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ENFORCING PUBLIC RIGHTS

The judgment

The case of *Harder v New Zealand Tramways and Public Passenger Transport Authorities Employees Industrial Union of Workers* (Supreme Court, Auckland, 28 April 1977 (A441/77)) has close similarities to the situation that confronted the English Court of Appeal in *Gouriet v Union of Post Office Workers* [1977] 1 All ER 696.

As in *Gouriet,* the plaintiff, a law student, sought an interim injunction to restrain the defendant union from acting illegally.

The defendant union had been negotiating with the Local Authorities Public Passenger Transport Association for a period of some 15-18 months. Being dissatisfied with progress, it notified the Auckland Regional Authority that there would be 48 hour stoppages on every Thursday and Friday for an indefinite period. The union was regarded as an essential industry by Chilwell J and as such both the union and its members would commit an offence by striking without giving 14 days notice of their intention. The notice given by the union was less than that.

Like Gouriet, Harder faced the contention that the Attorney-General should have commenced the action at least by way of a relator action. Otherwise, his position differed in two important respects. Gouriet had been specifically chosen as plaintiff because he was a person who could claim no greater interest than any other member of the public; Harder, however, was held to be affected in that his particular circumstances (looking after his infant son while attending lectures) forced him to take a taxi to university and he could therefore show that he suffered financially. In *Gouriet* the Attorney-General had refused his fiat; in *Harder* the pressure of time was such that it was not regarded as practicable to consider seeking it.

In the event *Harder's* case involved no more than an application of legal principle that may be traced back to 1592, namely, that, in the words of *Halsbury,* a private individual may bring an action in his own name in respect of a public nuisance when, and only when, he can show that he has suffered some particular, direct, and substantial damage over and above that sustained by the public at large". The main interest in the case from a legal point of view lies in the slight nature of the damage that may be regarded as sufficient to justify standing. In this the liberal trend of the Chief Justice in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 is continued.

Gouriet sought or (in view of the appeal to the House of Lords) seeks to go one step further, and remove altogether the need to show special interest at all.

It is of value to trace the application by Chilwell J of the law in light of the influence of *Gouriet* and last year's decision of the Chief Justice in *Fitzgerald v Muldoon.*

Firstly, may a plaintiff seek an interim injunction to restrain infringement of a public right without the fiat of the Attorney-General? Yes – provided he has demonstrated that he intends to do what he can to obtain the fiat.

> "In the past, in my judgment, there have been unwarranted restrictions placed upon a plaintiff in this situation. It is refreshing to find that the Court of Appeal in England has adopted a more enlightened view and I believe that to be the law in New Zealand and, for one, would express grave disappointment were it not so."

Secondly, what if the fiat is not obtained?

> "If Mr Harder is not able to obtain the fiat that is not the end of the matter because

the law is, and has been for a long time, that as a private individual he can maintain an action in his own name if he can point to a statutory provision which is for his protection and which is being interfered with, or if he suffers particular damage over and above that suffered by the general public through infringement of a public right."

Thirdly, was there an infringement of a public right?

"In my judgment the whole object of the creation of offences is to prohibit the offending act for the public well-being. Parliament has seen fit to make it an offence to strike unless the proper notice is given. No-one but a churl would suggest that that offence provision was not intended to be in the public interest. Every person is under a duty to the public to obey the law. Each member of the public has the right to expect that his neighbour will obey the law."

Fourthly, did the plaintiff suffer particular damage?

"If Mr Fitzgerald suffered particular damage in the failure of a superannuation fund to contribute a dollar a week towards his superannuation, I find it hard to believe that one could say that Mr Harder, now faced with paying $14 a week for taxis, is not suffering particular damage."

Fifthly, as to relief, where does the balance of convenience lie? It was suggested that interference by the Court might upset the delicate balance existing between the negotiating parties.

"In my judgment that would be a powerful argument were not it for the element of illegality. Why should any citizen suffer and have daily before his notice illegal activity and be told that it is more convenient to let it go on because otherwise certain repercussions may follow?"

Finally, what relief may be given to the plaintiff?

"In my judgment the law has thus far progressed that relief by way of interim declaration is an alternative and in some cases may be concurrent with the granting of an interim injunction."

In the event, Chilwell J granted an interim declaration that strikes that had taken place or were planned for the day following judgment were illegal and issued an interim injunction restraining the defendant from further illegal strikes.

Chilwell J has, then, continued the liberal approach towards the granting of interim relief and locus standi. In New Zealand the trend is towards removing obstacles that stand in the way of private enforcement of public rights. Where the activity in issue is illegal the Courts seem unkindly disposed towards finding that the balance of convenience favours refusing relief. In view of the trifling damage involved in both *Harder* and *Fitzgerald* it is a small step to enforcing public rights whether or not the plaintiff can show particular damage. That point remains to be argued before the House of Lords on an appeal by the Attorney-General from the Court of Appeal decision in *Gouriet*.

The union

Harder's case differs from *Gouriet* in one other respect – the manner of acceptance of the decision by the defendant union. Once the intended Post Office strike was declared illegal the union called it off. The union in this case has done no such thing. It has ignored the injunction and continued with the strike.

At the time of writing the situation is still confused but there have been several statements that cannot pass without comment.

There has been criticism of the plaintiff's motives from both the National Secretary of the Tramways Union (Mr H Stubbs) and the President of the Auckland University Students' Association (Mr B Gulley). The plaintiff has been described as a "vexatious litigant" and as pursuing an academic exercise.

In another recent decision, *Attorney-General, Ex rel McHardy v Waitemata City* (Supreme Court, Auckland, 23 March 1977) Chilwell J dealt firmly with a suggestion that the plaintiff in that case had been activated by political motives.

"Whether [politics] be his motivation or not, [the plaintiff] was under a duty to ensure that this Council acted according to law. Even the politician has that duty. It is important, in my judgment, for the preservation of our constitution and our judicial system that persons such as [the plaintiff] have full and free access to the Court without being branded as being motivated by some base political consideration."

The motives of the plaintiff are seldom regarded as important in law. Harder, by his action, has been instrumental in reinforcing the right of the individual to come before the Courts unrestricted by procedural hangovers from the past.

As for the rights of the individual, there have been statements, particularly from Mr Stubbs, to the effect that the rights of the individual are less important than the rights of the collective, that the remedy of injunction should not be exercised against unions, and that there are areas of the law that the unions are entitled to disregard. It is hard to believe that these sentiments are widely shared within the membership of the trade union movement. Have not the unions after all asserted

the individual rights of black South Africans to equality before the law? Have not individual union members asserted, through the Courts, their right as individuals to fair treatment by their unions over matters such as expulsion, suspension, discipline and the like? And have not two branches of the defendant union demonstrated their attitude by declining to join the strike (New Plymouth) or by giving the required 14 days notice (Invercargill).

Mr Stubbs has said that he is prepared to be imprisoned for his disobedience of the Court order. It is worth remembering that others have and many still are suffering for other principles and beliefs. These include:

That no one shall be above the law.

That the rights of the individual are important.

That the rule of law is fundamental to human liberty.

That independent Judges, whose orders are respected and obeyed, are essential to the rule of law.

If the law is unsatisfactory let it be changed by Parliament – not ignored. The unions may not like injunctions. They may not like the content of the law. But the unions can live with it better than we, as individuals, can live without the rule of law.

Tony Black

FAMILY LAW

ORDERING THE SALE OF THE MATRIMONIAL HOME

By W R ATKIN, *Lecturer in law, Victoria University of Wellington.*

The Matrimonial Property Act 1976 sets out in very elaborate terms the way in which the respective shares of spouses in matrimonial property are to be determined. What is still left largely to the discretion of the Court is the determination of the kind of order that is appropriate in the particular case. Sections 25-34 set out the court's very broad powers but give little guidance on what is a "just" order except in so far as s 26 requires the Court to have regard to the interests of the children of a marriage.

One issue which can have enormous practical significance for the parties is whether the Court should order the sale of the matrimonial home with division of proceeds or instead leave one spouse in possession, perhaps with the added support of an occupation order. The most important recent comment on the question of occupation orders in New Zealand has been by the Court of Appeal in *Gawith v Gawith* [1975] NZ Current Law 737, in which the view was rejected that the spouse with custody of the children should as a rule be entitled to occupation. The Chief Justice considered it undesirable that "the wide discretion" given to the Courts should "be fettered by any attempt to law down principles which might inhibit the Court in exercising that discretion". Whether the requirement under s 26 that the Court is to have regard to the children's interests alters the impact of *Gawith* is a moot point. It is clear, however, that the children's interests are not necessarily the paramount or decisive consideration, since s 18 (3) expressly empowers the Court to take matrimonial misconduct into account in deciding what order to make.

The Courts in England, while emphasising the highly discretionary nature of the corresponding English provisions (see *Wachtel v Wachtel* [1973] Fam 72, 91), have nevertheless been more willing to indicate guidelines for the exercise of the discretion to order the sale of the matrimonial home. New Zealand Courts may find these guidelines of assistance in certain cases.

In *Smith v Smith* [1975] 2 All ER 19, 22 (the judgment actually given in 1973) Latey J set out four guidelines, subsequently approved by the Court of Appeal in the same case. Firstly, the Court's approach should remain flexible to meet the particular facts of particular cases. Secondly, "[t]he availability of the house as a home for the wife and children should ordinarily be ensured while the children are being educated". Thirdly, "[w]hen the children have ceased to be educated and the house is to be sold the husband and wife should ordinarily receive their shares absolutely". And finally, the financial implications of the wife's remarraige are to be taken into account, where the propsect of remarriage is something more than guesswork.

The second and third of these principles are perhaps of greatest interest. The second at first glance appears to conflict with the attitude of the New Zealand Court of Appeal in *Gawith*. The third relates more directly to the question of the sale of the matrimonial home, which *Gawith* was not specifically concerned with. It bears the

implication that a sale *ought* to be ordered when the children are no longer dependent.

The English Courts have not been reluctant however to find exceptions to this guideline. On the facts of *Smith's* case itself, the Court refused to order sale of the matrimonial home when the daughter of the marriage in that case reached the age of 17. The main ground for this was that the child had suffered chronically from a serious kidney illness requiring the mother to provide continuing care for her and preventing the mother from embarking on any career or full-time employment. *Smith's* case was followed in *Jones v Jones* [1976] Fam 8 where after the marriage of the parties had been dissolved, the husband inflicted a serious knife wound on his former wife, causing 75 percent disability in her right hand. The Court of Appeal allowed an appeal against an order which had the effect of forcing the wife to sell the home upon the youngest child of the family ceasing to be dependent. The wife's continuing inability to work because of the injuries inflicted on her were analogous to the wife's continuing care of the daughter in *Smith's* case.

Further elaboration of the principles took place in *Browne v Pritchard* [1975] 3 All ER 721 (cf *Williams v Williams* [1976] 3 WLR 494). In that case the husband was living in the matrimonial home with two sons from a previous relationship, while the former wife, since deserted by her second husband, was living in a council house with the only child of the first marriage. Ormrod LJ in strong words said it would be "socially disastrous, if not irresponsible" to order a sale of the home, as it would leave the husband and his children without a home, while the wife did have "a secure home in a council flat". His Lordship emphasised that often in exercising the discretion as to what order to make, "the needs are likely to be much more important than resources" and for most "the most urgent need is a home. It is therefore to the provision of homes for all concerned that the courts should direct their attention in the first place" (at p 725).

In the cases discussed so far, the existence of children has had some bearing on the results of the cases, although in *Jones's* case the Court was probably more heavily swayed by the behaviour of the husband. In its most recent pronouncement, however, the English Court of Appeal appears to have taken its logic beyond that of the earlier cases.

In *Martin v Martin,* The Times 15 March, 1977, a couple, aged in their early forties who had had no children, were separated, the wife living by herself in the matrimonial home, the husband living with another woman in a council house. The other woman had children of her own as well as a child by the husband. The husband had sought sale of the matrimonial home which it was agreed was owned equally by the husband and wife but an order of the registrar to this effect was overturned by the High Court, holding instead that the house be held jointly on trust for the wife's use until she died, remarried or voluntarily left the house. (See *The Times* 30 November, 1976). This decision was upheld by the Court of Appeal.

Stamp LJ said that "the first essential was that each party should have a roof over his head". Applying this principle to the facts, his Lordship noted that the husband already had a secure roof in the council house, whereas his wife if she were to receive her half share of the matrimonial home would have insufficient capital to purchase another house. In words echoing reasoning employed in *Browne v Pritchard* at p 725, his Lordship noted that, had the marriage in fact continued, the husband would not have been able to touch his capital share of the matrimonial home. It would have remained an unliquidated asset.

Ormrod LJ agreed, and considered the case to be one where "the needs of the parties outweighed their resources". Thus since both parties needed a home and the husband already had one, the wife should be entitled to remain in the matrimonial home. "There was no rule of thumb," his Lordship said, "that the sale of a matrimonial home would only be postponed if it was required as a home for young children. Each individual case must be weighed on its merits."

Two comments on Ormrod LJ's judgment are worthy of note. Firstly, any principle to be derived from *Smith's* case, mentioned above, that the sale of the matrimonial home ought to be ordered unless there are dependent children, must now be considered incorrect. Furthermore, it would also be incorrect to say that there is no justification for refusing to order a sale in the absence of any other exceptional circumstances. There were no really exceptional circumstances in *Martin v Martin,* as there were on the facts of *Smith* and *Jones.* Indeed, Mrs Martin was of an age where remarriage was still a possiblity and where the chances of obtaining suitable employment must have still been bright.

Secondly, the decision brings the English approach much closer to that of the New Zealand Court of Appeal in *Gawith.* In both cases, a spouse without custody of children was permitted to remain in the matrimonial home, even though this meant that the accommodation of the other spouse was less commodious. The only difference between the cases is that the other spouse in *Martin,* the husband, did not have children of the marriage to care for as did the wife in *Gawith.*

CRIMINAL LAW

THE DUTY SOLICITOR SCHEME

By R M CROTTY, *a Wellington practitioner.*

After a year or so of operation by District Law Societies on a voluntary basis, the duty solicitor scheme began to be funded by the Government in July 1974. In October 1975 the New Zealand Law Society held a national workshop for duty solicitors at which representatives from District Law Societies reported on their local scheme, and the views of representatives from the press, the police and the Justice Department were heard. As a result a Manual for Duty Solicitors was produced by the New Zealand Law Society covering the scope of the scheme, the duties of a duty solicitor, and some notes on relevant procedures and the law. This was distributed to duty solicitors throughout the country. Each District Law Society was left to formulate its own detailed scheme suitable to its particular area and circumstances. This article examines the Wellington experience.

In Wellington there has been frequent consultation between the relevant subcommittee of the District Law Society, the Registrar of the Magistrate's Court, the Magistrates and the Police. It was found that although the scheme was working adequately there could be some improvements to the benefit of all concerned, particularly the public. The main problems arose not so much from the scheme itself but in linking it with the existing criminal legal aid scheme set out in the Offenders Legal Aid Regulations.

There was difficulty in ensuring that a defendant granted legal aid actually saw his assigned counsel before the defendant's next appearance on remand. First the Court staff had to find counsel on the legal aid list available to take the case. Frequently it took 10 to 20 telephone calls before counsel was found who could take the case. The reasons for this could be many but often counsel had conflicting appearances which precluded them from accepting appointments on the day of that particular defendant's appearance in Court. Next, the Court had to inform the defendant of the name and whereabouts of his counsel. Frequently the defendant had changed his address or could not be contacted at the address he had given on the legal aid application, or even if he was contacted failed to contact the counsel assigned to him before the day of his appearance in Court. This meant that counsel sometimes arrived in Court without having taken instructions from the defendant. This meant either a withdrawal of counsel and the whole process starting over again or a further week's remand to enable counsel to receive instructions.

The simple reform now instituted is that each day one duty solicitor will be a person who is also on the legal aid list and who is available to be appointed legal aid counsel for any defendants who obtain legal aid. Naturally under the Offenders Legal Aid Regulations the Magistrate retains a discretion as to whether or not he will appoint the particular duty solicitor as legal aid counsel for any particular defendant. But it means that in the normal case the defendant who obtains a legal aid can be told by the Magistrate while he is still in the dock that he is to see a particular solicitor before he leaves the Court. Also, the Court will enter the name of the assigned counsel on the defendant's bail bond notice that he receives before leaving the Court. Thus there will be little excuse for any defendant granted legal aid if he appears after the period of his remand without having given his assigned counsel instructions.

This reform has advantages for counsel as well as the defendant, the Registrar, and the Magistrates. It means that counsel can undertake a number of legal aid assignments on the day he appears as duty solicitor and can complete such assignments in the following weeks. At present he is granted an isolated legal aid assignment from time to time.

The other significant improvement is that the two duty solicitors each day will divide the duties between them to the extent that one counsel will advise defendants who *insist* on having the matter dealt with that day (of whom there are a significant number). That counsel will make a mitigation plea for each such defendant within the bounds of his duty and also bearing in mind the general undesirability of making mitigation pleas based only on instructions given by a defendant on the morning of his appearance. However, the duty solicitor can obtain full details of the charge and the facts from the prosecution and is at least able to supply to the Court any information that may assist the defendant. The particular duty solicitor making mitigation pleas on the day that he is duty solicitor will need to remain at Court for only such time as it takes to have those particular defendants

dealt with. He is then free to leave and is not involved, unlike the other solicitor for that day, with further appearances in subsequent weeks on remands, and for sentence. This should allow for greater participation by the profession in the duty solicitor scheme in that counsel of experience but who normally seldom practise in the Magistrate's Court can take part in the scheme safe in the knowledge that they will be involved only for about one hour on any day that they are called upon to be duty solicitor. Also, it provides a convenient means of bringing into the scheme counsel of significant Magistrate's Court experience but who have not acted as duty solicitor previously. The other duty solicitor for the day is the solicitor mentioned above who is already on the legal aid list. He will concentrate on advising those defendants who wish to obtain a remand in order to get legal advice.

The scheme provides that with the permission of the District Law Society or scheme convenor a duty solicitor may act in a private capacity for a defendant whom he first meets as duty solicitor. In most cases, however, where the defendant does not qualify for legal aid he will be directed by the duty solicitor to the ordinary list of barristers and solicitors to consult before his next appearance on remand.

A duty solicitor who is also on the legal aid list is rostered to appear in the separate Family Court on mornings when defendants appear in answer to disobedience summonses and on Children's Court day.

In general the Wellington experience has been that every defendant in custody is asked whether he wishes to seek legal advice and is informed of his legal aid rights. Also, many defendants on remand or on summons take the opportunity to see the duty solicitor in the duty solicitor's office near the No 1 Magistrate's Court. The only significant problems have been the ones mentioned above and with their resolution it is anticipated that every person appearing in the Magistrate's Court will have an opportunity to take legal advice.

ENVIRONMENT

ONUS OF PROOF PRINCIPLE INAPPLICABLE IN ENVIRONMENTAL CASES

By J A B O'KEEFE, *Barrister.*

There seems to be a tidal emphasis in the onus of proof principle in environmental cases swinging as they do through the full range from criminal, through quasi-criminal, to the civil. This has been discerned by the Hon Mr Justice Mahon in his paper "Environmental Issues and the Judicial Process" in [1976] NZLJ 507, and also by Mr D A R Williams in his article "Law and the Environment" in 3 Otago L Rev 372. Both commentators espouse the general proposition that environmental enactments, in so far as they control the otherwise lawful and natural use of land and water, should be regarded not as imposing limited restrictions on private use, but as creating a code of rights in relation to that use: and they aver a basic proposition that the applicant for a statutory right or privilege must carry the burden of proof.

Inherent in this is surely the implication that existing rights have been abrogated by the environmental legislation: that anyone wanting anything must now *ask* for it. No one will gainsay that the doctrine of riparian rights has recently been reduced to a shadow of its former self. But it is one thing to say that one doctrine has been superseded by another, and quite another to contend that proprietary rights of land use fundamental to our feudal-based property system have been snatched from under our noses, and the tables so turned that we must beg at our own table.

The decision of the Town and Country Planning Appeal Board in *North Canterubry Acclimatisation Society v North Canterbury Catchment Board* (1970) 3 NZTCPA 372 has been cited to illustrate the potential effect of applying a contrary criterion, namely the principle that there is a prima facie entitlement to a water right, the burden being on the objector to establish environmental risk.

With respect, I do not find the germination, let alone the generation, of any such principle in the *North Canterbury* case. Moreover, I am prepared to go the whole iconoclastic hog with a complete departure from the common law onus of proof principle in environmental cases.

The history of the art and science of law is the story of the growth of techniques for interpreting and applying the law as handed down by the law-giving agencies. The largest technique is, of course, language; and, in regard to the laws of New Zealand, there is interposed between the verbal

order and the idea conveyed a statutory touchstone of meaning expressed in s 5 (j) of the Acts Interpretation Act 1924. Because of this, one must look at the long title and other indicia of spirit and intendment as a prelude to playing out a particular case in the measure of a particular statute. This is illustrated in the judgment of R B Cooke J in *Water Resources Council v Southland Skindivers Club* [1976] 1 NZLR 1; (1975) 5 NZTPA 239 which started with an extensive review of the provisions of the Water & Soil Conservation Act 1967.

From this type of approach follows the curial posture and the ground rules for carrying out the judicial process in environmental cases. You have to begin by looking in this light at the statute setting up the environmental tribunal, and at the statute it is dealing with – in the *North Canterbury* case it was the Town and Country Planning Appeal Board dealing with an appeal under the Water and Soil Conservation Act 1967.

From the outset, the Appeal Board has had the difficult task, like that of the Commerce Commission, of charting new jurisprudential waters. The Board has an amplitude of discretion – discretion, it is submitted, even in the *selection* of its own decisional techniques. In its very first case, *Cassidy v Manukau County Council and Minister of Lands* (1955) 1 NZTCPA 2, the Board met the challenge that town planning principles were unsettled by declaring that its responsibility was to decide upon current principles and that in doing so it would be relying on experts.

A review of the whole spectrum of its decisions since that time reveals that, both in the town planning sector, and elsewhere in its jurisdiction, the Board is virtually, and, it is submitted, quite properly, seeing those present at hearings not so much as protagonists, but as a species of amici curiae – friends of the Court to *aid* the tribunal in the exercise of its *discretion*. This is not that unusual in our law. For instance, evidence inadmissible to construe an express term in a contract may be let in to *aid* the Court in the exercise of a discretion in a suit for specific performance. This is what equity is all about – and equity principle is at the basement of our system. Discretion is but another face of equity.

Some Acts, the general nature of which from the citizen's standpoint is not that far removed from environmental enactments, specifically provide for onus probandi. An instance is s 38 of the Rating Act 1967 stipulating that the onus of proof in rating objections rests with the objector: *Northern Roller Mills Ltd v Auckland Corporation* [1975] Butterworths Current Law 1097. However, the onus of proof that statutory requirements, eg, compliance with the conditions precedent to making a rate, have been complied with is squarely on the local body: *Wilkinson Ltd v Stratford Corporation* [1951] NZLR 530, 533. But nowhere in the water and soil legislation is there express provision of this kind as to who must prove what.

The reason for this is patent. What is granted in proceedings under the Water and Soil Conservation Act as a right, is granted in the light of current knowledge and opinion. The grant is not irrevocable. More often than not, it is conditional, and subject to periodic review.

What the Board was grappling with in the *North Canterbury* case was the problem of whether a proposed discharge into Lake Ellesmere would accelerate an eutrophic process. Allowance of the application was based on the totality of the evidence – the *expert* evidence. Nobody had to *prove* anything, for there was nothing to prove. What the Board was concerned with was an application of law to fact in the light of *current* scientific and technical knowledge.

To understand the jurisprudence of the *North Canterbury* case it is submitted that you have to look at *Henderson v Water Allocation Council* (1970) 3 NZTCPA 327 (the *Pukerua Bay* case), where a similar approach was applied to the problem of balancing possible health hazard against the public benefit to be gained from the exercise of the right and possible ecology change. Once again, nobody was proving anything. The tribunal was looking at *congeries of evidence.*

In deciding an appeal by way of case stated against a decision of the Appeal Board, Cooke J had this to say in *Metekingi v Rangitikei–Wanganui Regional Water Board* [1975] 2 NZLR 150; (1975) 5 NZTPA 330 at 340.

> "... the Appeal Board will be faced with adjudicating on this case [whether 700 acres should be used for farming purposes or for the generation of electricity] on the merits ... In the end a *value judgment* may be required ... arrived at after a scrupulously fair public hearing and the *weighing* of *submissions* and of *evidence*."

The insertion and emphasis have been added. With the benefit of this judgment, the Appeal Board reconsidered the application in a continuation of the appeals ((1975) 5 NZTPA 340), and concluded that the land should be used for farming purposes. This came about by the Board taking into account certain considerations which it had previously ruled irrelevant. This underlines the question of relevancy, of which the Board had been mindful, and brings out that the question of onus of proof may be germane at *this* point – but not to the ultimate discretionary decision.

Reading these cases together you can spell out the approach which the Board felt constrained to *select.* Turner SM, delivering the masterly decision in *Mahuta v National Water and Soil Conservation Authority* (1973) 5 NZTPA 73 (the Huntly Power Station case) which, unfortunately, is reported in part only – some key phrases being omitted – clarifies this approach which the Board has every right to select, indeed, has had to fashion, for these cases forging provisional principle for every link in the chain of judicial process. I say "provisional", because in this area neither knowledge nor opinion are stable.

The approach, as exemplified in *NZ Particle Board Ltd v Rodney Corporation* (1976) 6 NZTPA 1, a town planning and clean air case, is by way of a staircase to a landing from which an overview is obtained and a discretionary decision made: (1) The pros and cons of the proposal as such are traversed. This is a mixture of fact and opinion. (2) The proposal is lined up with national policy to see where they match. (3) The open texture areas and the local considerations are then scrutinised to see whether the particular proposal may be approved, and, if so, whether or not it should be modified. (4) At each preceding step, the Board checks itself to ensure that it is functioning within the magic square of its jurisdiction. (5) At each step the Board is also checking the alignment of is discretion. (6) The evidential process is not of the adversary kind, but involves an accumulation of aids to the ultimate exercise of discretion.

To round off my comments, I can do no better than add that the approach of the New Zealand Appeal Boards accords with that of the Inspectorate which is its United Kingdom counterpart, save that the latter does not generally make decisions as such, but makes recommendations to the Secretary of State. In an outstanding paper on "The Inspector's Criteria" in *Planning Inquiry Practice,* Journal of Planning and Environmental Law Occasional Paper, Sweet & Maxwell, 1974, C F Allan identified the key-points by observing that the decision-taking process is by the exercise of judgment exercised in the context of a framework of reference, ie, the framework of accepted planning policies, the identification of relevant policies being the first element in the process. Without this framework the decision-taker has no compass by which to orient his judgment and align it objectively. The particular circumstances of each individual case form the second element. The third is a determination on merit.

It is submitted that the Appeal Boards in New Zealand have created new law in the environmental sector, in line with overseas trends, in selecting and applying decisional techniques necessitated by the innovative nature of the legislation with which they deal. A Board must take on its own the critical step of distinguishing the issues which, in its view, will determine the case. The concept of burden of proof, whilst basic to legal practice, is not generally thought to be appropriate to the administrative procedures demanded by modern environmental legislation. As Allan points up on p 7 of his paper, ". . . the burden [of proof] tends to *shift* according to the nature of the case". The insert and emphasis have been added. At one end of the scale, the appellant in enforcement appeals *is* saddled with the onus of justifying his proposal. But from there down the scale, it is submitted that it is more appropriate to refer to policy presumptions which the tribunal must observe than to any doctrine of onus probandi – and, of course, there is the overriding factor of public interest. What is in and what is contrary to the public interest are matters entirely to be arrived at, not upon consideration of proof, but in the light of advice tendered to the Board.

RECENT ADMISSIONS

The following have been admitted to membership of the legal profession

Barrister

Ashraf, MM	Auckland	28 Oct 1976
Chapman, NP	Christchurch	4 Feb 1977

Barristers and Solicitors

Amesbury, M A	Auckland	11 Feb 1977
Anderson, G A	Auckland	11 Feb 1977
Anderson, R S	Wellington	25 Feb 1977
Argyle, A D	Christchurch	Feb 1977
Arscott, P C	Dunedin	9 Dec 1976
Ayton, D J	Christchurch	4 Feb 1977
Baker, H M	Auckland	11 Feb 1977
Balram, S A P	Auckland	10 Dec 1976
Balu, R A	Auckland	11 Feb 1977
Bannerman, R J B	Dunedin	9 Dec 1976
Bartlett, P J	Wellington	25 Feb 1977
Barton B J	Auckland	11 Feb 1977
Bates, D R	Auckland	10 Dec 1976
Bates, R P	Dunedin	9 Dec 1976
Bell, D B	Auckland	11 Feb 1977
Berthold, M F	Wellington	25 Feb 1977
Blackman, P C	Christchurch	4 Feb 1977

Bogiatto, G	Auckland	11 Feb 1977
Bolwell, F B	Dunedin	9 Dec 1976
Boswell, D G	Auckland	11 Feb 1977
Bowie, J F	Wellington	25 Feb 1977
Brady, J C	Wellington	25 Feb 1977
Bramley, M M	Wellington	25 Feb 1977
Brown, B W F	Christchurch	4 Feb 1977
Brown, W L	Christchurch	4 Feb 1977
Brummer, G A	Wellington	25 Feb 1977
Buchanan, M G	Auckland	11 Feb 1977
Budhia, R M	Christchurch	4 Feb 1977
Bull, C M	Christchurch	4 Feb 1977
Burley, W N	Wellington	25 Feb 1977
Butcher, C W	Wellington	25 Feb 1977
Calver, R M	Wellington	25 Feb 1977
Carter, B P C	Auckland	11 Feb 1977
Chand, M K	Dunedin	9 Dec 1976
Chandra, R R	Dunedin	9 Dec 1976
Chapman, D J	Wellington	25 Feb 1977
Clad, J C	Wellington	25 Feb 1977
Clarke, G J	Christchurch	4 Feb 1977
Cochrane, G R	Dundein	9 Dec 1976
Condon, P J	Auckland	10 Dec 1976
Corbett, C J A	Wellington	25 Feb 1977
Corkery, J F	Dunedin	9 Dec 1976
Cotton, E B	Dunedin	9 Dec 1976
Cousins, C J	Christchurch	4 Feb 1977
Coutts, A I	Dunedin	9 Dec 1976
Cox, R D	Auckland	10 Dec 1976
Crew, M P	Auckland	5 Nov 1976
Dally, L J	Wellington	25 Feb 1977
Daniell-Smith, B J A	Dunedin	9 Dec 1976
Davidson, B	Wellington	25 Feb 1977
Davies, I R	Auckland	11 Feb 1977
Dell, J A M	Wellington	25 Feb 1977
Dewes, W K	Wellington	25 Feb 1977
Donaldson, P W E	Dunedin	9 Dec 1976
Dorman, S J	Christchurch	4 Feb 1977
Dowthwaite, J M	Wellington	25 Feb 1977
Drake, R L	Auckland	11 Feb 1977
Drummond, R B D	Wellington	25 Feb 1977
Durbin, C B	Auckland	11 Feb 1977
Eccleton, P C	Auckland	10 Dec 1976
Enright, K M	Auckland	11 Feb 1977
Fa, T	Auckland	11 Feb 1977
Fatiaki, T V	Auckland	10 Dec 1976
Fitzgerald, D J	Christchurch	4 Feb 1977
Fleming, B M	Christchurch	4 Feb 1977
Fleming, C	Auckland	10 Dec 1976
Fleming, S J	Auckland	11 Feb 1977
Foot, H M	Wellington	25 Feb 1977
Fordyce, P A	Auckland	10 Dec 1976
Fuimaono, A F	Auckland	11 Feb 1977
Galt, J E	Christchurch	4 Feb 1977
Galvin, J F	Wellington	25 Feb 1977
Garland, A D	Dunedin	9 Dec 1976
Gilbert, P C	Wellington	25 Feb 1976
Gilkison, M A F	Dunedin	9 Dec 1976
Gillard, P H	Auckland	11 Feb 1977
Goldstone, A G	Auckland	11 Feb 1977
Gowan, D R	Auckland	10 Dec 1976
Graham, D M	Auckland	11 Feb 1977
Grant, S J	Dunedin	9 Dec 1976
Gunson, D W	Auckland	10 Dec 1976
Gunson, R C	Auckland	18 Feb 1977
Gurnsey, S J	Auckland	11 Feb 1977
Hardie, J G	Dunedin	9 Dec 1976
Harding, C J	Christchurch	20 Oct 1976
Hardy, G W	Auckland	11 Feb 1977
Harford, A D	Auckland	10 Dec 1976
Harris, B V	Dunedin	9 Dec 1976
Hartshorn, A L	Auckland	10 Dec 1976
Hay, Q M	Wellington	25 Feb 1977
Heaney, D J	Auckland	10 Dec 1976
Henaghan, R M	Dunedin	9 Dec 1976
Henderson, D J	Christchurch	4 Feb 1977
Henderson, W G	Auckland	11 Feb 1977
Henry, L B	Christchurch	4 Feb 1977
Hinton, A E	Auckland	11 Feb 1977
Hinton, L I	Christchurch	4 Feb 1977
Hinton, P B	Auckland	11 Feb 1977
Hooker, R J	Christchurch	20 Oct 1976
Howard, R L	Christchurch	4 Feb 1977
Howell, R G	Wellington	25 Feb 1977
Hunter, D J	Auckland	11 Feb 1977
Inglis, R W	Wellington	25 Feb 1977
James, A A	Auckland	11 Feb 1977
Jessop, S E	Auckland	10 Dec 1976
Johnson, P H	Dunedin	9 Dec 1976
Johnson, W M	Wellington	25 Feb 1977
Jones, D J	Wellington	25 Feb 1977
Jorgensen, J M	Wellington	25 Feb 1977
Keam, R C	Auckland	11 Feb 1977
Kember, S J	Wellington	25 Feb 1977
Kennedy, J E	Dunedin	9 Dec 1976
Kerr, A R	Christchurch	4 Feb 1977
Key, J E	Wellington	25 Feb 1977
Kidd, M J	Christchurch	4 Feb 1977
Knight, L A	Wellington	25 Feb 1977
Kwong, C C	Christchurch	4 Feb 1977
Laidlaw, A J	Dunedin	9 Dec 1976
Larsen, Y C	Wellington	25 Feb 1977
Lau, M L	Wellington	25 Feb 1977
Lipa, J S	Auckland	11 Feb 1977
Lowe, H R	Wellington	25 Feb 1977
Luby, B M	Auckland	11 Feb 1977
McCardle, J V	Wellington	25 Feb 1977
McCarthy, N M M	Dunedin	9 Dec 1976
McDonald, A R	Wellington	25 Feb 1977
McDonald, D E	Auckland	11 Feb 1977
McDonald, I R	Wellington	25 Feb 1977
McDonald, M J	Christchurch	4 Feb 1977
McDonnell, J E	Auckland	11 Feb 1977
McDowell, A J	Auckland	3 Nov 1976
McDowell, K F	Auckland	22 Oct 1976
McEwen, M F	Wellington	25 Feb 1977
McGeachie, M E M	Auckland	11 Feb 1977
McKechnie, R H	Christchurch	4 Feb 1977
McLauchlan, I G	Wellington	25 Feb 1977
McMillan, P A	Dunedin	9 Dec 1976
McPhail, C	Wellington	25 Feb 1977
Mabbs, P B A	Auckland	11 Feb 1977
Mabey, P G	Christchurch	4 Feb 1977
Mackie, N M	Christchurch	4 Feb 1977
Macky, P W	Auckland	11 Feb 1977
Mark, S P	Wellington	25 Feb 1977
Marks, S R	Christchurch	4 Feb 1977
Martin, J J	Wellington	25 Feb 1977
Mather, J F	Dunedin	9 Dec 1976
Mathers, N J	Christchurch	4 Feb 1977

Matthews, V A	Dunedin	9 Dec 1976
Maude, S J	Wellington	25 Feb 1977
Mayhew, D	Dunedin	9 Dec 1976
Maze, J E	Christchurch	4 Feb 1977
Mears, P J	Wellington	25 Feb 1977
Midgley, M O	Christchurch	4 Feb 1977
Miller, J K	Dunedin	9 Dec 1976
Mirkin, G	Dunedin	9 Dec 1976
Mitchell, P C	Wellington	25 Feb 1977
Mitchell, P W	Christchurch	4 Feb 1977
Monk, G B	Auckland	11 Feb 1977
Monteith, G P	Auckland	11 Feb 1977
Moore, E R	Dunedin	9 Dec 1976
Morahan, A B J	Christchurch	4 Feb 1977
Moss, R B	Auckland	11 Feb 1977
Muir, C A	Auckland	11 Feb 1977
Murphy, M G	Auckland	11 Feb 1977
Murray, K I	Wellington	25 Feb 1977
Murray, S R	Auckland	11 Feb 1977
Neeson, M P	Christchurch	4 Feb 1977
Newell, R H	Christchurch	4 Feb 1977
Niak, K L	Dunedin	9 Dec 1976
Nicholson, E A	Dunedin	9 Dec 1976
Okeby, D M	Wellington	25 Feb 1977
O'Regan, M A	Wellington	25 Feb 1977
Osborne, R A	Christchurch	4 Feb 1977
Pain, G F	Auckland	11 Feb 1977
Paki, J E	Auckland	11 Feb 1977
Papps, R L	Wellington	25 Feb 1977
Patel, A D	Auckland	11 Feb 1977
Paterson, R F	Dunedin	9 Dec 1976
Pereira, A J	Auckland	11 Feb 1977
Perumal, S	Auckland	11 Feb 1977
Philson, K H	Auckland	11 Feb 1977
Pinney, S B	Auckland	10 Dec 1976
Pollard, J	Auckland	11 Feb 1977
Pootjes, I C	Wellington	25 Feb 1977
Qetaki, A	Wellington	25 Feb 1977
Quigg, M F	Wellington	25 Feb 1977
Radich, N C L	Auckland	11 Feb 1977
Reddy, P L	Wellington	25 Feb 1977
Revington, E R	Wellington	25 Feb 1977
Ringer, A J	Auckland	11 Feb 1977
Robertson, G B	Auckland	11 Feb 1977
Ryan, F M	Auckland	11 Feb 1977
Salt, M A E	Auckland	11 Feb 1977
Sandford, R B	Christchurch	4 Feb 1977
Sargisson, H	Auckland	11 Feb 1977
Saunders, G C	Christchurch	4 Feb 1977
Schwass, T G	Blenheim	7 Mar 1977
Shand, R J L	Christchurch	4 Feb 1977
Sharkey, B M	Auckland	11 Feb 1977
Shiels, T J	Dunedin	9 Dec 1976
Singh, A K	Auckland	17 Dec 1976
Singh, J	Auckland	18 Feb 1977
Smith, M S H	Christchurch	4 Feb 1977
Smith, M V	Wellington	25 Feb 1977
Smith, R M G	Auckland	10 Dec 1976
Spear, R L B	Dunedin	9 Dec 1976
Stainton, B M	Auckland	11 Feb 1977
Stapleton, R J	Auckland	10 Dec 1976
Steele, J A	Auckland	11 Feb 1977
Stemmer, M A	Christchurch	4 Feb 1977
Stevens, R H	Auckland	11 Feb 1977
Sumpter, P C	Auckland	11 Feb 1977
Swan, A E	Dunedin	9 Dec 1976
Syme, T D	Dunedin	9 Dec 1976
Taffs, D J	Christchurch	4 Feb 1977
Taufaeteau, J K	Auckland	11 Feb 1977
Taylor, M J	Dunedin	9 Dec 1976
Thompson, K E	Christchurch	4 Feb 1977
Thompson, M R	Dunedin	9 Dec 1976
Treffers, M F	Christchurch	4 Feb 1977
Tucker, I D	Auckland	10 Dec 1976
Turner, I J	Christchurch	4 Feb 1977
Unka, U	Auckland	11 Feb 1977
Van Rij, P R	Christchurch	4 Feb 1977
Van Schreven, H D P	Christchurch	4 Feb 1977
Walker, G R	Wellington	25 Feb 1977
Wall, P A F	Auckland	11 Feb 1977
Wallace, N A	Auckland	17 Dec 1976
Wallis, R D	Auckland	11 Feb 1977
Ward, L M	Auckland	11 Feb 1977
Wardell, J J	Auckland	11 Feb 1977
Warren, J P	Wellington	25 Feb 1977
Weir, J J	Christchurch	4 Feb 1977
Wellwood, G D J	Auckland	11 Feb 1977
Whitney, K G	Auckland	11 Feb 1977
Wilkinson, V J	Wellington	25 Feb 1977
Wilson, G E H	Dunedin	9 Dec 1976
Wiltens, G A A	Auckland	11 Feb 1977
Windsor, J A	Auckland	11 Feb 1977
Winger, M R	Auckland	11 Feb 1977
Wolfe, B A	Christchurch	4 Feb 1977
Wolff, R P	Dunedin	9 Dec 1976
Wong, P	Auckland	11 Feb 1977
Wood, R J	Auckland	11 Feb 1977
Wood, R S	Auckland	11 Feb 1977
Wood, V A M	Auckland	11 Feb 1977
Wrigley, T F	Wellington	25 Feb 1977

Solicitor

Bartley, A J	Auckland	15 Oct 1976

MEDICO LEGAL CONFERENCE

Hamilton 3-5 June 1977

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Registrations to Mr M J Jackson, P O Box 258, Hamilton – fast! ($25 single, $45 double).

INCOME TAX PROVISIONS AND DECISIONS OF SPECIAL IMPORTANCE IN LEGAL PRACTICE

By ANTHONY P MOLLOY *and based on a paper presented by him to the Auckland District Law Society in December 1976*

Professional negligence arising from failure to foresee tax implications of conveyancing transactions

Few practitioners whose instructional legal education is more than a decade in the past will have had any formal or systematic grounding in income tax law. A decade ago, tax decisions figured relatively infrequently in our law reports. But today there is a flood of reported tax cases, of which it is difficult, even for the specialist, to keep abreast. Add to this, a plethora of recent major changes in tax legislation; to say nothing of the springing-up of learned journals devoted to taxation matters and the general practitioner could well hope to be excused if he adopted the stance of ignoring the subject in the hope that it would go away completely, or, at least, not bother *him.*

But if he succumbs to this temptation, and imitates the ostrich, the sand in which he buries his head may turn out to be quicksand. If it had not gone a great deal earlier, the age of innocence in tax matters passed away for solicitors with the decision of Quilliam J in *Morgan v Beck and Pope* 2 (1974) 1 NZTC on 2 September 1974, in which an ex-client successfully sued his former solicitors in negligence, and recovered almost $14,000 which he had become liable to pay in income tax as a result of what was held to have been breach of their duty to him of professional care.

The matter began in 1967, when the plaintiff entered into an agreement to sharemilk for his father for a term of five years. The agreement embodied a provision

> "offering the farm to the milker for sale for the price of forty thousand dollars ($40,000) and such offer remains open until the 30th day of April 1972 and is to be confirmed in writing by the milker on or before that date".

The father had been lessee of the farm for many years, and it was ultimately left to him by the owner in his Will. Since the father had by then retired, following heart trouble, the whole idea of this sharemilking agreement had been to enable the son to acquire the farm: at a fully commercial price, in fairness to the other children in the family.

At the date of the agreement, the son had no intention of reselling the farm. However, after making a loan application in 1969, he discovered that the farm advisory officer, who had reported to the prospective lender, considered that the expenditure of a substantial sum was required to bring the, then barely economic unit up to scratch. In the light of this, and because he had no prospect of raising the necessary finance, the plaintiff son put the farm on the market.

As a result, he entered into an agreement to sell for $70,000; but this fell through when the purchaser was unable to raise the finance. A conference took place between them, and it was agreed in writing that the plaintiff – at his own suggestion and not at his father's request – would increase his option price by $5,000, and, in consideration, that his father would leave $40,000 on mortgage to the potential purchaser. Later on the same day, a new agreement for sale and purchase was executed, still at $70,000, but with $40,000 expressly to be provided on mortgage by the plaintiff's father. At the same time an agreement for sale and purchase between the plaintiff and his father also was entered into.

After completion of these transactions, the plaintiff son was assessed, under the Land and Income Tax Act 1954, s 88 (1) (c), with tax of $13,838.73 in respect of his profit on the transaction, and his objection to this was abandoned when it was realised that he had not been advised, either, to seek the consent of the Land Valuation Court, or, to file a declaration under the Land Settlement Promotion and Land Acquisition Act 1952, s 24 (1), in respect of the option provision in the sharemilking agreement.

Quilliam J held that this oversight on the part of the defendant solicitors was incapable of being cured under either s 25 (1) (a) of that Act (because the option contract had not been entered into subject to the consent of the Court); or under the Illegal Contracts Act 1970 (because it could not be postulated with any certainty that a Court dealing, in its discretion, with an application pursuant to s 7 thereof, would have validated that option, long after the completion of the purchase arising from it, merely so that one of the parties could escape tax liability).

So, – on the assumption that the grantee of

an option "acquires" the land subject to it *(a)* instead of the agreement for sale and purchase with his father having been simply an exercise of a valid option acquired at a time when resale was not in view; it stood alone – the option being void – and, at the time that agreement was entered into, and the plaintiff acquired the equitable proprietary interest in the land which subsequently was completed by the conveyance to him of the full legal title, he clearly had a purpose of sale.

But for the oversight of the defendants, the plaintiff would have had a valid option which he could have exercised, and then resold the subject land, without adverse tax consequences. Consequently, the defendants were liable to pay damages in the amount of the tax which became leviable, plus interest on the tax from the date of its payment.

So, like clogs on the equity of redemption, tax factors lurk in what, to many, may be the unlikeliest of conveyancing corners.

Pitfalls in dealing with objections to assessments

Another field where the practitioner – used to seeking, and receiving, indulgences as to time; and used to being able to amend pleadings more or less as a matter of course – can come to grief, is that of objections to assessment.

Section 29 of the Land and Income Tax Act 1954 requires an assessment to be objected to by way of a written notice which states shortly the grounds of objection. This notice must be delivered or posted to the Commissioner within the time specified on the assessment: a period which must be at least 14 days, and which, in practice, is one month.

The first pitfall is that late objections are void unless they are accepted by the Commissioner in his absolute and unreviewable discretion, and he notifies the objector of his acceptance. So that a tax assessment is one document which cannot be left lying around the office while other "more important" things are attended to. If this happens, and time runs against the objector; and the Commissioner, as he is quite entitled to do, declines to accept a late objection; and if there was a good argument for the objector succeeding: it is obvious that one could have to look to one's indemnifier to meet the objector's tax bill.

The second pitfall with objections, by a combination of the Land and Income Tax Act 1954 s 32 (10), and the Inland Revenue Department Act 1974, s 36, is that, at the hearing of a case stated on the question whether the Commissioner's disallowance of an objection has been correct, the taxpayer is limited to the grounds stated in his notice of objection. A point not taken expressly in the notice is not available to the objector at the hearing, unless it is very clearly implied. In other words, the ordinary rule in civil litigation that enables pleadings to be amended, on the usual terms, emphatically does not obtain in the field of tax disputes. So, again, if a ground which would have succeeded was not taken on behalf of the objector when his objection was formulated, and if he fails on the grounds which were remaining to him, it is fairly clear that the indemnifiers may be in the picture again.

One of the problems of drafting notices of objection is that often one lacks the time to investigate fully the merits of the case; and to brief the evidence and consider the law, within the one month period. Consequently, one has to be aware of every possible objection which may well be open to the objector in a case of whatever type it is, and then take every one of these points.

All of this means that a notice of objection is not a document to be taken lightly; but, in many cases, one which will require extensive and prompt consideration and preparation.

Heading off assessments and making objections unnecessary

The field of cases in which the purpose of a taxpayer's acquisition of property is concerned is one in which much can be done to head off assessments, and avoid having to go through the objection procedure at all. Where one is aware that a client has sold property, and that the question of liability for tax on the proceeds could well be considered by the Commissioner once he finds out about them, it is sound practice, in my view, to assemble all the evidence: briefing, for example, any land agents who had been instructed to search the property out, to see whether they recall being told the reason for which the land was wanted; briefing any lending institutions which were approached for finance; searching the Court files for any Land Settlement Act declarations where the land is farmland, and, at the time of its acquisition, the client owned other land in excess of the minimum area[a] – this is a particularly important one, and failure to do this piece of research before committing the taxpayer to a particular story on paper to the Department, has boomeranged more than once; considering all other relevant factual matters, including evidence in support of all the relevant legal matters. At that point, the whole can be assembled, worked, and reworked, until the client's story appears in the

(a) Consideration of the correctness of this view is not relevant here. However, the nature of an option has been the subject of much debate. See, for example, *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 (FC).

best possible and provable light. A written approach then can be made to the Department, on the basis that certain land was sold in such and such a year, and that the proceeds were not returned as income for the following reasons. Would the Department please confirm. My experience has been, that, if this open-handed approach is taken, and provided the homework has been done meticulously and at considerable length, so that no questions are either begged or raised which are not answered, it is possible to get many clients off the spit straight away. The alternative, is that the Department will ultimately catch up with the client, whether by means of an inspection, or by means of the normal quinquennial audit which now applies to every business taxpayer: and the inspectors, having discovered that certain proceeds, which, on the face of it, arguably may be taxable, have not been returned, may naturally feel that they have caught the taxpayer out, and that this justifies them in being sceptical of any submissions made on his behalf at that late stage.

These inspections or audits, if they are made on an unprepared client, for whom this homework has not been done, can result in the making of statements which subsequently are shown to be at variance with the facts – not because the client is being untruthful, but, simply, because, in many of these cases, his memory is being stretched over a long period – and this can give rise to evidence which is inconvenient, so far as credibility is concerned, from the tax inspector on the hearing of the subsequent case stated.

Apart from the prospect that one might head off, in this way, an assessment which is inevitable anyway, the object of making the carefully-prepared open-handed approach, that omits no essential information, favourable or unfavourable to the client, is that, once this is done, and a return lodged for the relevant year, supplemented by the information that the transaction took place and that the proceeds were not returned because they were considered to be capital for the reasons given in the letter, a four year time period begins to run against the Commissioner under s 24. After the lapse of that period from the end of the year in which the complete information is given to him, he can no longer assess. On the other hand unless every piece of information which could have been relevant to an assessment decision has been given to him, that period never starts to run, the Commissioner could come back on the taxpayer 20 or more years later.

It should go without saying that none of these remarks are directed to the getting off of taxpayers from assessments they legally should meet: rather they are directed to ensuring that, if there is a case why, in law, they should not meet the assessment, that case is, from the outset, put in the best possible light, with a view to ensuring that it stops the matter in its tracks as soon as possible.

The client who says he "won it at the races"

Comments so far have applied mainly to the case where the question of assessability is one which is, on the face of it, disputable. Cases often arise, however, where the assessability is quite indisputable, and the client has been defaulting in his obligation of candour about his financial affairs. A common explanation to be given when this class of client is picked up on an inspection; and, by the application of the assets betterment method of measuring an increase in assets over a period, large deficiencies in his income as returned are revealed: is that he 'won it at the races'.

To succeed in this, on the authority of cases such as *Barrett v CIR* [1957] NZLR 1098 (Henry J). he needs to be able to show, as a matter of belief, not only that he *had* betting winnings [a fact which, normally, the Court is prepared to find on relatively slight evidence], but also the extent to which those winnings, precisely, reflected in the assets which the Commissioner has taken into account. And it is not enough that the figures produced to the Court are taken from records which are not contemporaneous; and which were compiled, perhaps from official race records, only after the taxpayer had been called on to explain the increase. Finally, if the statement of alleged winnings is not accompanied by a corresponding statement of losses, the objector will not succeed in persuading the Court that the absence of losses was set off by other small winnings. In *N v CIR* [1958] NZLR 122, 124–5, McCarthy J, as he was then, said:

> "No doubt the appellant has been a gambler on a large scale; no doubt he has had many successful bets; he may even have won more than he lost; but there are no records of his losses, and his statement as to the excess of his winnings over those losses is unsupported . . . . I have reached my decision . . . simply on the appellant's failure to discharge the onus of proof cast on him by the legislation".

Occasionally, one does come across an objector who has excellent records, covering both winnings and losses; and including pay-in slips and TAB account slips. But then he can be in trouble in another way. While the proceeds of a bet are not normally of an income nature, any more than the proceeds of any other windfall receipt, they *can* be of an income nature, where, either, betting is indulged in for an income (and R B Cooke J held that, had he accepted the objector's evidence

as to his race winnings in *Duggan v CIR* [1973] 1 NZLR 682, 687–8, he would have felt obliged to have treated those winnings as assessable income), or, where they form part of the income of a wider business of which the punting was an incident. This second category is established where a punter has enjoyed continual success from an organised and systematic betting activity, coupled with a close connection with the racing industry in another capacity, such as owner, trainer or jockey. Where this happens, it is possible to have a decision that betting receipts are assessable as part of the profit of a business embracing, as well as betting, the ownership and racing for stakes of horses *(b)*.

Deductibility of the costs of tax advice

If all of these matters seem to indicate that such a large amount could be entailed that the fee might be a fairly solid one, one thing to bear in mind, in respect of expenditure on legal fees, accountancy fees, and Court costs, incurred by a taxpayer either in calculating or determining his assessable income for any income year, or in consequence of any objection or appeal, is that they are deductible pursuant to the Land and Income Tax Act 1954, s 129CG. The only exceptions are those cases where the Commissioner has grounds for holding that the returns in question were fraudulent or wilfully misleading; or that the objectios in question were inconsequential or frivolous; or that the expenditure in question was incurred in relation to a revenue law offence, or to an assessment of penal tax other than an assessment which later was cancelled. So, where the taxpayer is on a top tax rate, the subsidy afforded by this deduction can be as high as 60 percent of the costs of the advice that you are giving.

The effect of s 105 on transfers of property to, and the operation of, inter vivos trusts

One income tax provision with wide implications, which can be the cause of considerable perplexity, is s 105, and the decision on it of R B Cooke J in *James v CIR* [1973] 2 NZLR 119.

Subsection (2) deals with what it describes as "settlements" of property which may last for less than the "prescribed period", and it provides in respect of them that

> "the income from the settled property ... shall, so long as the income is not derived by a beneficiary who is entitled to the corpus, be deemed to be income derived by the settlor and by no other person as if the settlement had not been made".

Subsection (4) gives "settlement" such an extended definition that it includes any "arrangements" made in respect of income-producing property.

The facts of *James v CIR* were that the objector, who was a farmer, had incorporated a company, of which he was governing director and in which he was majority shareholder. The balance of the shares were distributed among his wife beneficially; and among his wife, himself, and his solicitor, jointly, as trustees of a trust formed simultaneously for the benefit of his wife, children, and grandchildren.

He sold his farm to the company, subject to two mortgages, for $40,318. The company drew a cheque for this amount in his favour; and he passed this cheque on to the trustees as an interest-free loan repayable on demand. The trustees, after executing an acknowledgement of indebtedness to him, drew a cheque for the same sum, and lent it to the company on the security of an unregistered mortgage repayable in five years and carrying interest at 6 percent in the meantime.

Finally, the objector leased the farm back from the company at a rent more than sufficient to cover the mortgage interest.

The result of these moves was that the objector had become a mere lessee of the farm he had formerly owned, and was now paying rent to the company. The trust was deriving an income from the company by way of interest on the unregistered mortgage. The objector was owed, by the trustees, free of interest, the money that, ultimately, had been used to buy his farm from him. Finally, after five years, the trust would become entitled to $40,318 from the company.

On these facts, the Commissioner assessed the objector to tax on the mortgage interest received by the trust from the company, on the basis that: (1) In transferring it to the trustees, by way of loan the objector had made a "settlement" of the $40,318. (2) The income from the loan, to the company, of the $40,318 subject to this "settlement" was to be applied for the beneficiaries under the settlement, for a period which, because the loan was repayable "on demand", of necessity was less than the "prescribed period". (3) The "settlement" provided that the corpus would revert to the settlor, because of the obligation of the trustee to repay the loan. (4) The objector had reserved the right to control the disposition of the corpus: by means of the exercise of this power of demand.

Cooke J upheld this assessment, so that the interest received by the trustees from the company was deemed, for income tax purposes, to have

(b) *C of T v MacFarlane* [1952] NZLR 349; *Trautwein v FCT* (No 1) (1936) 56 CLR 196; and *Langford v FCT* (1954) 7 AITR 140.

been derived by the objector himself. Obiter, the learned Judge "presumed" that, were the sum repayable to the objector by the trustees to be reduced at any time, by virtue of a deed of partial release or forgiveness, the interest deemed by s 105 to be derived by him would be reduced pro tanto: provided it had been derived by a beneficiary entitled to the corpus within s 105 (2) *(c)*.

The thing to note about this case is that the objector had not merely sold his farm outright to the company and left the purchase price owing and repayable "on demand". He had sold to the company, and been paid by it, in full; but then had advanced a sum of money to the trust, for a period capable of being less than the "prescribed period". It was the subsequent advance, and not the prior sale, which brought his situation within s 105.

The section, and this decision, commonly gives rise to perplexity in at least four types of situation:

(1) Where a property is transferred to trustees who are "related" to the transferor.

(2) Where the question arises whether funds should be lent to family trustees and the debt gradually forgiven; or whether an asset should be purchased, transferred to them – at the price of a second dose of stamp duty, and the outstanding consideration for the transfer gradually forgiven.

(3) Where a taxpayer is purchasing a property, and, although putting up the only equity capital, wishes to have it transferred into his own name and that of another [his wife, say] as co-owners. Should he buy the whole first, and then – again at the price of a second dose of stamp duty – sell a share to that other; or can he lend the other half the money he is putting up?

(4) Where an asset is owned already; or where, in either of the foregoing two instances, the decision is made to purchase the asset itself, and then retransfer it: whether the terms of the transfer, or re-transfer, should be expressed as a sale with the price merely left owing, or as a sale with a mortgage back?

(1)

Dealing with the first of these. Where anyone transfers an income-producing asset outright to an existing trust, on terms that the price is left as payable "on demand", there *normally* would be no room for the application of s 105. In *James v CIR* Cooke J spoke of the possibility that there could have been "a settlement of the farm, immune from the operation of the section because the objector had alienated his entire interest in the farm" (p 125).

However, where the asset is one which is productive of identifiable income *(d)*, that income still could be assessable to the transferor if the terms of the "settlement" *(e)* provide that the "right to dispose or direct or control the disposition of that corpus shall be reserved to the settlor or to a relative of the settlor or to a company in which the settlor or a relative of the settlor is a shareholder . . ." (s 105 (2) (b) (ii)) the "settlor", in this sense, being the transferor of the asset (s 105 (2)).

If the existing trust conferred on the settlor the power of ultimate disposition of the asset transferred; or if it conferred that power on any relative (as defined by s 2) of his; or any company in which he or a relative holds shares: any income derived from the asset transferred – say, by leasing it – will be assessable as his income and not that of the trustees, "so long as the income is not derived by a beneficiary who is entitled to the corpus . . . ." That is, it will be assessable to him so long as the trust is a discretionary trust; or, at least, is a trust the provisions of which include a discretionary power of advancement of capital.

When will the existing trust confer the right of ultimate disposition on the settlor; any of his relatives; or any company in which he or any of them hold shares? Clearly, when any of them is the sole trustee; or – and provided the trust deed authorises the trustees, instead of acting unanimously, to act by a minority delegating their duties or powers to a majority – where any of them constitute a controlling majority of the trustees of the trust.

The result is that, in the case of trusts with a discretionary capital distribution, or a dis-

(c) At p 124 lines 13–19. In order to avoid the final requirement mentioned here, it would be necessary for an objector to persuade a Court that the reduced sum had been "substituted" for the original advance, and that, accordingly, only the income of the substituted property was assessable to him.

(d) It is "a question of mixed fact and law, not simply a question of law, whether income such as the mortgage interest here was income of the settled sum; and, at least on the facts where in accordance with the objector's scheme the trustees lent the precise amount received from him and had no other substantial resources, realism demands an affirmative answer to the question" (p 124).

(e) As defined by s 105 (4) this includes any "trust", and this is what is created where a transferor intends the terms of the transferee trust to become applicable to the property he is transferring: ibid, 125 lines 20–33, citing *Tucker v CIR* [1965] NZLR 1027 (Woodhouse J).

cretionary capital advancement provision, the settlor and his relatives should not be placed in a position of control in respect of that discretion.

In many cases, the taxpayer who wants to avoid estate duty, by transferring his hard-earned capital assets, is going to require to keep them in his own name, by being trustee of his own trust. If he is adamant that he must be a trustee, and if it is clear that his family circumstances require the creation of a discretionary trust, the first thing is to try and persuade him that he should not be *sole* trustee; and, if he and his relatives, or any company or companies in which he or they hold shares, are to be a majority of the trustees, the second thing is to try and persuade him that the trust deed should not have any provision empowering the majority to rule, and should not in any way abrogate the normal private trust requirement of unanimity of trustees.

If he cannot be persuaded on these points, and if it still appears that a discretionary trust is necessary, one solution is to suspend the discretionary powers of the trustees in respect of capital during any period when s 105 (2) (b) (ii) could apply. A basis for an appropriate provision could be along these lines:

> During the period ending one day after the seventh anniversary of the execution of this deed, or one day after the attainment of the age of twenty by the youngest child of the settlor, whichever is the longer, no power vested in the trustees to pay, apply, appropriate, appoint, advance, or determine the beneficial ownership of, any of the capital of the trust fund, is exercisable if, and so long as, the settlor, or any relative (as that term is defined for the purposes of the Income Tax Act 1976) of the settlor, or any company in which the settlor or any such relative is a shareholder, or any combination of these, constitutes or constitute a controlling majority of the trustees".

This provision on its own will not be sufficient, unless there is an additional clause prohibiting the trustees accepting any further transfers of property. Section 105 is not concerned with the period during which the existing trust itself must remain operative. Rather, it is concerned with the period of each separate "settlement", constituted by each separate transfer of property thereto.

Since it is unlikely that such a prohibiting prohibition would be acceptable in the majority of trust deeds, a broader provision usually would be necessary: suspending the advancement and capital distribution powers during any period during which the settlor, any of his relatives, or any company in which he or they hold shares, constitute a controlling majority of the trustees capable of binding a dissident minority. One approach is along these lines:

> "No power which is vested in the trustees to pay, apply, appropriate, appoint, advance, or determine the beneficial ownerships of, any of the capital, is ever exercisable if, and so long as, the settlor; any relative (as that term is defined in the Income Tax Act 1976) of the settlor; any company in which the settlor or any such relative is a shareholder; or any combination of these: constitutes or constitute a controlling majority of the trustees".

That is the cleaner approach, but, if the restriction on these powers ever being exercisable by the settlor or his relatives is unacceptable to the settlor, an alternative approach is to provide:

> "(a) The settlor, or any other person, with the consent of the trustees (and their consent is a sufficient and binding declaration and acknowledgement that the property is held by them on the trusts, and with, and subject to, the powers declared in this deed), from time to time may transfer to the trustees any property by way of sale or gift.
>
> "(b) The property so transferred becomes, upon transfer, part of the trust fund.
>
> "(c) No power which is vested in the trustees to pay, apply, appropriate, appoint, advance, or determine the beneficial ownership of any item of property so transferred, or any property substituted therefor, is exercisable – during the period ending one day after the expiration of, the longer of, the period of seven years from the date of the transfer of that item to the trustees, or the period calculated to begin at that date and to end on the date of attainment of the age of twenty by the youngest child of the settlor to attain that age – if, and so long as, the settlor; any relative (as that term is defined in the Income Tax Act 1976) of the settlor; any company in which the settlor or any such relative as a shareholder; or any combination of these: constitutes or constitute a controlling majority of the trustees".

This first class of problem arises under s 105 only where the trustees have a special power of appointment of the corpus among whatever members of a nominated class of beneficiaries they, in their discretion, choose to benefit. Where, by contrast, vesting of capital is not discretionary, but is fixed by the very terms of the trust, there is no reservation on the right to control the disposition of corpus within s 105 (2) (b) (ii), and the income will be derived by beneficiaries entitled to the corpus, within the final phrase of s 105 (2), so that s 105 will be inoperative.

(2)

The second of these four areas of perplexity is where a settlement has been created, and the question arises whether to advise the settlor, who has sufficient cash, whether he should lend this to the trustee, who then will buy an asset, following which the settlor gradually will forgive the debt over a period; or whether he should purchase the asset himself, transfer it at the price of a second dose of stamp duty, and then gradually forgive the outstanding consideration for the transfer.

If the funds are lent to the trustee – and assuming that the first class of difficulty, just discussed, does not arise – the possible application of s 105 will depend upon whether the funds being advanced are going to be, by themselves, productive of income. In *James v CIR* there was no doubt about this, because the objector simply made a *free of interest* loan to his trustees; who, in turn, made a loan of the same amount, *at interest* to the company. The interest paid by the company was the only income involved, and it clearly was produced by nothing other than the advance made by the objector.

If, however, instead of making an advance to his trustee, to enable him to lend the money out at interest, the settlor makes an advance to him for the purpose of enabling him to purchase an asset capable of being used in the production of income which cannot be attributed solely to the asset, the position is not so straightforward. For example, if the asset purchased with the help of the loan is a farm: on the assumption that it is to be worked, rather than simply leased, the farming income is going to be produced, not simply by the farm, but by the whole amalgam of assets of the farming business, plus the labour of those involved in running it, plus, where applicable, loan moneys from independent third parties.

Section 105 (2) (para (a) refers to "The income *of* the settled property or of any property substituted therefor"; and para (b) uses the expression 'corpus') appears to contemplate income-producing property: such as company shares expectantly capable of producing dividends, or money capable of producing interest.

So, where the property or asset to be "substituted" for the "settled property" – that is, to be substituted for the cash advanced – is something, like a farm, which, unless it is just leased, is not of itself income-producing; but which, taken together with a number of other factors, is capable of forming part of a process of income production: it should not be within s 105 to lend funds to the trust, repayable upon demand – and, hence, within the "prescribed period" – and then gradually release the obligation to repay them *(f)*.

On the other hand, where the asset, the purchase of which is being contemplated, actually or expectantly *will* be income producing of itself – such as a discounted mortgage, a parcel of shares, or a farm which is leased rather than worked – there is no longer any difficulty in discovering income "of" the property substituted for the loan. In this kind of situation, however, the question arises whether, within s 105 (2) (b), the lender "remains the beneficial owner of the corpus of *that* property". "That property", it is submitted, is the property producing the income; and this, where an asset has been acquired (rather than – as in *James v CIR* – the original sum simply on-lent at interest), is that "substituted" asset. If it was the "settled", rather than the "substituted" property to which reference was being made, the more natural reference would have been to *"the"* property rather than to "that" property.

But, if an insurance policy is required, against the risk of judicial rejection of that reasoning, it lies in the settlor first purchasing the chosen asset himself, and, at the price of a second dose of stamp duty, transferring it to the trustees: rather than lending them the money to make the purchase themselves in the first place.

The other alternative safety-first approach is to make the loan for such a period as *must* equal or exceed the "prescribed period".

Making it impossible of repayment, in whole or in part, before the expiration of the "prescribed period", raises no difficulty where the loan is unsecured, or, being to a company, is secured either by a debenture or by a mortgage. The Companies Act 1955 s 97, provides that a debenture is not invalid merely because it is "made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding". And because, by s 2, "debenture" includes "any securities of a company", neither is a mortgage invalid which, if given by a company, is irredeemable for a long period. The rule against perpetuities is not applicable *(g)*.

But if the loan – not repayable for a stated minimum period – is to an individual, problems could arise if it is to be secured by mortgage. At

(f) It ought to be beyond the purview of s 105 for the further reason that, once the farm property has been "substituted" for the cash advanced, it is no longer the "corpus" (which, it appears, must be a reference to the "substituted" property producing the income) which can be demanded within the "prescribed period" but only the original loan.

(g) *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 (HL).

common law there should not be any question of avoidance for being a clog on the equity of redemption:

> "[T]he proposition that a postponement of the contractual right of redemption is only permissible for a 'reasonable' time is not well-founded. Such a postponement is not properly described as a clog on the equity of redemption, since it is concerned with the contractual right to redeem. It is indisputable that any provision which hampers redemption after the contractual date for redemption has passed will not be permitted. Further, it is undoubtedly true to say that a right of redemption is a necessary element in a mortgage transaction, and consequently that, where the contractual right of redemption is illusory, equity will grant relief by allowing redemption.
>
> . . .
>
> "[E]quity does not reform mortgage transactions because they are unreasonable. It is concerned to see two things – one that the essential requirements of a mortgage transaction are observed, and the other that oppressive or unconscionable terms are not enforced. Subject to this, it does not . . . interfere" *(h)*.

However, the Property Law Act 1952, s 81 (2), entitles a mortgagor to redeem, on terms, at any time: irrespective of whether the appointed date has arrived. This is a provision that is so expressed as to take effect, for reasons of public policy, notwithstanding any contrary provision in the mortgage *(i)*. In this regard, it is well known that Courts are reluctant to decide cases according to public policy. They see themselves as "more to be trusted as interpreters of the law than as expounders of what is called public policy" *(j)*. The protest of Borough J is well known: the learned Judge having held that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail" *(k)*.

However, s 81 is the first of a fasciculus of sections headed "Redemption", and its analogy with the provision at issue in *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587 (PC) is very close. In that case, delivering the judgments of their Lordships in the Privy Council, Lord Dunedin, referring to the Life Insurance Act 1908, held.:

> "Sect 64 is the first of a fasciculus of sections headed 'Protection of Policies'. The other sections which end with s 66 are concerned with the protection of policies from the effects of bankruptcy and the securing that the proceeds of a policy at death shall pass to the representatives of the deceased.
>
> "Their Lordships have no doubt that this is a section intended to lay down a rule of public policy, and that it is impossible for either an assured or an assurer to contract himself out of it or to waive its effect" (p 595).

In the family protection case of *Gardiner v Boag* [1923] NZLR 739 (Chapman J), the Court, referring to this last dictum, was

> "satisfied that nothing that was said can affect the conclusion that the will of the Legislature may be equally apparent whether expressed in the form of a prohibition, as in that case, or in the form of an explicit grant of a right . . ." (p 743).

as in the Property Law Act 1952, s 81 (2).

Consequently, in addition to that given in the discussion under the fourth head of perplexity which is mentioned shortly, this is a further reason for avoiding the securing of a loan, other than to a company, by a mortgage.

However the objective of making the loan incapable of being repaid within the prescribed period is to be achieved if the transferor wishes both to avoid charging interest, and to avoid paying gift duty on the value of the interest foregone *(l)* [which he would have to pay if the loan was made free of interest, and if the amount of interest foregone exceeded the free of duty gift limit], the terms of the loan could provide that, so long as any of the principle remains owing, the transferee will pay him interest, at the rate of $X%, in respect of the period of 12 months then past, *provided only* that he delivers to the transferee, in each year in which he required such interest to be paid to him, a written demand on or before, say, 24 March. In *Re Marshall* [1965] NZLR 851 (CA), the Court of Appeal held that, by refraining from making a timely demand, the creditor in such a case as this would *not* be making a gift within legislation differing in no significant way from the relevant provisions of the Estate and Gift Duties Act 1968.

(3)

The third of the occasions where perplexity can arise is where someone purchasing a property,

(h) *Knightsbridge Estates Trust Ltd v Byrne* [1939] 1 Ch 441 356–457 per Sir Wilfrid Greene MR reading the judgment of the Court of Appeal.

(i) Cf Goodall and Brookfield *Law and Practice of Conveyancing* (1972) 3rd ed 315 note (1).

(j) *Re Mirams* [1891] 1 QB 594, 595 per Cave J.

(k) *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303.

(l) *Rossiter v CIR* (1976) 2 TRNZ 1.

and putting up the only equity capital, wishes to have it transferred into his own name and that of another as co-owners. Should he buy the whole interest in the property first, and then – again at the price of a second dose of stamp duty, sell a share to that other; or can he lend the other half the money he is putting up?

The applicable arguments here are the same as those discussed under the previous heading: that is, if the contemplated asset is not income-producing per se, there should be no danger in making an advance to his proposed co-owner. If it is income-producing, on the other hand, it *should* still be safe – but the double dose of stamp duty attaching to a prior acquisition of the asset, and the subsequent re-transfer of a share, might be considered as a desirable insurance premium.

(4)

The final area of perplexity is that arising either where an income-producing asset is already owned by the potential settlor; or where, in either of the second or third of the perplexing cases I have mentioned, the choice between an advance of cash to a trust, or – at the price of a second dose of stamp duty – the use of that cash to purchase an asset which is then sold to the trust, has been exercised in favour of purchase of the asset. In either instance, the question which arises is whether the terms of the transfer should be expressed as a sale with the price merely left owing, or as a sale with a mortgage back.

In either case it seems that the "settled property" must be the asset itself, and that the nature of the transaction does not involve a separate loan *(m)*. Certainly, because it is the property itself *which is being transferred,* it does not seem right to suggest that it is property being substituted for the amount of any loan. Consequently, the expressed form of the transaction should not matter, although many feel more comfortable by expressing it entirely within the confines of an agreement for sale and purchase, where the balance of the purchase money is payable on demand, and where the interest of the transferor in that balance is formally protected, if at all, by caveat.

However, provided the documentation does not evidence that a separate loan has been made, but merely states that the mortgage is given in consideration for an existing debt, there appears to be no real objection to the granting of a mortgage by the transferee to the transferor: simply charging the property with payment of the purchase price. It is difficult to see how the giving of a charge *by the transferee* can amount to the making of a statutory "settlement" *by the transferor.*

Deductibility of "home-office" expenses

The Land and Income Tax Act 1954, s 111, provides for the deduction of any expenditure or loss which is neither of a capital nature nor of a private or domestic nature, to the extent to which, either, it is incurred "in gaining or producing the assessable income", or, is necessarily incurred "in carrying on a business for the purpose of gaining or producing the assessable income", for any income year.

It has been held that these expressions connote "in the course of gaining or producing" that income, and look rather to the scope of the operations or activities, and the *relevance* thereto of the expenditure, than to purpose itself *(n)*. Although it is not an "exclusive and exhaustive" *(o)* test, the accepted criterion is whether the expenditure was "incidental and relevant" to the operations carried on for the production of income *(p)*.

The most contentious area of application of this accepted test of relevance has been that of "home office" overheads: in respect, first, of the actual *use* of the facilities of the dwelling; and, secondly, of the rent, rating, or servicing of any indebtedness which attaches to its rental or ownership. While the matter awaits resolution by either the New Zealand Court of Appeal or by the Full Court of the High Court of Australia, the balance of Australian authority favours deductibility of expenses in the first category, but rejects similar treatment of rates, rent, or interest on borrowed money. The only New Zealand case, which allowed expenditure in both categories, was decided before the numerous Australian decisions.

The first decision, by a single Judge in the High Court, was that in *Thomas v FCT* (1972) 3 ATR 165 (Walsh J), in which a barrister had claimed to deduct, inter alia, a proportion of the interest on money borrowed to enable the addition of three rooms to his house, one of which he proceeded to use as a study in which he did some of the work required in the carrying on of his practice. In rejecting the claim, Walsh J, said:

> "The appellant seeks to support his claim mainly by saying that one of the three rooms then added has been and is used by him as a

(m) Cf the judgment of Woodhouse J in *Rossiter v CIR*.

(n) *Amalgamated Zinc (De Bavay's) Ltd v FCT* (1935) 54 CLR 295, 309 per Dixon J (as he was then) (FC).

(o) *Lunney v FCT* (1958) 100 CLR 478, 497 per Williams, Kitto, and Taylor JJ (FC).

(p) *W Nevill & Co Ltd v FCT* (1937) 56 CLR 290, 305 per Dixon J (as he was then) (FC); *Ronpibon Tin NL and Tongkah Compound NL v FCT* (1949) 78 CLR 47, 56 per the Full Court.

study for professional purposes. But in my opinion, the house should not be regarded in the circumstances of this case as being or as including part of the business premises of the appellant and the loan should not be regarded as having been raised for the purpose of providing him with business premises. Payment of the interest, in so far as it was an outgoing connected with the cost of extensions to the house, was, in my opinion, an outgoing of a 'capital, private or domestic nature' within the meaning of [the Commonwealth equivalent of s 112 (1) (a), (i)]. In my opinion it did not lose that character merely because the appellant, like most professional men, did some of his work at home, or because he used one of the added rooms for that purpose. The appellant did not spend money in erecting premises suitable only for use as business premises. He added rooms to his house. It is natural to suppose that the addition increased the capital value of the improvements on the land" (p 168)..

Another single Judge of the same Court decided *FCT v Faichney* [1972] 3 ATR 435 (Mason J), in which the objector was a research scientist with the CSIRO, whose accommodation at the place of his work was a room which served as a laboratory and veterinary operating theatre, and also had a desk in it. There was considerable traffic through the room, and it was shared with two assistants. He was required to put in about 36 hours a week during normal business hours, and was not required to work at home specifically. However, he was expected to publish his scientific research in scholarly journals; to compile reports; and to read the papers of scientific colleagues. Further, there was evidence acceptable to the Court that a research scientist, such as the taxpayer, could not do his job properly if he confined his work to ordinary working hours. For those reasons, he spent considerable time at his home preparing papers and reports; keeping up with scientific journals and literature; and perusing papers prepared by his associates for publication. All of this work was done on weeknights and weekends.

The Commissioner argued that the taxpayer should have done his work in his laboratory: either returning after dining at home each evening, or, alternatively, dining near his place of employment, and working back in the evenings without returning home first. The learned trial Judge, Mason J, was unable to see the "relevance" and "practicality" of this suggestion, and he was satisfied that it would have been "neither congenial, convenient nor practical" for the taxpayer to have acted in accordance with it. It was clear that the laboratory was neither an attractive, nor, indeed, even a suitable, place for the type of work which the taxpayer did at home.

The taxpayer had caused one of the four bedrooms in his home to be set aside as a study. It contained a desk, a chair, and a bookshelf; and it was used, for practical purposes, wholly for the activities mentioned already. The learned Judge was satisfied that the taxpayer spent a considerable amount of time in it, working on matters related directly to the actual work on which he was engaged in his employment.

Adopting part of the dictum of Walsh J in the earlier case, and rejecting the claim to a deduction of part of the mortgage interest on the residence, Mason J drew a distinction between the study of the scientist, or of the barrister, and the surgery of the physician. He held that the latter "is not, in a relevant sense, part of his home; it is his place of business, if I may be permitted so to describe the premises at which a doctor carries on his profession" (p 439).

FCT v McCloy (1975) 5 ATR 315 (Helsham J) explicitly followed these two cases, and rejected the similar claim of a computer salesman. Apart from periodic meetings, the objector, whose income depended on his selling success, was neither required, nor encouraged, by his employer, to attempt to perform his work at the latter's business premises. He spent only eight hours a week there; a further 24 hours calling on customers; and 20 hours more in his home office, preparing proposals, telephoning, interviewing, and the like.

He purchased a particular house (having lived in a flat for the first few months of his employment) on the basis that it contained an office:

> "this home cost him $5000 more than a house of virtually identical standard without an office but which probably would have been more convenient in other respects. The office comprised a room of the house which also had access from the garage, unsuitable, it is said, for this reason as a bedroom, and comprising approximately one fifteenth of the total floor area of the house. It has been furnished as an office with a desk and office chair, two bookcases, a filing cabinet, it has a telephone, and was and is used exclusively by the taxpayer for his work. Since the tax year in question the taxpayer has bought and installed in it a dictating machine. His performance judged by results has improved each year since 1 April 1971, when he was appointed, and consequently his income has increased. The use of this facility at home is not a requirement of his employment, but he

attributes his success, and hence his income improvement, to its existence; he said he regarded the availability of his home office as essential, but by this, of course, must be meant essential if he were to do his job at the level of efficiency which he seeks and to maintain the level of income which he has achieved. Indeed he said in evidence that his business card does not show his home 'phone number or address" (p 317).

On these facts it was held that:

"the taxpayer was not in any real sense carrying on his business in a separate part of his home any more than the barrister or the scientist were in the two cases referred to, nor was there a separate business establishment adapted solely for business use to which any expenditure, capital or otherwise, could be seen to be referable. To say that to maintain the income from his employment the taxpayer here had to have somewhere that he exclusively could use to work away from his place of employment, and found it convenient to provide this in his home, is not sufficient to turn outgoings referable to the provision of a home into outgoings incurred in gaining or producing that income" (p 320).

The learned Judge felt bound to reach this decision by the way the single justices of the High Court had decided the two previously cited cases. In so doing he differed from Wickham J, in the Supreme Court of Western Australia, who, in *Caffrey v FCT (No 1) (q),* had expressed himself to be unable to find anything in those two cases

"which lays down any new legal rule relating to the construction of s 51 of the Act and each decision seems to me to be a decision of fact. In particular, the example given by Mason J in [*FCT v Faichney*] where he said [(1972) 3 ATR 435, 439 lines 26–29] that payment of rent on the taxpayer's dwelling is an example of an outgoing of a private or domestic nature cannot, even if it were not obiter, be erected into the legal proposition that rent paid for the taxpayer's dwelling can never be to any extent incurred in gaining or producing assessable income within the meaning of s 51 (1). This would be taking a liberty with his Honour's reasons which cannot be taken and would in addition not be construing the section, or applying it, but amending it by adding another exception or proviso to it. . . .

"If it is thought useful to apply some other test than the actual wording of the section, then I also think it to be here clear on the facts that the occasion of the loss or outgoing (to the relevant extent) is found in what is productive of the assessable income, namely is found in the necessity to pay rent for a house which includes a workroom used for work productive of the income and is directly 'incidental and relevant' to that" (p 111).

Consequently the objector succeeded in his claim to deduct a portion of the rent paid for a flat: one room of which he had converted exclusively into a library and study, in which he worked long hours doing the research necessary to enable him to prepare the law lectures he delivered at a country college of advanced education.

But although Helsham J found for the Revenue, while Wickham J upheld the objector, in apparently similar factual circumstances, the two agreed that, as Wickham J said, a question of fact, rather than principle, was involved (110). Thus, Helsham J allowed that there *could* be

"occasions no doubt when portion of moneys borrowed and expended in circumstances resembling the present case can be categorized as being spent in acquiring business premises from the use of which assessable income is derived; if that is the essential character of the expenditure of such a portion, then the amount would qualify as an outgoing incurred in producing assessable income, although, of course, it would be an outgoing of capital or of a capital nature; if that were its true characterization, then money expended to service that amount, and I suppose to protect what was acquired, *(r)* would be no less outgoings incurred in producing the assessable income, and hence allowable deductions" (1975) 5 ATR 315, 319).

On the facts of the Australian cases the room

(q) (1973) 4 ATR 109. Wickham J, at the hearing, found that, in respect of an associated travelling expense claim, the objector "did much exaggerate the number of journeys which he had made": ibid, 110 lines 13–14. Jackson CJ held to same effect in respect of a similar claim by the following year: (1976) 6 ATR 230. Subsequently to the first claim, it appeared that, in addition, he had not even resided in the home in respect of which the deduction had been claimed; as a consequence of which the order made at the initial hearing was vacated, the objection discontinued, and costs awarded against the taxpayer: (1974) 74 ATC 4275. However, those facts had not been fabricated – as has been suggested by Helsham J in *FCT v McCloy* (1975) 5 ATR 315, 320 line 39 – but merely had been "mistakenly argued with reference to an incorrect tax year": *Caffrey v FCT* (No 2) (1976) 6 ATR 230, 232 lines 38–47 per Jackson CJ reading a statement by, and at the request of, Helsham J.

(r) A reference to the insurance claim which fell with the mortgage interest.

(s) *Thomas v FCT* (1972) 3 ATR 165, 168 per Walsh J.

in question was being used, respectively, "as a study for professional purposes *(s)*; "[e]xcept occasionally . . . was used by the taxpayer and then almost wholly for these activities" *(t)* of his profession; or "wholly and exclusively" *(u)* or "virtually exclusively" *(v)*, therefor.

Only the taxpayer whose use had been "wholly and exclusively" *(t)* professional succeeded.

However, in *CIR v Castle* (1971) 2 ATR 481 (Beattie J)) the respondent taxpayer was able to persuade a single Judge of the Supreme Court of New Zealand that mere "primary" use was sufficient. A member of a firm of solicitors, he interviewed clients and land agents in a room of his home which was furnished – unlike all the Australian cases – as a dining room; and there he also perused documents and worked on complicated legal matters which were being dealt with by his firm: all tasks – as in the Australian cases *(w)* directly productive of professional income, and distinct from such activity as the mere keeping abreast of the latest reports and law journals (p 489). These professional matters represented up to 36 occasions during the year, and use of the room for its ostensible purpose was confined to six occasions each year (p 482).

As Mason J later was to do in *FCT v Faichney* (1972) 3 ATR 345, 437, Beattie J held that it was irrelevant that the objector would have been liable to pay the same amount of mortgage interest even if he had not worked at home, because, on the occasions he did work there, it was not for his own convenience but for the purpose of meeting the exigencies of his duties as a partner in his firm ((1971) 2 ATR 481, 48); and because, in any event, it was no business of the Commissioner to issue an assessment on the basis that the taxpayer *could* have done the work elsewhere *(x)*.

Further, the room suited the objector for the purposes of that work (p 490); its domestic use was so limited as to leave it available for professional purposes whenever required (p 489); and its primary use during the relevant period was for such purposes.

But, in contrareity with the already-mentioned view later to be taken by Mason J, the learned Judge was able to infer from these factors that the relevant portion of the interest had not been expenditure of a "private or domestic nature" *(y)*; and had been incurred in gaining or producing the assessable income or in carrying on a business therefor.

It is submitted not only that Beattie J was correct, in so holding, but that – while, no doubt, it usually could be expected – a finding even of primary use is not the test of *deductibility*, but only of quantum.

In principle, all that s 111 requires is that the use of an identifiable part of the residence has been a real and substantial element in the taxpayer's gaining or producing of his assessable income; or that it has been a necessary element in the conduct of an income-producing business being carried on by him. Whereas Beattie J considered it a virtue of his finding of "primary" use, in *CIR v Castle*, that it would serve to rule out "any modern Archimedes making a claim connected with his bathtub" *(z)* there is every reason to allow just such a claim provided a *real and substantial* use of it for an income-producing or business purpose can be established by the taxpayer.

On every occasion on which a residential dwelling is put to a business use, its availability for use as a residence is, pro tanto, excluded or diminished. For example a solicitor might close, or never open, a city office; and thenceforth work instead from his dining room table at home; install his secretary and her typewriter at the kitchen table; permit his clients to wait, in the hallway for conferences; and make his bathroom available to clients and staff. Notwithstanding that there would be no area either wholly and exclusively, or, even, primarily *(a)*, devoted to his business, it is submitted that there would be such a real and substantial use, not being of a private or domestic nature *(b)*; that mortgage interest would, to the appropriate extent, be clearly deductible within s 111; and that it would not be disallowed under s 112 (1) (g) as not being payable on capital employed in the production of assessable income. Certainly the fact that he would continue to need his residence as a home cannot, of itself, entail

(t) *FCT v Fairchney* (1972) 3 ATR 435, 437 per Mason J.

(u) *Caffrey v FCT (No 1)* (1973) 4 ATR 109, 110 per Wickham J.

(v) *FCT v McCloy* (1975) 5 ATR 315, 318 per Helsham J citing from the decision of the Board of Review which was the subject of the appeal before him.

(w) *FCT v Faichney* (1972) 3 ATR 435 was no exception, for, although the taxpayer spent much of the time in the reading and preparation of learned papers, this was a requirement of his employment: cf ibid, 436 lines 35–41 per Mason J.

(x) Ibid, 488 line 42/489 line 19, applying the *dictum* of Lord Wilberforce during his reading of the majority judgment in *Europa Oil (NZ) Ltd, v CIR* (No 1) [1971] NZLR 641, 649 lines 5–11.

(y) And, hence, not allowable, notwithstanding s 111: s 112 (1) (i).

(z) (1971) 2 ATR 481, 490 lines 56–57, citing from an Australian Taxation Review Authority decision.

(a) The relevant definitions given by the SOED are: "of the first importance; principal, chief . . .".

(b) So that expenditure thereon does not become a prohibited deduction within s 112 (1) (i).

that the costs of its ownership must always be mere private or domestic expenditure *(b)*. For example, the owner of a parcel of land which is subject to unimproved value rating may decide to add a flat on to his existing house situate thereon, and to rent that flat in order to produce an income. The rates on the property would be incurred irrespective of the existence of the flat. However, once the flat has been rented, an apportionment of the rates surely must be made, and a deduction permitted in respect of whatever fair and reasonable proportion thereof can be attributed to the gaining or producing of the rent. Again, a person, on purchasing a new residence, instead of selling his former home, which is mortgaged, might rent it out instead. That it had been *acquired* solely as a residence does not detract from, or affect, the income-producing purpose for which it is being retained. Similarly; that a property is acquired, with the help of a loan secured by a mortgage, solely as a home, can not detract from a subsequent partial use as business premises.

The matter depends, then, upon whether a finding of a real and substantial business, or other income-producing, use can be made. If it can, the issue of the degree of such use – whether exclusive, primary, or whatever else – is one which should go only to the quantum of the deduction.

So far as rent, but not rates or mortgage interest, is concerned, this principle of deductibility pursuant to s 111 is reinforced by s 112 (1) (e), providing that, notwithstanding s 111, no deduction is allowable in respect of:

> "Rent of any dwelling-house or domestic offices, save that, so far as any such dwelling-house or offices are used in the production of the assessable income, the Commissioner may allow a deduction of such proportion of the rent as he may think just and reasonable".

However that principle does not depend upon s 112 (1) (e), and the expenditure should be deductible under s 111 itself, whether in relation to rent, rates, or mortgage interest. Provided the business "use" of which he speaks is a real and substantial one, it is submitted that Jackson C J, in the Supreme Court of Western Australia, in the most recent decision, *Caffrey v FCT* (No 2) (1976) 6 ATR 230, was correct in holding that a provision not materially different from s 111

> "allows for the dissection and apportionment of outgoings even of a private or domestic nature if some demonstrable part of the expenditure is shown to be incidental and relevant to the gaining of assessable income. The occasion for the outgoing is to be found in whatever is productive of the assessable income, and it is of importance to consider the essential character of the expenditure to decide whether it is incurred in the course of gaining income. But the decision in each case turns on a question of fact.
>
> "The payment of rent for a flat or house for a taxpayer and his wife is prima facie an outgoing of a private or domestic nature. But it is not difficult to conceive circumstances where an apportioned part of such rent and other house expenses might properly be claimed as a deduction under s 51; for example, where a medical or legal practitioner conducts his professional practice from his home, and uses part of his house premises for office, consulting room, surgery, library and the like" (p 232) *(c)*.

So while it must be conceded that the matter is not finally settled, it is submitted that a proportion of rent or mortgage interest, and insurance, on one's home, is deductible pursuant to s 111: provided that part of the home has been put to a real and substantial business, or other income-producing, use.

Apart from these expenses of ownership or rental of a property, the actual expenses of *use* are more clearly deductible. In *FCT v Faichney* while he disallowed the mortgage interest claim, Mason J allowed a claim for that portion of the electricity bill which could be attributed to the lighting and heating of the study while it was being used for professional purposes. The learned Judge held that this had been an outgoing "incurred in gaining or producing the assessable income", and it was not made into an outgoing of a private or domestic nature just because the electricity had been consumed at the objector's *home*.

To the extent to which the expenditure on electricity had been incurred in providing for the objector exclusively while he had been engaged in the work which produced the income: it was clearly an expense having a revenue character and was not of a private or domestic nature.

Other considerations would have arisen if the light and heat had been provided, not exclusively for his benefit while he was working; but also for members of his family at the same time. If that had been the case, the expenditure would have to have been treated as of a private or domestic nature.

In *Caffrey v FCT (No 1)* (1973) 4 ALT 109, 110, Wickham J noted that the Commissioner had accepted that the electric light and gas charges were proper deductions, and he commented that this acceptance seemed to be correct to him.

Certainly, once it is accepted that the

(c) On the facts, the evidence in this case was not good enough to establish such an entitlement.

"relevance" test, which I discussed at the beginning of this head of the discussion, makes a proportion of rates, insurance, mortgage interest, or rent, deductible; expenditure on, say, electricity used directly and exclusively for an income-producing purpose is deductible a fortiori.

Finally, in *FCT v Faichney,* as well as allowing the proportion of the electricity bill, Mason J allowed a claim in respect of depreciation on the carpet, curtains, a bookshelf, and a desk with which the room that had been set aside as a study had been fitted out.

All that remains is to point out that most of the "home office" expenditure which is deductible on these principles will be of modest size, and a sense of perspective is essential if time-consuming and complex rounds of explanation to the Revenue are to be avoided which could more than outweigh any tax gains by cutting into fee-earning time.

LEGAL LITERATURE

Contractors' Liens and Charges by the Honourable Nigel Wilson. Second edition. Wellington. Butterworths of NZ Ltd, 1976. xvi and 130 pp incl index. NZ price $17.50. Reviewed by R P Smellie.

The publication of a second edition of this work was originally planned for the mid 1960s. However, the project was delayed by the introduction of a Bill in 1969, intended to implement the far-reaching amendments recommended by the Dugdale Committee. The Bill has lapsed and apparently is not to be revived, so that it can be assumed that the legislation in its present form, will continue to apply for a number of years.

In the almost quarter century since the publication of the first edition, there have been significant changes in the statute and further interpretation of the same by the Courts. Furthermore this issue arrives at a time when the down turn in the economy has placed a strain on builders and financers alike, leading to an intensification of the consideration and use of the protection provided by the Act.

In the introduction to the extremely useful appendix, the author states that "speed is generally essential". Faced with an otherwise "difficult, obscure and technical piece of legislation" the busy practitioner can comply with that admonition by turning to the distilled and clearly presented knowledge of the author, in this second edition. The original plan of presentation by way of an annotated Act, plus an appendix containing practical directions, has been retained. The provisions of the 1958 amendment and the cases since 1954, particularly *J J Craig Ltd v Gillman Packaging Company Ltd* [1962] NZLR 201 in the Court of Appeal and *Farrier-Waimak v Bank of New Zealand* [1965] NZLR 426 in the Privy Council, are fully considered.

As the author points out in his foreword to this edition, however, the full consequences of the new provisions have still to be worked out by the Courts, and there are some difficult problems to be resolved. In view of his intimate knowledge of the Act, and wide experience of the judicial process, it is perhaps unfortunate that the author has explored in greater depth, some of the grey areas and proffered his views as to the way in which they should be interpreted. It might also be suggested that some of the authorities brought forward from the first edition, dealing more particularly with the transition from the earlier Acts to the 1939 consolidation, could have been excised without loss. This may be so, but it could well be a superficial view, for without doubt, one's understanding of the legislation is enhanced by a consideration of all that has been said about it, whether in its present, or earlier form.

The presentation of this second edition coincides with the retirement of its author from the Supreme Court Bench. It is entirely appropriate that this should be so. For there is here, a parting contribution by a precise and pragmatic Judge, to the practice of a specialised and frequently used segment of the law.

For the price of $17.50 this is a small book – but it contains all there is to know about its subject, and no legal office in the Dominion can afford to be without it.

Parliament's role in law reform – The Report also calls attention to the need to provide machinery to process reports of the Commission and to ensure that they receive Parliamentary consideration. The litmus test of Parliament's commitment to law reform is its willingness to facilitate the enactment into law of the Commission's proposals or at least to ensure that they receive due consideration. Otherwise public funds are wasted and law reform is merely rhetoric, not action. Mr Justice Kirby, 1974 Report of the Australian Law Reform Commission.