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HARD TASKMASTERS

"The British people are hard taskmasters. . . . One must not expect them to be affectual to those whose duty it is to enforce the law . . . yet it is because the British have learnt to measure out stingily their grants of authority so that it is just enough and no more that they have, perhaps more successfully than any other nation, held the balance between order and freedom. The police power oscillates uncomfortably at the point of balance and this is what gives every policeman an exacting task. But the British way of life depends to a great extent on the way in which he discharges it". Lord Devlin: "Police in a Changing Society" (1966) 57 Journal of Criminal Law, Criminology and Police Science 123, 127.

Sir Thaddeus McCarthy drew attention to his traditional British approach to the power of he police in an essay on the role of the police n the administration of, justice (RS Clark: Essays on Criminal Law 173). It may provide some onsolation to those members of a force that is nvariably criticised for overstepping the mark and rudgingly praised otherwise, to know that their ternest critics (including those on the Bench) lo not destroy respect for them, but in the long erm, preserve it.

Now, to the recent Court of Appeal decision *R v Hartley and Others* (5 August 1977, Richmond P, Woodhouse J Cooke J), at least as it affects one of the defendants, Dennis John Bennett. The circumstance leading up to Bennett's arrest for participating in a Hell's Angels, raid that ended with murder are enough to raise the hackles of civil libertarians and even, one suspects, to ruffle the feathers of the Judges on Appeal. Bennett was interviewed by the police after the raid and they raised no objection to his proceeding with plans to go outside the Auckland district for a holiday. After his return to Auckland he travelled to Melbourne with his wife to stay with her sister. Forty hours after his arrival at about midnight several members of the local police force arrived, roused him from bed and required him to go with them to the police station. He said he left "with a detective on each side of me who had hold of the loops of my pants". His request to communicate with someone to obtain advice was refused. He was placed in a cell and on the following morning flown to Wellington. These events followed from a telephone call by a detective inspector in New Zealand to the Criminal Investigation Branch at Melbourne to tell officers there "of our interest in him".

At Wellington he was met by police who took him to the central police station where he was in-

terrogated at length. He was not warned until the interview had continued for "a prolonged period". A warning had not been given when Bennett first arrived because the detective concerned considered that "there was insufficient material in the hands of the police to enable the man to be charged". As Woodhouse J, who delivered the Judgment of the Court, pointed out "that inhibition had not operated at all when the decision was made to enlist the assistance of the authorities in Melbourne to have him brought back here".

Later in the day Bennett was flown to Auckland and during the evening he produced a statement. By the time it was completed he had been without sleep for 32 hours and in effective custody for 20 hours. Ultimately, Bennett had received legal advice but the Court considered that his solicitor had not been fully aware of what had gone before.

Bennett appealed against conviction on the basis, firstly, that by reason of the illegality surrounding his removal from Australia the Courts in New Zealand did not have, or should have declined jurisdiction, and secondly that his statement should have been excluded in terms of fairness and justice.

The jurisdiction issue was quickly settled. Jurisdiction rested not on the method of coming but on presence within the territorial boundaries and the processes that take place within those boundaries to bring a defendant before the Court.

Matters were not left there. The question of the exercise of the Court's discretion to quash the indictment remained and here the Court of Appeal was firm that the procedures required by the Fugitive Offenders Act should not be replaced by extradition by telephone call. Essential statutory precautions had been "blithely disregarded".

> "For the protection of the public the statute rightly demands the sanction of recognised Court procedures before any person who is thought to be a fugitive offender can properly be surrendered from one country to another, ... There can be no possible question of the Court turning a blind eye to the action of the New Zealand police which has deliberately ignored these imperative requirements of the statute. ... The issues raised by this affair are basic to the whole concept of freedom in society".

The Court of Appeal was concerned that one day the New Zealand police would be called on to reciprocate this favour and "spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime had been committed elsewhere".

These matters had not been argued before the trial Judges and in that context the Court of Appeal was not prepared to dispose of the case on that ground alone, but went on to consider the admissibility of the statement.

> The account of question and answers left: "a clear impression that there was indeed a determined and successful effort by a process of cross-examination to extract a series of acceptable answers from the man .... even after the warning was given a similar form of cross-examination was continued. .... There was clearly a serious breach of the spirit and purpose of the Judges' Rules and for this reason alone we think the evidence should have been excluded as a matter of discretion".

The method of Bennett's return from Australia was added as a makeweight in quashing the conviction.

After the hard words spoken on the extradition issue it came as something of a surprise to see it seem to fizzle out – particularly as a remark by Lord Devlin was cited that to protect Executive process from abuse "the only way in which the Court could act ... would be by refusing to allow the indictment to go to trial".

Yet the point has been made. As Sir Alexander Turner indicated in an earlier decision, (*R v Convery* [1968] NZLR 426, one factor to take into account in exercising the discretion to exclude evidence is "the necessity of maintaining effective control over police procedures in the generality of cases". The same could be said of the discretion to quash an indictment. This cuts two ways. Someone who is, to coin a phrase, as guilty as hell, may escape punishment on the basis of comparatively minor breaches of police procedures if the Court considers that that action is necessary to ensure that those procedures are strictly complied with in future. On the other hand, it may feel that the interests of justice are sufficiently served by issuing a warning, as did Edwards J in *R v Barker and Bailey* (1913) 32 NZLR 912, 927 (CA) when he said that "if the police do not act upon the warning given in this case more drastic steps will be taken to keep them within the strict line of their duty". He was referring with disapproval to an admission tendered in evidence that had been obtained by cross-examination and his warning was given effect to in later cases.

Letting the guilty free as the cost of ensuring compliance with proper procedures is itself a sacrifice on the altar of justice. It is the price the community pays. The criticism that follows is the price the police pay.

Tony Black

CRIMINAL LAW

OBSTRUCTION: THE MINISTER AND THE "LONG BEACH"

By Dr W C HODGE, *Senior Lecturer, Auckland University.*

When the American nuclear warship *Long Beach* arrived at the Rangitoto Channel approach to the Auckland Harbour at dawn on 1 October 1976, it found a flotilla of small protest vessels, from motor launches to surfboards, deliberately stationed to impede or prevent its entrance into the harbour. The skippers of two such small vessels, Patrick Taylor and Phil Amos, Minister of Education in the third Labour Government, were arrested and subsequently convicted in the Magistrate's Court for obstructing a constable in the execution of his duty, contrary to s 77 of the Police Offences Act 1927. Both defendants appealed and the appeals were heard jointly in the Supreme Court before Speight J: *Amos v Assistant Commissioner of Police; Taylor v Police,* 23 May 1977 (m 1752/76).

Speight J made no new law in allowing the appeal by Amos, while dismissing the appeal by Taylor, but he has synthesised a useful review of the basic principles of the offence of obstruction.

Both defendants had deliberately taken the yacht or launch in their control to a location outside the Auckland Harbour limits, where their seamanship was not subject to Harbour Board regulations applicable only to confined waters. All New Zealand seamen, however, are obliged to obey the International Regulations for Preventing Collisions at Sea, promulgated by the Governor-General under the Shipping and Seamen Act 1952 in the Collision Regulations Order 1965 (SR 1965/42). Charges had been laid in the Magistrate's Court under Rules 27 and 29 of those Regulations, but it was determined in that Court that Rules 27 and 29 were only cautionary admonitions of good seamanship. Those Rules aided in the interpretation of other Rules, but did not themselves create substantive offences. The trials then proceeded on the charge of obstruction only.

The prosecution attempted to prove that Amos had so navigated his craft as to create two forms of constabular duty, and had persisted in such navigation after being warned by constables in the police launch *Deodar.*

First, witnesses testified that Amos had repeatedly stopped and started in the path of the *Long Beach,* and changed his course under the bow of the *Long Beach* in a fashion which Speight J referred to as "nautical chicken". Such behaviour would have breached reg 21 of the Collision Order, which requires that a craft being overtaken by another vessel "shall keep her course and speed". This game of nautical chicken, as a criminal violation of the regulations, would have created a clear constabular duty to prevent a continuing or anticipated crime.

Secondly, a witness testified that Amos had manoeuvred his craft into a position of imminent danger, where lives could have been lost. A second form of constabular duty would have arisen under that set of facts, being the general duty to protect life and property. This lesser known mode of constabular duty is demonstrated in *Haynes v Harwood* [1935] 1 KB 146, where a constable was found to be doing his duty by stopping a runaway horse.

Defence witnesses, however, testified that Amos's craft had maintained steady way, did not zigzag or stop and start, and was in face never in danger of collision. Therefore, two contradictory factual situations were offered as evidence and the latter of these two would not have given rise to either form of constabular duty.

The learned Magistrate did specifically find that Amos had heard a request from the *Deodar* to change course, but the Magistrate neglected to find in favour of one of the two factual presentations. As a matter of fact, therefore, the trier of fact had not found that there was either a breach of reg 21, or that Amos's craft was in danger. Although Amos's navigation may have violated an alleged "spirit of the regulations", Speight J ruled that the Magistrate had erred in law in finding an obstruction of a duty by Amos when there was no proven duty. Amos was awarded costs of $100.

The opposite conclusion was reached in Taylor's case, where the Magistrate had carefully, and expressly, found that:

(1) Taylor had zig-zagged "immediately under the bows of the *Long Beach;* and
(2) Taylor had placed himself and his crew in serious danger.

The two forms of constabular duty had, therefore, arisen and Speight J denied Taylor's appeal, with $100 costs to respondent.

FAMILY LAW

ANCILLARY POWERS UNDER THE MATRIMONIAL PROPERTY ACT 1976

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

It is becoming clear that close attention will now have to be paid to the principles being evolved by the Courts in the making of ancillary orders under s 33 of the Matrimonial Property Act 1976. Since the writer had prepared a note on the question of when an order for the sale of the matrimonial home should be made, *(a)* several judgments have appeared dealing with this very question. In what is perhaps the leading judgment on the subject, Jeffries J in *Hackett v Hackett* (1977) (unreported, Wanganui Registry M 39/751) commented that:

> "With the great majority of matrimonial homes of broken marriages being divided equally, following the provisions of the Act, the Courts will increasingly face the troublesome problem of the proper time at which a sale should be ordered"

Later his Honour added:

> "I think it is important for the profession and the public to understand the consequences of a nearly inflexible rule of equal division of certain property. The fact that the order for sale must ultimately be made and the statutory provisions about equal division allowed to become a reality must be faced immediately property matters are being considered".

The problem is indeed a troublesome one. It will be the exception rather than the rule that hardship does not fall on the shoulders of at least one party when their respective interests in the matrimonial home are capitalised by an order for sale or when the order is delayed in its effect. What guidelines are the Courts following in dealing with this problem? In his lucid judgment in *Hackett v Hackett,* Jeffries J gives some guidance on this question.

The presumption of immediate sale

The Court is first to give "its primary direction" indicating the proportions in which the parties are entitled to share the matrimonial home. Having done this, there must be no more delay than absolutely necessary in executing "the primary direction". "[I]f an order for sale is to be postponed the onus rests upon the person asking for that to justify such a request". We can therefore infer that there will normally be a presumption in favour of ordering the sale of the home.

The reasons for such a presumption are not hard to discover. If a marriage has broken down, the party who has left the matrimonial home will likely require capital in order to finance his new lifestyle and, perhaps, new family. In most cases, the bulk of a person's capital will be tied up in what was the matrimonial home. Unless there are additional sources of money enabling one spouse to buy out the other spouse's interest the only way of realising this capital is to sell the home and distribute the proceeds.

On the other hand, the spouse in occupation of the home has fewer needs for capital. At the same time, apart from the necessity of meeting the usual outgoings on the house, this spouse will have free accommodation. As the spouse who has left home may be paying a full market rental for his accommodation, as was the wife in *Hackett v Hackett,* that spouse will in effect be heavily subsidising their former partner.

Generally speaking to delay the sale of the home will strongly favour the spouse in occupation and seriously prejudice the interests of the other spouse.

The presumption in favour of sale may not however be difficult to displace, depending upon the facts. Jeffries J cited with approval the approach of Latey J in *Smith v Smith* [1975] 2 All ER 19, 22 and in particular the principle that "[t]he availability of the house as a home for the wife and children should ordinarily be ensured while the children are being educated". Thus the parent with custody of young children will normally be entitled to occupy the matrimonial home. As Jeffries J points out "[t]hat is an easily recognisable situation and conventional justice would prevail". In these situations the most appropriate time to set for the future sale of the home is when the children have ceased their education and are no longer dependent.

There are other situations however which are far less clear-cut than the one just mentioned. The guidelines for these are rather more obscure

(a) "Ordering the Sale of the Matrimonial Home" [1977] NZLJ 187.

and the outcome will depend very much on the peculiarities of each case. Nevertheless recent decisions indicate that the Courts will not be easily convinced that the sale of the home ought to be deferred.

In *Hackett v Hackett*, the matrimonial home was occupied by the former husband. The eldest son, aged 18, lived with him, although the son was working and was periodically away on matters to do with his job. The former wife, whose adultery had provided grounds for divorce, had custody of the two younger sons and lived in rented accommodation in Hamilton.

Apart from an argument based on the wife's misconduct, which will be dealt with later, the main reason for the husband's opposition to an order for sale was that he needed somewhere to live. His Honour held that this was not enough to satisfy the onus on the husband. The house was a four-bedroomed one, acquired principally through the efforts of the wife. She had just as much claim to its occupation as the husband did, perhaps more so, in view of her having custody of the two younger boys. His Honour thus found no justification for delaying the sale of the home.

Three other decisions under the Matrimonial Property Act 1976 have dealt with the question of sale of the home. In two, the Court refused to postpone an order for sale and in another the difficulties were resolved by a different route.

In *Van Zanten v Van Zanten* (1977) (unreported, Christchurch Registry, M 331/76), the husband had left the matrimonial home to live with another woman. The wife remained at home with their two boys. These boys were aged 23 and 22, but the youngest was epileptic and partially intellectually handicapped.

The wife argued that she should be entitled to exclusive occupation under s 27. Her reasons were threefold, namely her own state of health, the dependence of the younger son upon her, and the husband's misconduct (which will be dealt with separately). As Roper J noted, an order under s 27 would have the effect of tying up the husband's capital indefinitely because the wife was in no position to buy out the husband's interest nor to service a mortgage raised for the same purpose.

His Honour was unimpressed by the wife's reasons. The evidence of her health was scanty. The dependence of the younger son was not entire, as he was in full time employment and had savings of his own. Furthermore, the wife's position in the event of an order for sale was not all that desperate because, besides her share of the proceeds of sale, she could expect financial assistance from her son in financing the purchase of another home. The case was one therefore where, according to Jeffries J's test, the occupant of the home had not met the onus justifying a request for postponement of sale.

A similar result was reached by Mahon J in *Turner v Turner* (1977) (unreported, Christchurch Registry, M 443/76). Here, the former wife had had sole possession of the home for the four years since the couple had separated and was living there by herself. The husband had remarried and his present home had been acquired by the capital of his new wife. Nevertheless the husband applied for sale of the matrimonial home and was met with the objection that the former wife would lose the home in which she had invested all her savings, $1000 at the time of purchase. Since the purchase of the home, however, the husband had paid at least $2000 by way of reducing mortgage liabilities.

Mahon J considered that, four years after separation, the husband was entitled to retrieve his share of the equity in the home. His Honour noted the power in both spouses to apply for a sale and went on to say that "this is one of the risks which must be faced by persons deciding to get married".

The third case is *Jones v Jones* (1977) (unreported, Christchurch Registry, M 31/76). The facts were somewhat special. The husband occupied the matrimonial home in Hanmer, a sizeable house valued at $38,000, set in 2½ acres, with a swimming pool and a clay bed which the husband was developing for the making of pottery as a future source of income. The husband suffered from chronic asthma which prevented him from moving into Christchurch and taking employment there. He also had a batten mill which he hoped would one day be reopened. Generally, it had been his life-long desire to retire in Hanmer and if forced to sell he would have difficulty refinancing a new house. Meanwhile, the wife had lived in Christchurch since the separation. There were no dependent children. The husband argued that he should not be forced out of his home and town by an order for sale.

Roper J pointed out the hardship to the parties whatever decision he took. But the necessity to decide was obviated by the late suggestion that the husband could raise $15,000 from relatives. His Honour proposed to the parties that the husband satisfy his wife's interest by giving her this money along with a charge over the property for the balance. What would have been the outcome if this fortunate solution had not been advanced is mere speculation. Although the special circumstance of the case was the link of the house and the town with possible sources of income for the husband, it is thought that per-

haps he had not done enough to justify depriving the wife of her interest in the home *(b)*.

Matrimonial misconduct

Section 18 (3) of the Matrimonial Property Act 1976 reads:

> "In determining the contribution of a spouse to the marriage partnership any misconduct of that spouse shall not be taken into account to diminish or detract from the positive contribution of that spouse unless the misconduct has been gross and obvious and has significantly affected the extent or value of the matrimonial property. The Court may, however, have regard to such misconduct in determining what order it should make under any of the provisions of sections 26, 27, 28 and 33 of the Act".

From a purely drafting point of view, this subsection must reach an all-time low. The comments of Jeffries J are flattery:

> "The sheer drafting inelegance of applying a concept of misconduct that has been deliberately defined to relate to the specific issue of contributions to the range of ancillary powers of a Court I simply note and pass on".

Unfortunately the drafting difficulties are not mere matters of style, but raise ambiguities of substance.

The subsection refers to two kinds of misconduct: (1) misconduct of a general kind, which would include the usual list of matrimonial offences – this is the principal subject of the first sentence; and (2) a particular species of misconduct which is gross and palpable and affects the extent or value of property (described by Jeffries J as "exacerbated misconduct"). The second sentence of the subsection then refers to "such misconduct". But to which of the two kinds of misconduct does this phrase relate?

Roper J in *Van Zanten* was inclined to the view that it referred to the first kind of misconduct but did not decide the issue because on either interpretation, his Honour was not prepared to hold that the husband's misconduct justified granting the wife an occupation order.

On the other hand, Jeffries J in the *Hackett* case concluded that the second sentence related back to the second kind of misconduct, the exacerbated kind and on this basis, he excluded the wife's adultery and desertion from consideration. Her actions were neither gross nor palpable, nor had they affected the extent or value of property. His Honour explained his conclusion as follows:

> "The Legislature stipulates that only aggravated or exacerbated misconduct is to be used to diminish or detract from a positive contribution. I therefore think it a natural and logical conclusion that if a Court is to account misconduct at all it must be that misconduct which exhibits additional reprehensible characteristics. If one were to choose misconduct simpliciter there would need to be some pointer in that direction, and the reverse is so".

His Honour's approach is in line with that of the Privy Council in *Haldane v Haldane* [1976] 2 NZLR 715, 728 under the previous law but counter to that of the Court of Appeal in *E v E* [1971] NZLR 859, 883 which granted the husband exclusive occupation on the basis of his innocence and the wife's matrimonial guilt.

In the alternative, however, Jeffries J said that where misconduct simpliciter has ended, "[it] cannot ... be revived and put to work to bring financial benefit to one party". Thus, even if the phrase "such misconduct" refers to misconduct of a general kind, the Court should not take it into account unless it is of a continuing nature. In *Hackett v Hackett,* although the wife had clearly pursued an adulterous relationship with another man, that relationship had been permanently terminated by the time of the hearing. On either interpretation of s 18 (3) therefore, his Honour would not have taken the wife's conduct into consideration.

With respect, it is submitted that the approach of Roper J is the correct one. The key word in deciding this question is "however" in s 18 (3), and with respect to Jeffries J, this word is a pointer in the direction of a reference back to misconduct simpliciter. The word "however" introduces a note of contrast with the previous sentence. The only way in which the second sentence can stand in contrast with the first is where it makes positive what is negative in that first sentence. The main clause states that misconduct shall not be taken into account (a negative statement) and then gives a special exception where it can be (a positive statement). The second sentence by the use of the word "however" must create a further exception to the main clause and be referring to the subject of the main clause, viz misconduct simpliciter. If anything else had been intended, the word "also" should have been used rather than the word "however".

It is also suggested that this interpretation is sound in principle. The Act generally removes matrimonial fault from the court's consideration in determining substantive rights to matrimonial property (although it remains to be seen exactly how s 14 will be interpreted and such sections

(b) However cf the approach in *Martin v Martin, The Times* 15 March 1977.

as ss 7 (3), 9 (4), 11 (3), and 13 (3) where the Court has a discretion to do what it thinks "just"). The procedural question of how the parties' substantive rights are to be translated into real terms is a quite different one and it is thought a sound principle that where one or other of the spouses is to suffer hardship it should not, without more, be the innocent one.

It is also respectfully submitted that there is reason why s 18 (3) should as a rule be limited to continuing acts of misconduct. If one spouse's actions have irreparably ruined the marriage, this fact may be relevant in deciding upon a just order even if the spouse is now quite virtuous and regrets the injuring actions. Section 18 (3) does not oblige the court to take fault into account but says it "may" take it into account. In cases of contrition, the courts should be free to decide on the facts whether or not to exercise this discretion.

Ancillary orders in general

One further question of some importance relating to the interpretation of the Court's ancillary powers arises. By the Third Schedule of the Act, the capital maintenance provisions in the Domestic Proceedings Act 1968 and the Matrimonial Proceedings Act 1963 are repealed. It has been suggested *(c)* that s 33, and in particular s 33 (3) (n), is inter alia a capital maintenance provision. If this is so, it means that the court can order a capital sum from a spouse's separate property irrespective of the rules for sharing in the earlier sections of the Act.

It is the writer's view that the powers in s 33 are truly "ancillary" and in the words of s 33 (1) can only be used "to give effect, or better effect" to another order under the Act. The Court can make orders under the Act only so long as they are not in conflict with the rules determining entitlements to matrimonial property. Thus for instance if the Court finds that there is only a negligible amount of matrimonial property but a large amount of separate property vested in the husband, it cannot "compensate" the wife with an order under s 33 (3) (n). To be able to do so would defeat the whole purpose of having detailed rules determining substantive rights in matrimonial property.

If this interpretation is correct, it may work harshly in some cases. A wife for instance may be in occupation of the matrimonial home which is in need of capital repairs and which she cannot finance *(d)*. It would appear that there is now no way in which she can seek maintenance by way of a lump sum from her husband for this purpose. Perhaps this situation ought to be reviewed.

(c) The question was raised by Vaver, *Matrimonial Property Act Seminar* (Legal Research Foundation, Auckland, 1977), 73, 81.
(d) Cf *Lindsay v Lindsay* [1972] NZLR 184 (CA).

INDUSTRIAL LAW

TRADE UNIONS AND THE LEGAL PROFESSION— Or Rule of Law and Unjustifiable Dismissal

By ALEXANDER SZAKATS *Professor of Law, Otago University.*

The trade union movement in general and the Transport Workers Union in particular have been severely criticised in connection with the aftermath of the injunction granted by the Supreme Court at Auckland in *Harder v NZ Tramways etc Union (a)*. The union not only refused to obey the injunction, to pay the fine and the costs, but publicly announced that to do so would be contrary to longstanding principles of organised labour. Not suprisingly the legal profession firmly declared again that the rule of law must be upheld and no one can be above the law. It is most surprising, however, that a firm of distinguished legal practitioners seemed to have taken the very view condemned, and conducted themselves as if they were not bound by the rule of law. This situation occurred in *Northern District Legal Employees IUW and Helen Dee v Kensington, Haynes and White (b)*, barristers and solicitors, Auckland, a decision of the Industrial Court in a grievance action for unjustifiable dismissal.

Ms Dee was employed as a receptionist-telephonist. She joined the union and became a member of the executive. It was suggested to the Court that she sensed her employer's unsympathetic attitude and therefore did not disclose her union activities. When she attended conciliation council meetings as an observer, she took leave due to her. At the end of 1976 she was appointed assessor for the union in conciliation proceedings and asked for time off. The evidence on this point was contradictory, as according to her version she clearly specified "to attend a

(a) A441/77, not yet reported.
(b) IC 21/77, dated 27 May 1977.

conciliation council", while in the principal's recollection she referred to a union meeting. In any case the time off was refused, but Ms Dee still attended the conciliation council. Upon her return she was called in to the senior member of the firm who handed her a cheque for a fortnight's wages and dismissed her forthwith.

The union asked for reinstatement, and proposed setting up a grievance committee pursuant to cl 30 of the Northern District Legal Employees Award *(c)* to which the employers are subsequent parties. The Labour Department arranged a conciliator to act as chairman, and he made a tentative date for a meeting. The employers, however, advised him by letter that "there could be no question of reinstatement, and therefore there was no point in the personal grievance procedure being invoked". The Court found that "the respondent firm adamantly refused to appoint representatives or to take part in grievance proceedings" and strongly condemned this attitude describing it as "astonishing, regrettable and unworthy of the firm" *(d)*. One is reminded of the "virtual proprietor" of the plaintiff company in *Pete's Towing Services Ltd v Northern (except Gisborne) Road Transport etc IUW* [1970] NZLR 32, who indicated that he would, and in fact did, ignore both the union and the Port Conciliation Committee, and whom Speight J characterised as "curt and unco-operative", having "a smug and unyielding manner" (pp 36-37). It may be regarded as a mitigating fact that the plaintiff in *Pete's* case did not profess to be learned in law.

As the employers were unco-operative the grievance was referred direct to the Industrial Court under s 117 (3A) of the IR Act *(e)* alleging unjustifiable dismissal. The employers asserted that the dismissal had no connection with the fact that Ms Dee acted as an assessor, but the employment was terminated because of her "eccentric and difficult" behaviour of which the unauthorised absence "was simply the last straw". The Court thought that "the partners would have been justified in demanding from Ms Dee an explanation of her absence", especially if they did not realise she was acting as an assessor, and expressed severe criticism of their conduct:

> "It should have been apparent to the firm that a disastrous mistake had been made in not discussing the matter before dismissing Ms Dee. Nevertheless the firm's response was not only to stick firmly to its attitude . . . but . . . [it] took up the rather high-handed attitude that it would decide the matter, and that there was no point in following the grievance procedure . . . laid down by the Award which was binding upon the firm" (pp 3 and 4).

In conclusion the Court held that Ms Dee was unjustifiably dismissed. As the parties' personal relations became obviously rather strained, instead of reinstatement payment of $500 compensation was ordered together with costs, disbursements and witnesses fees.

It is worth noting that as union activities were involved the dismissed employee could have elected to start action under s 150 of the Act claiming victimisation, but as she was covered by the Award, unlike the technical officer in the *Insurance Guild* case (1976) BA Ind Ct 173, and as the employers denied any knowledge of activities connected with the union, grievance proceedings seemed more appropriate. Though the grievance machinery as laid down in s 117 of the Act, or a similar one approved by the Industrial Commission, must form, or is deemed to be, part of every award or collective agreement and binding on all the parties to it, in the past proceedings could be easily frustrated by refusing to nominate committee members. Subsection (3A) inserted into s 117 makes it possible to refer the grievance with the leave of the Industrial Court direct to the Court.

Under s 150 the burden of proving reasons other than victimisation for the dismissal is placed on the employer, but s 117 has no corresponding provision. The question of onus, however, did not arise as the evidence given by the parties clearly established the facts.

Industrial law in the past has perhaps been considered by most members of the legal profession as merely of marginal importance, not "real law", and as relating to factories, unions and similar matters but not affecting anybody outside industry. This attitude may have its origin in the exclusion of legal counsel from award hearings before the former Court of Arbitration, except with the consent of all the parties which usually was not forthcoming *(f)*. Even now legal practitioners can appear before the Industrial Commission only with that consent, but in Industrial Court proceedings they have the right to represent their clients *(g)*. Common law actions for wrongful dismissal and recovery of unpaid wages are commenced only in the rare cases where the statutory remedies under the Industrial Relations Act for some reason may not be resorted to. Clearly, the law of employment does not simply

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(c) (1976) BA 1565.
(d) Decision, p 2.
(e) As inserted by s 19 of the Industrial Relations Amendment Act 1976.
(f) Industrial Conciliation and Arbitration Act 1954 (repealed), s 139.
(g) Industrial Relations Act 1973, ss 30 and 54.

equate any more with that of master and servant, but it has developed in the last few years into a special and most important branch of industrial law. It vitally affects legal practitioners in their capacity as legal advisors and also as employers. Sir Otto Kahn-Freund said, "[t]he law governing labour relations is one of the centrally important branches of the law" and "[n]o one should be qualified as a lawyer – professionally or academically – who has not mastered its principles" *(h)*.

(h) O Kahn-Freund, *Labour and the Law* (London, 1972) 2.

TOWN AND COUNTRY PLANNING

CAVEAT PLANNER – THE CONSEQUENCES OF A VOID PLANNING CONSENT

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Since the passing of the Town and Country Planning Act 1953, any use or development of land must have the benefit of a statutory authorisation given either by the appropriate local council, or, in some cases, by the legislation itself. In general terms such authorisations may be regarded as being either: *automatic*, as in the case of existing use rights or predominant uses; or, *specific* arising from a particular application, as for example, conditional uses and specified departures. The Town and Country Planning Act 1953 itself carefully defines the extent of, and procedures for conferring, each type of development authorisation, and it is clear that nothing short of a properly granted and appropriate authorisation will enable a landowner lawfully to complete his development. Therefore any unauthorised land use or development (one which lacks any, or at least a properly granted, planning consent or other statutory authorisation in the strict terms of the 1953 Act) may be the subject of some appropriate enforcement action at the instance of the local council. Because of this, an inappropriate or defective planning consent is generally to be treated as no planning consent.

This in brief is the broad effect of the planning legislation in this country. The purpose of this short article is to consider the principal consequences of a defective planning consent, or the absence of a proper consent, where that circumstance has been contributed to by the Council or its officials; where, for example, the developer has been misled by the Council or an official into believing that he had a proper consent, or did not need one.

It is clearly a desirable practice that intending developers have preliminary consultations with the local bodies before submitting a formal application for the relevant planning consent, if for no other reason than to minimise technical planning problems and to arrive at a mutually acceptable proposal. However, such a procedure is not without its dangers, and the law reports contain several examples where the practice has misfired.

There seem to be four possible occasions for error or for misleading the developer, of which a local authority should be aware:

(i) where the Council or official assures the developer that a specific planning consent is not required because the development:
- (a) is covered by existing use rights; or
- (b) constitutes a predominant use; or
- (c) does not involve development – (as occurred in *Attorney-General v Cunningham* [1974] 1 NZLR 737);

(ii) where the developer receives from the Council some consent under the bylaws or other licensing legislation which he assumes to be a sufficient planning consent, and which ought not to have been granted in the absence of a prior planning consent: thus perhaps implying an assurance under head (1);

(iii) where the developer applies for and obtains an apparent planning consent, but under the wrong heading (as for example an erroneous interpretation of a district scheme as illustrated by *Attorney-General v Codner* [1973] 1 NZLR 545);

(iv) where the developer applies for and is granted the right sort of planning consent, but the consent is defective for reasons beyond the control of the developer – (eg *Wilsher v Bennett* (1966) 3 NZTCPA 13; *Godber v Wellington City* [1971] NZLR 184).

Such errors, when they occur can obviously be frustrating and expensive for the developers concerned, for in each case the development is deprived of its legality and cannot proceed without risk.

The immediate consequence – No estoppel

Estoppel is simply a rule of evidence devised by the common law which provides that no-one may, in the course of litigation, deny any previous

assertion which he has made. In the context of litigation, arising under the planning legislation, usually a prosecution, developers who have fallen into one or other of the categories listed above, and who consequently lack a proper planning consent, have, from time to time, sought to raise an estoppel against a council, claiming that the Council or its staff has asserted that the development concerned is properly authorised.

However, it seems well established that, at least so far as concerns the first two situations, a council cannot be estopped from denying a want of planning consent, and may indeed take appropriate enforcement action against the developer.

The leading authorities for this view are to be found in the decisions of the English Courts in, for example, *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416 where an unfounded assurance of existing use rights given by a Council official was held not to stop the Council in a later prosecution of the developer for breach of the planning legislation; and *Wells v Minister of Housing and Local Government* [1967] 1 WLR 1000 where it was held that a bylaw permit was not a substitute for planning permission, and similarly could not estop the Council.

Of course, English planning law is quite different from that of New Zealand, but nonetheless, the New Zealand Courts now appear to apply the same general principle (see *Attorney-General v Birkenhead Borough* [1968] NZLR 383 and cf *EH Shirley and Sons Ltd v Wellington City Council* [1964] NZLR 327) especially as there is in New Zealand planning law a feature not found in English law – the right of objection. There is a statutory right for those who claim to be affected by an application for specific planning consent to object and to be heard by the Council in support of their objection. The Courts have held in a variety of circumstances that only express statutory authority can deprive a potential objector of his rights – (see eg *Attorney-General v Mt Roskill Borough* [1971] NZLR 1030).

The cases noted above relate only to the question of estoppel in the first two situations of planning error noted at the beginning. The question of estoppel in the case of defective planning permission (situations (iii) and (iv)) is perhaps more difficult, for it would seem that, in either of these cases the dictum of Lord Denning MR in the *Wells* case (at p 1007) that a local body "can be estopped from relying on technicalities", might apply. In such cases, potential objectors would also have had their objections heard and cannot be said to have been completely prejudiced. Therefore, it seems that the Council could be estopped from proceeding by enforcement action against a defective consent.

Against this, it is clear that the Courts have held that objectors can be defeated only by a proper and valid planning consent and the Council may be compelled to ensure compliance with its scheme or the legislation (see *Attorney-General v Birkenhead Borough* (supra)). Thus it seems probable, in fact, that an estoppel cannot be raised, even in the case of a defective permission, to prevent the Council taking appropriate action against invalidly authorised development, and the English cases which speak of the Council or its officers being estopped by statements made within the apparent scope of their authority (*Lever (Finance) Ltd v Westminster City Council* [1971] 1 QB 222) might not apply to the different circumstances of planning applications and objections in New Zealand.

Enforcement

Under the Town and Country Planning Act 1953 there is a fundamental duty imposed on the Council to ensure compliance with its district scheme and the planning legislation (s 33 (2)). To facilitate the performance of this duty, the Act provides specific powers for the Council either

(i) to prosecute a developer in respect of unauthorised development (s 36); or

(ii) to serve a restoration notice requiring that the unauthorised development be removed, with the ultimate option of seeking a Court order allowing the council to undertake this work at the expense of the developer (s 37).

These are perhaps the principal enforcement powers available to a council although they are not the only ways in which the Council may enforce the planning controls, and s 33 merely obliges the Council to take some appropriate action, leaving the form of proceedings to the Council's discretion. It is clear from the authorities discussed above that the Council cannot be estopped from exercising this discretion by the existence of an apparent, but legally ineffective, planning consent, and indeed it seems that a private citizen may directly or indirectly compel the Council to enforce its scheme or statutory development control (*Kennedy v Auckland City Council* (1966) 2 NZTCPA 297, *Pahiatua Borough v Sinclar* [1964] NZLR 499 and *Attorney-General v Birkenhead Borough* (supra)).

However there is one factor which may limit the Council's choice of enforcement procedure. It is clear that mens rea, a particular criminal intent, is an inherent element in the offences created by the Town and Country Planning Act 1953. Thus, a prosecution under s 36 must fail unless the Council can show that the developer had no "honest belief that he was entitled" to develop his land, in pursuance of some purported consents or assurances from the Council or its officials. (*Wilsher v*

Bennett (1966) 3 NZTCPA 13: *Waitemata County v Expans Holdings Ltd* [1975] 1 NZLR 34.)

The existence of an informal or otherwise invalid planning consent, if acted on in the belief of its validity may negate the necessary mens rea, and effectively bar a successful prosecution for breach of the planning legislation under s 36. But that does not prevent the Council taking other enforcement action under s 37 or otherwise against the unfortunate developer for whose plight the Council may be, at least partly, responsible.

The remedies of a developer

The Act provides clear remedies for a developer who is refused, initially, a satisfactory planning consent – in the form of a right of appeal and in a few cases to compensation also. Further if consent is improperly refused he may obtain some remedy from the Courts in general administrative law. Clearly the principle in *Denton and Auckland City* [1969] NZLR 256 would apply. The value of these remedies seems to disappear however, where consent is improperly granted, though there is, here a tantamount refusal in the guise of a consent.

In the circumstances of an invalid consent the general remedies seem, prima facie to favour objectors. Any objector to the development may, of course, appeal against the grant of consent, or, if the grant was made improperly, obtain some general administrative law remedy from the Courts (*Denton v Auckland City* [1969] NZLR 256) to upset the consent, but not generally claim damages. (*Kennedy v Auckland City Council* (supra): *Attorney-General v Birkenhead Borough* (supra)). In any case if unauthorised development is proceeded with the Council may take some appropriate enforcement action subject only to the constraints on prosecution as discussed above.

With these powers against him the developer who has been granted invalid consent or been wrongly advised that no consent is required has been put at considerable disadvantage by the Council in that he may have expended money or entered into contracts based on the completion of development, authorisation for which is only afterwards taken away.

One remedy by which a developer or subsequent purchaser of the land may, in such circumstances, recover some or all of his loss is revealed in the quite recent Australian case of *Hull v Canterbury Municipal Council* (1974) 29 LGRA 29.

The facts of this case were quite simple. The developer entered into a contract for the purchase of some land and to this end applied for an appropriate planning consent. In accordance with a quite usual practice on both sides of the Tasman, the contract for the purchase of the land was conditional on the satisfactory grant of planning consent, and because of this the purchase price of the land was based on the proposed use value and not on the lower existing zoning value.

Subsequently the Municipal council granted consent subject to certain minor conditions, and the developer seems to have been satisfied for the purchase of the land was completed at the agreed price.

Unfortunately, the development was within a class specified in the County of Cumberland Planning Scheme Ordinance in respect of which, before granting consent, the Council was required to consult with the State Planning Authority of New South Wales. In fact, the Council had failed to consult the State Authority before granting consent, and as a result the consent was void.

On these facts, the developer successfully claimed damges in negligence on the difference between the purchase price paid and the value of the land at existing zoning value.

The previous judicial decisions that were exactly in point seemed to be against the developer – for example in *Miller and Croak Pty Ltd v Auburn Municipal Council* (1960) 5 LGRA 225 the New South Wales Supreme Court had held that the negligent exercise of planning powers could not give rise to an action in damages. In this 1960 case, the Full Court took the view that planning powers are

> "intended to be carried out for the benefit of the public at large and not for the benefit of an individual or limited class of individuals" (at p 226).

Similar sentiments appear prima facie to have been expressed in New Zealand in the cases of *Kennedy v Auckland City* (supra) and *Attorney-General v Birkenhead Borough* (supra) where objectors who had successfully sought the Court's aid in setting aside a void planning permission were denied a further remedy in damages.

It is perhaps significant that in the New Zealand cases, the claim for damages was made by objectors who had succeeded in avoiding the consent ab initio or with retroactive effort. The objectors would, of course, if any renewed application for consent were made, have their full rights to object and appeal, and thus their position is somewhat different from that of a developer who must stop his work and if necessary recommence his planning application with possibiy reduced chances of success.

To this extent any similarity between the New Zealand decision and the Australian case of 1960 may be doubted, and further the Australian case itself may now be regarded as having passed into history as concerns the developer's right to damages for a void planning consent. In the *Hull* case Nagle J, in the New South Wales Supreme

Court, declined to follow the decision of 1960, because in the intervening years major developments had taken place in the general common law of negligence, and these were held to be applicable to planning consents.

In the law of negligence generally it is now clear that an action will lie and damages may be claimed in respect of some negligent statement which causes injury in purely financial or economic terms (*Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465), whether the statement is made voluntarily or pursuant to some obligation (*Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223).

The decision of Nagle J is merely to extend to planning consents this general law:

> "The facts here are that the defendant council held itself out and was the authority to grant permission for the development sought. . . .
>
> "It received an application for the development of the area and the prescribed fee from the plaintiffs and it knew, or ought to have known that if it was to indicate the grant of an invalid approval for the development sought the plaintiffs could suffer financial loss" (at p 37).

Although the payment of an application fee in the circumstances of planning applications did not create a contractual relationship between the applicant and the Council, the necessary contractual intent being absent, the application did create a "neighbour" relationship within the principle formulated by Lord Atkin in the foremost case on the law of negligence – *Donaghue v Stevenson* [1932] AC 562, 580, between the applicant, or any other person whom the Council ought reasonably to foresee as involved in the application and the Council.

The existence of this relationship imposes upon the Council a duty of care in the determination of planning applications so that it will be liable for the reasonable foreseeable consequences, if, by itself or its employees, it breaks the duty by ignoring some factor of which it ought to have been aware, or by making some assertion without proper consideration. Thus, while not every error or defective planning consent will be negligent (eg an honest misinterpretation of the Act or scheme) it seems enough, in general terms, for the developer to show that: some affirmation of an authority to develop was given by the Council or its official (*Ministry of Housing and Local Government v Sharp* (supra)); that that authorisation was void for want of care on the part of the council or official, or because the Council or official exceeded their authority or did not do all that they ought to have done to ensure the validity of the apparent consent; that the applicant or some other person (eg a conditional purchaser) who, within the reasonably expected contemplation of the Council, is foreseeably likely to be adversely affected, financially or otherwise.

If this is a possible consequence from a formal planning application it is probable that the principles of negligence are no less applicable where, in advance of a formal application, a potential developer of land seeks the Council's advice as to the need for consent or the type of consent or the type of consent required. Such advice would be sought because of the special responsibility of the Council for planning, and because of this, the Council must be taken as having, as a matter of law, a sufficient degree of competence to give the advice. In these circumstances a preliminary request may have the same effect as a formal application as the Council and its staff must owe a duty of care to give proper advice within its area of responsibility. It would seem to make no difference to his case, no answer, that he could have found the correct information from the district scheme, or elsewhere – *Capital Motors Ltd v Beecham* [1975] 1 NZLR 576.

Of course, it may be objected that the exact facts of *Hull v Canterbury Municipal Council* could not, under the present legislation, arise in this country (regional planning authorities do not have the same powers as the State Planning Authority under the Cumberland Scheme – *Hutt County v Wellington RPA* [1972] NZLR 916. On the other hand a situation closer to the facts of *Hull's* case might arise in New Zealand where a local authority does not inform a developer of a pending designation, and the need for other consent under s 21 (8).) There is no reason though why the principle should not apply here, where a council, or council official, gives an invalid planning consent which it would reasonably know is invalid, or wrongly affirms that such consent is not required. Indeed the principle has recently been applied in the Hamilton Supreme Court to the negligent issue of a certificate of fitness for a motor vehicle, where financial loss was involved (*Rutherford v Attorney-General* [1976] 1 NZLR 403).

Thus if a Council may not be prevented from taking enforcement action against development based on an invalid consent, it may still be liable to the developer in damages for his financial loss. So in the last analysis let the Council and its planner beware – faulty advice might prove expensive.

Ponder the exorbitant value that society thus attributes unintentionally to a man's reputation – irrespective of any financial harm done to him, or of his real merits. Libel is an English figment of the inflated ego. Guardian Gazette.

TAXATION

ACCRUALS ACCOUNTING FOR TAX PURPOSES: A Review of CIR v National Bank of New Zealand Limited

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Introduction

On 17 December 1976, the New Zealand Court of Appeal gave judgment in favour of the appellant Commissioner in *CIR v National Bank of New Zealand Ltd.* Cooke J gave the Court's leading judgment. Wild CJ and Richmond P gave separate judgments stating shortly their own reasoning. The Court of Appeal was unanimous in reversing Haslam J in the Supreme Court. The bank has given notice of appeal to the Judicial Committee of the Privy Council.

The case is of considerable importance to both the legal and the accounting professions. The issues themselves – revolving around the questions of what is a profit and how and when an enterprise has to recognise a profit for income tax purposes – are of obvious significance. Perhaps of equal import, however, is the reasoning adopted by the members of the Court of Appeal. It is the writer's opinion that the Court significantly departed from the traditional method of construing revenue statutes. The judgments – particularly those of Cooke J and Wild CJ – reflect a basic policy decision in favour of the Commissioner.

The facts

In its ordinary banking business, the bank lent various customers funds by way of overdraft facilities at the ruling rates of interest. These accounts were subsequently classified into three lists – A, B and C. An "A" list customer was one in whom the bank had complete confidence. "B" list customers were regarded as being secure, but because of some departure by the "B" customer from the agreed terms of the overdraft facility, the account was not in the same class as an "A" list customer. "B" list customers required a closer supervision from the bank of the overdraft facility. "C" list customers, to use the bank's own description, had "Accounts which for some reason or other give [the bank] cause to think there may be doubts as to safety of [its] lending." The bank charged interest on the funds lent on overdraft. The interest was assessed periodically and debited to the customer's account (every six months, as is normal bank procedure). Probably the first time the customer was aware of the amount of interest charged was when he read his bank statement and saw the interest debit note on it.

The income tax position

The bank was in the business of lending money. This would normally require an accruals system of accounting. Under ordinary income principles, the interest charged to customers on the money actually borrowed under the overdraft facilities, was assessable income and subject to income tax accordingly. The Bank recognised this and treated the interest, debited to the customer's account, as a *receivable* item. The dispute arose because the Bank afforded different treatment to the interest charged to "C" list accounts – it did not return that interest *as income* as it did from "A" and "B" list accounts.

The bank explained its practice as follows:

> ". . . [W]here an account is transferred to the 'C' list it is bank practice to debit the debtor customer's account with interest in the normal way each half year but to credit the amount to 'Interest Suspense' and not to the interest profit account. If and when the account returns to within arrangements and its safety is no longer in doubt, it is reclassified to either 'B' or 'A' list, the amount of interest suspended is debited to 'Interest Suspense' and transferred to interest profit account bearing tax along with other profit items.
>
> ". . . 'C' list classification is not applied to the account until it is shown that irrespective of any arresting or corrective action we may take, the debt [ie the money lent] is not safe against the security . . . [given by the customer].
>
> ". . . [T]he bank does not necessarily make provision against the debt itself . . . but, as a precaution and to arrive at a more realistic and fair assessment of profit on lending operations, does cease to take to profit interest on the debt."

Like other Commonwealth jurisdictions, New Zealand's tax legislation reflects two systems of accounting for income tax purposes – *cash* as distinct from *earnings* or *accruals*. The systems differ in that the cash system depends on the

taxpayer actually receiving assessable income in cash whereas the earnings or accruals basis requires that the taxpayer has a claim to cash or the right to receive income. A taxpayer has no right to choose which method he adopts: he must choose the method calculated to yield: "what is in fact the correct figure for that [assessable] income ... Whilst opinion may differ as to that fact, ultimately the opinion of [the] Court will determine it", per Barwick CJ, *Henderson v FCT* (1970) 1 ATR 596, 599 (HC Aust).

It was common ground that the bank's adoption of the accruals system was correct. Indeed, the Commissioner could not have taken issue with the bank's suspense account, without this acceptance. "Accruals" or "earnings" is the basis normally used by businesses lending money.

The contentions of the Commissioner

The Commissioner based his case in the alternative. Firstly, it was argued that the 'C' list interest was a profit or gain derived from the bank's business of lending and was therefore assessable income. The Commissioner was relying on the ordinary business income provision – section 88 (1)(a) of the Land and Income Tax Act 1954 – which refers to profits or gains made in the course of carrying on business.

At first sight, the Commissioner's approach has an attractive simplicity. It was that:

(a) the interest had been earned by the bank and was quantified;
(b) the customer was "charged" – he had the bank statement;
(c) the interest so "charged" was due and was a recoverable debt owed to the bank.

The bank accepted each step. What was disputed was that the steps were *sufficient* to establish an accrued "profit or gain". The bank contended that a further step was necessary. To adopt the words of Barwick CJ, for the High Court of Australia, in *Arthur Murray (NSW) Pty Ltd v FCT* (1965) 114 CLR 314, the extra step was (p 318):

> "The word 'gains' ... refers to amounts which have not only been received but have 'come home' to the taxpayer; and that must surely involve, if the word 'income' is to convey the notion it expresses ... that the amounts received are unaffected by ... restrictions ... [so] that the situation has been reached in which they may properly be counted as gains completely made, so that there is neither legal nor business unsoundness in regarding them without qualification as income derived."

The bank's argument was that "C" list interest was not a gain "completely made"; that there was doubt as to its collection and there was "business unsoundness in regarding it without qualification as income derived".

In the alternative, the Commissioner sought to rely on s 92 – the constructive receipt provision – arguing that the amount credited to the interest suspense account was deemed, by operation of that section, to be income derived by the bank. The bank disputed this claim on several bases. The Court of Appeal did not consider, in the judgments, this branch of the case because of the view it took of the Commissioner's principal contention. It is difficult to see how this provision could have applied. In the Supreme Court Haslam J rejected the Commissioner's arguments on this branch of the case in short order and, it is submitted, correctly.

In terms of s 32 of the Act, the legal onus is on the taxpayer to prove that the Commissioner's assessment is wrong. However, because of the somewhat special circumstances of the case, the bank was able to make two preliminary points against the Commissioner.

The Commissioner's previous conduct – The bank had used the same method of accounting for income since its foundation in 1873. The Commissioner expressly approved the suspense account system in 1941 when banks were first taxed on the same basis as other business taxpayers, and had consistently followed that approval for the ensuing thirty years. The bank had to accept that the Commissioner is entitled to reverse his previous conduct and ask the Court to declare the correct principle and to proceed against taxpayers accordingly: *Europa Oil (NZ) Ltd (No 1) v CIR* [1970] NZLR 321. 393 (CA).

Second, the Commissioner changed his legal reasons for supporting the practice for which he contended. The initial correspondence showed clearly that the Commissioner originally was relying on s 92 only. The bank argued that the Commissioner had to give good reasons to show that the bank's method was wrong in these circumstances. As Haslam J remarked in his Supreme Court judgment:

> "... [T]he Commissioner['s] ... long acquiescence in the method of treating the suspended interest account, disrupted by a sudden cancellation of his former policy, and followed by a subsequent change in his legal reasons for so doing, may suggest that ... he has not elected to join issue on auspicious ground."

While the bank had the legal burden of proof, its contention that there is a heavy *evidentiary* burden on the Commissioner in such circumstances, is well supported by authority: *BSC Footwear Ltd v Ridgway* [1971] 2 All ER 534 (HL) especially Lord Reid p 538; Lord Morris p 539. The United Kingdom legislation casts the same legal burden on the taxpayer as our own.

Relevance of accounting practice – The income of a business is determined according to relevant accounting principles and commercial practices except so far as the statutory provisions require otherwise. The Commissioner can depart from such principles only with specific statutory authority: *Sun Insurance Office v Clark* [1912] AC 443 (HL) and *Union Bank of Australia v CIR* [1920] NZLR 649 (FC).

The accounting method of the taxpayer must fairly show the year's profits: In *Carden's Case,* Dixon J said [(1940) 63 CLR 108, 155]:

> "Speaking generally, in the assessment of income the object is to discover what gains have during the period of account *come home* to the taxpayer in a realised or immediately realisable form."

The bank's accounts, like those of any company, are required to conform with the requirements of the Companies Act 1955. Section 153 (1) of that Act requires that ". . . every profit and loss account of a company shall give a true and fair view of the profit and loss of the company for the financial year." This requirement involves an enquiry as to the appropriate accounting principles and commercial practices, and whether the method chosen is appropriate to the particular business involved to give a substantially correct reflex of the taxpayer's true income: *Carden's* case at p 154.

The bank's first contention was that its system of accounting for profits was strictly in accordance with accepted accounting principles and practice, that its accounts gave a "true and fair" view of its profits, and that the system contended for by the Commissioner was contrary to those requisites. In support, the bank called expert opinion evidence from its auditors, a tax consultant, a professor of accountancy, and two senior partners from two different firms of chartered accountants. In rebuttal, the Commissioner also called a professor of accountancy, a businessman closely associated with finance company operations and accounting systems, and accountants in practice.

While there was initially considerable disagreement between the members of the opposing sides, the following aspects were clearly established:

(1) A basic requirement for any system of accounting is that the approach taken must be *consistent.* It was accepted that the bank's treatment was consistent in terms of its approach. That is, it consistently took the same approach.

(2) ". . . the bank's expert witnesses established that the bank's suspended interest account was a method of accounting which could properly be adopted for financial reporting purposes . . . Clearly there are different ways of treating accrued interest of doubtful collectibility. As a matter of choice of commercial practice the bank was entitled to do what it did." (per Cooke J, Wild CJ and Richmond P agreeing.)

(3) The bank's different treatment of "C" list interest was justified in terms of the accounting principle or concept of *prudence* for financial reporting purposes.

The United Kingdom Accounting Standards Steering Committee stated in 1971 fundamental accounting concepts having general acceptability. The relevant concepts are:

> "(b) the 'accruals' concept: revenue and costs are accrued (that is, recognised as they are earned or incurred, not as money is received or paid), matched with one another . . . and dealt with in the profit and loss account of the period to which they relate; *provided that where the accruals concept is inconsistent with the 'prudence' concept . . . the latter prevails . . .*
>
> "(d) the concept of 'prudence': revenue and profits . . . are recognised by inclusion in the profit and loss account when realised in the form either of cash *or of other assets and ultimate cash realisation of which can be assessed with reasonable certainty; . . .*" (emphasis added).

The Bank's expert evidence was that these concepts have been adopted as generally being accepted principles in New Zealand.

Apply these concepts, one of the bank's experts explained the position as follows:

> ". . . [T]he concept of prudence . . . provides modifications to the application of the accruals concept and accordingly revenues are to be recognised only when realised in the form either of cash or of other assets the ultimate cash realisation of which can be assessed with reasonable certainty. . . . [W]hen there is uncertainty about the collection of an amount that is receivable, it is acceptable to defer recognition of the revenue until the time that cash realisation becomes more definite."

This statement is directly supported by the passage referred to earlier of Barwick CJ's in the *Arthur Murray* case.

The bank's second contention was that its accounts, by not taking "C" interest into interest profit, were prepared in accordance with the requirements of income tax legislation. It was on this second contention that the Court of Appeal reversed Haslam J and held that the bank's treatment was unacceptable for income tax purposes.

The reasoning of the Court of Appeal

The Commissioner's case can be seen in two parts. Following the reasoning of Cooke J in the Court of Appeal, the first part was that the scheme of the income tax legislation *required* the "C" list interest to be brought into the interest profit account. The second part was that the bank's treatment did not "give a substantially true reflex of the taxpayer's true income" applying the test in *Carden's* case.

The "requirements" of the tax legislation – The Commissioner, unable to point to any express statutory language, argued that the deduction provisions, especially ss 111 and 112, required *by inference* that the "C" list interest be returned as business income in the year of accrual.

The only analysis of the Commissioner's submission was made by Cooke J. Wild CJ agreed with his reasoning and Richmond P shortly stated his own reasons. Cooke J reasoned as follows in accepting the submission:

(1) Section 111 is the general provision defining the expenditure or loss which a taxpayer may deduct in calculating his assessable income.

(2) Section 112 expressly overrides s 111. Section 112 prohibits deductions made with respect to bad debts. The only bad debts allowed as a deduction are "(s 112 (b)) . . . debts which are proved to the satisfaction of the Commissioner to have been actually written off as bad debts by the taxpayer to the income year;"

(3) "Prima facie, the policy of [s 112 (b)] appears . . . to have a simple rule, rather than to leave a great deal of room for the exercise of discretion by the taxpayer in calculating the gross income. . . . [T]he legislature apparently presupposes that all trade debts will automatically be brought into account . . ."

(4) "It would undermine such a rule and policy if the taxpayer could refrain from bringing an alleged bad or doubtful debt into account at all."

(5) There is a practical inconsistency between the apparent statutory scheme and the bank's system. If the interest in suspense is ultimately written off it is not claimed as a deduction. The effect of the system is to keep debts ultimately said to be bad out of the income calculations altogether.

(6) There is the position in the United Kingdom to be considered. The UK legislation allows the deduction of doubtful debts to the extent that they are estimated to be bad. New Zealand has never introduced any equivalent of the United Kingdom provisions regarding the deduction of doubtful debts.

(7) "Parliament cannot reasonably be supposed to have contemplated that, although bad debts must be brought into account in calculatin the income of a business (subject to writing off merely doubtful debts can for the time being b ignored altogether for tax purposes."

In the writer's submission, the learned Judge' method of interpretation, avowedly based on policy inferred from the Act, is contrary to th well-established and accepted principles fo construing revenue legislation. The most recen definitive statement for New Zealand is the Priv Council's judgment in *Mangin v CIR* [1971] NZLR 591 (JC). Lord Donovan said:

> "First, the words are to be given thei ordinary meaning. They are not to be give some other meaning simply because thei object is to frustrate legitimate tax avoidanc devices . . . .
>
> "Secondly, 'one has to look at what i clearly said. *There is no room for an intendment.* There is no equity about a tax *There is no presumption as to tax. Nothin is to be read in, nothing is to be implied.* On can only look fairly at the language used' (pe Rowlatt J in *Cape Brandy Syndicate v IR* [1921 1 KB 64, at p 71, approved b Viscount Simonds, LC, in *Canadian Eagle Oi Co Ltd v R* [1946] AC 119 . . ." (emphasi added).

To this may be added two further statements. I *Shop and Store Developments Ltd v IRC* [1967] AC 472, 493 (HL) Lord Morris of Borth-y-Ges said:

> "[T]he decision . . . calls for a full and fai application of particular statutory language t particular facts as found. *The desirability o undesirability of one conclusion as compare with another cannot furnish a guide i reaching a decision"* (emphasis added).

In *Saunders v IRC* (1957) 37 TC 416, 436 Lor Reid said:

> "If the words of a statute are reasonabl capable of two interpretations it is right t adopt that which will [protect the tax base provided that this course does not lead t some other difficulty or injustice."

The approach taken by the Court of Appeal i based on a policy inferred from the scheme of a Act which, in turn, is inferred from a provisio which does not contain any specific statutor language directly relevant to it. The polic discerned – an "inference upon an inference" – could be exactly what the Legislature intended However that may be, the approach ordinarily t be taken in tax cases is that a Court is no entitled to adopt a *policy* attitude in construin tax legislation. Upholding the bank's system woul have caused no practical difficulty and would no have been inconsistent with any specific languag of the Act. It would have been quite consisten

with the present provisions as to bad debts. A strict construction supported the Bank's position.

To this may be added a further criticism of Cooke J's approach. To adopt the second part of Lord Reid's statement in *Saunders'* case; Does the Court's approach lead to some other difficulty? This question must be answered, Yes. There are two reasons.

The learned Judge began by considering ss 111 and 112. Each deals with deductions. With due respect, that approach begs the question. The reason is that to rely on the inference drawn from those sections, his Honour had firstly to assume that the "C" list interest *was income.* That was the very question that had to be answered. It was the bank's case that the "C" list interest was not "income" because it would be imprudent to consider it as a profit in the year of accrual. It was for this reason that Haslam J in the Supreme Court rejected the Commissioner's submission. Haslam J said:

> "Our s 112 (1)(b) by definition relates only to debts which have already been credited to income account before the procedure of writing off has been embarked on. It is, in any event, a deduction section, and the only reference to income therein is found in the proviso, . . . In my view, s 112 (1)(b) does not help in determining whether interest recorded in the interest suspense account has . . . 'come home' to the bank within the meaning of Dixon's words [in *Carden's* case] . . ."

The writing off of a bad debt, in terms of s 112 (1), is the writing off of a debt which was taken into profit because, at the time of account, it was considered good but which is subsequently considered to have become bad. The bank's case was that "C" list interest was doubtful and was therefore not taken into profit. It was not safe enough to be considered "income" in terms of the prudence concept adopted.

Finally, regard should be had to the statements made by members of the House of Lords in *Absalom v Talbot* [1944] AC 204. Cooke J, after considerable discussion of various aspects of the case, did not regard it as conclusive. However, the learned Judge clearly recognised that it gave some support for the bank's position. Cooke J said:

> ". . . [T]here are some statements in the speeches telling to varying degrees against finding an implication in the statutory provision about deducting bad debts. . . . In short, it was pointed out that what constitutes the profits or gains from a business is not necessarily to be implied from a statutory rule about deductions."

The second aspect which causes difficulty concerns the Court's acceptance of the bank's accounting practice. Cooke J said (both Wild CJ and Richmond P agreeing):

> ". . . I think that the bank's expert witnesses established that the bank's suspended interest account was a method of accounting which could properly be adopted for financial reporting purposes."

The Court must therefore be taken to have accepted that the bank's profit and loss accounts were in accordance with s 153 of the Companies Act; they gave a "true and fair" view of the bank's income. If that is correct, how can it be that the bank was required to include, under tax law, "C" list interest as *income*? As Barwick CJ said in *Henderson's* case (p 599):

> ". . . [U]nless the method of computation yields what is in fact the correct figure for that income it cannot be said to be appropriate . . . or to be not inconsistent with the provisions of the Act."

Either the bank's accounts did give a substantially true reflex of its income or they did not. If, as the Court held, the income was understated because "C" list interest was not included, the accounts for income were wrongly computed. Accordingly, they could not be giving a "true and fair" view unless the Commissioner's method gave a "truer and fairer" view. In a paper delivered to the Commonwealth and Empire Law Conference, entitled "Modern Problems in Company Law" Mr Justice Wallace, formerly President of the New South Wales Court of Appeal, said:

> "It is a little difficult for a lawyer to detect why either expediency or the practice of the accountancy profession can authorise departure from ordinary principles of construction applicable to a statute. . . . Of course one recognises the difficulties and perplexities involved in many cases in translating the 'true and fair' directive into action . . . To me, the word 'true' (curiously enough) simply means what it says."

The effect of the Court's decision is that it was of the opinion that the bank's accounts did not give a true reflex of its income position. The added qualification "*for income tax purposes*" is sterile. If "C" list interest was required to be returned as interest profit, it was not because the tax legislation said so, but because the accounts, without it, did not give a true reflex of the bank's income position. Cooke J actually said so: ". . . [The Commissioner] must show that a change . . . gives a *truer* picture of the taxpayer's earnings in each income year" (emphasis added). There cannot be degrees of "trueness" on a question of fact. It is submitted that the Court of Appeal's answer to the taxable income question cannot be reconciled with its acceptance that the bank's accounts gave a true view of its income. The failure to apply the

reasoning of Barwick CJ in the *Arthur Murray* case, and determine the question as one of fact, is unfortunate.

The authorities – The Court had the benefit of extensive citation of authorities from Commonwealth and United States jurisdictions. Cooke J was the only member of the Court to consider these cases in detail. His Honour concluded:

> ". . . I think the authorities show that *the Act requires a true view or reflex of the taxpayer's annual income;* and that when interest has been earned and charged by such a business, and assets consisting of current book debts of substantial value have thereby been gained, *the annual income cannot be ascertained with reasonable accuracy without taking those debts into account*" (emphasis added).

The writer respectfully agrees that the authorities show exactly that. What they do *not* show however, is that the *total* current book debts have to be included to give the correct reflex of income. The cases admit an exception which, the bank argued, applied to its position.

Of the jurisdictions examined, the United States decisions are of particular importance. The bank relied on four decisions of Circuit Courts of Appeal (the highest Federal jurisdiction except for the Supreme Court of the United States). The Commissioner relied on a decision of the US Supreme Court which, with respect, was completely reconcilable with the cases relied on by the Bank.

The US decisions were important because, on both sides, the accounting experts considered that American accounting practice was highly persuasive in relation to desirable treatment in New Zealand. The official US accounting practice guides directly supported the bank's suspense account treatment argument that an accruals system can be modified. Further, acknowledged leading UK and US texts on auditing and accounting contained passages referring to the bank's practice and approving it.

The US decisions relied on by the bank are in conformity. Three were decided after the Supreme Court case relied upon by the Commissioner and all are reconcilable with that decision. These decisions hold that income in doubt should not be taken into account unless it is regarded as collectible. The US, UK and New Zealand accounting practice support that view.

The *Spring City Foundry Co v CIR* (1934) 292 US 182 (Supreme Court) decision stated:

> "Questions relating to allowable deductions under the income tax act are quite distinct from matters which pertain to an appropriate showing upon which credit is sought. It would have been proper for the taxpayer to carry the debt in question in a suspense account awaiting the ultimate determination of the amount that could be realised upon it, . . ."

Of the Circuit Court of Appeal decisions, Cooke J said:

> "They recognise that interest earned by a business is usually accruable when the right to receive it is fixed, and not when it is actually received, but they do admit an exception."

The exception the learned Judge referred to is stated in *Clifton Manufacturing Co v CIR* (1943) 137 F 2d 240 thus:

> ". . . [I]t is not accruable as long as reasonable doubt exists as to the amount that is collectible by reason of the financial condition or insolvency of the debtor . . . but . . . should be accrued and reported as income when its collectibility is assured."

When regard is had to the official pronouncements of the US accountants' body, and the recognised auditing and accounting text books, which support the bank's practice, it is submitted that the bank had very powerful support for its practice. The Commissioner's own witness – a professor of accountancy – placed substantial reliance on the American influence. He would have had to concede that the US official statements of accounting principle expressly authorised the modification of an accruals system in certain circumstances. The theory behind the bank's practice was firmly established by American accounting principle and practice, and by the US cases. The position in the United Kingdom is referred to in Haslam J's judgment. That learned Judge cited Spicer and Pegler's *Practical Auditing* (14 ed, Biggs) which reads (p 184):

> "When the auditor does not consider the debt fully secured . . . he should see that proper provision is made to cover any possible loss. Where interest has not been paid, it is sometimes left out of account altogether. This prevents the possibility of irrecoverable interest being credited to revenue . . . *[I]n the case of banks . . . it is usual to find that interest is regularly charged up, but when its recovery is doubtful the amount thereof is* either fully provided against or *taken to the credit of an Interest Suspense Account which is carried forward, and not treated as profit until the interest is actually received"* (emphasis added).

The US text, *An Introduction to Financial Accounting,* by May Mueller and Williams, (Prentice Hall) states (p 350):

> ". . . [W]hen the degree of uncertainty regarding the ultimate collection of cash is high (most frequently when the collection period extends over a long period of time) recognition of revenue is sometimes deferred . . ."

Summary

The criticisms of the Court of Appeal's reasons for judgment are based on the following factors:

(1) The cases, particularly *Ostime v Duple Motor Bodies Ltd* [1961] 2 All ER 167 (HL) and *BSC Footwear Ltd v Ridgway* [1972] AC 544 (HL), show that a long-accepted system of accounting for tax purposes should not be changed by compulsion unless the Revenue can show good reason. Cooke J said in his judgment: "I am prepared to assume that in New Zealand such a history casts an evidentiary burden on the Commissioner . . ."

(2) The Court of Appeal accepted, as did Haslam J, that on the basis of the expert evidence presented, the bank's suspense interest account was justified and acceptable in terms of accounting theory and practice. The official statements of the US, UK and NZ accounting bodies recognised that the principle of *prudence* overrode a pure accruals basis because collectibility of debts was in doubt. *Spicer and Pegler*, an authoritative text on auditing, expressly refers to the bank's practice and approves it.

(3) The Courts accepted that the correct test was whether the taxpayer's method ". . . is calculated to give a substantially correct reflex of the taxpayer's true income" per Dixon J, *Carden's* case. The learned Judges each expressly stated that the bank's income statment was truly and fairly presented for financial reporting purposes. Yet, these are parallel enquiries because there is only one "correct" income. It is a question of fact: *Henderson's* case. There is only one true reflex and there cannot be degrees of "trueness". The test propounded by Dixon J in *Carden* uses language remarkably similar to that in the "true and fair" view provision of the Companies Act. It could be that Dixon J had this requirement in mind in *Carden's* case because the language used in the *Carden* test is remarkably similar to the "true and fair view" requirement.

(4) There is no specific statutory language supporting the Commissioner's case. It is submitted that there is nothing to support the Court of Appeal's construction, based on implication, which does not involve begging the question as to "income" and accepting that there can be degrees of correctness in calculating income for the purposes of financial reporting and tax accounting.

(5) The Court's judgment allows the bank to overstate its profits because it was clear that at least 20 percent of "C" list interest would never be recovered. Overstatement of profit cannot be justified. Understatement cannot be supported either, but the Court accepted the bank's experts that its accounts gave a true view of its profits.

An alternative: the question of valuation

The Commissioner's case was advanced on an "all or nothing" basis. The accounting evidence established that the "C" list interest was not all receivable in the year of accrual. That is, the bank had no hope of recovery in the immediate future, of *all* the interest credited to the suspense account.

The Court of Appeal was obviously influenced, however, by the bank's actual recovery history of "C" list interest.

The bank justified its practice on the "prudence" concept. Its view of "C" list customers was that its ultimate realisation of interest was *in doubt*. In his judgment, Wild CJ said:

> "In fact an analysis of the records placed before the Court show that of the total amount taken to profit or written off during the years 1936 to 1973 inclusive 64.69 percent was taken to profit and only 35.31 percent was written off. During all the years from 1941 to 1973 80.374 percent was taken to profit and only 19.65 percent was written off."

Faced with these recovery rates, the Court obviously thought it was unreal for the bank to contend, as it did, that the "C" list interest was so doubtful that it could not properly include any of it as income in the year of accrual. The genuineness of the bank's assessment of its "C" list customers was never questioned – the point was simply that the bank had a recovery history of better than sixty percent, indeed eighty percent over some years, which demonstrated that it definitely had an income value. It certainly would not have sold those debts for nothing.

Faced with this recovery history, it seems clear that the Court was not prepared to accept that *none* of the "C" list interest should be regarded as interest profit. The Court decided that it should *all* be so treated, even though the bank clearly established that at least 20 percent was not ever recoverable. It can be argued that the bank's approach is not satisfactory either. The question is: What is the substantially true reflex of the bank's income? Would a "true" reflex require a valuation?

Cooke J's analysis of the United Kingdom cases clearly shows support for such an approach. In the Privy Council's decision in *Gleaner Co v Assessment Committee* [1922] AC 169 (JC) Lord Buckmaster expressed the view that a trader was not permitted to limit the accrual of income in terms of that which he actually received. He must estimate the value of the debts that have accrued to him in the year's trading. The United Kingdom legislation expressly makes provision for doubtful debts. What is required is a valuation of the asset

"to be judged with regard to its soundness as an estimate upon the then facts and probabilities" per Rowlatt J, *Anderton & Halstead v Birrell* [1932] 1 KB 271.

Several of the cases – decisions of the House of Lords – discussed by Cooke J set out the requirements for a valuation. His Honour treated *Gold Coast Selection Trust Ltd v Humphrey* [1948] AC 459 (HL) as a leading authority. Viscount Simon, giving the opinion of the majority, said (p 472-3):

> "In my view, the principle to be applied is the following. . . . [W]hen a trader in the course of his trade receives a new and valuable asset, not being money, as the result of sale or exchange, that asset, for the purpose of computing the annual profits or gains arising or accruing to him from his trade, should be valued as at the end of the accounting period in which it was received, even though it is neither realised nor realisable till later. The fact that it cannot be realised at once may reduce its present value, but that is no reason for treating it, for the purposes of income tax, as though it had no value until it could be realised. . . . If the asset is difficult to value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible."

The United Kingdom, however, makes specific requirements for the treatment of "doubtful" debts. New Zealand has no similar legislative regime.

Having reviewed this, and other authorities to the same effect, the learned Judge returned to the basic question: Did the bank's treatment give a true view of the profit? Cooke J said:

> ". . . [I]t is hard to see how interest earned and having some substantial value, even if less than face value, could be ignored in trying to give a true view of the profit in any particular year."

In spite of the expert accounting evidence, it is submitted that his Honour's conclusion can be supported, when seen in the light of the bank's recovery history. "C" list interest was obviously not worthless in terms of income. The bank did not claim it was. More important, however, it is hard to see how the Court of Appeal's requiring of the bank to include *all* the "C" list interest in its interest profit account, when demonstrated to be worth substantially less than face value, gave a "truer" view of its income in any particular year. It plainly did not. At least twenty percent would never be recovered, on the history of which the Court placed emphasis, and a large percentage was not recovered in the year of accrual. In considering the question of valuation, two aspects are important. Firstly, it costs money to realise overdue book debts – realisation of securities, negotiations, and the like. Secondly, while the bank's ultimate collection rate was about 80 percent, that was achieved over a period of some years after the debts first became receivable. Accordingly, the present value would need to be discounted. If the recovery rate was about eighty percent, but only after several years, and at added expense, it seems that a proper valuation would have been considerably less than fifty percent. Cooke J said:

> ". . . [W]hether the bank could mitigate its position by bringing in doubtful interest debts at individual valuations is not now in issue. I express no opinion on it."

Against this background, it is to be noted that the percentages which influenced the Court were "global" in the sense that they were based on hindsight and not an analysis of each debt forming the suspended interest account. The valuation or "worth" approach taken by the Court of Appeal in reaching its decision would have to be translated, by the bank, into an individual examination and assessment of the value of each debt; this enquiry to be made after having first determined which customers were to be placed on the "C" list. The subjectiveness of the second step is obvious and its practicality must be questioned. The Court of Appeal was, it is suggested, somewhat over-influenced by the global rate of recovery and did not attempt to put the percentages into their perspective by analysing how, and over what period, they were achieved by the bank.

The Commissioner did not contend for a "valuation" and neither did the bank. In the circumstances, it is submitted that the view of the bank's experts, having established the propriety of the system for accounting purposes, should have been fully accepted. The enquiry is parallel in terms of the "true and fair" view and the "correct reflex" requirements. The prudence concept fully justified the bank's treatment. A valuation is even more subjective than the customer classification, and the Court of Appeal was very concerned by the "subjective" element of the bank's treatment. To a large extent the Court was influenced by the "flood gates" argument; if the Bank can determine a modification of its accruals system, so can other taxpayers who may not be so reputable. In the absence of specific statutory language, and in the face of powerful accounting evidence supporting what is a factual assessment of the bank's income it is submitted that the Court of Appeal's approach cannot be justified.

The adjustments issue – In establishing his basis of assessment, the Commissioner relied on s 92A. This section was enacted by Parliament

immediately after the decision of the High Court of Australia in *Henderson's* case. The Commissioner tried to reassess the bank by adding back a proportion of the sum held in interest suspense. The argument is fully recorded in the judgments of the Court of Appeal, and especially those of Wild CJ and Cooke J. Suffice it to say here that the Court was emphatic that the Commissioner could not rely on s 92A to bring those amounts suspended into interest profit before 1972. At that time the suspended interest account was $207,168.32. As the Commissioner succeeded on the main issue, the Court reserved leave to both parties should any dispute arise on the qualification of the amended assessments required by the Court of Appeal's judgment. The Commissioner exercised that right on 26 April 1977 and addressed further argument to the Court of Appeal. Basically, the Court of Appeal's earlier judgment suggested that the money credited to interest suspense before the 1972 year (when the Revenue first took issue with the bank) amounting to some $150,000.00 could not be taxed. Not surpisingly, the Commissioner did not share the bank's interpretation of the Court's judgment, and sought clarification.

The Commissioner argued that, even though the Court held him wrong on the s 92A method of adjustment, nevertheless he was still entitled to assess the bank on the interest in suspense prior to 1972 as it was received by the bank or otherwise reclassified into "A" or "B" list in subsequent years and should be taxed in the year of receipt. In short, the Commissioner suggested that it would be absurd if the money was never taxed, and the only way of doing so was to assess it when it was actually received. The bank formerly accepted that view – in the sense that it treated "C" list interest as profit on a cash basis – and returned its income accordingly. However, since the Court of Appeal disagreed with the bank on the main issue, holding that a pure accruals basis was necessary, the bank was able to argue that the Commissioner's view could not now be correct. The Bank argued that the Commissioner was bound by the pure accruals ruling. Since the interest had accrued as income in the year it was debited to the "C" list customer's account, as held by the Court of Appeal, it was *derived* in that year and was taxable accordingly in that year. Relying on the *Henderson* case the bank argued at the second hearing that the money could only be included as income in the year of derivation and in no other year subsequently. It could only be taxed in the year of accrual. After hearing arguments on this question, the Court gave oral judgments upholding the bank's contention and followed *Henderson's* case. As Cooke J pointed out in his main judgment (of 17 December 1976) *Henderson's* case held:

> "... that there cannot be any warrant in a scheme of annual taxation upon the income derived in each year of taxation for combining the results of more than one year in order to obtain the assessable income for a particular year of tax."

Conclusion

The case shows clearly a very unsatisfactory state in New Zealand's legislation for tax accounting and accounting for financial reporting purposes. Apart from the tax legislation failing to deal with the two systems it reflects – cash and accruals – the real defect is in apparently allowing for different concepts of "income". If the Court of Appeal's decision is upheld, should the bank prosecute its appeal to the Privy Council, it means that doubtful debts, with a proven record that a percentage will be *bad,* have to be returned as income in the year of accrual. That inevitably overstates, or at least, allows for the overstatement of profits, and that is an unjustifiable situation. It may well be necessary to enact a doubtful debts provision similar to that operating in the United Kingdom.

The important point is that there is no *need* for a dual system of reporting income. It is highly desirable that the "income" concept is standard for both tax and financial reporting purposes. The Court of Appeal's judgment overlooks, it is submitted, this aspect of the case which is of considerable practical importance.

Furthermore, the case demonstrates the tension between the requirements set by legal standards and those adopted by the practising profession to which those standards relate. The readiness of our Courts to impose standards materially different from those imposed by the principles and theory developed by the profession responsible over a long period, must cause some concern. When these features are coupled, as they are in the case of the National Bank, with the reversal of a long standing practice expressly approved by the Commissioner in a ruling of 30 years standing, the confidence of the accounting profession must be undermined. The evidence suggests that the bank is the only one which decided to pursue the matter as a question of principle. While it lost in the Court of Appeal there must at least be some consolation for it from the effect of the Commissioner's approach on the issue of adjustment. The result, confirmed in the Court of Appeal's second judgment, is that the bank has a "windfall" of about $150,000 which cannot be taxed. In these circumstances, perhaps the Privy Council is too much of a risk.

Two UK cases, relevant to the *National Bank* case, have recently been reported. In *Willingale (Inspector of Taxes) v International Commercial*

Bank Ltd [1977] 2 All ER 618 the Court of Appeal considered the application of the accruals system to anticipated profits from maturing bills of exchange. The Court held by majority that the bank could not be required to accrue, as income, the increment from the value of the maturing bills in each income year. Leave to appeal to the House of Lords was granted. In *Pearce (Inspector of Taxes) v Woodhall – Duckham Ltd* [1977] 1 All ER 753, Templeman J considered the effect of a change of accounting methods in assessing the taxpayer's profits. The taxpayer changed from cash to accruals for the year ending December 1969. The company showed in its accounts over $1 million as being profit arising from the change in valuation, but argued that sum could not be taxed. The Court held that the taxpayer was bound by its accounts and the money was properly taxed in the year in which it was brought to account. This case was referred to the Court of Appeal in the *National Bank* case and distinguished by the Bank at the second hearing. The Court's judgments do not consider the case.

INTERNATIONAL LAW

THE INTERNATIONAL COMMISSION OF JURISTS: 25th Anniversary Commission Meeting at Vienna in 1977

Mr D J HEWITT, *a Christchurch Barrister reports*

While on a recent tour of Europe I was invited, as a member of the Council of the New Zealand section, to represent it at the 25th Anniversary Meeting of the International Commission of Jurists at Vienna. As an observer I found the experience most rewarding.

The proceedings (to which the ladies were invited) began in the beautiful Palais Trautsohn, the opening speech being made by Ambassador T S Fernando, President of the International Commission of Jurists. He was followed by the Secretary-General, Niall MacDermot, who spoke on the policy and activities of the Commission since its inception in 1952, which may be summarised briefly as follows:

"The activities of the International Commission of Jurists in recent years have continued to be directed to the positive promotion of human rights and their legal protection and also to the study and publicising of violations of human rights and the Rule of Law.

"A great deal of the activity for the positive promotion of human rights has taken place within the United Nations, pursuant to the consultative status enjoyed by the International Commission of Jurists with the Economic and Social Council. This activity has included making reports and oral and written submissions to various United Nations bodies, either alone or jointly with other international non-governmental organisations, and lobbying governmental delegations and members of United Nations bodies in support of the proposals put forward.

"The subjects covered have included proposals for improving procedures for considering and acting upon human rights violations; the elimination of racism and racial discrimination and apartheid; the protection of prisoners and detainees against torture, ill treatment, arbitrary arrest and detention; the protection of human rights in armed conflicts and the revision of the Geneva Conventions; the rights of non-citizens and migrant workers; the promotion of regional human rights organisations; and the ratification of the international convenants on human rights.

"The staff of the International Commission of Jurists has carried out a comparative study on the legal protection of the right of privacy. The study which was commissioned by UNESCO surveyed the existing law in ten countries dealing with the impact of technological developments on the right to privacy; the general law prevailing in the ten countries, specific intrusions into privacy and the public disclosure of private information. Finally, the study set out certain conclusions and recommendations for the adequate legal protection of privacy.

"The International Commission of Jurists has been active in several ways in the international campaign against the torture of prisoners and detainees. Many of the studies on situations of gross violations of human rights have included detailed information about torture practices, and have pointed to the defects in the legal systems which encourage and make possible these practices. A draft Code of Conduct for Lawyers was prepared for use in connection with Amnesty International's campaign against torture.

"The International Commission of Jurists has continued to follow and further the development of international humanitarian law for the protection of victims of war. A resolution drafted by the Commission on improved procedures for investigating violations of human rights in armed conflicts was distributed by the Geneva Special NGO committee on Human Rights to all members of the General Assembly.

"In regard to the right of asylum, one of the most serious human rights problems is the

protection of refugees from political persecution. The International Commission of Jurists has maintained close contact with the office of the United Nations High Commissioner for Refugees, in relation to individual cases and to the general advancement of international law and procedures to safeguard refugees."

The Secretary-General added: "Another subject which has given much cause for concern is the protection of lawyers who are persecuted or threatened with persecution for carrying out their duties. The Commission has been consistently active in this field.

"A seminar on "Human Rights, their Protection and the Rule of Law in a One-Party State" was held by the International Commission of Jurists in Dar-es-Salaam in 1976, with the blessing of President Nyerere. This seminar marked an important development in the activities of the Commission, since it was the first occasion upon which the Rule of Law and the protection of human rights had been discussed other than in the context of a multi-party parliamentary democracy. There have been numerous studies and reports of violations of human rights undertaken by the International Commission of Jurists in such countries as East Pakistan/Bangladesh; Greece; Turkey; Uruguay; Chile; Uganda; Southern Africa; Rhodesia and Iran.

"In addition to these activities of the International Commission of Jurists there have been many publications; press releases, radio, television and press interviews; private interventions with governments; international conferences and seminars, and observers at trials."

After the above report of the Secretary-General, His Excellency, the Austrian Federal Minister of Justice, Dr Christian Broda, through whose courtesy the Palais had been made available to the Jurists, gave an address of welcome to the Commission and assured it of the continuing support of his government. The meeting then adjourned to a reception given in its honour by the Federal Minister of Justice.

After the luncheon and adjournment we all met in the International Atomic Energy Agency building which was closely guarded by the police. The room provided was elaborately equipped and there were simultaneous translations into four languages, namely, English, French, German and Spanish. As each speaker was invited to speak (for not longer than 10 minutes) it was possible for those present to operate the switches from their seats and thus listen in any one of these four languages.

Among the many who spoke were the Hon Michael A Triantafyllides, President of the Supreme Court of Cyprus, the Hon Manfred Simon, a great Administrative lawyer and formerly the Conseiller d'Etat; Paul Sieghart, Joint-Chairman of the Executive Committee of "Justice" and Thomas Sargant, the British Secretary of "Justice," who spoke about the Ombudsman. Sargant was of the opinion that with the heavy burden of work now falling upon the Courts, the Ombudsman principle should be extended.

After the plenary session the meeting then divided into three Committees, namely (1) "The International Implementation of Human Rights (including fact-finding procedures and tribunals of enquiry." (2) "The Rule of Law in Emerging Forms of Society and under Military Regimes" and (3) "Minority Rights, their scope and protection."

The Reports of Committees 2 and 3 to the closing plenary session may be briefly outlined as follows:

"THE RULE OF LAW IN EMERGING FORMS OF SOCIETY IN ONE-PARTY STATES

"The Commission discussed the problems of the Rule of Law in the One-Party State with particular reference to the seminar on that theme held in Dar-es-Salaam in September 1976, which was attended by participants from 6 countries of East and Central Africa. The Commission welcomed the initiative taken by the Secretariat and the Executive Committee in providing for the discussion of the complex and important issues involved, and urged that future meetings of this kind should be arranged.

"The Commission was of the view that there were dangers of abuse of power inherent in one-party systems which were less likely to arise if there existed an effective multi-party system. Human rights could, however, be endangered by ineffective attempts to duplicate multi-party systems without due regard to cultural traditions and the historical development of particular countries.

"The Commission was pleased to note the real concern shown by all delegates at the seminar that the Rule of Law and human rights should be preserved in the countries from which they had come and agreed that the achievement of this goal would be facilitated if the following principles propounded at the seminar were actually observed.

"Electoral freedom of choice is essential to any democratic form of society. The party should guarantee genuine popular choice among alternative candidates.

"Everyone should be free to join the party or to abstain from party membership or member-

ship in any other organisation without penalty or deprivation of his or her civil rights.

"The party must maintain effective channels of popular criticism, review, and consultation. The party must be responsive to the people and make it clear to them that this is party policy.

"In a one-party state it is particularly important that

"(a) the policy-forming bodies of the party utilise all sources of information and advice, and,

"(b) that within the party members should be completely free to discuss all aspects of party policy.

"The independence of the judiciary in the exercise of its judicial functions and its security of tenure is essential to any society that has a respect for the Rule of Law. Members of the judiciary at all levels should be free to dispense impartial justice without fear in conformity with the Rule of Law.

"The independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed. They should enjoy complete immunity for actions taken within the law in defence of their clients.

"Facilities for speedy legal redress of grievances against administrative action in both party and government should be readily available to the individual.

"The absence of an opposition makes it essential to provide mechanisms for continuous, impartial, and independent review and investigation of administrative activities and procedures. In this respect such institutions as the ombudsman and mediateur with powers to initiate action can be usefully adopted.

"In a one-party state, criticism and freedom of access to information should be permitted and encouraged.

"The right to organise special interest associations such as trade unions, professional, social, religious or other organisations, should be encouraged and protected. Such organisations should be free to affiliate or not with established political parties.

"MINORITY RIGHTS

"The Commission agreed upon the following statement of principles concerning minority rights:—

"In this statement of principles the term "rights of minorities" refers to the rights of non-dominant groups. The gross violation of human rights involved in the domination of a people by a minority group, such as occurs in South Africa, Zimbabwe/Southern Rhodesia and Burundi has no place in the subject of minority rights.

"The right of an ethnic minority to enjoy its own culture, of a religious minority to profess and practise its religion, and of a linguistic minority to use its language is now recognised in international law under Article 27 of the International Covenant on Civil and Political Rights. Serious or persistent violations of these rights are, therefore, a proper matter of international concern.

"While the problems of minorities have certain common elements, the analysis of the solution to any particular minority issue must take into account the political, economic, geographical, social and historical context in which it arises.

"Preservation of minority cultures is important to the happiness and well-being of the individuals who belong to the minorities and may contribute to the enrichment of the life of the nation as a whole."

More than 50 Jurists from all parts of the world were present at the meeting, the British section being led by Lord Gardiner. It was indeed an honour to have the opportunity of attending such a gathering of lawyers with unusual talent and expertise.

A total of 21 governments helped the Commission financially and twelve of them are doing so on a continuing basis. Seven of the governmental contributions came from Third World countries. The remaining contributions are from North America, Australia, New Zealand, Western Europe and recently Greece. At the beginning of 1977 an important grant was received by the Commission from the Ford Foundation to be spent over a period of three years. A particularly encouraging feature of this grant was that it was the outcome of a profound study by the staff of the foundation of the whole field of human rights. This led them to conclude that it was the work of a few specialised non governmental organisations including the Commission, which merited support.

On the less formal side there were invitations (all printed in German) to attend a reception given by the Federal President, Dr Rudolf Kirchschlager, at the Imperial Palace; a reception given by the Lord Mayor of Vienna, Dr Leopold Gratz at the Town Hall; a dinner party hosted by the Chairman of the Austrian Peoples Party, Dr Josef Taus; a lunch given by the Zentralsparkasse der Gemeinde, Wien; a guided tour through the new United Nations Centre; and a reception given by the Austrian Liberal Party at the Hotel Hilton.