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INTER ALIA

The state as guardian

When the welfare of children is being considered there are a number of weighty interests to be balanced. There are "the intimate personal rights of the [child], the schooled and concerned opinions of the physicians, the well-intentioned parental desire for their children's well-being, and the solicitude of the State for the health and welfare of its population". The recent report of the Ombudsman, Sir Guy Powles, into the treatment of a 15 year old boy at Lake Alice Mental Hospital indicated that in that case at least, the balancing apparatus was sadly out of kilter.

The boy concerned was a problem child, and when he eventually appeared in the Children's Court to answer for his misdemeanours one of the orders made was that he undergo a psychiatric investigation. With some reluctance his parents agreed to his being admitted to Lake Alice Hospital, they thought for examination. In fact he was committed under the Mental Health Act and received treatment. When the parents discovered this they insisted that he be returned home.

The welfare and health authorities considered that the boy should stay in the hospital. Because the committal procedures had not been properly followed, the detention of the boy was unauthorised. He could not be "committed" again in view of psychiatric opinion that he was not "mentally disordered" (which makes one wonder what evidence the JPs who made the earlier reception order had before them).

These obstacles were circumvented by an application to the Magistrate's Court to have the Director-General of Social Welfare appointed the guardian of the boy under the provisions of the Children and Young Persons Act 1974. Pending the hearing the boy was detained at Lake Alice Hospital and, as Sir Guy pointed out, that detention was also unauthorised.

The Director-General was eventually appointed guardian and the boy's detention at Lake Alice Hospital continued. Then occurred the events that have been so widely publicised. The boy was subjected to a course of unmodified electro-convulsive treatment (ECT) without the knowledge of his guardian, or his parents, and against his wishes.

Sir Guy was pungent in his criticism of the Departments concerned. The Social Welfare Department had not discharged its duties in terms of the Children and Young Persons Act, it had not kept the family informed, and it had not paid sufficient attention to the boy's legal status or to his welfare at Lake Alice. The Department of Health was criticised for administering ECT without consent and for not paying sufficient regard to the admission procedures in the Mental Health Act.

Of all the four competing interests mentioned earlier, the personal rights of the child are most at risk. The inadequacies of some parents has led to the involvement of the State in child welfare. This particular incident suggests that the over-enthusiasm of the State is best countered by continuing parental involvement. Parents and State each serve to control the potential excesses of the other for the ultimate benefit of the child. When the influence of one is removed the personal interest of the child is even more at risk.

The importance of the family is recognised in the Children and Young Persons Act 1974. The Act has the express object of involving the family, the community and the State in a co-operative effort to promote the well-being of children. This object was expressly recognised by White J in *Department of Social Welfare v M* [1976] 2 NZLR 180, the only reported case so far involving the

Act. He felt that the Court should be slow to break the tie between parent and child. Sir Guy said of the Department of Social Welfare that it had not reasonably discharged its duties as guardian in terms of the objects of the Act. It could be asked whether in this particular case the objects of the Act were sufficiently recognised when the Director-General was appointed guardian.

The next point worth considering is the question of consent – both consent to admission to the hospital and consent to the administration of ECT. The law is sufficiently clear that consent is required to prevent the former being false imprisonment, and the latter an assault. As to *whose* consent is required, the law is singularly unhelpful. It is still in its infancy and needs time to develop.

It has long been accepted, and in recent years confirmed by Courts in other countries, that the parents or guardian of a child may substitute their consent for that of a child who is incapable of consenting. Where the child is capable of consenting the position is confused and it is by no means settled who should prevail in the event of disagreement.

In the face of such uncertainty a child is again vulnerable. In this case "the opinions of physicians" and the "solicitude of the State" have in effect combined, the parents have been excluded from any decision-making, and the boy's wishes subordinated to his treatment. That his parents have succeeded in bringing the affair into the open, demonstrates again the importance of balancing, rather than excluding the competing interests.

The Court plays a major role in welfare matters and it is worth emphasising that its function is not, as in custody cases, to decide which of two competing parties should have the child. Rather it is to decide how the various competing interests may best be balanced, one against the other, for the benefit of the child.

It is understood that neither the parents nor the boy were represented by counsel at the hearing of the guardianship application. If that is correct it cannot but have resulted in a rather one-sided presentation of the competing interest. The Court has power to appoint counsel to represent the child. That power is frequently used. Where the order sought has such far-reaching consequences it is surprising, even a matter of criticism, to find the child unrepresented especially when the parents are also unrepresented.

The parents showed initiative in approaching the Ombudsman. Sir Guy's report commented on the actions of the Departments concerned. He made a number of comments on the law and the extent to which it had been flouted by the Departments. His views will carry weight. Understandably he did not comment on the part played by the Court.

Yet it is from the authority vested in the State by the decision of the Courts that so much of the trouble flowed. There was the invalid reception order made by the Justices of the Peace – an order which proved doubly dubious in view of later psychiatric opinion that the boy was not "mentally disordered". Then there was the actual guardianship order in favour of the Director-General. If the interests of the child are to be protected in future it is these decisions and the manner in which they are made that need to be examined. For that reason it is regretted that the boy's parents did not bring the matter before the Supreme Court. The Judges of the Supreme Court have, in a number of recent and inexplicably unreported custody cases, shown an increasing degree of sophistication where child welfare is concerned. Their guiding hand would be equally valuable in guardianship matters. Helpful though Sir Guy's comments will be they can be no substitute for the refinement of the law through proper use of the appeal structures.

In the end the parents' interest won through. Did that of the boy?

Shops and offices

For some time now many lawyers have been labouring under the delusion that it was but a matter of time before an end was seen to the absurd process of scheduling those items that may be purchased outside normal trading hours. One wonders at the logic of being able to purchase hacksaw blades but not hacksaws, mustard and pepper but not spices, and so one could go on. Yet not only is this situation to be continued and complicated in the proposed Shop Trading Hours Act but it will be backed by a new administrative structure that will be responsible not only for what is on the list but also for making decisions as to opening outside extended hours.

Is this complex approach really necessary?

The shop owners who have been most affected in the past are the owners of small neighbourhood dairies and the like. A neighbourhood dairy by its nature serves those living in the immediate vicinity. If a small-shop owner wishes to extend his opening hours why not simply specify the general nature of the business that is to be carried on and the maximum retail area that his shop may have. By specifying the general nature of the business it can be assured that the needs of the neighbourhood will be met while by limiting the floor area the range of goods and number of staff involved will be indirectly controlled. The degree

of supervision required will be minimal and there is little reason why the matter should not be handled by the local councils as part of their town planning jurisdiction. There would be one additional advantage in dealing with the application as a town planning matter. Those living near the shop would have an opportunity to appear and to be heard. They would not have that advantage under the Shop Trading Hours Act.

Regional shopping centres pose a different problem. Here again planning and economic considerations become an important controlling factor. A regional shopping centre attracts its custom from a very much wider area than does the neighbourhood dairy. Its attraction lies in being able to provide a wide range of shopping facilities. If shops open at different hours so that there can be no assurance of a wide range of services at any time it will lose its attractiveness. There is then an economic pressure on all shop owners to agree on opening hours and those opening hours will depend very much on the hours on which the main draw, usually a supermarket, will wish to open.

There is also an important planning consideration. A balance needs to be maintained between suburban shopping facilities and central shopping facilities. For this reason opening hours become very much a matter that should be within the control of local and regional councils.

The concern of the unions over working hours and holidays is understandable. These again may be controlled through award provisions and wage controls and possibly by overriding legislative controls requiring two consecutive days holiday per week for employees and specifying maximum total opening hours of regional shopping centres.

It could well be that with just the slightest amount of legislative nudging this whole area could be found to be self-regulating – or is that suggestion heresy?

Tony Black

CASE AND COMMENT

Anisminic and the Transport Licensing Appeal Authority

The preference over road transport given to the railways by the Transport Licensing Regulations 1963 (Reprint SR 1971/87) has given rise to many conflicts and incidentally to a "kind of folklore", to adopt Barker J's phrase. According to this folklore, there must be a fair trial of the railway before an exemption will be granted under Reg 24 (1). In this case, in the view of the Transport Appeal Authority, there had not been a fair trial of the railway before the exemptions were issued to the applicant in these proceedings. The Appeal Authority ordered the matter to be reconsidered by the Licensing Authority in terms of the Transport Act 1962, s 1973. The applicant made an application for review of that decision. Its proceedings, *Bay of Islands Timber Co Ltd v Transport Licensing Appeal Authority and Attorney-General* (judgment 1 April 1977, Barker J) raise a number of important questions, including the effect of the *Anisminic* case [1969] 2 AC 147.

In October 1973 the applicant conducted its own trial rail shipment of the company's product, components of a Moduloc home, which on arrival at its destination were severely damaged. It later made application for four vehicle authorities to transport Moduloc homes throughout the North Island with exemption from Reg 24 (1). These were granted on 13 December 1974. The railways appealed. The Appeal Authority's decision, referring the application back to the Licensing Authority, was made on 25 July 1975. An application for review was filed on 3 October 1975. Counsel signed a ready list application on 16 March and twelve months later the hearing began. In less than two weeks from the end of the hearing, the decision of Barker J was given.

The applicant's main complaint concerned the attitude shown by the Appeal Authority in his decision. He had not given the parties an opportunity of making submissions on the desirability of using s 173 and referring the application back to the Licensing Authority for reconsideration. It was also alleged that he had misconstrued his powers and asked himself the wrong questions in disposing of the appeal. It is certainly clear that the Appeal Authority had relied to a considerable extent on his accumulated experience in disposing of the appeal. Bias was not alleged. Though some of the Appeal Authority's statements were "unfortunate", they fell far short of bias.

The argument that the Appeal Authority, having embarked on a hearing under s 172, cannot exercise the power given by s 173 to remit the matter to the Licensing Authority for consideration was not upheld. The history of the legislation and the decision of Turner J in *Fletcher v Archer* [1960] NZLR 815 were considered. Barker J concluded that the powers in s 173 could be exercised even after the hearing of the appeal on the merits had commenced. But before doing so, the Appeal Authority must give counsel the

opportunity of making submissions on the desirability of using s 173 to refer the case back. It is contrary to natural justice, and a jurisdictional error in terms of the *Anisminic* case, to deny counsel the opportunity of making submissions. The privative clause, s 164, does not protect from review a decision affected by jurisdictional error. None of the considerations seen by Speight J in *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 to be relevant to the exercise of the Court's discretion to refuse relief existed and the decision of the Appeal Authority was quashed.

The second argument that the Appeal Authority had assumed the power to direct rail trials was upheld. Barker J concluded that "the cumulative effect of the Appeal Authority's several references, both direct and indirect, to rail trials leave me with the clear impression that he had elevated them into a practical requirement for an applicant for a licence with rail exemption". This assumption was described as "folklore" and as part of the "common law of transport licensing". It went further than was justified by the legislation. The remarks of Danckwerts and Sellers LJJ, in *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, 207–8 and 186 respectively, as to the weight to be attached to precedent and the entitlement of an applicant to have his case decided on its individual merits were cited with approval. The Appeal Authority's elevation of rail trials into a rule of law was a misconstruction of the legislation and did not involve a purely incidental question of law. As a result, the Authority had asked itself the wrong questions or had taken into account irrelevant matters. On the authority of *Anisminic*, recently applied in *R v Southampton JJ ex parte Green* [1976] QB 11; [1975] 2 All ER 1073, this was a jurisdictional error and not an error within the jurisdiction, protected by s 164. Reference was made to Wade, "Constitutional and administrative aspects of the *Anisminic* case" (1969) 85 LQR 198 and Tracey "Absence or insufficiency of evidence and jurisdictional error" (1976) 50 ALJ 568. The Authority should have disposed of the appeal on the basis of the evidence before it and not, as had been done, by making assumptions which were not warranted or justified by the considerable expertise possessed by the Authority.

The learned Judge made an order under the Judicature Amendment Act 1972, s 4 (5) for the newly appointed Authority to reconsider the application in the light of the directions given by the Court. Those directions included confining the appeal to the parties and issues raised by them.

One other point is worthy of comment. When deciding that none of the factors which had influenced Speight J in the *Wislang* case existed on the present application for review, Barker J observed:

> "There are no alternative remedies available to the applicant short of a motion for review. Indeed, the fairly constant recommendation of the Public and Administrative Law Committee, from the time of its first report (January, 1968) has been that the right of appeal from a Licensing Authority should be to the Administrative Division of this Court. Even if such an extreme step as abolishing the Appeal Authority (as is implicit in that recommendation) is not acceptable, it is difficult to see why there is no provision for an appeal from the Appeal Authority to this court on a point of law. I have in mind a similar right of appeal on a point of law as exists from a decision of a Town and Country Planning Appeal Board. Licensing Authorities and the Appeal Authority frequently deal with transport undertakings worth millions of dollars. Their decisions often have far-reaching effects on the national economy. It is difficult to see why there is no right of appeal provided to this Court on points of law and also why the right to aggrieved parties to come before this Court on a motion for review should be circumscribed by a privative section".

It is to be hoped that those responsible for advising the relevant Ministers will not overlook these remarks.

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Making time of the essence

Following hard on the note of *Rickey v Bruhns* ([1977] NZLJ 212) comes the judgment of Mahon J in *O'Sullivan v Moodie* (M 140/75), given in the Supreme Court at Auckland on 23 March 1977, which carries our understanding of this area of the law in New Zealand several steps further. The facts are very simple. On 24 January 1972 an agreement for sale and purchase on the standard form printed on behalf of the Auckland District Law Society was made between O'Sullivan as the vendor and Moodie as the purchaser. The purchase price was $8,500 made up of a deposit of $500, and the balance to be paid on the date of settlement, 13 March 1972. The purchaser failed to complete on that date, and on 20 March 1972 the vendor gave notice purporting to make time of the essence as at 2.30 pm on 27 March. Again on the 27 March the purchaser failed to complete. On 7 April the vendor re-sold the property and forfeited Moodie's deposit; later in April Moodie tendered settlement which was refused. Moodie then successfully sued in the Magistrate's Court for the return of the deposit and damages for the loss of his bargain. The present judgment is on appeal

from that decision.

The argument revolved around whether the vendor had properly made time of the essence of the contract. His Honour began by looking at the two classic authorities (*Jamshed Khodaram Irani v Burjorji Dhunjibhai* (1915) 32 TLR 156, PC; *Stickney v Keeble* [1915] AC 386, HL) and drawing from them and other authorities three pre-conditions before time can unilaterally be made of the essence. First, the innocent party must not be in default and must be willing, able and ready to settle. Secondly there must have been such a default by the other party as would justify rescission by the innocent party. Thirdly, the time allowed by the notice for settlement must be a reasonable time.

In addition to these, it was argued for the purchaser that there is a requirement that when there is a settlement date fixed in the contract and there is default by the purchaser, the vendor may not immediately give notice making time of the essence but must wait until there has been gross or unreasonable delay after the settlement date. This submission is based on *Smith v Hamilton* [1951] Ch 174, has been adopted by most textbooks, and has commonly been regarded as the law in New Zealand until now. His Honour analysed the correctness of this proposition in the light of principle, academic comment and other decisions including *Winchcombe Carson Trustee Co Ltd v Ball-Rand Pty Ltd* [1974] 1 NSWLR 477 (see note in (1975) 1 NZ Recent Law (NS) 342 (DWM)). He concluded that the criticisms of the proposition were persuasive and he construed the decision of the Court of Appeal in *Thomas v Monaghan* [1975] 1 NZLR 1 as having reserved judgment on this question. He therefore decided to reject *Smith v Hamilton* and adopt the reasoning in *Winchcombe Carson* with the result that notice may be given immediately after there has been default justifying rescission by the innocent party, eg immediately after the other party has failed to settle on the settlement date named in the contract. It might be suggested that this conclusion was reached a little too easily given the long recognition of the requirement of delay after the settlement date in New Zealand at Supreme Court level and even obiter by the Court of Appeal in *Thomas v Monaghan*. But it is nevertheless respectfully agreed that the conclusion is correct at both the legal and the common sense levels.

Four other points were argued on the appeal. The first was that although the above reasoning may be correct when the vendor is in default and the purchaser is giving notice, because of cl 10, the standard form of vendor's remedies clause, in the particular form of agreement (see *Thomas v Monaghan* [1975] 1 NZLR 1 at 3-4 for the wording of this clause) the vendor could not give notice until after the expiration of the 14 days referred to in the clause. It appears that the obiter comments of the Court of Appeal in *Thomas v Monaghan* were the basis for this argument (cf the recent judgment of O'Regan J in *Rickey v Bruhns*) but Mahon J could see no suggestion in the judgment that notice making time of the essence must be delayed for 14 days. On its own wording the clause suspends only the operation of the remedies for that period. It does not on its own wording have the further effect of also suspending for the same period the right of the vendor to give notice of his intention to exercise those remedies. Therefore this clause does not prevent an innocent vendor being able to give notice at the same time as an innocent purchaser could (cf the note on *Rickey v Bruhns* in [1977] NZLJ 212 (DWM)). Again at this point, it might be suggested that some express consideration should have been given to the comments in the judgment of Richmond J in *Thomas v Monaghan* as to the possible significance of the 14 day period, comments which had persuaded O'Regan J in *Rickey v Bruhns* that a vendor could not give notice after a purchaser's default until the expiry of the 14 day period. However, again it is respectfully agreed that the construction placed upon the 14 day period best accords with the wording of the clause and the practical requirement that the rules for making time of the essence should be as expeditious and as straightforward as possible.

The next point taken for the purchaser was that at the time of giving the notice the innocent party must in fact be able to rescind, which the vendor in this case could not do because cl 10 deferred that right for the 14 day period. However, again Mahon J accepted the argument for the vendor that the requirement was only as to the status of the default and did not require that its occurrence should give an immediate right of rescission. Under cl 10, it was held, the right to rescind arises immediately upon default but its enforcement is suspended for the 14 day period. This suspension does not alter the quality of the default and therefore does not affect the vendor's right to immediately give notice making time of the essence.

Thirdly, the purchaser argued that the 7 days given by the notice was not a reasonable period. This must be determined from the point of view of both parties (*Michael Realty Pty Ltd v Carr* [1975] 2 NSWLR 812 where there is a review of the authorities). For this purpose Mahon J saw the 14 day period in cl 10 only as setting the earliest date by which the purchaser could be compelled to complete, but not as otherwise interfering with the general equitable jurisdiction to determine what is a reasonable period in the particular

circumstances, which may in fact be a longer period (cf the note on *Rickey v Bruhns* in [1977] NZLJ 212 (DWM)). The detailed reasoning of Mahon J on the effect of cl 10 on the present facts is of importance to practitioners.

> "Here the default occurred on 13 March and since the appropriate notice, in my opinion, could have been served immediately upon the occurrence of the defaut it could therefore have been served on 13 March which means that that day would have been the first day on which the purchaser was in default, and on 26 March the default would have continued for fourteen days. The notice making time of the essence required completion on 27 March and thus it did not infringe the fourteen day restriction imposed by Clause 10."

His Honour then considered the reasonableness of the particular notice given having regard to the facts of the case. He could see no reason why the purchaser could not have completed on 27 March and the purchaser had not advanced any reasons to the contrary. Thus the period of notice was held to be reasonable.

The fourth and final point taken for the purchaser was that the notice was defective in form because it did not state the consequences of non-compliance, that is that the vendor may exercise his right to rescind, but simply said "We hereby make time of the essence . . . ." His Honour distinguished *Baker v McLaughlin* [1967] NZLR 405, upon which the purchaser relied, on the ground that the notice in that case had said at one point that time was being made of the essence, and at another that it was not. It was therefore self-contradictory and plainly defective. Mahon J recognised, however, that this was not the ground upon which Macarthur J had held the notice to be invalid which wa rather that it failed to make clear the consequences of non-compliance. His Honour went on to review the judgment of Gibbs J in *Balog v Crestani* (1975) 132 CLR 289; 49 ALJR 156, where a less strict approach to the wording of the notice was taken and more emphasis was placed on the understanding of the effect of the notice which the recipient would have in the circumstances of the case. As Mahon J said in the present case:

> "The essential question is not whether it [the notice] is couched in special phraseology but whether the contents of the notice, in the light of the facts, adequately conveyed to the purchaser that non-compliance would be treated by the vendor as entitling him to rescind. The meaning of a legal notification of this kind may no doubt vary according to the character or status of the recipient. Here the notice was sent by the vendor's solicitors to the purchaser's solicitors. Having regard to conventional conveyancing practice in New Zealand, I can have no doubt that when the solicitor for one party receives a notice under these circumstances nominating a further date for completion and stating that time is being made of the essence of the contract, the solicitor receiving the notice is fully aware that the party giving the notice considers himself entitled in the event of non-compliance to treat the contract as rescinded."

The notice on the present case sufficient by indicated such an intention.

The vendor's notice was therefore valid in all respects and the appeal was allowed. The vendor was entitled to rescind, forfeit the deposit and resell.

This case is important as establishing three points:

(1) That notice making time of the essence may be given immediately after there has been a default of such status as would justify rescission by the innocent party, eg immediately there has been a failure to settle on the date specified by the contract; and that this applies equally to vendors as to purchasers even though the contract contains a vendor's remedies clause postponing the right to rescind for 14 days after default.

(2) That the 14 day period set in the vendor's remedies clause determines the earliest date by which the purchaser could be compelled to settle, but does not otherwise interfere with the general equitable jurisdiction to determine what is a reasonable period in the particular circumstances, which may require the notice to set a date later than the date determined by the 14 day period.

(3) That the form of the notice, apart from containing the future date for settlement, must indicate that the vendor is also making time of the essence of the contract in that respect, and must adequately convey to the particular recipient that non-compliance will entitle the vendor to rescind the contract. Where the recipient is the solicitor for the other party, merely stating that time is of the essence will normally be sufficient in itself, and though ideally the notice should further state that in the case of non-completion the vendor will hold himself entitled to treat the contract as broken, omission of this intimation will not necessarily vitiate the notice.

If this judgment stands and is accepted as giving the proper interpretation of the standard vendor's remedies clause, it would not be necessary, as suggested in the comment on *Rickey v Bruhns* to adopt a provision in the terms of condition 22 of the National Conditions of Sale. The aim of doing away with the requirement of an unreasonable period of delay after the settlement date and before giving notice would have been

achieved judicially. Further, a period of 14 days' notice is quite acceptable as a basic minimum of notice it being otherwise recognised that equity could in the circumstances of the particular case regard it as insufficient. If it were ever to be taken as the fixed period of notice to apply in all circumstances, it is suggested that it is too short, and that for such a purpose the 28 day period set in the National Conditions of Sale would be a more suitable length.

D W McMorland

FAMILY LAW

CONCURRENT JURISDICTION OR AN INDEPENDANT FAMILY COURT?

This is an edited version of an address given by Mr B D INGLIS QC *to a Family Law Forum of the Auckland District Law Society on 16 October 1976.*

The topic we are here to discuss is important because there is a strong feeling among New Zealand lawyers that something ought to be done to improve our Family Law. Particularly among those lawyers who practise regularly in this area – and they are very much more sensitive to the needs and feelings of the parties than is generally supposed – there is a feeling that the whole of our Family Law procedures must be strengthened, improved, and upgraded.

One myth needs to be exploded at the outset – and that is that lawyers as a whole have no real sensitivity or appreciation for the problems faced by people who get entangled in a matrimonial dispute. In my experience that is totally wrong, and to suggest it is to offer a great disservice to the legal profession. It is particularly sad when you hear that sort of uninformed comment coming sometimes from within the legal profession itself.

There are, of course, some lawyers who tend to avoid matrimonial matters, of whose practice had never gone in that direction: to them what we are talking about is virtually a closed book. But those lawyers who do a good deal of matrimonial work are becoming more and more critical of what our present matrimonial procedure offers, and they are the lawyers who should be listened to. They are becoming more and more frustrated at the inadequacy of the present procedure to cope with the real human problems that are so often present in this work. They are becoming intolerent at the often ponderous and sometimes wrong-headed moves towards reform in this area.

We are in fact going through a transition. And that is because the whole standard of practice in matrimonial work has been raised. The legal profession itself has done that. And that raising of standards has come about, I think, because of a new awareness of the real harm and damage that can be done in people's lives unless these matters are handled carefully, wisely, and with common sense. Family Law has now ceased to be the poor relation of the law. And indeed everyone must be impressed by the spirit of dedication and the constructive professional skill which many lawyers are now bringing to matrimonial work. A new attitude was needed and it has now arrived.

Now it follows from this that we are now tending to expect a very much higher standard in our Courts in dealing with matrimonial cases. And this applies in two areas. In the first place there is in the majority of cases a degree of emotional involvement by the parties which is seldom seen in other classes of litigation. This requires, in a dispute that cannot be resolved by conciliation, not only careful and patient handling by the Court but it also means that the parties must be left with the impression that their intimate affairs have been dealt with in a calm, orderly, and dignified way, with sympathy but also with firmness. Then, secondly, there is the fact that to the parties themselves their matrimonial dispute is always of the very highest importance. This means that every care must be taken to ensure that no impression is being given that the dispute is being trivalised or dealt with casually – the "I've heard all this before" type of attitude – bored, rushing it through – and furthermore it has to be demonstrated that the matter is regarded by the community itself and by the law as one of great importance. And of course the matter *is* of importance – it is important both to the parties and to society.

Now I cannot help feeling that one of the gravest criticisms that can be made of the way in which these cases are heard at present, is that many of them are downgraded and made to look as if they deserve only second or third-rate treatment.

The facilities provided for the Wellington Domestic Proceedings Court give us a perfect example of this.

The Wellington Domestic Proceedings Court

and the Children and Young Persons Court are housed in an elderly converted building: it is supposed to be an historic building, but the only historic thing about it is its age. The waiting room is furnished with the cheapest possible Government issue seating, and it is also a storehouse for old unwanted furniture – old wooden cupboards, shelving, and the like. There used to be a table-tennis table in the middle of the floor, presumably for the entertainment of the staff at lunch-time. This adjunct to light informality has now disappeared. The room used for the Domestic Proceedings Court is small: everyone has to sit almost on top of each other. I suppose that is intended to provide an intimate atmosphere. The furniture has obviously seen long Government service. The Magistrate sits at an ordinary office desk some four feet away from the front row reserved for counsel and parties. The stenographer almost has to sit on the Magistrate's knee. Whoever is giving evidence sits at one side of the room and is liable to severe physical injury every time someone opens the door. Every now and then proceedings have to be interrupted because the traffic on a main arterial route thunders along immediately outside the window.

The Magistrates try to do their best in these conditions but of course to create any sort of proper atmosphere is fighting an uphill and losing battle. It doesn't even look like a place where you go to get important and intimate personal matters decided and readjusted. It looks like the sort of place you would go to get a dog licence: temporary, makeshift, and degrading. It is understood that some remodelling of these premises is shortly to take place. It is about time.

The one impression you do carry away with you is one of hopelessness – that nobody cares – that these cases are the dregs. On the other hand, matters of immense social significance like judgment summonses, and dealing with people accused of casting offensive matter, quite clearly deserve all the panoply and pomp of the traditional Courtroom.

I look at some of the relatively comfortable and reasonably-appointed Courtrooms we have in Wellington: I look again at the substandard conditions we offer to people with serious matrimonial problems, and I wonder, as you must, just where our priorities lie.

It all stems, of course, from the idea of some theoretician in the Justice Department that matrimonial disputes should be dealt with in intimate, cosy surroundings, with no off-putting formality, and away from the bleak imposing Courtroom atmosphere. Of course no one seems to have thought of consulting practitioners about any of this: practitioners who have to deal with these cases can hardly be expected to see some of these finer points. But practitioners hear some of the comments their clients make about our present so-called Family Court set-up in Wellington and elsewhere, and those clients wonder why they have been denied the right to have their cases heard in surroundings which add at least some weight and seriousness and dignity to the proceedings.

I contrast all this with the reactions of clients who have been through, say, a contested divorce, or a custody hearing, or a matrimonial property hearing, in the Supreme Court. The general atmosphere in the Supreme Court is such that the great majority of clients are impressed, whatever the result. They feel that their litigation has been taken seriously in a serious environment.

Well, if we come back to the sordid and unappetising surroundings of the Wellington Domestic Proceedings Court, right on the Justice Department's doorstep, I say that demonstrates an official feeling that the third-rate is good enough for Family Law cases, and if the third or the second-rate is to be the pattern for the Family Court of the future, I don't think any of us will want any of it.

One question arises more and more frequently, and that is the need for specialisation. Now I think we would all take it for granted that we should have a degree of specialisation in the Judges and Magistrates who are called upon to hear matrimonial cases. But there are two caveats that have to be entered. One is that no Judge or Magistrate should be asked to concentrate on this area alone. The Judges must be given a variety of work. Overseas experience has shown that Family Court work is very demanding indeed, and I predict quite confidently that one of the difficulties they are going to have in the new Australian Family Courts is recruiting Judges of the high calibre needed for this kind of work. You need first-rate Judges, not time-servers. That, I think, is one practical reason – along with a number of others – why it is quite impossible to think we can expect to have a separate and independent Family Court in this country. So the point here is that it is important that the Judges and Magistrates who are selected for their special aptitude in Family Law work should not have a constant diet of it.

The second point about specialisation is this. With some exceptions, a lawyer, a Judge or a Magistrate who considers *himself* as having a special aptitude for this class of work, is usually the last person who should be selected to specialise in it. The qualities that are really needed are unlimited patience and sound common sense, and – not unnaturally, a judicial approach. An enthusiasm for the social issues involved in Family Law may be an excellent quality in the advocate, but not necessarily in the Judge.

By way of example, I will mention one particular Judge, but I could equally say the same

about a number of Magistrates. By far the best Judge we have had in recent years in matrimonial matters was one who had never in the whole of his practice at the Bar acted in a matrimonial dispute, and who, as a Judge, felt that he was better qualified in other fields. And I know he was astonished to find that practitioners were constantly asking the Registrar to try to get their matrimonial cases before him. Perhaps I should add another quality to be looked for in the matrimonial specialist: that of humility.

I have another example: a Magistrate – not a New Zealand Magistrate – who sincerely believed that he was God's gift to matrimonial disputes. He left behind him a wake of resentment, dissatisfaction, and distress. He was plus on theory, but minus on judgment.

However desirable it may seem in theory to have an independent Family Court, my own feeling is that any such proposal is for the present at least quite unrealistic. Where, for instance, would we find the Judges who would be prepared to devote their entire lives to hearing Family Law cases? Remember, too, that they need to be of the highest calibre.

Is there, then, any other alternative to concurrent jurisdiction? I am bound to say that I still prefer the scheme, set out in a special report of a Committee set up by the New Zealand Law Society, for a Family Division of the Supreme Court, manned by some Supreme Court Judges and by selected Magistrates who would for the purpose sit as Judges. I think that would convince the general public that matrimonial litigation has a prestige which it clearly does not have in all aspects at present: that is not the fault of the Magistrates; it is the fault rather of the conditions under which many of them have to work.

In that way, you could start to see the development of a uniform policy and a uniform procedure, and a properly organised use, on a national basis, of the essential conciliation services as a proper adjunct to the Court's work.

But is that is still jumping too far ahead of the times – and I remember it took something like four years to persuade the authorities that even the elementary and imperfect Court structure enshrined in the Domestic Proceedings Act was workable – if a Family Division of the Supreme Court is too advanced an idea to be immediately acceptable, then I believe there is a clear case for enlarging the jurisdiction of the Supreme Court so as to enlarge the present areas of concurrent jurisdiction.

Let the litigant himself choose where he wants to go. The general run of undefended divorces might well be more appropriately dealt with in the Magistrates' Courts. But some defended separation applications, and most defended custody applications, would be more appropriately dealt with in the Supreme Court. Let the litigant whose future and whose children's future may be at stake, decide which forum is the better for the particular case.

For there are two important points.

The first is that there are many matrimonial and Family Law matters that call for the utmost refinement of judgment and the acceptance of a very onerous responsibility. You are not dealing only with people's money; you are dealing with their lives and the lives of their children. That is a daunting responsibility in anyone's language. I wonder if we reflect often enough on the really major interests involved in Family Law litigation. And it is no reflection whatever on the Magistrates' Courts to state a simple fact of life: that the Court which is set up to deal with matters of grave responsibility is the Supreme Court, whose Judges are appointed to accept that responsibility and to use refinement of judgment.

The second point is a much wider one. It concerns one of the first principles of public relations. Litigants in Family Law matters believe that their litigation is of great importance, and so it often is, both to them and in the more general social interest. The reason why it has been said, both here and overseas, that these matters require to be determined by the highest Court of original jurisdiction is not because Judges are necessarily always better at sifting facts than Magistrates, but because matters which are important should be dealt with in a way and in an atmosphere that makes it clear to everyone that they are in fact treated as important matters.

As lawyers we tend to lose sight of that kind of thing. We know that the Magistrates are doing a good job in the conditions they have to put up with. Because we know that, we think everyone else ought to know it.

The general public doesn't look at it in that way at all. Important matters go to the Supreme Court; lesser matters go to the Magistrates' Courts – it's as simple as that. And the message is of course that domestic proceedings are relatively unimportant: if they were thought to be important they would go to the Supreme Court. If you take the Family Law matters which are now dealt with in the Supreme Court, and give them all to the Magistrates' Courts, you are never going to be able to persuade the general public that a general downgrading was not the object of the exercise. I think we would all agree that what is needed is to build up public confidence, and we can only do that if we are *seen* to be upgrading matrimonial work and recognising, in a way the public will clearly understand, the very great and fundamental importance of that work to the parties, to their children, and to the whole fabric of our society.

TORTS

TRESPASS TO ROADS, STREETS, AND CROWN LAND

By BYRON O'KEEFE, *Barrister.*

The decision of Chilwell J in *Moore v MacMillan* (Supreme Court, Gisborne, 16 March 1977) underlines the need to remember that the law of England is much overlaid by statute in New Zealand.

The law of New Zealand quite simply is that prior to 1 January 1973 the fee simple of roads in counties was vested in the Crown (Public Works Act 1938, s 111) subject to control and management by the local body (Counties Act 1956, s 191). Section 191A of the Counties Act 1956 (inserted by Counties Amendment Act 1972) now provides that county roads vest in fee simple in the Corporation under control of the Council.

Counties are thus now in the same position as municipalities – the fee simple of streets in which is vested in the Corporation by s 170 (1) of the Municipal Corporations Act 1954.

Moore v MacMillan began in the Magistrate's Court as an action for trespass. The parties had adjacent farm lands and jointly used cattleyards situated substantially on a County road and partially on the plaintiff's property. The defendant demolished that part of the yards situated on the road and appropriated the materials. The plaintiff sought damages under the heads of replacement cost, consequential loss in respect of impaired efficiency of his farm, and damages for inconvenience and injury to his dignity.

The Magistrate found trespass proved and fixed damages for consequential loss and something for insult to dignity.

The defendant appealed against the whole of this decision: the plaintiff cross-appealed for a higher award and interest thereon.

There was much common ground in the evidence. Someone had made a mistake when the yards were built.

Because the evidence in the Magistrate's Court had been inadvertently "cleaned off" the tape recorder, Chilwell J found it necessary to rehear the whole of the evidence pursuant to s 76 (2) of the Magistrates' Courts Act 1947 which meant that he had to decide the matter on the facts and evidence before him, and not merely to inquire into the correctness of the Lower Court decision (*Larsen v Aubrey* [1933] NZLR 755).

After considering the arguments on possession founding trespass, Chilwell J found that the road in the case was "laid out and marked on the record maps" and thus at the material times Crown land affected by s 172 (2) of the Land Act 1948 which provides that it is not possible for anyone to acquire any right whatever in a road which in any way derogates from the title of the Crown. A complementary provision, not applicable in *Moore's* case, in s 77 of the Land Transfer Act 1952, enacts that the principle of indefeasibility of title must yield, if a road is wrongly included in a Certificate of Title. The learned Judge observed,

> "Not only does each and every member of the public have the right vested in him to pass and re-pass on a road without hindrance but the Legislature has taken care to protect the title of the Crown or local authority, as the case may be, against claims to adverse user and also against mistakes resulting in a road being included in a certificate of title of any land owner.
>
> "I have come to the conclusion that a road is incapable of being possessed by anyone to the exclusion of the right of each and every member of the public to assert his right to pass and re-pass without hindrance over every part of it. This is no mere exercise in theory: I understand that in more remote parts of New Zealand, notably in the South Island, it is a common practice amongst hunters, deerstalkers, mineral prospectors and the like to use paper roads much to the consternation of the landowners who have incorporated the roads within their farms. The plaintiff, no matter how firm his animus possidendi, could not exclude any member of the public (including the defendant) from exercising his right to pass and re-pass. Alternatively, the matter can be looked at another way. As title to a road is incapable of being acquired by adverse possession the possessor cannot exclude the true owner. The right of each and every member of the public to pass and re-pass without hindrance is an incident of the peculiar nature of the title of the Crown or local authority. That right cannot be denied to any person by the Crown or the local authority."

The position is analagous to the principle in *Hill v Tupper* (1863) 2 H & C 121; 159 ER 51, a

leading authority which held that the law does not recognise a personal licence as creating any interest in land sufficient to found an action for trespass: likewise the law does not recognise the "right" of any person to occupy a road to the exclusion of the public. This principle was recognised in *Hare v Overseers of Putney* (1881) 7 QBD 223, 231, 233 which was approved and the principle carried further by the House of Lords in the *Brockwell Park Case* [1897] AC 625.

Waugh v Sheehy (1888) 7 NZLR 81 was an action for trespass involving crown land in which the learned Judge left open the question whether an intruder on Crown land could maintain an action for trespass. It is respectfully submitted that this question is now resolved by the decision in *Moore v MacMillan,* and that the only person who can maintain an action for trespass to Crown land is the Commissioner of Crown Lands for the Land District concerned who has a statutory duty (Land Act 1924, s 24) to prevent trespass upon or unlawful occupation of Crown land. He and he alone is specifically empowered to recover possession of such land (s 25). In this context the meaning of Crown land is to be discerned in ss 172 and 176 of the Land Act 1948. The foregoing points are touched upon in the writer's book, *The Law and Practice Relating to Crown Land in New Zealand* (Butterworths, 1967), pp 30, 271, where further cases are footnoted.

Finally, it remains to comment that nowadays action for trespass to roads in counties and streets in municipalities may be maintained only by the corporation concerned; and action for trespass to Crown land as defined above may be maintained only by the Commissioner of Crown Lands concerned.

PROPERTY REAL AND PERSONAL

SEARCHING TITLE: HOW FAR DOES A SOLICITOR'S DUTY EXTEND?

By KEITH ROBINSON, *a Wellington practitioner.*

The recent decisions of *Bradley v Attorney-General and Another* ([1977] Butterworths Current Law 335, and likely to be the subject of an appeal, though probably not upon the point which is relevant for present purposes) and *G K Ladenbau (UK) Ltd v Crawley and de Reya* (The Times, 2 May 1977) emphasis the heavy duty placed upon solicitors to search the relevant registers relating to title to land. In the former case on behalf of the defendant solicitor, it was submitted that in view of the practical difficulties in searching the journal book, to hold that it should have been searched and that the failure to do so was a breach of their duty was to impose an impossible standard. Of this, O'Regan J said, "That I think was an overstatement. Difficult, perhaps, time consuming, yes, but not impossible."

Reference is made to these cases because the facts (especially of *Bradley's* case) illustrate that mere difficulty in performing the task of searching may be no defence to a claim for negligence if injury flows from the failure to obtain information which was there to be obtained had the relevant search been made.

I emphasis this aspect of the case because one of the problems facing anyone seeking to search the register maintained, or which ought to be maintained, under s 49C of the Town and Country Planning Act 1953 may well be that of difficulty in obtaining the relevant information.

There was a time some years ago when the sluggishness of local authorities in preparing their district planning schemes made it possible for one tacitly to ignore the existence of the Town and Country Planning Act, but that day has passed for there would be few, if any, places in the country which do not now have some recongizable form of town and country planning scheme. In many places the problem is somewhat compounded by the fact that not only is there an operative district scheme but there is also a proposed reviewed scheme. There will be cases where the review makes no great change, but in the majority of the reviewed schemes which the writer has seen, the changes are apt to be very substantial.

To turn then to s 49C, subs (1) imposes upon every Council the duty to keep at its office: (a) an adequate and properly annotated copy of its operative district scheme, showing all changes and amendments made to the scheme and the location of all properties effected by departures; and (b) an adequate and properly annotated record in readily accessible form in respect of each property concerned, of all consents to departures and of all conditions, obligations, restrictions, prohibitions and covenants imposed under this Act by the board or the council in respect of any land or building in the district of that council and of all requirements made by the minister or any other local authority but not incorporated in the district

scheme.

Subsection (2) gives the public a right to inspect the documents referred to in subs (1) without fee during ordinary office hours.

One can put to one side such fanciful possibilities as the purchaser of the best dwellinghouse in town who discovers that next door a glue factory is to be erected, for one would hope that the combined effect of the Town and Country Planning Act and the Clean Air Act would be to prevent such a travesty of planning arising, but there are of course many other prejudicial situations which could and do arise particularly in those areas where redevelopment is taking place. Larger, older sections are being subdivided, new amenities are being provided, land which has lain dormant for some while becomes the subject of a small subdivision. Situations such as these could cause a purchaser, even though he might not be deterred from purchasing altogether, to demonstrate that he would not have purchased at that particular price had he known of developments on adjacent land. One could take for example the siting of a new kindergarten in an already established residential area. For some people this could well be a useful amenity but for the unsuspecting purchaser of the next-door site, perhaps an elderly couple attracted to it by its flat access and the peace and charm of the area, the prospect of 40 or so 4 year olds at play almost every day of the year a few feet away next door could be a daunting one.

In such a case there might well be a requirement from the minister not then incorporated in the district scheme but which would be disclosed if a search were made of the register required to be maintained under s 49C (1)(b).

One could draw many other examples from the things to which adjoining owners are apt to object if given an opportunity.

It will be noted that the statute requires the local authority to maintain this register "in readily accessible form". An enquiry from the various local authorities in the Wellington area suggests that a very varied interpretation is placed upon that command.

In so far as one is concerned with consents to conditional uses under s 28C, changes of use contrary to a proposed change of scheme under s 30B, and specified departures under s 35, the position is slightly eased by the provision in each of those sections that consent lapses after two years if substantial progress towards whatever was consented to has not been made within that period. There is no similar provision in s 38A so that it would be possible under that section for a change of use which had been authorised before the district scheme became operative (and is thus protected as an "existing use") to expand after the scheme has become operative. This would be very much a matter of degree because if the expansion were too great it could well be a further change of use for which consent had not been given. That apart, however, unless one is dealing with a situation where there is a new and first ever operative scheme the chances of difficulties arising under s 38A are rather more remote but it should be remembered that local authority boundary changes can sometimes revive the affect of s 38A.

Section 49C (1)(b) therefore deals with two sets of possibilities, namely the question of consents under any of the sections mentioned above, and secondly the possibility of a requirement which has not been incorporated by way of change in the operative scheme.

Under para (a) of subs (1), the council has the duty to maintain a fully annotated copy of its operative district scheme. If one is very careful and the changes are not too frequent, it is possible to keep one's own copy of the district scheme fully annotated because the local authority will generally ensure that copies of changes are supplied, so long as one is on their mailing list for that purpose, but it would, I think, be a bold man who would claim that he has managed to record all the changes to a scheme in any one of our larger cities, and there is of course the added danger of the proposed changes.

It is appreciated that local knowledge will often play a part in the extent to which a practitioner may feel obliged to search this type of information, but it is suggested that unless one has a very intimate knowledge of the activities of the council's planning department, one is at risk in relying on local knowledge.

It may be asked whether there is any duty imposed upon us to ensure that not only do we search the Land Register thoroughly, but that we also make proper enquiry to guard, so far as one can, against events which could have a far more damaging effect upon the interests of one's client than could many of the items recorded in the Land Transfer Office. Does the solicitor's duty stop at matters touching title. The lawyer might perhaps answer yes, but would his client? If the legal profession is not prepared to undertake these enquiries then who is to do so?

It is appreciated that there are all kinds of difficulties involved. The major one is that all too frequently there is a contract in being before the solicitor is brought into the matter at all. Another is the need to train appropriate personnel to search effectively, and a third may well be the need for some local authorities at least, to look again at the words "in readily accessible form", for I would question whether a large file held in one

department of a large council but incomplete because other matters relating to the same property are held on other files in other departments in the council is a record "in readily accessible form". There is the further difficulty, too, that sometimes this information is held on a file which in other respects ought properly to be confidential, for example the building permit file, which is regarded by most councils as confidential to the owner of the property. If one's search had to be limited solely to the property being purchased or over which a mortgage is being taken, that could readily enough be overcome by insisting upon the written consent of the owner being provided, but the further difficulty is that one could well be obliged to look not so much at the property being purchased (though this certainly should not be ignored) but rather at the position relating to surrounding properties. No doubt the question will be asked, where does one draw the line? The writer would not profess to know the final answer to that question, but it is suggested that if a search is made in respect of all contiguous properties and properties immediately opposite on the other side of the road, then it would certainly be possible to say that reasonable steps have been taken.

One question which arises particularly for those advising local authorities in this connection, is what is their position should some officer of theirs negligently provide inaccurate information as to the records kept under s 49C.

We have all met the client who assures one that someone in the town planning department has said that it would be "all right" if the client did that which the district scheme does not authorise. That situation is clearly covered by s 33 (3) once the scheme is operative, and by the line of authorities which hold that a local authority cannot be estopped from carrying out its statutory duties, in other circumstances. The question of an inaccurate search, however, goes to the general law of negligence, and recent authority indicates that the local authority could well be liable if want of reasonable care on the part of its officers could be established.

As if s 49C were not enough, it is as well to remember that air and water have not been ignored by our persistent legislators. Section 27 (5) of the Clean Air Act 1972 requires:

> "Every register of licences shall be kept in such form, whether in bound book or otherwise, as the licensing authority may determine, and shall, together with applications for, and any copies of, current licences under the control of the licensing authority and copies of any other documents recording conditions imposed on licences, be open for inspection during ordinary office hours by members of the public on payment of such fee, if any, as may be prescribed".

Perhaps this is of less general interest, but it might for example be relevant to a purchaser of farm land near a factory because certain types of chemical discharge can have a deleterious affect upon crops. The registers under this Act are maintained by the Director-General of Health and by the relevant local authority. Enquiry of both is therefore necessary.

The Water and Soil Conservation Act 1967 controls all uses of "natural water" for purposes other than domestic, stock maintenance and fire fighting. Amongst many others Regional Water Boards are charged with the following duty, by s 21 (4):

> "Each Board shall keep conveniently available for public inspection and information detailed and properly indexed records of all rights granted on application or otherwise lawfully authorised under this Act".

Unlike the other two subsections, this does not expressly confer on the public the right to obtain the information. That right is clearly to be implied, however.

These again are provisions of wide significance because, as with s 49C of the Town and Country Planning Act, it is not only the rights which attach to the land being purchased which are significant, but at least equally those which apply upstream (and in cases of damming, downstream) of that land.

In short, not only may it be necessary for us to search the Land Transfer register, the register of chattel securities, and, in appropriate cases the companies register, but the cautious practitioner might well be wise to search the information which ought to be available to him under s 49C of the Town and Country Planning Act and s 27 (5) of the Clean Air Act and s 21 (4) of the Water and Soil Conservation Act.

Small Claims Tribunals – Small Claims Tribunals will be operating in Christchurch, New Plymouth and Rotorua from Friday 3 June 1977. These first tribunals will enable a preliminary assessment of their service.

Persons wishing to make a claim may obtain the application form from the Magistrate's Court Office. The office staff will be available to assist with the completion of the forms. An initial fee of $4 will be charged on each claim. The other party will be notified and a time arranged for the parties to appear before the referee.

ADMINISTRATIVE LAW

THE OMBUDSMAN AND LOCAL GOVERNMENT

By LESTER DALLY, *a solicitor employed in the Wellington Ombudsman's Office.*

The jurisdiction of an Ombudsman covers a wide field:

- central government departments and organisations and their employees
- and as from 1 April 1976 Parliament extended jurisdiction to include local authorities and organisations and their employees.

Involvement in this new area has resulted in a reorganisation and a growth in staff at the offices to cope with the increased workload. From April last year regional offices were established in Auckland and Christchurch. Mr Eaton-Hurley, a senior Wellington law practitioner with considerable experience in local government law (and counsel to the Municipal Association for many years) was appointed Ombudsman heading the Auckland Office with special responsibility for local government in the upper part of the North Island, and Mr G R Laking, former Secretary of the Ministry of Foreign Affairs was responsible for local government in the lower part of the North Island and the entire South Island, but based in Wellington. On the recent retirement of the Chief Ombudsman, Sir Guy Powles, Mr Laking succeeded to the position with responsibility for central government matters. It is also a function of the Chief Ombudsman to be responsible for administration of the office and co-ordination and allocation of work between Ombudsmen (Ombudsmen Act 1975, s 3(4)). Mr Lester Castle, a senior Wellington law practitioner who has just completed a term of President of the New Zealand Law Society, was appointed as an Ombudsman from 6 April. At present he has general responsibility for local government matters in the rest of New Zealand and certain central government matters including custodial complaints.

Since April 1976, the staff of the office has increased from 12 to 30. The staff includes a number who have legal qualifications, and local government experience; the remainder have varied tertiary and occupational backgrounds and experience.

The bulk of the work of the three offices centres on the investigation of complaints referred by members of the public against the organisations within the Ombudsman's purview, and by employees of the organisations themselves (s 12(1)(2); s 16(1)). The organisations over which the jurisdiction of an Ombudsman extends are specified in the First Schedule to the Ombudsmen Act 1975. An Ombudsman has power to embark on an investigation on his own motion without a formal complaint where the circumstances require (s 13(3)). This course has so far been adopted only in a very few cases, but it may be used more frequently in the future.

The subject of a parliamentary petition which is within the jurisdiction of an Ombudsman may be referred by a Parliamentary Committee to an Ombudsman for investigation and report (s 13(4)).

There is further power in the Ombudsman Act for the Prime Minister to refer "any matter" (other than a matter concerning a judicial proceeding) for investigation (s 13(5)). The investigation undertaken last year into the Security Intelligence Service was such a case.

When a problem or complaint is raised with the Ombudsman, the first questions to be resolved are:

(a) Whether there exists the jurisdiction or authority necessary to commence a formal investigation?

(b) How can the complainant best be helped?

In some instances even where an Ombudsman does not have juridiction the complainant may be helped by suggesting possible alternative courses of action. There are certain limitations in the governing legislation which prevents an Ombudsman from embarking on an investigation where other remedies are reasonably available. For example, except in special circumstances an Ombudsman may not undertake an investigation of a complaint where there exist statutory rights of objection and appeal (s 13(7)(a)). In other cases where adequate procedures have been established by the organisation or otherwise concerned for the ventilation and examination of complaints an Ombudsman would normally, but not invariably, exercise his discretion not to begin an investigation (s 17 (1)(a)). The reasoning which underlies these restrictions is to ensure that the remedies available under the Ombudsmen Act supplement existing avenues of redress and do not supersede them except in very exceptional circumstances.

The office therefore can be a quick and effective way for people to obtain advice about a

problem or grievance, and it is the aim of the Ombudsmen to make the services of their offices freely available to anyone who feels he has a grievance or complaint against any central or local governmental authority.

When an Ombudsman decides that he has the jurisdiction necessary to begin an investigation, the first step is to inform the Permanent Head of the Department involved or, as the case may be, the principal administrative officer of the particular organisation (s 18(1)).

Once this step has been taken, the Ombudsman and his staff can begin the formal enquiries. During the enquiries it may be necessary to:

(a) ask for and examine all files and other relevant material and information held by the organisation relevant to the matter under scrutiny (s 19(1));
(b) interview the person complaining and employees of the organisation familiar with the matter (under oath if necessary) (s 19(2));
(c) gain access to or inspect land, buildings or institutions where necessary (s 27);

The investigation is conducted in private (s 18(2)), and the Ombudsmen and their staff are under a strict obligation to both the complainant and the organisation complained against to maintain secrecy in all matters coming to their attention (s 21), although the office has no control over what the complainant or the authority concerned may say publicly.

Once all enquiries have been completed an Ombudsman is obliged to form an opinion about the complaint (whether the person has been treated unfairly, unreasonably, or unjustly (s 22(1)(2)), and if it is decided to make any formal recommendations about the case at hand, the findings are presented to the authorities in a formal report. It is frequently unnecessary to go this far, but in cases where it is, the report with recommendations is made available to the Permanent Head or principal executive officer concerned, copies being sent at the same time to the responsible Minister or Head of the local authority or other organisation (s 22(3)). At a later stage, if this course is necessary, the report can be presented through the Prime Minister to Parliament (s 22(4)), and in the case of a local authority, to the Mayor with the requirement that it be made available for inspection by members of the public.

An Ombudsman also has the right to make the report public where it is considered in the public interest to do so under the authority of the Ombudsman Rules 1962 (ss 22(3), 23). This power has been used occasionally, and it appears that this will need to be done more frequently in the future.

Turning now to the specific area – the experience of the office in dealing with local authority complaints. In extending the jurisdiction of the Ombudsman over local authorities, the legislature sought to provide a means of examining local administration additional to those normally provided by the Courts and administrative tribunals (like the Town and Country Planning Appeal Board). It was never intended that an Ombudsman have power to investigate directly the decisions of the elected representatives of local bodies and similar organisations, presumably because their performance can be challenged at the ballot box at the next local government election.

Basically, an Ombudsman's jurisdiction or authority to investigate and decide *(a)* is the same in local government as in central government, subject only to some variations which the legislature has made to suit the local government structure:

(a) the complaint must affect someone in his personal capacity and it must relate to what the statute describes as a matter of administration (s 13(1)) – It is common ground that this concept is incapable of precise definition, but it covers most local government activities, and the final arbiter is the Supreme Court (s 13(9)). The limits of the jurisdiction have not yet been the subject of consideration by the New Zealand Courts, although aspects have been received by an Australian Court *(b)* and Canadian Courts *(c)*.
(b) Jurisdiction extends only to activities of a committee, sub-committee, or officer, employee or member of a local body. The acts and decisions of a committee of the whole, or a full council are not within the Ombudsman's jurisdiction. However, the activities of individual members of a local authority and those of committees of members are. In addition, any recommendations made by officers and committees to the Council as a whole are capable of investigation by an Ombudsman (s 13(2)).
(c) An Ombudsman may not investigate a matter where the complainant has available to him a statutory right of

(a) See SA de Smith *Judicial Review of Administrative Action* (3rd ed), 96.

(b) *Booth v Dillon* Supreme Court, Victoria (Unreported, 8 October 1975, Lush J).

(c) *Case 63115* (1970 Supreme Court of Alberta; Milvain CJ, *In the matter of s 16 of the Ombudsmen Act;* (1973) Queens Bench, Saskatchewan.

appeal or review unless special circumstances exist which would make it unreasonable for the complainant to have resorted to that right. This stricture is particularly important in the context of town planning, subdivisional approval, and the taking of land. What constitutes "special circumstances" within the meaning of the proviso to s 13(7)(a) of the Ombudsmen Act, depends on the facts of each case.

(d) The Ombudsman also has a discretion not to investigate a complaint where the complainant has available to him other means of redress. Reference was made earlier to the practice in this area which is designed to supplement rather than supplant other grievance procedures already available to the citizen.

(e) There is a further limit to jurisdiction in local government – the subject of a complaint must have arisen after 1 October 1975 or have continued after that date (s 14).

The mechanics of the investigation procedure were discussed earlier in general terms. Some of the peculiarities of this procedure as it relates to local government investigations are as follows.

The jurisdictional question can be unusually complex in local government matters and it is very often necessary, after receiving a letter of complaint, to make a series of preliminary enquiries of the complainant himself (occasionally his solicitor) or council officers in order to establish this point. The statute requires an Ombudsman then to notify the principal administrative officer of the local body of his intention to begin an investigation (s 18(1). Details of the grievance are drawn to his attention at the same time. A report is normally called for, and, if necessary, reports from other council officers who may have been involved. These reports are helpful in enabling the office to gain a better preliminary understanding of the nature of the problem, albeit from the council's point of view. There may be no need to take the matter further at this point, having regard to the information which has come to light, and the complainant is supplied with a frank and helpful explanation.

If further enquiries are needed, and the experience is that this is usually the case, these are made and files and other relevant material are requested. An Ombudsman requires a complete disclosure of all the material which may be relevant to the matter at hand to be sent to him. Occasionally, where it is represented to an Ombudsman that it would be inconvenient for the file to leave the local office for any length of time he is prepared to have a staff member visit the office and inspect the files. Copies of documents considered relevant by the various bodies themselves are normally inadequate for our purposes. The legislature has given to an Ombudsman comprehensive powers to require any person who in his opinion is able to give any information and material relating to a matter that is being investigated to furnish him with such information and material, and to give evidence on oath. The determination as to what information and material are relevant to an investigation is one which an Ombudsman himself must make. Thus as a general rule and subject to the special situation referred to, all relevant files and material need to be made available. It is manifestly impractical for an Ombudsman or his staff in every case to visit the offices of a local body in order to inspect files.

It is important to the effective functioning of the Ombudsman concept that the organisations under scrutiny make the fullest possible disclosure. There was a case recently (a central government matter) where original documents on files coming to the office had been replaced by altered and amended material (Case 11066). Even though there was no intention to obstruct the enquiry the incident was reported to the State Services Commission under the terms of s 18(6) of the Ombudsmen Act.

The next step in the investigation process may well be a visit by either an Ombudsman or one of the staff to the locality concerned. This would involve a visit to the site, a talk to the complainant, or discussion of the problem with the relevant council officers, the principal officer, and, if necessary, the Mayor or Chairman. This course is essential in gaining a clearer picture of the problem to hand. Discussion, negotiation and conciliation have in fact proved to be important features of the experience of the office in local body investigations.

Once all enquiries and interviews have been completed, the evidence is analysed and on the basis of that analysis the Ombudsman makes a decision on the merits of the complaint.

An Ombudsman has no power of compulsion. His duty, having received and investigated a complaint, is to form an opinion as to whether the act, decision or omission complained against:

(a) appears to have been contrary to law;

(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was based on some law, policy or practice which suffers from one of these defects;

(c) was based on a mistake of law or fact, or

(d) was wrong.

If he concludes that a complaint is justified on one or more of these grounds, the Ombudsman

may then compile a report making a recommendation designed either to redress the grievance, if that is possible – and sometimes it is not – or to ensure that action is taken which will reduce the possibility of the complaint recurring. This recommendation for example could be by way of invitation to the principal officer to submit the Ombudsman's report and opinion to the local authority concerned with the proposal that it reconsider its decision. In this way the Ombudsman may bring about the modification or reversal of such a decision and indeed the experience of the past 14 years is that the Ombudsman's recommendation is usually accepted and acted upon.

If in the course of investigating a local body complaint it appears that a provision of a statute or regulation ought to be reviewed or modified, the report would be drawn to the attention of the appropriate Minister. An example is differential rating in Wellington where the Ombudsman considered that some legislative change was required in the public interest *(d)*.

As mentioned earlier, a report may be made public if the Ombudsman feels that it is in the public interest to do so. This power is being used more frequently now than before. As an alternative, the Ombudsman may require the principal officer to make available to the public a summary of his report (s 23); this summary is prepared by the Ombudsman but before completing it he is required to send a draft to the local authority for perusal. Within one week after receiving the Ombudsman's report the principal officer is required to give public notice that the summary of the report is available for inspection and it must remain available for a period of four weeks from the date on which the first public notice was given. In this way, the legislature has ensured that the public is aware of the report and is able to read it an; express an opinion on it to the local authority.

So much for the mechanics of the Ombudsman operation. It can readily be seen that the legislature has designed the extension of the Ombudsman's activities into the local government field to pinpoint areas of unsatisfactory or defective administration, flaws in the planning procedures, negligence, bias, neglect, delay – so that members of the public and employees of the local organisations themselves have a simple and effective means of ventilating their problems and grievances and where appropriate have them resolved by a form of intervention which is constitutionally independent and completely impartial.

Before discussing some of the recurrent problems brought to the attention of the office and the causes of them, it is appropriate to relate some facts about local government complaints received over the past year. Taking the country as a whole, the office has received 707 complaints of varying complexity relating principally to the following areas: town planing; taking of land and compensation; subdivision of land; roads, streets, and property access; reserves and domains; rating; health and environmental nuisances; flooding and erosion of property; electricity; drainage, water, refuse works and services; and employees and conditions of employment. Of the complaints fully investigated, some 45 percent have been found to be justified. By comparison in the central government field, 1368 complaints were received last year and of those investigated about 34 percent of those fully investigated were found to be justified.

It is not easy to draw general conclusions from the experience to date as to the main factors in local government giving rise to complaints. However, it is possible to venture the opinion that in the course of time they will be seen to be very little different from those encountered by the Ombudsman in central government. These might be summarised as follows:

(1) failure to determine relevant legal or factual issues;
(2) failure to obtain accurate, complete and relevant information;
(3) failure to consult affected parties;
(4) failure to apply relevant information properly to the issues;
(5) failure to give proper advice and take proper action;
(6) failure to inform affected parties of decisions accurately and adequately;
(7) failure to act in appropriate time;
(8) failure to be prepared to revise or reverse decisions or actions taken where circumstances warrant this course;
(9) failure to act with appropriate courtesy.

Commenting briefly on each of these in turn:

(1) It is essential that an administrator make the right decision about the relevant legal and factual issues in the problem before him – and there may be a number. Expert advice may be needed in certain circumstances. Frequently legal advice may be required. The correct legislation must be consulted and a reasonable interpretation given to the words of a specific legislative provision.

The Ombudsman recently undertook an investigation of a noise complaint where it became apparent that the Council officers concerned had

(d) Cases W 10958, 11010, 11141, 11193, 11324; reported in (1977) 1 NZAR.

(e) Case W 10786; reported in (1977) 1 NZAR.

not sufficiently apprised themselves of all the facts and legal issues involved *(e)*. There was no inspection of the site even after the council had received a complaint. A wrong interpretation was given to an ordinance in the operative district scheme. In the report the Ombudsman recommended that a fuller investigation of the facts be made and that the council's legal advisers be consulted on the town planning matter. The recommendation was accepted. The complaint highlighted the difficulties surrounding noise nuisance complaints – particularly the need to exercise careful judgment and balance the competing interests of the parties involved *(f)*.

(2) A second area of weakness is the failure to obtain and consider all relevant information available before a decision is made. The noise complaint referred to illustrated this factor. The Ombudsman has found instances in which officers have overlooked some vital piece of information but when this has been brought to their attention in the course of the enquiries they have usually accepted that the original decision made without regard to all the relevant information required modification.

(3) Then, there is a lack of consultation. It is the view of the Ombudsmen that there is an obligation on local administrators to consult with persons who are affected or likely to be affected by administrative decisions *(g)*. It may be inconvenient and time-consuming but it very often serves to avoid later suspicion and distrust. Indeed, the lack of effective communication is often at the core of a number of the complaints received.

(4) A fourth factor is failure to apply the relevant information correctly to the relevant issues. The amassing of information by consultation and otherwise has very little value unless the information is carefully and objectively analysed and the results of the analysis correctly related to the issues under examination.

(5) Fifthly, it is found not infrequently that wrong advice has been given or careless or incorrect action taken by local government employees. The consequences of such deficiencies can often be unfortunate as instanced by a recent Supreme Court decision where local authorities were held liable in negligence for errors of judgment on the part of council officers *(h)*.

The other area under this head is the giving of advice. It is common practice that ratepayers should enquire from local body officers whether the district scheme or a bylaw prohibits a particular proposal, and officers should try to be helpful and accurate in answering enquiries. Bad or inadequate advice can lead to serious results because where an officer holds out or possesses a special skill or knowledge not available to the enquirer and in the circumstances the officer should be aware that the enquirer and others rely upon the advice and may act to their legal detriment, liability can arise *(i)*.

(6) The sixth factor which often given rise to complaints is a failure to inform the affected parties accurately and adequately of any decision. It makes little difference whether it is merely a matter of conveying information or advice, notifying a refusal of consent, or making an order which residents are required to act upon. In this process errors or omissions can easily occur. It may be that the decision is not communicated at all or the content of the decision is communicated on the basis of the assumption of qualifications which are not expressed so that the result is misleading; or it may be that the decision is expressed in terms which are themselves unclear or ambiguous. If this happens it may well be unreasonable to expect residents to act in accordance with the decision or penalise them for failing to act in a particular way in response to it.

(7) The next factor is delay which is a recurrent theme in the complaints received. A failure to act or delay in acting may cause serious hardship to a citizen. In some cases the situation calls for more effective and speedy procedures in the organisations concerned. In others there may be legitimate reasons for the delay and the complaint arises simply because the complainant has not been told that an early decision is not practicable and if so why that situation exists.

(8) Occasionally, a reluctance is encountered on the part of authorities to modify or reverse a decision even though new and different factors may have arisen. The original decision could have been entirely sound when it was made but later events or fresh evidence call for a modification.

(9) Finally, courtesy in dealing with the public. An Ombudsman is frequently called upon to examine the conduct of public officials. Pressure of work and other factors can cause instances of alleged discourteous or highhanded behaviour which are brought to the notice of the office. By no means all of these complaints are found to be justified. On occasions the complainant clearly contributes to a situation by his own behaviour, although there are other instances

(f) An excellent article on the subject of noise control is G P Curry "The Legal Controls on Noise" [1976] NZLJ 517.

(g) This principle is elaborated by D Mahoney "Informing the Public" 2 Local Authority Administration p 49 (September 1976).

(h) *Hope v Manukau City Council* [1976] Current Law 762.

(i) There is an interesting and useful article on this subject by K A Palmer – "Local Authorities and Negligence" [1976] NZLJ 541.

n which a more accommodating approach on the ›art of an official, particularly where the :omplainant is not familiar with the intricacies of ocal body requirements, or is unclear about the ssues involved could easily have presented a later mpasse.

These general observations relate principally :o that proportion of complaints found to be justified – namely some 30 percent of the total received. To balance the record the experience of the office over the past year has produced much more evidence of good administration than bad, and it is fair to speculate on the basis of over a decade of experience in central government matters, that this will continue to be the case.

ADMINISTRATIVE LAW

MAKING GOVERNMENT ACCOUNTABLE— A Comparative Analysis of Freedom of Information Statutes—Part II

The first part of JOHN McMILLAN'S *three-part article appeared at [1977] NZLJ 248.*

Finland *(w)*

In recent years a significant number of European countries have enacted some form of freedom of information legislation. None of the statutes is nearly as impressive as the Swedish Act, and most have failed to promote a great public demand either for information or for a right to scrutinize and participate in government administration. Despite this the legislative experiments are important in any comparative study: the enactment of each of the statutes was the culmination of disputes about government secrecy that had raged for more than a decade and which became the basis of election promises; special committees outside the normal departmental structure were commissioned to study the issue and, in the case of Finland and Denmark, have since been appointed to review the laws; and together the laws have experimented with every possible form for drafting the exemptions from disclosure.

Finland has had open records legislation since 1951. The *Law on the Public Character of Official Documents* is an ordinary Act of Parliament and contains many procedural similarities to the Swedish law: citizens may browse through any public documents without first having to identify those they are interested in; to assist them, the internal journals (indexes of public documents) are open to inspection; a denial can be appealed through the heirarchy of administrative Courts; and it is as much an offence to withhold public documents as to disclose secret ones. Indeed, the Finnish Law was meant to be a consolidation of existing rules on publicity and secrecy, and consequently much of the Law is concerned with procedural matters relating to the storage, transfer and release of records.

The definition of exempt material is disappointingly wide. First, internal working material is excluded from the definition of "official documents" which are subject to the law, but in addition another section provides that "proposals, drafts, reports, opinions, memoranda or other studies" shall not be public. Although as a general rule factual material is disclosed, this provision nevertheless has the capacity where needed to exclude from public inspection factual matter, statistical and scientific data, and final opinions. Second, other material can be withheld pursuant to any regulation made under the Law and which requires secrecy out of consideration for one of a number of general standards contained in the Law – national security, foreign relations, law enforcement, personal privacy, and the business affairs or legal proceedings of the government or individuals. The *Regulation Containing Certain Exceptions in the Question of the Publicity of Official Documents* made pursuant to this merely illustrates the unqualified breadth of the general standards. Examples of the exemptions (which are few in number) are documents prepared by the Ministry of Foreign Affairs concerning political or economic negotiations with other countries; documents prepared by a defence agency and relating to some aspect of military activities or organisation; documents prepared or received by the police and intended for use in law enforcement; documents concerning a commercial or industrial enterprise operated by the government; and "documents which contain information and reports on private commercial and industrial entities, business and professional activity, or personal economic condition". The main failing with these exemptions is that they are not drafted by reference to any interest which needs protection, rather by reference to the subject-matter of the document or the authority which prepared it. Lastly, secrecy can be prescribed for a "matter" as well as for a document, and if "a

(w) The open records laws of Finland, Norway and Denmark are reproduced in Anderson, note (l) supra, 463-473; discussed also in Wennergren, notes (l) and (r) supra.

particular matter is to be kept secret, secrecy applies also to the documents belonging to the matter". Changes in the currency or bank interest rates, for instance, clearly need protection, but certainly the raw economic data which is collated for these purposes should be available to the public.

Norway and Denmark

Norway and Denmark both enacted a *Law on Publicity in Administration* in 1970. Each of the Laws purports to shield the same basic areas of government activity as the Swedish and Finnish Laws (and, indeed, as those in other countries do), and one would expect therefore that the points of difference would be minimal. The opposite, however, is the case.

The striking features of the Norwegian and Danish Laws are that they are tame in appearance, they respect the ideas and values that a conservative Administration might wish to protect, and thus they exude a judgment that secrecy is to be the rule, and disclosure the exception. For instance, both Laws protect the internal workings of government, yet in addition to covering opinions, drafts and proposals, the definition in Norway extends to "explanations or reports" and in Denmark to "reports, schemes", "letters exchanged within the same authority" and "letters exchanged between a municipal council and its divisions, committees or other administrative organs or internally among these organs". Presumably these exemptions are designed to protect internal frankness and candour, however they could also permit the withholding of the details of a government's policies and of its internal law *(x)*.

Other exemptions similarly invite an open-ended, expansive interpretation, unlike the comparable Swedish exemptions which are designed to be interpreted restrictively – in Norway, for example, documents can be withheld "out of consideration to the justifiable accomplishment of the financial, wage and personal management of national and local government", or "because publicity will thwart public regulation and control measures or other necessary requirements or prohibitions, or endanger their accomplishment"; and in Denmark out of consideration to "the public's economic interests" or "the accomplishment of public control, regulation or planning activities".

Any impact – psychological or legal – that the Laws could have in guaranteeing a public right of access to documents is dissipated by other loopholes. In Denmark documents may be withheld "where secrecy is required by the special character of the circumstances". The Norwegian Law permits an authority to deny access if to do otherwise could be "assumed to give an obviously misleading picture of the case and publicity might damage public or private interests"; and the King has a similar power to defer publicity "for certain kinds of cases or documents, or certain branches of administration". Further, in both countries the Laws only apply to documents created after the date of the Law; a person has to identify the case to which the documents they wish to inspect are related; and information need not be released immediately upon request but in accordance with administrative convenience.

One remaining point is significant. Both Norway and Denmark have administrative systems similar to that of Great Britain, and the principle of ministerial responsibility is observed. In enacting some form of open records law each has experimented in a way that many decry as doctrinally incompatible with Westminster government.

Austria

In 1973 the Austrian Federal Parliament took what, to countries such as Sweden and the United States, would seem like a shuffle forward, yet to some Austrians constitutes a sizeable step. A *Federal Ministries Bill* was introduced by the Government to enumerate the general tasks to be fulfilled by each Ministry, and during the committee deliberations two clauses were inserted. One requires each Federal Ministry to provide information to the public on request, the other requires each Federal Minister to ensure that the subordinate authorities under his jurisdiction provide a parallel service. In both cases the duty to furnish information is subject to the obligation of civil servants to observe official secrecy.

Prima facie the obligation of secrecy is all-encompassing, since the Austrian Constitution provides that, save as otherwise provided by law, all functionaries entrusted with Federal, Provincial or local administrative duties are pledged to secrecy about all facts of which they have obtained knowledge exclusively from their official activity and the concealment of which is enjoined by the interests of a territorial authority or those of the parties concerned. No legislation has qualified this obligation, so the interpretation of the phrases "interests of a territorial authority" and "interests of the parties" is determinative. Administrations argue, quite naturally, that they have been secretive in the past, not for

(x) Although, in Denmark the law confers upon a party to administrative cases a right to be apprised of all documents relevant to the cases, notwithstanding the exemptions, unless the party's interest ought to yield to a decisive regard for public or private interests.

authoritarian motives, but rather because confidentiality is essential in the formulation and administration of policy and is necessary to protect personal privacy. On this view, the *Federal Ministries Act* would be moribund – displaced by the constitutional obligation of secrecy.

It has been argued *(y)* that the two phrases should be given a restricted interpretation, first, to give some meaning and operation to the *Federal Ministries Act*, and secondly, because Article 10 of the European Convention on Human Rights (which in Austria enjoys the status of a constitutional instrument) embodies the familiar concept of freedom of information. The Austrian Federal Government appears to have adopted this view. They have approved a set of guidelines to implement the Act, listing procedures and exemptions, and the Federal Chancellery has issued a circular listing additional matters. Unfortunately both seem to show great deference to administrative convenience and provide, for instance, that there is no duty to allow inspection of documents, but only to communicate the contents of documents; the obligation to furnish information only applies where the decision-making process has terminated and has led to a tangible result; enquiries do not have to be met which necessitate evaluation of voluminous materials or preparation of detailed papers; and an enquiry should be directed towards a specific matter (an example given was an enquiry as to what laws and regulations are in force!).

A positive feature though is that an aggrieved party will be able to appeal a decision, and thus the public's right might be clarified and enlarged. Again this right arises indirectly, in that under Austrian administrative law any decision which is "capable of becoming absolute" may be appealed to the administrative Courts. In so far as the *Federal Ministries Act* grants a legal right to obtain information from a Federal Ministry (but not a subordinate authority), any denial will constitute a final decision to the effect that the prerequisites for obtaining information have not been fulfilled.

In summary then, the Austrian public's right to information is dependent upon many variables. Yet this slight reform is in itself a volte-face for a "civil service bureaucracy [that] still shows traces of its historical origins as the support and vanguard of absolutism" *(z)*.

France, Holland and Canada

The factor which these countries have in common is that all are considering the enactment of freedom of information legislation and in each a bill has been drafted for this purpose. There has been an insistent and continuing demand in responsible quarters in the three countries for a statutory form of access to be introduced.

Currently France has a system of discretionary secrecy like that in New Zealand and Australia, yet tempered by some ad hoc exceptions – municipal council meetings have to be open; new town plans have to be considered at a public enquiry; individuals have access to the registers of births and deaths; some departments must prepare annual reports; and parties to litigation and administrative cases have broader rights of access, particularly in situations where natural justice applies. In 1973, however, a Commission for the co-ordination of Administration Documentation submitted a report to the Prime Minister in which they proposed "the institution of a genuine right to communication for members of the public. The rights and fundamental principles should be laid down by the legislature, for only intervention by the latter could make the impact necessary for the reversal of the most deeply-rooted administrative habits" *(aa)*. Thereafter the Prime Minister established a working party which in 1976 submitted a bill and a draft decree. In addition, the French Cabinet announced plans in July 1976 to enact primary legislation which would grant individuals a right of access to their personal files, provide that they were to be notified when information about them had been gathered, and establish a national commission to control computer data banks *(ab)*.

Passage was denied a programme *Open Administration Bill* introduced in the National Parliament of Netherlands by the Government in May 1975. Probably the most interesting feature is that the Bill proposed a system by which documents intended for internal consumption only could be made public. It was proposed to provide information in something less than the complete text. The method recommended was that a document be disclosed, but if necessary the name of the author of the document could be deleted whether he be a minister or a civil servant. Documents liable to be published in this fashion would include internal documents, civil service notes, and the reports of civil and semi-civil service commissions. The duty to publish would not apply to a document or that part of a document

(y) L Adamovich, "The Duty to Inform in Austria as a Means of Realizing Freedom of Information" (paper delivered at colloquy, note (l) supra).

(z) Id, 2.

(aa) Quoted in L Fougere, "Freedom of Information to Persons of Public Documents in French Theory and Practice – Present Situation and Plans for Reform" (paper delivered at colloquy, note (l) supra). This account is regrettably brief, since the draft bill was not available.

(ab) The *Australian*, 20 July 1976, p 15.

(ac) Generally, see D C Rowatt, "We Need a Freedom of Information Act" (paper delivered at the

containing the personal opinions of government officials or civil servants.

Canada *(ac)* led the Commonwealth countries in attempting to lessen administrative secrecy. An initial step was the publication in 1969 of *To Know and be Known* – a highly-praised, two volume task force report on information services and activities of the Government. Adopting one of the recommendations, the Government established Information Canada, an agency charged with the task of informing the public of government activities; unfortunately it was abolished in 1975 as an economy measure. Yet prior to this, on 16 February 1973, all departments and agencies were issued (pursuant to a Cabinet directive) with guidelines requiring that all Government papers, documents, and consultant reports be produced to Parliament pursuant to any Notice of Motion for the Production of Papers except where the papers fell within the scope of sixteen enumerated exemptions *(ad)*. The guidelines also come to be used in determining what information should be disclosed in response to a parliamentary question or a citizen's request. Following this, on 16 October 1975, a private member's *Right to Information Bill* was introduced by Mr G W Baldwin *(ae)*. On 19 December 1974 the guidelines and Bill were both referred to the joint parliamentary committee on Regulations and Other Statutory Instruments, which has held public hearings but is yet to report. Since then, both the federal and Ontario governments have promised to enact information legislation, but draft bills are not yet available. Further, on 21 July 1975 the Government introduced a Human Rights Bill which provides, inter alia, that the Governor-General, on the recommendation of the Ministers for Justice and Communications, may make regulations respecting the privacy of individuals in relation to the records of any government institution, and in particular for notifying citizens of the existence of record holdings and the uses to which they are put, granting citizens a right of access to personal records, and allowing them to correct inaccurate or obsolete data *(af)*. In the Governor-General's Speech from the Throne delivered at the opening of the new session of Parliament on 12 October 1976, His Excellency reaffirmed the Government's intention to enact the Human Rights Bill and to co-operate with the joint statutory committee in improving the citizen's access to information.

Whilst they are a start, neither the guidelines nor the *Right to Information Bill* go very far towards serving a worth-while right to information. The Bill, for instance, seems to be drafted more with an eye to passage through Parliament than to innovation – three of the eight exemptions apply where a request is made "for a frivolous or vexatious purpose", or where the information sought is "elsewhere provided or available" or "is so trivial in public interest that [it] is not in the public interest" to supply it. The only strong feature is that, where a dissatisfied citizen has appealed his or her denial, the court could order the disclosure of exempt information if it thought the public interest so required.

The guidelines are to be interpreted and enforced by the Administration, and the degree of openness must therefore be the inverse proportion of the Administration's disposition to secrecy. The sixteen exemptions equally contribute to the preservation of this status quo. Whilst they purport to protest the same areas of government activity as the legislation of other countries, many employ neutral (yet open-ended) wording that does not indicate there is any public interest to be weighed against the interest to be protected – for instance, unwarranted invasions of personal privacy should not be permitted, but an exemption for "Papers reflecting on the personal competence or character of an individual" would sanction the withholding of a report revealing inefficiency, incompetence or corruption among the senior managerial ranks of a department. (Similarly, compare the ambiguity of "Papers that are private or confidential and not of a public or official character.") The only interesting feature of the guidelines is the attempt to differentiate between types of consultant's reports – those which are comparable in nature to a Royal Commission report should be disclosed, and in other reports consultants should separate recommendations from factual and analytical data in order that the latter can be released. This distinction is a tentative recognition of one of the

28th Annual Conference of the Institute of Public Administration in Canada, 7-10 September 1976); a forthcoming book edited by Professor Rowatt, *Administrative Secrecy in Developing Countries;* evidence presented in 1975 to the Canadian Standing Joint Committee on Regulations and Other Statutory Instruments – Issues 1, 13, 15, 17, 19, 22, 32; and G Robertson, "Official Responsibility, Private Conscience and Public Information" (1972) *Optimum*, Vol 3, No 3. The topic was also an agenda item at the Canadian Bar Association Convention, Winnipeg, 30 August 1976.

(ad) Reproduced in House of Commons Debates, 15 March 1973, p 2288. The guidelines were later supplemented by a report entitled "The Provision of Government Information" (April 1974) by Mr D W Wall, an Assistant Secretary of the Cabinet for security matters. The report urged that the 16 exemptions in the guidelines be replaced by 8 broad criteria. The report is reprinted in Issue 32 (25 June 1975) of the proceedings of the joint parliamentary committee.

(ae) Bill No C-225 (1974).

(af) Bill No C-72 (1975).

nexplicable anomalies of government secrecy.

> "Very often it is just an accident whether an outside committee, which publishes its report, or an inter-departmental committee, which does not, is appointed to advise a Minister *(ag)*."

England

For the moment, England has been content to experiment with reforms other than open records legislation. In recent years the measures have included the enactment of s 12 of the *Tribunals and Enquiries Act* 1958 requiring that reasons for decisions be given by tribunals, and by a minister in the case of a statutory enquiry; appointment of a Parliamentary Commissioner (Ombudsman) in 1967; relaxation of the archival rules; tolerance of senior officials publicly discussing policy matters, particularly before parliamentary committees *(ah)*; and the preparation of White and Green Papers and the establishment of inquiries, including enquiries into privacy *(ai)* and s 2 of the *Official Secrets Act* and three separate enquiries into the "D" (or Defence) Notice System (under which the Defence, Press and Broadcasting Committee can issue notices to the Press seeking their voluntary restraint from publishing anything on a topic covered by a notice) *(aj)*.

One can nonetheless detect in England a restless concern with official secrecy since the Fulton Committee on the Civil Service reported in 1968 that "the administrative process is surrounded by too much secrecy. The public interest would be better served if there were a greater amount of openness" *(ak)*. In response to the Committee's recommendation "that the Government should set up an inquiry to make recommendations for getting rid of official secrecy in this country", two inquiries were eventually launched. The first – designed presumably to circumvent the issue – involved the preparation by an interdepartmental committee in 1969 of a Government White Paper entitled *Information and the Public Interest*, which simply described the types of information being released (particularly White and Green Papers) and urged a continuation of these practices *(al)*. The second inquiry was conducted by the Franks Committee into s 2 of the *Official Secrets Act*, which creates various criminal offences involving the unauthorised communication, receipt or retention of official information. The Committee found that the section was "a mess", yet "its scope is enormously wide" *(am)* (Mr Justice Caulfield had earlier suggested it be "pensioned off") *(an)* and recommended its repeal and replacement by an *Official Information Act* which would confine the use of penal sanctions to disclosures endangering the security of the nation, the safety of the people, or the constructive operation of democracy. In the Committee's assessment, this meant the wrongful disclosure of Cabinet documents; documents relating to the national security, foreign relations, the currency or the reserves, disclosure could cause at least serious damage to the nation's interests; information which could facilitate an escape from legal custody, impede the apprehension and prosecution of criminal law offenders, or assist in the commission of an offence; certain information either given in confidence to the government or which might invade personal privacy; or where official information is wrongfully used for the purposes of securing financial gain.

On 22 November 1976 the Government published a new Official Secrets Bill embodying the proposals of the Franks Committee, except that Cabinet documents not dealing with national security and information relating to economic security are excluded from the protection of criminal sanctions. Like the Franks Report, the Bill has been roundly criticized, on the one hand, because it would replace an "old blunderbuss" with an Armalite rifle, and on the other hand, because there is no counterweight in the form of freedom of information proposals. In short, both Franks and successive governments have failed to undertake the basic enquiry anticipated by the Fulton Committee into improving the public's access to information *(ao)*. Indeed, the debate has been frequently rehearsed on a related issue – the

(ag) M Brittan, *Steering the Economy* (1969) 34.

(ah) See, eg, Evidence from First Division Association to the Fulton Committee on the Civil Service, *Evidence* Vol 5, Memo No 16; and Emy, note (e) supra at Ch 2.

(ai) Report of the Younger Committee on Privacy.

(aj) See D G T Williams, "Official Secrecy in England" (1968) 3 FL Rev 20, 22-37. A similar system in Australia is discussed in H Whitmore; "Censorship of the Mass Media: The 'D' Notice System (1968) 41 ALJ 449.

(ak) Cmnd 3638, para 277.

(al) Cmnd 4089.

(am) Cmnd 5104, para 88. There have been 23 prosecutions under the Act since 1945 (for details, see App II of the Report). Another prosecution seems imminent, as 3 civil servants were arrested in February 1977 on charges of leaking information ex – CIA agent Phillip Agee (Washington Post, 20 February 1977).

(an) His Honour heard the *Sunday Telegraph* secrets case, in which two journalists and the editor were charged over the unauthorised publication of an official report on the Nigerian civil war; see E Campbell and H Whitmore, *Freedom in Australia* (1973 ed) 344.

(ao) See W Birtles, "Big Brother Knows Best: The Franks Report on Section Two of the Official Secrets Act" (1973) Pub Law 100; J Jacob, "Some Reflections on Governmental Secrecy" (1975) Pub Law 25; and The *Australian*, 8 September 1975.

disclosure of Cabinet papers. One focus has been a recent and frequent leakage of Cabinet papers *(ap)*, another the unsuccessful attempt by the Attorney-General to restrain publication of the diaries of the late Richard Crossman (a former Minister in the Labour Cabinet). In that case, Lord Widgery CJ ruled that revelation of events which happened ten years previously (with three intervening general elections) should not inhibit free Cabinet discussion *(aq)*. In response to the ruling, the Prime Minister announced on 23 January 1976 that the archival period governing the release of historical records was to be reduced from thirty to fifteen years *(ar)*.

If one lesson emerges from English experience it is perhaps that where alternatives to information legislation are pursued, there will remain an insistent and continuing demand in responsible quarters for a statutory form of access to be introduced. It is no surprise therefore that a bi-partisan All Party Parliamentary Committee for Freedom of Information has been formed among MP's, and on 20 November 1976 announced plans to introduce a draft Freedom of Information Bill *(as)*. The Committee is supported by a public arm, called the Freedom of Information Campaign, which comprises representatives of professional community and trade union groups, and concerned citizens. This trend confirms the growing awareness in a number of countries that openness, far from being incompatible with Westminster Government, is essential for the rejuvenation of the principles of responsibility and accountability on which that system is founded.

(ap) See, eg, The *Economist*, 26 June 1976; and The *London Times*, 31 May 1976 and 2 July 1976.

(aq) *A-G v Jonathan Cape Ltd* (1975) 3 WLR 606; for comment see The *Economist*, 4 October 1975.

(ar) *Canberra Times*, 24 January 1976. England's Archives Office is governed by the *Public Records Act* 1958. Section 5 of the Act authorises the Lord Chancellor to determine the period for which documents shall remain secret.

(as) The address of the Committee is 8 Elsiedene Rd, London N21.

PRACTICE NOTE

Interpleader summons

The applicant company held goods in cold storage. The inwards goods docket showed that the goods were received for storage on behalf of the first respondent. The second respondent claimed possession as (inter alia) unpaid vendor.

Rule 482 of the Code of Civil Procedure authorises the Court to (a) order one claimant to commence a separate action against the other or (b) to order issues to be prepared to try the issue. Which course should be selected? If (b), who should be plaintiff? What happens if the nominated plaintiff does nothing?

As far as the applicant was concerned the legal point was straightforward – where does the property lie. Either course would suit it. If trial of the issue only was ordered, and the determination was against the second respondent, then the second respondent would then need to bring a separate action to recover the price. Alternative (a) directing a separate action was therefore preferable.

Selection of the plaintiff has tactical consequences. The first respondent was selected as prima facie the applicant held the goods as bailee for it.

If the nominated plaintiff failed to initiate proceedings then, in the absence of powers equivalent to those vested in the English Courts to bar the claimant from prosecuting his claim against the appellant (a lack that was criticised by the Judge) the main sanction was for the applicant to apply to have the order rescinded and to seek the alternative order for trial of the issues. *Coolstores (NZ) Ltd v Sunplus Products Ltd (1st respondent). Keri Sweet Processing Co-op Ltd (2nd respondent)* (Supreme Court, Auckland, 29 March 1977 (A 26/77). Mahon J).

Tony Black

Bowled out – Remember Lord Reid's dictum in *Bolton v Stone* that "If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all". The English Court of Appeal have given it less than wholehearted support in *Miller v Jackson* The Times, 7 April 1977. While agreeing that it would be fair enough if the houses or road were there first it was a different matter if the cricket ground had been there first and the houses arrived later.

It was therefore held that the playing of cricket on a ground used by the village club for over 70 years should not be stopped by granting to the owners of an adjoining house built in 1972 the discretionary remedy of an injunction although they had established damage from balls hit for a six. In modern conditions the interest of the public should prevail over that of the individual.