be reaffirmed. Otherwise, promotion to the Court should be based strictly on the Judge's suitability for appellate work and not on seniority.

Appointment of President

5.32 Since its establishment in 1957 down to and including the appointment of Mr Justice Richmond, six Judges have been appointed to the Court of Appeal. Five of this number have served as President, the only member not having been appointed President being Cleary J, who died in 1962. Latterly the tenure of office of President has been short as the following table demonstrates:

Gresson P	1957–1963
North P	1963–1972
Turner P	1972–1973
McCarthy P	1973–1976
Richmond P	1976–

In all cases the Judge appointed to the office of President has been the most senior member of the Court following the retirement of the outgoing President. While the Society has nothing but the highest praise for all those who have held the office, the pattern which has emerged of appointing the most senior Judge as President is clear to see.

5.33 Yet the office of President must be regarded as one of major importance. The President must have the capacity to form the Court into an effective unit ensuring that the "combined judicial operation" operates in fact as well as theory. He should also have sufficient time to serve on the Court before retirement so as to enable him to achieve this objective. Consequently, the Society would not like to think that

appointment to the office of President would come to be regarded as an automatic progression based on seniority alone. It considers that an appropriate recommendation is required to prevent the pattern which has developed from crystallising into a fixed convention.

5.34 The Society appreciates that if the President is appointed on the basis of seniority the harmonious and co-operative spirit in which the Court should work could be facilitated. For that reason, and because the overall calibre of the Judges would be high, the Society would not want it thought that it is contending that the principle of seniority should be entirely discarded. Rather, it wishes to stress that the practice which has apparently developed of appointing the most senior Judge as President should not become so firmly entrenched as to become the invariable rule. It should readily be departed from where a less senior Judge is of outstanding ability or the most senior Judge would have only a short term of office to serve as President before reaching the age of retirement.

Recommendations

5.35 The Society's recommendations relating to the Court of Appeal may be set out as follows:

(1) In the event of the Judicial Committee of the Privy Council remaining the final appellate tribunal for New Zealand, the number of permanent Judges on the Court of Appeal should be increased to four, or possibly five, (in addition to the Chief Justice) depending on the workload of the Court. Three Judges should sit as the Court for the hearing of all appeals.

(2) In the event of the Court of Appeal being the final appellate tribunal, the number of permanent Judges should be enlarged to not less than five, and possibly increased up to seven, (again in addition to the Chief Justice). Five Judges should sit for all major appeals but three Judges could determine less substantive matters.

(3) The Chief Justice should have the power to assign, with the approval of the President, Judges of the Supreme Court to the Court of Appeal for the hearing of criminal appeals.

(4) The Court of Appeal should be a separate Court of Appeal with Judges permanently appointed to the Court. The practice which has developed whereby Judges of the Supreme Court successively sit as members of the Court of Appeal should be discontinued.

(5) The work, organisation and membership of the Court of Appeal should be kept separate from the Supreme Court.

(6) The Court of Appeal should, on special occasions, sit outside Wellington.

(7) Promotion to the Court of Appeal should be based on the Judge's suitability for appellate work and the policy of appointing outstanding members of the bar direct to the Court of Appeal should be reaffirmed.

(8) The practice of basing the appointment of President on seniority should be departed from where there is a less senior member of exceptional ability or the most senior Judge would have only a short term to serve as President before reaching the age of retirement.

6. The Supreme Court

Role of the Supreme Court

6.1 The Society believes that it is desirable that the role of the Supreme Court as the superior Court of first instance should be fully recognised and that it should fulfil a more substantial appellate and review function than it presently performs. To this end the Court should be freed from the task of handling the more routine matters, jurisdiction for which could be transferred to the proposed District Courts. Apart from the fact that this role would be more appropriate for the Supreme Court of this country the Society believes that it would result in a better utilisation of judicial talent.

6.2 The Society therefore accepts that the Supreme Court should be primarily concerned with more important litigation only. Civil cases, whether in contract, tort or some other branch of law, which involve large sums or important questions of law or principle should continue to be heard in the Supreme Court. The prompt and effective hearing and determination of commercial causes would be a major objective under this head. While the Court's jurisdiction in respect of criminal jury trials should generally be restricted to the more serious charges it should extend to lesser offences whenever there is a good reason for the trial to be heard in a Court of superior jurisdiction. The Society recognises that the Supreme Court has an important contribution to make in the field of family law. The Court also has a vital function in the area of administrative law. As government agencies charged with functions in all spheres of both national and local activity increase and statutory powers continue to expand the Society considers that this role will assume even greater importance than at present. For this reason as well as the fact that much of the work of the Supreme Court could properly be transferred to the proposed District Court, the Society contemplates that the Court's appellate and review functions would assume greater significance.

Number of Judges

6.3 Notwithstanding any reallocation of

work, the Society considers that the maximum number of Judges permitted by the Judicature Act should be increased. While it welcomes the recent amendment increasing the number of Judges, it believes that a number slightly in excess of the actual requirement should be set as the limit and would suggest that 25 is the appropriate maximum to specify in the Act at the present time. Illness, accident, involvement in lengthy cases or leave of absence to conduct commissions of inquiry make it difficult to gauge the actual requirement. The Attorney-General therefore requires the ability to appoint more Judges if and when required. Indeed, the situation whereby the number of Judges is strictly curtailed by statute and any increase necessitates an amendment to the Judicature Act or the appointment of a temporary Judge is exceedingly difficult to justify.

6.4 The Society acknowledges the constitutional reason advanced for restricting by statute the number of Judges constituting the Supreme Court. Theoretically, it is aimed at preventing successive governments from appointing members of the bar to the Supreme Court Bench for reasons which are unconnected with the forensic ability of the nominee or the requirements of the Court. However, there has been little trace of political bias in the appointment of Judges following a vacancy on the Bench and the Society does not believe that this would develop if the Attorney-General of the day was free to appoint two or three more Judges than might be required at any given time. The absence of such a power has led to the appointment of numerous temporary Judges and to constant pressure to amend the Judicature Act. The Society would therefore urge the Commission to recommend that the Act be amended to permit the Attorney-General to appoint up to 25 Judges as required having regard to the workload of the Court and the efficient administration of the Court's business. It would also suggest that the Commission recommend that this number be increased by amendment if and when the maximum number of Judges permitted under the Act are actually appointed to the Bench and it appears that there will be no decrease in the business of the Court.

6.5 The Society has consistently opposed temporary appointments to the Bench. Over recent years the Judges appointed to the Supreme Court have, with only one exception, been temporary appointments solely because of the restricted number provided for in the Judicature Act. In each case the temporary appointee has later been confirmed as a permanent Judge. The practice is to be condemned on all counts. It is demeaning to the Judges. It has also created an unfavourable public impression in that it suggests that the Judges are appointed on a trial basis and that there may be some doubt in the minds of the authorities as to whether or not they are suitable. Most importantly, as a matter of principle, temporary appointments of this nature are quite inconsistent with the fundamental notion of the independence of the Judiciary. The suggestion that the Judge will not necessarily be confirmed if he should incur the disfavour of the authorities is implicit in the system. The impression created is a bad one and it would be clearly preferable for Judges to be appointed permanently from the outset. This will only be possible if the maximum number of Supreme Court Judges permitted by the Act is increased.

6.6 Disregarding any question of the redistribution of work, the Society is also concerned that there is an insufficient number of Judges to cope with the increasing volume of business in the Supreme Court. The population throughout the country and in various Supreme Court centres continues to grow. Moreover, with the increase in the volume of work at lower court levels and the constant statutory expansion of the jurisdiction of the Administrative Division of the Supreme Court, the Court's appellate and review work could be expected to increase in quantity as well as importance.

6.7 Principally concerned in this part of its submission with the structure or concept of the Court system the Society has not sought to canvass the statistics evidencing the burden carried by the Court. Delays in the disposition of the Court's business will be dealt with further in Part II of its submission. Moreover, the Department of Justice has already made certain statistical information available to the Commission and will no doubt supply further figures as required. However, even in 1972 the very real need for more Judges was demonstrated from information made available to the Society. In a Departmental report sent by the Minister of the Society it was pointed out that the increasing workload upon the Judges was exemplified by a 10 percent increase between 1962 and 1967 and a 66 percent increase between 1967 and 1970 in the total convictions and sentences recorded in the Supreme Court. The three Courts most affected by the increased workload, Auckland, Hamilton and Whangarei, showed a 38 percent increase between 1962 and 1967 and a 40 percent increase between 1967 and 1972 in total trials. This increase in trials between 1967 and 1972 represented an 80 percent increase in Judge weeks occupied in criminal trials in those centres.

6.8 The steady increase in civil actions in the Supreme Court over the same period is shown in Table 5 of the Department of Justice's Report to the Commission.

6.9 The Report of the Committee on Court

Business reported that over 80 percent of a Judge's time was spent sitting in Court in the years 1971 to 1973. It is understood that there has been no improvement in this figure. If it correctly indicates the time which is still spent by Judges sitting in Court, it represents a far too high proportion of a Judge's working time. The Society understands that a figure in this vicinity would compare unfavourably with the equivalent percentage of time spent in the Courtroom by overseas Judges and would suggest that the Commission obtain data from overseas jurisdictions with a view to making a reliable comparison. For its part, the Society considers that it is important that Judges have sufficient time off the Bench to devote to the consideration of legal argument and completion of reserved judgments. Justice cannot be done in haste. Yet the complaint that the Court is proceeding with undue speed is heard with increasing frequency, particularly in the circuit centres.

6.10 Furthermore, the Society rejects what might be called the "work horse approach" to Judges of the Supreme Court. It regards it as desirable that Judges have the opportunity to read widely in the law and related subjects and the time to pause and reflect on developments in the law and trends in the society which it serves.

6.11 The Society also rejects the argument which has been put forward to the effect that an increase in the number of Judges would lower their status or the esteem in which they are held. It agrees that the long term answer cannot be to appoint more and more Judges to cope with the increasing workload of the Court but it is quite satisfied that enlarging the Supreme Court Bench to the number recommended would in no way damage the status or prestige of the Court or its Judges. It believes that the high esteem in which Judges are held depends essentially on the calibre of those appointed to the Bench and not on their number. It also doubts that the man in the street is aware of the present number of Judges or that his respect for the Court or Judges would change significantly, if at all, even if the number were doubled. Indeed, the argument seems to be very much a subjective judgment having restricted acceptance.

6.12 Nor is the argument borne out by reference to the position overseas. The evidence perused by the Society indicates that the number of Judges having an equivalent status and function to a Supreme Court Judge in overseas jurisdictions, including Scandinavian countries, the United Kingdom and states in Australia and the United States of America, is far higher per head of population than in New Zealand. It again thinks that it would be worth while for the Commission to seek accurate data from these jurisdictions for the purpose of making a reliable comparison.

Specialisation

6.13 The Society favours a greater degree of specialisation in the Supreme Court. It believes that specialisation will improve the expertise and ability of the Court to handle the range of business coming before it. Equity questions and commercial disputes are examples of matters which should benefit from being heard and determined by Judges having a background and familiarity with work in those areas. In the Society's view, specialisation may be regarded as an aid to efficiency, as a means of making the best use of the judicial talent available on the Bench and as a prerequisite to achieving the highest quality of judicial performance which is possible.

6.14 It is now widely accepted that no one person can master all aspects of any discipline and the law is no exception. As statutory law increases apace and case law grows in ever-increasing volumes the difficulty of remaining proficient in all branches of the law is accentuated. More lawyers today, whether by deliberate choice or otherwise, are working and claiming expertise in narrower and more closely defined fields of the law. A barrister who is acknowledged to be a sound criminal lawyer is not likely to receive the same assessment in respect of his ability in equity, commercial or administrative matters and vice versa. It would seem both inevitable and desirable that this greater degree of specialisation should extend to the Supreme Court for it has a direct bearing on the Court's ability to perform its essential function. The Society therefore believes that the Court should be so structured and organised as to facilitate this development.

6.15 The Society also believes that restructuring or reorganising the Supreme Court so as to provide a greater measure of specialisation will enable the judicial system to obtain the advantage of the skill and knowledge of able lawyers in defined areas of the law. At present highly competent lawyers whose work has been concentrated in a given area may be thought unsuitable for the Supreme Court Bench simply because they lack experience in other areas. The Court system – and the community – fails to gain the benefit of the ability of these lawyers in their recognised fields. Conversely, Judges whose practice at the bar was restricted to something less than the full range of legal activity will find themselves called upon to handle kinds of work with which they are not conversant. In the result, the standard with which the Court dispatches its business may be less than it should or need be.

6.16 Once on the bench, concentration on a specialised area of Court work will reinforce the Judge's experience and proficiency in that area. He will necessarily act with more confidence, his pronouncements are likely to be regarded as more authoritative and he is likely to be accorded a

greater measure of respect.

6.17 Moreover, given the workload of the Supreme Court no Judge can remain well read in all branches of the law. It would be unfortunate if the development of the law is to be circumscribed solely by the impression or knowledge Judges are able to acquire in the course of hearing submissions in particular cases. In such circumstances, judicial innovation is curbed and judicial understanding impeded. Yet, the development of the law to meet the changing needs of society is frequently dependent upon the vigour and perception of its Judges. Greater specialisation, leading to close familiarity with a given subject, should facilitate this process.

6.18 It is acknowledged that there are certain difficulties in New Zealand in providing for greater judicial specialisation. The uneven distribution of the population throughout the country and the varying workload at different Supreme Court centres militates against a uniform system. Clearly, unlike Judges in the more highly populated cities, Judges on circuit must be prepared to preside over all aspects of the Court's business.

6.19 Whether or not greater specialisation in the Supreme Court can be achieved by organisational means or whether more structural changes are required is a question which the Society has considered at some length. Some favour an administrative solution only, considering that an informal system in which cases are allocated to Judges on the basis of their background and expertise should suffice. This view may be associated with the Society's suggestion that Court Managers be appointed with the responsibility of allocating work among Judges (see paragraph 6.38 below) in order to ensure that the distribution of work coincides with the specialised expertise of the Judges.

6.20 Others consider that a more formal rearrangement of the Court structure will be necessary before any real measure of specialisation will be obtained and would accept the creation of specialised divisions of the Supreme Court along the lines of the present Administrative Division. Judges in New Zealand, it is said, have not shown any apparent readiness to forgo their general jurisdiction in favour of a system which would result in certain work being performed by nominated Judges. Consequently, this school of thought believes that the establishment of specialised divisions of the Supreme Court to which certain Judges only are assigned to do the work placed on the list for that division is necessary. Judges would not, of course, be assigned exclusively to the one division.

6.21 On balance, the Society favours the approach whereby Judges having a known expertise in a particular field are selected on an administrative basis for the hearing and determination of matters arising in that field. No defined divisions of the Supreme Court need be created. It is considered that such divisions would exacerbate the difficulties already encountered by circuit centres in waiting for the arrival of a Judge to dispose of the cases which have built up at the registry.

6.22 The following areas of law would seem to be those which require more specialised judicial attention:

(1) Criminal
(2) Commercial
(3) Equity
(4) Matrimonial/Family

Criminal work

6.23 The Society believes that criminal matters should be referred to Judges who are experienced in that area of the law. This suggestion is to be read in conjunction with the Society's proposal that the proposed District Courts be given jurisdiction to hear criminal jury trials in respect of lesser offences. However, Supreme Court Judges having a recognised expertise in criminal matters should continue to handle major criminal jury cases thus retaining for this area of the administration of justice the importance which it deserves.

6.24 It is contemplated that, unless the Judge otherwise directs, all crimes carrying a maximum sentence beyond a specified level would be heard in the Supreme Court. Consideration should also be given to a provision allowing accused persons charged with lesser offences in the District Court the right to apply to a Judge for his trial to be heard in the Supreme Court on the grounds that either an important point of law is involved or that the facts of the case are of exceptional complexity. The fact that legal aid would be available should prevent the situation developing where it could be said that there was one law for the right (that is, a trial in the Supreme Court) and another for the poor.

6.25 The Society takes the view that Judges should not be required to do criminal work exclusively and adopts the view of the Criminal Law Reform Committee in this respect. (See Report on the Criminal Law Reform Committee attached to the Report of the Committee on Court Business, 1973, as Appendix D, p 53). The Criminal Law Reform Committee, although recommending the creation of a separate Criminal Division of the Supreme Court, referred to the dangers inherent in having a Judge do nothing but criminal matters and expressed the opinion that such a Judge could eventually develop a distorted view of society. This point was also made in the Beeching Report (discussed in (1969) Crim LR pp 567 and 570). The Society also recognises the

practical difficulties of finding lawyers who would be prepared to preside over criminal jury trials as a permanent way of life.

6.26 Greater specialisation in respect of criminal work would have a number of advantages. First, in conjunction with the proposed re-allocation of criminal jury cases, it would avoid the necessity to set up an intermediate tier of Courts restricted to criminal work only and having all the disadvantages and anomalies attaching to the creation of such a Court. Secondly, the traditional importance accorded criminal law involving, as it does, the preservation of the freedom and rights of the citizen would be retained. The Supreme Court would remain concerned with the administration of criminal justice. Thirdly, it would lead to greater efficiency and expertise on the part of those Judges presiding at jury trials and hearing criminal appeals from the District Court. With this added efficiency, the Supreme Court would be in a better position to cope with the increasing volume of criminal work. Finally, persons who have a recognised experience in this type of work could be appointed to the Supreme Court bench in the knowledge that the community would get the benefit of their experience.

Commercial causes

6.27 The Society believes that there is a need for more specialised handling of commercial causes and would refer to the Commercial Court now established under the Administration of Justice Act, 1970, in the United Kingdom. The twin evils of delay and expense, which were the principal reasons for the creation of the Commercial Court in England, exist in equal measure in New Zealand. Businessmen are frequently heard to complain in this respect and it is common ground among lawyers conversant with commercial matters that the interests of their clients are poorly served by proceeding to Court. Lack of confidence and distrust of the Court process is prevalent and many commercial disputes are diverted to arbitration.

6.28 However, as pointed out in the Report of the Contracts and Commercial Law Reform Committee (March 1974), delay and expense were not the only reasons which led to the establishment of the Commercial Court in the United Kingdom. Certain of the remarks by Scrutton LJ in *Butcher Wetherly & Co Ltd v Norman* [1934] 1 KB 475 at pp 477-478 quoted in the Report may be repeated: ". . . There was great reason for this step [the establishment of a commercial list] being then taken. One of the objects of justice is to satisfy litigants that their cases are properly and adequately heard, but certain commercial cases are so complex that Judges unfamiliar with that class of business require many explanations in the course of the hearing . . . Owing to the fact that a number of cases had come before Judges not conversant with commercial matters a good deal of dissatisfaction was felt in commercial circles . . . That led to the resolution of the Judges that such cases should be heard by Judges with commercial experience . . .".

6.29 It was the Judges of the Queens Bench Division in England who, of their own initiative, resolved as early as 1895 to provide the remedy for this state of affairs by providing for a commercial list. Some statutory or formal basis for specialisation in this area of work would appear necessary. Consequently, the adoption of rules to ensure the speedy determination of disputes as recommended in the Report of the Contracts and Commercial Law Reform Committee is endorsed by the Society.

Equity work

6.30 Equity work also tends to be highly specialised at the bar and an equivalent degree of specialisation and expertise should be apparent on the Bench. The Society regards the fact that Judges with a sound grounding in equity matters are diverted into unrelated areas of law in which they may have had little or no experience as a waste of judicial capacity and a possible disservice to the litigants and the public at large.

Matrimonial and family work

6.31 Matrimonial and family matters must be considered in connection with any move towards greater specialisation in the Supreme Court. In the first place, family or domestic matters are of prime importance and deserve specialised treatment. Secondly, it is an area of law in which traditional modes of thinking and the methods of resolving disputes are being re-appraised. Thirdly, it is a field in which a number of lawyers are highly specialised and they should be matched by a Bench of equivalent interest and expertise. Finally, as the Society is contending that the Magistrate's Court should be given increased jurisdiction in matrimonial matters it believes that a strong appellate Court should exist to counterbalance and guide the development of the inferior Court in the exercise of that enlarged jurisdiction.

6.32 As outlined below (see paras 7.16 to 7.22) the Society considers that a division of the District Court should be established as the Family Court rather than creating a division of the Supreme Court for that purpose. However, parties to property disputes should retain the right to obtain a hearing in the Supreme Court in all cases where the value of the property in issue exceeds a

specified sum. All appeals from the Family Court would lie to the Supreme Court including, for example, the de novo hearing of custody applications. The ancillary services available to the District Court in its capacity as the Family Court should also be available to the Judges of the Supreme Court undertaking this work.

Administrative Division

6.33 Following the First Report of the Public and Administrative Law Reform Committee in 1968 the Administrative Division was established pursuant to the Judicature Amendment Act of the same year. The expectation was that a greater degree of specialisation and consistency would result from the creation of the Division and the concentration of decisions in administrative law in the hands of a few Judges with special competence in that area (see paras 35 to 40 of the Report). This was the principal objective behind the Committee's recommendation.

6.34 The Society unreservedly supports this objective and, generally speaking, would favour any move which would assist to achieve the predicted advantages of specialisation in this area of law. It considers that it would be useful if the method by which Judges are recruited to the Division is reviewed. Subsection (2) of s 25 of the Judicature Act 1908 enables the Chief Justice to assign Judges to the Administrative Division. However, the Public and Administrative Law Reform Committee originally recommended that appointments to the Division should be made by the Governor-General thereby enabling direct recruitment from the Bar. The Society agrees that appointing administrative lawyers direct from practice should assist to create a relatively permanent Division manned by Judges having special competence in the field of administrative law. It therefore considers that the Committee's recommendation should be belatedly adopted.

6.35 Subsection (2) of s 25 also limits the division to not more than four Judges. Although appeals and applications before the Administrative Division are heard promptly compared with other classes of cases, the Society cannot see any good reason for the imposition of this limit. As this important branch of the law expands, more Judges will be needed to ensure that the Division is able to fulfil the role contemplated for it.

6.36 Other provisions of the Act which should be reviewed are those which confer power on the Chief Justice to determine which applications for the prerogative writs or declaratory judgments or order for injunctions should be referred to that Division (s 26 (1)(c)) and to refer appeals on proceedings and applications for review under Part I of the Judicature Amendment Act 1972 to Judges who are not assigned to the Administrative Division (s 26 (3)). The Society considers that all applications for a prerogative writ, declaratory judgment or injunction against a public authority involving a question in administrative law should be automatically referred to the Division. It also considers that the Chief Justice's ability to refer appeals to Judges not assigned to the Division should be exercised only where a Judge of the Division cannot reasonably be made available for the hearing of the appeal. The criterion of the Division's jurisdiction should be clearly founded on the substance of the action.

Appointment of Chief Justice

6.37 It has been the invariable practice in the past to appoint the Chief Justice direct from the Bar. This policy has been based on the theory that Judges should be spared the temptation of favouring the Crown in proceedings between Crown and subject in order to promote their own interests or ambitions. There is no concrete evidence to support this theory and most lawyers today would accept that the members of the Judiciary would not be influenced by the possibility of promotion to the office of Chief Justice. It is the Council's view that, so far as the Chief Justice is concerned, the appointment should be offered to the man best suited for it whether he be on the Supreme Court bench or not.

Court management

6.38 The Society has noted with concern the increasing strain which administrative matters place on the Judges, particularly in Auckland. Apart from the Chief Justice, appointments to the Bench are not made for the purpose of carrying out administrative functions and the Society considers that the Judges should be free to carry out their judicial duties. In Auckland, for example, very onerous responsibilities now fall on the senior Judge in that Registry. The allocation of work is a major task. The Society takes the view that in the main centres there should be a specialist senior appointment from the Justice Department whose responsibility would be to administer the sittings of the Courts and allocate the work among the various Judges sitting.

6.39 The role of such a Court Manager will be dealt with further in Part II of the Society's submissions. For present purposes it may be noted that a Court Manager would not only serve to relieve Judges of administrative tasks leaving them free to concentrate their energies and talent on the judicial function for which they were appointed but would also assist in the development of a greater measure of specialisation.

Masters

6.40 The Society would be pleased to see the powers of Court Registrars in respect of certain interlocutory a and noncontentious matters enlarged. Such matters might also be handled by retired lawyers on a part-time bases. Overseas experience would be of assistance in this connection and the Society considers that it could be usefully studied by the Commission.

Recommendations

6.41 With regard to the Supreme Court the Society's recommendations may be summarised as follows:

(1) The role of the Supreme Court as a Court of superior jurisdiction should be fully recognised.

(2) The practice of making temporary appointments to the Supreme Court Bench (except where they are truly of a temporary nature) should be discontinued.

(3) Sufficient permanent Judges should be appointed to cope with the business of the Supreme Court.

(4) (a) The Judicature Act 1908 should be amended immediately to permit the Attorney-General to appoint up to 25 Judges as required, having regard to the workload of the Court and the efficient administration of the Court's business. (b) The maximum number of Judges should be increased if and when the maximum number permitted under the Act are actually appointed and it appears that there will be no decrease in the business of the Court.

(5) Greater specialisation in the Supreme Court is desirable and this objective should be implemented by having cases assigned to Judges who have recognised expertise in the area of law involved.

(6) Specialisation is required in the following areas of the law: (a) criminal; (b) commercial; (c) equity; (d) matrimonial and family.

(7) Greater specialisation in criminal work is desirable but no Judge should be required to do criminal work exclusively.

(8) Rules should be adopted to ensure the speedy determination of commercial causes as recommended by the Contracts and Commercial Law Reform Committee.

(9) The Judicature Act 1908 (as amended by the Judicature Amendment Act 1968) should be amended to provide that Judges shall be appointed to the Division by the Governor-General; that the limit on the size of the Division of no more than four Judges be repealed; that all applications and proceedings clearly involving principles of administrative law be referred to the Division; and that no appeal or proceeding shall be heard and determined by a Judge who is not a member of the Division if a Judge of the Division is reasonably available.

(10) The appointment of Chief Justice should be based on merit irrespective of whether the nominee is on the Supreme Court Bench or not.

(11) Court Managers should be appointed to administer the operation of the Courts and have the authority to allocate work among the Judges.

(12) The powers of Registrars to dispose of certain interlocutory and noncontentious matters should be enlarged.

CORRESPONDENCE

Sir

Minor offences

I have read your editorial comment ([1977] NZLJ 1) relating to minor offences.

In the discussion of real or imagined defects in the minor offences scheme it seems to have been overlooked that before it was introduced defendants received no information whatsoever prior to the hearing other than a bare statement in the summons of the time and place of the offence and its statutory description. In other words, they had no intimation of the facts that the informant intended to present to the Court, nor of the penalties that might follow conviction. At the very least therefore the new scheme gives a defendant a great deal more information than he had before.

We know that under the old procedure upwards of 80 percent of those charged with traffic offences that might have involved disqualification did not appear in Court in answer to the summons. I could not give a precise figure of orders for disqualification that were made in the absence of the defendant, but this happened frequently.

You are thus comparing the new system not with the realities of the old law but with an ideal. Doubtless the minor offences procedure is capable of improvement (I know few areas of law that are not) but in practical terms the new procedure gives a defendant the right to know before he decides whether to come to Court, exactly what is alleged against him and what may happen if he is convicted. It should be unnecessary for me to add that the minor offences legislation specifically applies the provisions for rehearing and of course the right to appeal has been retained.

Yours faithfully,

G S Orr
Secretary for Justice

[That the defendant should be notified of his liability to disqualification was only one of the reasons given by Mahon J in favour of proceeding by way of summons in offences involving probable disqualification. More important surely was his observation on appeals when the Supreme Court is confronted with an abbreviated summary of facts from which it is often impossible to discern whether s 30 (4) in fact was relevant. Ed.]