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PREPARING FOR LAW

A combination of academic and practical training is a prerequisite to entry into the practice of the recognised professions. The deficiencies inherent in the present arrangements for practical training for lawyers have already been commented on (see [1978] NZLJ 489) and should not be allowed to detract from the fact that practical training is necessary. Now the present situation is that the universities are producing law graduates who want to embark on the practice of their chosen profession but cannot because no one wishes to employ them. As three years practical experience in a legal office is a prerequisite to practise on one's own account this circumstance at present effectively precludes them from the private practice of the law and from entry to the profession they have spent five years preparing themselves for.

Responses to this vary. Graduates, with some justification, feel that having come so far they should not be frustrated in their aim, that the opportunity for practical training should be made available to them, and that they should then be allowed to sink or swim. Of those in practice, some feel an obligation to assist; others, supported by long tradition, simply take the view that market forces are market forces and law graduates are not the only ones looking for employment.

However one views it the end result will be that a number of law graduates will turn to second choice employment in business, or Government or some other field. While their legal education will stand them in good stead, much of it, probably as much as two years of it, dealing as it does with detailed topics of particular relevance to private practice, will be singularly useless. Bruce Slane, President of the Auckland District Law Society in a recent address expressed concern "at what could be regarded as a waste of resources in educating far too many students for law". He went on to say "I believe that there will be a place in the commercial world for some of them. The law graduate has largely been ignored by commerce to its great loss. But I cannot see that a situation in which the number of students at our universities is not much less than half the number of lawyers in practice can be maintained, or, if it is, that it would be in the public interest to train so many lawyers. On the other hand I would not like to see a situation develop in which only the very academic – the examination passers – can get into university law schools. We still need those who are motivated to help people."

At the moment the emphasis is on graduate employment, as this is where the bottleneck is. It might be fairer for all concerned for supply to be mated with likely demand at an earlier stage. It would certainly be less wasteful.

The obvious means of achieving this is by limiting the places available in law schools and either making the law a post-graduate degree as in a number of American universities or basing entry on a certain standard in specified preliminary subjects as is the case with entry to medical schools in New Zealand. While this may be seen as favouring the academic it should not discourage the diligent who bring to legal practice a most necessary quality. In any case there is a tendency on the part of employers to prefer those who have done well in their law degree so to some extent there is a preference for those who do well academically in any event.

What then of those who seek a legal education but with business or Government in mind? While topics have come and gone, the structure of the law degree has remained without significant change for as long as most of us can remember. It is very

much geared towards producing lawyers, not businessmen or civil servants. It may well be that their interests, and the interests of any others who feel in need of a measure of legal education, could be better served by means other than their obtaining a law degree.

For some years the Bachelor of Laws course has taken four years to complete with an additional year for those who intend to enter private practice. That was intended to go part of the way towards meeting the position of those who did not intend to practise. Given, though, that so many are interested in studying law and of those so few compared with yesteryear will finally practise law on their own account there is reason for suggesting that a much more radical review of the place of legal studies in the university curricula is needed.

It was encouraging to read that the New Zealand Law Society was considering a plan for practical training of graduates. Those who complete an extensive legal education should not be denied the opportunity to seek one of the many personal goals that may be attained through the practice of the law. But the ideal of free choice needs to be tempered by the reality of the market place and the needs of other occupations. At a time when there is some emphasis on moving law into the community it could be suggested that academically it should also promote other disciplines. It is after all, the fabric of society, not just a design in one corner.

Tony Black

FAMILY LAW

CUSTARD PIES AND THE FAMILY PROCEEDINGS BILL 1978

By WR ATKIN, *Senior Lecturer in Law, Victoria University of Wellington.*

The Family Proceedings Bill 1978 must represent a typical example of the inadequacies of the New Zealand legislative process. Introduced in an enormous hurry on the last day of the Parliamentary session, it carries within it all the marks of a sad history. The writer's image of how the Bill was produced is as follows. Take the Domestic Proceedings Act 1968, the Matrimonial Proceedings Act 1963, the Family Law Act 1975 of Australia, their sundry amendments, a smattering of material from other sources such as the United Nations Convention for the Recovery of Maintenance Abroad 1956, and finally a few "bright ideas", throw them all together like custard pies, and you have a very messy result.

The proposed new law on maintenance is a good example of this. One of the major criticisms that can be levelled at the current law of maintenance is the existence of two different systems. One system appears in the Domestic Proceedings Act 1968 and enables parties to a marriage to make applications for maintenance prior to divorce. The other system is found in the Matrimonial Proceedings Act 1963 and operates on or after divorce. Both systems incorporate different grounds for obtaining maintenance, different rules with respect to enforcement, agreements, the role of personal representatives and many other things of lesser importance.

One might have hoped that a reform of the law of maintenance would have put an end to this anomalous situation. However, what do we find? Clause 49 is headed up "Right to maintenance during marriage" and lists four factors to be taken into account. Clause 50 is headed "Right to maintenance on dissolution of marriage" and lists two of the four factors in cl 49, and adds one or two other requirements not found in cl 49. Clause 56 allows parties to an existing marriage to make an application for maintenance and the Court's powers in dealing with such an application are found in cl 57. Clause 58 covers the Court's powers after dissolution, although it does not actually provide for the parties to the former marriage to make an application. (Strangely, cl 59 goes on to talk of an "application . . . made under *section 58* . . ."!) The powers contained in cls 57 and 58 are not the same. For instance, on divorce, an order may be made against the respondent's personal representative. Not so in any other case. And on divorce, the payment of periodic sums can be ordered by the Court but in other cases, the Court can also award lump sums for past maintenance.

Enough has been said to show that the Bill contains two systems of maintenance and has therefore failed in what should have been one of its main objectives. It represents a patchwork combination of the present law, not a proper synthesis and reform of it. Is there nevertheless any justification for favouring a more complex approach? In the writer's view, no.

Some of the difficulties may arise from the fact that both the Magistrate's Court and the Supreme Court have jurisdiction. Those difficulties

might be resolved by adopting the recommendations of the Royal Commission on the Courts and having a family Court with sole jurisdiction in family matters. However, even without a family Court system, it seems unnecessarily pedantic to deal with the two Courts separately. Why not have one clause each for jurisdictional questions, the ability to make applications, the grounds upon which an application may be dealt with, and the kinds of orders which can be made? Surely this would be much simpler both to understand and to put into operation.

The question can also be raised whether there must of necessity be differences in the maintenance system before and after dissolution. A couple of examples may be examined. Clause 50(2) says that a right to maintenance after dissolution shall cease "within a reasonable time". Unless this provision is coupled with a requirement that maintenance orders have a built-in terminating date, it seems mere window-dressing. But that point aside, if the policy of the Act is that parties should be encouraged as quickly as possible to become financially independent of each other why should not the same rule apply where the maintenance order happens to have been made before the formal dissolution of the marriage? In the writer's view dissolution does not justify treating the situation differently, since the actual needs of the parties and their circumstances will be the same before divorce as after. What the divorce does is merely to change the parties' legal status. It gives formal recognition to the breakdown of the marriage which has already taken place. It does not address itself at all to the economic position of the parties. Of course, after dissolution they are free to remarry and this eventuality will alter financial needs and responsibilities. But the Bill quite properly provides for this in cl 50 (2) and (3) and there is no reason why a similar provision should not appear in a single simplified system of maintenance.

Another example can be found in the difference between cls 49 and 50 in the circumstances which may be taken into account in determining whether a person has a "right" to maintenance. During marriage, "physical or mental disability" and "any inability to obtain work that is adequate . . ." are to be considered but not after the marriage has been dissolved. In both cases however certain other circumstances can be taken into account, ie the division of functions while living together and the way in which custody of any children has been arranged.

The reason for the discrepancy is presumably that the two additional factors are not necessarily related to a person's marriage and therefore should not be relevant after the marriage ceases – a physical disability for instance will not normally have been caused by the other spouse but more likely by some external or natural agency. The argument is that during marriage you take your spouse as you find him ("or her", as we are required, pedantically, to add) but after the formal dissolution, you take your spouse only as changed by the marriage.

The comments already made on the significance of the formal dissolution apply just as much in this context but in any case it seems highly artificial to consider a person's needs in isolation of their abilities and disabilities. At the very least it is quite possible that marriage may have improved or exacerbated those needs.

In the writer's view a far more straightforward approach is to treat maintenance as an issue separate from divorce and have one system covering all situations.

However, we come to another quite unnecessary complication. Clauses 49 and 50 address themselves to the question whether a person has "a right to be maintained". This new approach harks back to the common law (where a wife had a right to be maintained) and is similar to the approach in ss 25 and 27 of the Domestic Proceedings Act 1968. Under the 1968 Act, an applicant must first prove that she "is not receiving or is likely not to receive proper maintenance" before the Court can decide whether or not to grant an order by having regard to the s 27 (2) factors. The necessity under the present law for two steps to be satisfied instead of just one is a ground for criticism.

Regrettably, the Bill perpetuates and further complicates the present procedure. An application can only be made under cl 56 "to enforce a right to maintenance", so before any assessment of liability is made (under cl 51), a "right" must be established. Yet herein appears to lie a contradiction. If a person has a right, it follows that he can exercise that right in the absence of superior rights. But cl 51 may well prevent this happening because no one is "liable to pay maintenance" if such payment would deprive the payer of a reasonable standard of living. Clearly a Court will not allow a "right" to be enforced without considering cl 51, in which case it seems more correct to say that a person has a "claim" rather than a "right". There is no point in giving someone a right in one breath, only to take it away again in the next.

The "right" is further circumscribed by the list of circumstances in cls 51 (2) and 52 which are relevant in determining the amount of the payment. In the light of this, one seriously wonders why the notion of "rights" needs to be introduced at all. Would it not be far simpler to permit parties to make an application for maintenance and then supply one list of factors that the Court can have regard to in deciding whether an order should be made and how great that order should be?

Enough has probably been said to reveal the methodology of our law-making process. Where one clause will do, we have two. Where one system will do, we have two. Examples can be multiplied. A classic instance must be the proposed existence of *two* interim maintenance systems, the familiar interim orders given by the Court (cls 67 and 68) and the new "interim family maintenance orders" handed out by a court Registrar on being "satisfied prima facie" by the Social Welfare Department of nothing more than that the respondent is married to the applicant (cls 67-74). On being "satisfied", the Registrar *shall* make an order (cl 71). One must have grave doubts whether (to coin a phrase) the rights of the respondent are going to be sufficiently protected, even though there is provision for appeal to the Supreme Court and for rehearing by a Magistrate. These doubts aside, the point that is being emphasised here is that the Bill, far from simplifying the law and making it easier for all to understand, has done the very opposite. Was this aim not frustrated in a similar way by the Matrimonial Property Act 1976?

Acceptable presentation of legislation depends first of all on properly worked out policy. The Cabinet Committee on Family Affairs was presumably established to ensure such policy but no one would suggest that there is a coherent family policy at work in New Zealand at present. Take some items already mentioned. The interim family maintenance orders are designed to replenish the empty Social Welfare Department coffers as soon as possible after the first payment of a domestic purposes or emergency benefit. Yet in the same Part of the Bill there is provision for the expiry of orders after a reasonable period of time, so that parties will not be forever shackled with maintenance obligations. Which of these two conflicting approaches is government policy?

Again, the legislators seem unclear whether they are regulating "families" or marriages. The Short Title is "the Family Proceedings Bill" and not "the Matrimonial Proceedings Bill". The Bill is not however principally concerned with families but with the legal relations between spouses. It incidentally covers paternity and makes some provision for unmarried couples to sue each other for maintenance (a dozen clauses out of 175). The Bill does not purport to cover the general law dealing with parties to de facto relationships nor the law of children, and so, to call it "Family Proceedings" is unnecessarily misleading. Only when we have a proper (and long overdue) codification of the whole of family law, will it be appropriate to have a Family Proceedings or Family Law Bill.

Another example of poorly thought out policy leads to phraseology which can be described as, perhaps grammatically correct, but decidedly ugly. In its desire to be non-sexist, the Bill repeats ad nauseam "him or her", "himself or herself", "the first party", "the second party". Yet in their earnestness, our lawmakers have overlooked one large portion of the Bill which remains completely gender-based. The writer refers to cls 36-46 relating to "paternity". Paternity orders are permissible against fathers but not against mothers. If we can envisage men increasingly suing their wives for maintenance, can we not equally envisage men seeking "maternity" orders against the mothers of their children?

The relationship between policy and presentation of that policy in legislative form gives rise to another point. A new policy must appear in the right piece of legislation. One would not expect for instance a change in company law to appear in legislation on noxious weeds, and yet this is in effect what has happened here. Some "bright ideas" on the question of child custody and access, matters dealt with by the Guardianship Act 1968, were thought to merit action. Instead of introducing an amendment to the Guardianship Act in the normal way, we find tucked away in the First Schedule to the Bill ("Enactments Amended") three significant changes to the Guardianship Act, changes which are in no way consequential upon provisions contained in the substantive Bill. This procedure of amendment by schedular reference is to be thoroughly deprecated. Two reasons for criticism immediately spring to mind. Changes contained in schedules can be easily overlooked especially by the layman as likely to be of a machinery nature only. Secondly, changes made out of context may mean a proper examination of the principal Act and the effect of the amendments is not made. Most people will naturally concentrate their attention on the main Bill and its precursors, not on the Acts referred to in a schedule.

Another aspect of good legislation is that it should be presentable. This apparently self-evident truth needs to be constantly reiterated. It has often been said that our laws should be written in such a way that the layman can understand them and laws dealing with marital affairs provide a pre-eminent example of where great efforts must be made to ensure simplicity, accuracy and clarity. Few other areas of the law touch people's personal lives so intimately.

The Family Proceedings Bill falls short of these criteria. The length of the Bill is formidable – 175 clauses. Much of it is technical and more appropriately dealt with in oft-misused regulations. The size could also be reduced if the Bill is simplified along the line of suggestions made earlier in this article.

A number of oversights in this Bill are inexcusable. For instance, cl 3 states that ". . . it shall bind the Crown". What is meant is that "the Act shall bind the Crown" but as drafted the Crown seems likely to be bound by anything that can be labelled "it". In cl 62 (5), we learn that maintenance orders for children cease to have effect when they reach 16 (unless the Court directs otherwise). In the very next subclause, the same rule is repeated with the difference that the age is 18. Which age is the correct one, 16 or 18? It cannot be both.

Clause 66 deals with maintenance orders against unmarried parents, and maintenance may be awarded so long as the applicant has custody of a child of the relationship. Clause 66 (2) (b) however also requires that the applicant be "a person to whom any of paragraphs *(a), (b), (d), (e) and (f) of section 54(1)* applies". The problem is that only fathers can be persons to whom cl 54 applies but it was surely not intended to limit the right to claim under cl 66 to men only. In practice, this mistake would render the effect of the provision nugatory.

Finally there is cl 93. In subcl (1) the Courts are quite clearly and properly given power to discharge maintenance orders. Utter confusion arises however with subcl (2) which sets out the orders a Court can make when it is "satisfied that it ought to do so", ie to discharge a maintenance order as referred to in subcl (1). Inexplicably no provision is made for an order which has the effect of simply discharging the original order. The Court can vary, suspend, discharge and substitute, indeed do a number of things not mentioned in subcl (1) but somehow the main thing has been missed out. If the existing provisions in the Domestic Proceedings Act 1968 had been used without alteration, the clause would have been markedly better.

The purpose of this short article has not been to undertake a careful analysis of the whole Bill nor indeed to give a comprehensive commentary on the policy behind it. No attempt for instance has been made to expound the arguments for and against having a single non-fault ground for divorce. Instead the aim has been to raise serious doubts about how satisfactory the final version of the legislation will be. The Matrimonial Property Act 1976 became law despite its shortcomings, and was coupled with the promise of future legislative action to deal with such things as property rights on the death of one of the spouses. The chance of early amendment is however slight though the life of the Act has not so far been smooth. Likewise once the Family Proceedings Bill has been passed into law, our legislators are likely to be most unwilling to review the subject-matter again in the near future. It is all the more important therefore that a simple accurate and clear Bill, embodying carefully worked out policies, be finally passed. The Bill as it stands will need considerable modification before it attains these standards. At the very least, it must avoid the "custard pie" appearance described at the beginning of this article.

TORTS

DEFAMATION: DEFENDING LETTERS TO THE EDITOR AS FAIR COMMENT

By IAN D JOHNSTON, *Lecturer in Law, University of Canterbury.*

The test of fair comment, when that defence is pleaded by the publisher of someone else's opinion who has not adopted it as his own, was examined by the Saskatchewan Court of Appeal in *Cherneskey v Armadale Publishers Ltd* 79 DLR (3d) 180. This issue had, surprisingly, received little judicial attention before. *Lyon & Lyon v Daily Telegraph Ltd* [1943] 2 All ER 316 was an action in respect of a letter to the editor of the defendant newspaper. The letter was signed and purported to be from a vicarage. Assuming it to be genuine the defendant published it in the paper's correspondence columns. The address turned out to be fictitious and the writer was never identified. The defendant's attempt to raise the defence of fair comment failed at the trial, partly on the ground that even though the letter itself was prima facie fair comment, containing opinions "such as an honest person might hold", the defendant could not prove that the writer, whoever he was, did actually hold the views expressed. The Court of Appeal reversed the decision and allowed the defence, relying on the fact that the letter, judged by its tenor, was within the limits of fair criticism. It was not necessary for the defendant to adduce evidence of the writer's actual state of mind. Moreover insincerity or malice was not to be inferred merely from the fact that the writer had given fictitious particulars about himself. One member of the Court, Scott LJ, noted that the defendant also held the view in the letter and that they believed they were dealing with a sincere comment, but he did not make it clear whether these findings were relevant. The question whether evidence of malice

on the writer's part would have affected the newspaper's own ability to raise the defence of fair comment was also left open.

The *Cherneskey* case also arose out of the publication of a letter to the editor. The writers were identified this time but were not sued, were unable to be joined as third parties, and were not called as witnesses. The editor did not subscribe to the view expressed but he published the letter as a genuine comment, it being quite sincere on its face. The trial judge withheld the defence of fair comment from the jury on the ground that "there is no evidence that the offending words express the honest opinion of anyone".

The Saskatchewan Court of Appeal, by a two to one majority, held that the issue of fair comment should have been put to the jury, and ordered a retrial. Hall J A and Bayda J A gave apparently different reasons for allowing the appeal but on analysis there is considerable similarity. In Bayda J A's view the newspaper's plea of fair comment should not be dependent on the letter-writer's state of mind but on its own. Honest belief by the paper in the views expressed would clearly be sufficient but should not be necessary. The alternative of honest belief in the sincerity of the writer (without concurrence in the opinions expressed) should also suffice. Otherwise newspapers would be effectively confined to publishing letters with which they agreed (if the letters were potentially defamatory). In the learned Judge's view his conclusion produced the same standard of "fairness" for the publisher as for the author:

> "[T]he law demands from the writer of a letter to the editor, a state of honesty – but not conformity (with the views of some other person). So, too, I think, the law demands from a newspaper publishing that letter – honesty, but not conformity. To ask the newspaper to not only honestly believe that the opinions expressed are the real opinions of the writer, but also to adopt those opinions and honestly believe them as his own before it can publish a letter which the writer, himself, could publish with impunity, were he equipped to do so, is to require the newspaper to conform, and to exact from it a standard higher than that demanded of an ordinary subject" (p 203).

Bayda J A distinguished *Lyon & Lyon v Daily Telegraph Ltd* (supra) pointing out that the acceptability of an alternative to honest belief in the views expressed was not in issue in that case because the newspaper did hold the same view as the writer.

Hall J A approached the case in terms of the question of malice. Honest belief was required for a successful plea of fair comment because its absence indicated malice. It was well established that malice was a jury question (provided there was some evidence of it) and that the onus of proving malice was on the plaintiff. The trial Judge had therefore erred by reversing the onus and by effectively deciding the question of honest belief or malice himself. Moreover it was malice on the part of the defendant himself that would have to be established to defeat his defence because malice on the part of the writer would not be imputed to his co-defendant jointly responsible for the publication, except where the co-defendant was his employer or principal and therefore vicariously liable. (In this respect the learned Judge extended the principle laid down in *Egger v Viscount Chelmsford* [1965] 1 QB 248 in the context of qualified privilege). It can be seen that in emphasising the importance of the newspaper's own state of mind Hall J A's approach was similar to that of Bayda J A despite the different terminology. (The main difference of substance between them concerned the burden of proof). Hall J A did not consider it essential to decide just what state of mind would be required on the newspaper's part to negative malice but he appears to have leaned towards Bayda J A's view by saying:

> "A newspaper cannot provide a forum for public discussion if it is limited to published [sic] opinions with which it honestly agrees" (p 196).

It is submitted that this is the only sensible conclusion to which his reasoning could lead him. To say that a paper was actuated by an improper motive (the strict meaning of malice in this context) in publishing in its correspondence columns what it took to be a sincere letter merely because it did not agree with the views expressed would be a complete denial of the paper's proper function in this respect.

The majority decision in this case accords with the view taken by the Committee on Defamation in its report to the Minister of Justice in 1977. In the Committee's view the criterion applicable in the case of a defendant who was not the author of the comment should be whether "he honestly believed that the opinion expressed was genuinely held" (para 151). In two respects the Committee departed from the views of the Faulks Committee in Britain. The latter committee had recommended that the burden of proving this element be put on the plaintiff and that he also be required to show that the opinion was not the genuine opinion of the author. The New Zealand Committee's approach of making the defendant's plea turn on his state of mind alone and not that of the author as well is consistent with the rule suggested, obiter, by Denning MR in *Egger v Viscount Chelmsford* (supra) and

adopted by White J in *McLeod v Jones* [1977] 1 NZLR 441 that malice on the part of the maker of the comment is not to be imputed to his co-defendant who publishes it.

Finally Brownridge J A's dissent may be noted. He agreed with the trial Judge that as "there was no evidence that the offending words expressed the honest opinion of anyone" the defence of fair comment could not be a raised by the paper. He considered it material in *Lyon & Lyon v Daily Telegraph Ltd* that the defendant newspaper itself held the opinion expressed in the letter and he distinguished the case on that ground. But it is submitted that that factor was not treated as material in the case itself, at least not by a majority of the judges. Brownridge J A considered that to allow a newspaper to raise the defence of fair comment on the basis of its honest belief in the sincerity of the letterwriter, as opposed to an honest belief in the opinion expressed, would put the newspaper in a privileged position compared with the ordinary subject, but it is submitted that this reasoning is fallacious. It overlooks the fact that in publishing a letter to the editor a newspaper is not itself making a comment. It would be different if the newspaper impliedly supported the views expressed, eg by giving the letter front page prominence. Then it should have to establish the same state of mind as the author would to succeed in the defence of fair comment. But in the normal case the newspaper would not be privileged by the application of the test established by the majority in this case and also arrived at by the Committee on Defamation. This is clearly demonstrated in the passage quoted above from Bayda J A's judgment.

COMPANY LAW

INFORMAL COMPANY ARRANGEMENTS WITH CREDITORS

By JOHN H FARRAR *LLM PhD, Solicitor (England and Wales), Barrister and Professor of Law in the University of Canterbury.*

Formal schemes of arrangements for companies are governed by s 205 of the Companies Act 1955. This procedure is useful for the reorganisation of a large public company and is sometimes used to achieve a moratorium. It does, however, result in too much cost in assembling documentation and delay for general use in a liquidity crisis *(a)*. For this reason practitioners sometimes attempt to set up an informal scheme between a company and its creditors. The validity of informal schemes and their effect on priorities in a subsequent winding up is far from clear in the light of the authorities in spite of indications to the contrary in Anderson and Dalglish, and Sutton's *Creditors' Remedies (b)*. The purpose of this article is to attempt to clarify the position. The most liberal decision is that of FB Adams J in *Re Walker Construction Company Limited (in Liquidation)* [1960] NZLR 523. This was followed in 1962 by Hardie Boys J in *In re Luxford (a Bankrupt)* [1963] NZLR 211; referred to in 1968 by Newton J in the Victorian case of *Re Walker Hare Pty Ltd (in Liquidation)* [1968] VR 447; doubted in 1975 by Chilwell J in *Rendall v Doors and Doors Ltd (in Liquidation)* [1975] 2 NZLR 191; applied by Douglas J in the Queenland case of *Re Marlborough Concrete Constructions Pty Ltd (in Liquidation) (c)* in 1976; and distinguished by Casey J in the recent unreported case of *Re Jack Andrews Builders Ltd (in Liquidation) (d)* in 1978. We will deal with each of these cases in turn.

Re Walker Construction is an unusual case of an informal scheme which was later converted into a formal scheme sanctioned by the Court. The order, however, was never sealed and was rescinded by consent on a winding up order being made. The informal scheme and the formal scheme provided for a division of ordinary debts into "deferred" and "current". "Current" debts were to be paid in priority to "deferred" debts. The issue was whether this varied the payment of ordinary debts pari

(a) This matter is more fully discussed by the present writer in "Corporate Insolvency and the Law" [1976] Journal of Business Law 214.

(b) Anderson and Dalglish, *The Law Relating to Companies in New Zealand*, 2nd ed pp 372, 386 and RJ Sutton *The Law of Creditors' Remedies in New Zealand*, para 8.33.

(c) (1976) 2 ACLR 240 (part of Paterson and Ednie's *Australian Company Law Service*).

(d) Supreme Court Auckland, 15 September 1978 M 1064/78.

passu under s 120 (e) of the Bankruptcy Act 1908, which was held to apply in a winding up by the Court by virtue of s 307 of the Companies Act 1955 *(e)*. FB Adams J held that it did. His reasoning was that the pari passu rule was a matter not of public policy but of private right which could be varied in the circumstances. It would have been "unconscionable *(f)* in the extreme to permit any deferred creditor who assented to that arrangement, and whose assent was acted upon, to prove in competition with the current creditors. There was, in effect an agreement to the contrary, it being impossible to give full practical efficacy to the arrangement for priority without implying that it was to be effective in a winding up" (p 532). His Honour said there was then no case directly in point and that he was compelled to rely on principle. There is in fact a decision of Denniston J in *Re The New Zealand Imperial Cash Register Company (Limited) (in Liquidation)* (1913) 32 NZLR 981 which appears to be in point. This was a case of a "deed of arrangement" between a company and its creditors whereby one of them agreed to its debt being deferred. Denniston J simply regarded the matter as depending on the intention of the parties and did not consider the pari passu rule. He held that the particular deed continued in effect after the liquidation. The case does not appear to have been cited in *Re Walker Construction*. FB Adams J (inter alia) considered the bankruptcy case of *In re Stephens* [1929] NZLR 254 where Ostler J had said obiter that "no harm would be done" in carrying out an agreement of *all* the creditors in a bankruptcy to vary the order of preference. (See also the dicta in *Smith & Smith Ltd v Basten* [1934] GLR 340, in *Re Campbell* [1937] NZLR 1 and *In Re Luxford* [1963] NZLR 211.) In fact *Re the New Zealand Imperial Cash Register Co* appears to have been a case where all the creditors agreed and this was not the case in *Re Walker Construction*. Although FB Adams J said he was compelled to rely on principle he was, however, equivocal as to which principle. The "deferred" creditors who assented were bound by the arrangement "in such a way that it would be grossly inequitable if they were permitted to insist on a distribution contrary thereto. I do not think it matters much on what principle they are bound: whether one may spell out a contract of some sort between them and the company, or between them and current creditors; or whether it be, as I am disposed to think, merely a matter of giving effect to equitable principles; or whether it be an 'equitable' or 'promissory' or 'quasi' estoppel of the kind envisaged by such authorities as *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256. There is, indeed, much to be said for Mr Alpers' contention that the case falls, if not within those decisions, certainly within the firmly established principle laid down in the earlier cases of *Hughes v Metropolitan Railways Co* (1877) 2 App Cas 439, 448, and *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268, 286. As to estoppel, a creditor has been held to be estopped from proving in bankruptcy by conduct subsequent to the making of the receiving order: *In re Wickham* (1917) 34 TLR 158. I do not agree with Mr Mahon's submission that, to rely on estoppel here would be to accept an estoppel as an affirmative cause of action, and think, on the contrary, that there would be no more than a restraint on the estopped persons from exercising the full legal right they would otherwise possess. On one ground or another, I am satisfied that the arrangement is binding on the deferred creditors in such a way as to justify and require the intervention of the Court in order to effectuate the arrangement" (p 537).

His Honour then faced the difficult practical consequences of his stand on principle. Non assenting "deferred" creditors would get what they would have got had there been no arrangement. They would not get the same as the current creditors but would gain at the expense of the assenting "deferred" creditors. There was nothing inequitable in that because the assenting "deferred" creditors had not stipulated that all should be bound. Assent for this purpose required something in the nature of active assent, express or implied. Mere standing by or attendance at the meeting with knowledge of what was going on was not enough.

Clearly, *Re Walker Construction* was a special case. It almost gave rise to an estoppel by record *(g)*. FB Adams J had special circumstances which perhaps justified equitable redress *(h)*. It is not a

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(e) Section 293 explicitly applies the rule to a voluntary winding up.

(f) Sometimes the word "fraud" is used where an assenting creditor attempts to renege on a composition – see *Wood v Roberts* (1818) 1 Starkie 417 and *Cook v Lister* (1863) 13 CB (NS) 543, 595.

(g) The order was not, however, perfected and was rescinded by consent. Quaere whether this species of estoppel or issue estoppel applies to an order under s 205 in any event. It might have been possible to argue that the order was provisionally effective before rescission since the justice of the case required it – see *Re Harrison's Share* [1955] Ch 260 (CA). It is submitted that if the order had been perfected the matter would have been governed by s 205 (2).

(h) Cf the cases on quasi estoppel by election in bankruptcy discussed in Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed) by Sir Alexander Turner p 325.

useful authority on which to base a general argument that an informal arrangement always gives rise to equitable relief and a variation of the pari passu rule. A central plank of His Honour's reasoning has now been taken away by the clear statements by the House of Lords in *Halesowen Presswork Assemblies Ltd v National Westminster Bank Ltd* [1972] AC 785 a case on contracting out of the mutual dealings section, and *British Eagle International Airlines v Compagnie Nationale Air France* [1975] 1 WLR 758, a case on contracting out of the pari passu rule. In both these cases the House of Lords have indicated that the distribution rules applicable in bankruptcy and insolvent winding up must be observed and that it is against public policy to allow contracting out. They are not simply matters of private right which can be varied by agreement. None of the New Zealand cases were cited. There seem to be two aspects of public policy involved here. One is that the legislation lays down a mandatory code of procedure to be administered in a proper and orderly way and this is a matter in which the commercial community generally has an interest (per Lord Simon of Glaisdale in the *Halesowen* case [1972] AC at p 809A; see also Lord Kilbrandon ibid at p 824 A-B). The second is that to allow contracting out would be unfair and possibly a fraud on the general body of ordinary creditors (per Lord Cross in the *British Eagle* case [1975] 1 WLR at pp 780E-781A). It is submitted that the latter will not always be the case. Indeed there may be circumstances where it would be unfair to the general body of ordinary creditors not to allow a particular creditor or group of creditors to waive the benefit of the statutory rules. If all the creditors are parties to the arrangement then the second point has no validity.

In re Luxford is an unusual bankruptcy case where Hardie Boys J held that the Official Assignee in applying the moneys received by him in the realisation of the property of the bankrupt could have regard to purported withdrawals, in whole or in part, of proofs of debt lodged by creditors even though those creditors had already received a dividend on their original proofs. This was a case where certain creditors were prepared to withdraw their proofs out of humanity towards the bankrupt, thus enabling 20s in the £ to be paid out and a surplus to go to the bankrupt. Hardie Boys J referred to *Re Walker Construction* as showing "the critical and analytical mind of FB Adams J seeking out principles of law to resist the same sort of notion as is advanced here, namely, that the Court is powerless to give effect to solemn promises and bargains" (p 214). He thought that *Re Walker Construction* could not be used as an analogy because in *Luxford* the release of the bankrupt by some of the creditors was their unilateral act and there was no equity or estoppel operating against the Official Assignee restricting him in his duty to distribute pari passu. Having said there was no analogy he then said (rather obscurely) that it was the principle under which *Re Walker Construction* was decided which made it of importance (p 216). He made some interesting remarks distinguishing between the Official Assignee's public duty to distribute pari passu and the private right of the creditor to receive a dividend. A creditor could be allowed to forgo his statutory right. "No one is asking the Official Assignee to forgo his public duty to distribute (pari passu); he is simply asked to recognise the right of a man to waive the entitlement to have that duty enforced in his favour" (p 216). He was safe, in other words, to rely on the creditors in question being estopped from claiming from him. Again *In re Luxford* is a special case and it is dangerous to use it in conjunction with *Re Walker Construction* to establish a general rule permitting contracting out of the pari passu rule. Hardie Boys J's distinction, though interesting and sounder than FB Adams J's analysis, probably cannot stand in the light of the blunt and simplistic logic of the *Halesowen* and *British Eagle* cases. It is unfortunate that the New Zealand cases were not cited to the House of Lords.

In *Re Walker Hare Pty Ltd* Newton J in the Supreme Court of Victoria was concerned with a liquidator's application for the Court's sanction to pay a class of creditors in full under the equivalent of our s 240(1) (d). His Honour held that the power was limited to two classes of case. The first class was where the creditors in question though not entitled to preference under the Companies Act have a claim recognised by law to priority over other classes of creditors who are also not preferred under the act. He cited claims depending on Private International Law and said in addition, "there could be cases of the sort illustrated by *Re Walker Construction*" *(i)*. The second class was where payment in full of the creditors in question would be beneficial to the winding up of the company in that the collection and distribution of the company's assets for the general benefit of its creditors will be, or is likely to be, thereby facilitated.

Chilwell J, in the *Rendall* case said that in view of the *Halesowen* case "the decision of FB Adams J in *Re Walker Construction* . . . must now be regarded as of questionable authority so far as s 293 of the Companies Act 1955 *(j)* is con-

(i) [1968] VR 447, 455.

(j) This applies the pari passu rule to a creditors' voluntary winding up.

cerned" *(k)*.

The *Rendall* case involved an attempt to set off a pre receivership credit against a post receivership debt. The company was in liquidation and Chilwell J held that the set off rule was mandatory despite the fact that the New Zealand mutual dealings section *(l)* uses the word "may" instead of "shall" which is the present wording of the equivalent English legislation. *Re Luxford* does not appear to have been cited.

Re Walker Construction was cited with approval by Douglas J in the Supreme Court of Queensland in *Re Marlborough Concrete Constructions* in a summons for directions by the liquidator in which the *Rendall* case does not appear to have been cited. This was, however, a case of a scheme of arrangement which had been sanctioned by the Court and become binding on all the creditors by virtue of s 181 (2) of the Queensland Companies Act 1961-1975. Douglas J cited FB Adams J at length and said that he (Douglas J) thought that in view of s 181(2) the right in question was contractual and not based on equitable estoppel. It is submitted that His Honour was wrong on this point. The right arises by virtue of the wording of the section, ie it is a statutory right although its scope depends on construction of the relevant scheme *(m)*. Douglas J held that *Re Walker Construction* was correct and was prepared to follow it. "Not only is it common sense, but it appears to me to hold otherwise would render nugatory those provisions of the Act dealing with schemes of arrangement" *(n)*. This is quite so but an important difference was that in *Re Walker Construction* the order on the scheme was never perfected. Douglas J distinguished an earlier decision of a full court of the Queensland Supreme Court in *Re Alfred Shaw & Co; the Bank of Australasia's Claim* (1897) 8 QLJ 48 where a scheme of arrangement which had been approved by the court nevertheless proved abortive because it did not clearly provide that it should continue after liquidation and it had not been completed at the date of liquidation. Douglas J said it was a case of a lacuna in the scheme which was not the situation in the case before him. What was relied on before him was an express term or alternatively a holding out which had been acted on to the party's detriment. Douglas J rather casually distinguished the *British Eagle* case on the facts without giving reasons.

In an oral judgment given in Chambers in the Auckland Supreme Court recently Casey J in *Re Jack Andrews Builders* followed the *British Eagle* case and *Re Walker Hare* and distinguished *Re Walker Construction*. This, like *Re Walker Hare*, was an application by a liquidator to the court to sanction payment in full of certain of the unsecured debts. The circumstances were an informal arrangement approved by approximately 92 percent in value of the creditors. Casey J referred to *Re Walker Construction* and said "the arrangement stemmed from proposals for a compromise between creditors, but which did not obtain the necessary majority". This was originally true in *Re Walker Construction* but as we have seen the scheme did eventually get the necessary majority and was sanctioned by the court but the order was never sealed by the Court. Casey J referred to the facts that full consideration must have been given to the company's position at the time by creditors voting on the scheme; the arrangement was made some 16 months before the winding up (here his Honour refers to the original informal arrangement) and FB Adams J was able to say that it was well known throughout the business community in Christchurch. In the case before him, Casey J said the first meeting was simply an informal one of a number of the major creditors who would not have constituted the requisite majority in any event under s 205. (Section 205 (2) requires a majority in number representing three quarters in value of the creditors.) He was "unable to infer such a wide general knowledge that all creditors who dealt with the company must have been aware that it was trading on borrowed time and special credits in order to keep afloat". There was, therefore, no basis for an equity against other creditors who had no part in the scheme, enabling him to grant a priority to those who acted in accordance with it. Note this would in any event have been going further than *Re Walker Construction*. Casey J said that the appropriate procedure was s 205. His Honour then referred to *Re Walker Hare* and said that the circumstances before him did not give rise to an equitable priority of the type recognised by *Re Walker Construction*. He also referred to the *British Eagle* case and said that in effect the real purpose of the liquidator's application was to use s 240(1) (d) to give effect to an agreement which had been made by a large majority of creditors whereby some of their number should obtain priority contrary to the express provisions of s 293.

(k) [1975] 2 NZLR 191, 197, line 39 et seq.

(l) Section 93 of the Insolvency Act 1967 which is applied to companies by s 307 of the Companies Act 1955.

(m) See *Re Guardian Assurance Co Ltd* [1917] 1 Ch 431, 441 per Younger J, *Re Garner Motors Ltd* [1937] Ch 594, 599 per Crossman J and *Srimati Devi v People's Bank of Northern India* (in Liq) [1938] 4 All ER 337, 345 per Lord Romer (PC). See also *Bridges v Hershon* [1968] 3 NSWR 47 (CA). The headnote of the latter is misleading. Cf, however, *Re Alfred Shaw & Co; the Bank of Australasia's* claim (1897) 8 QLJ 48.

(n) [1976] 2 ACLR at p 243.

Where does all this leave us? It is suggested that the present position can be summarised as follows:

(1) The appropriate procedure for company arrangements with creditors is s 205 (*Re Jack Andrews Builders*).

(2) A scheme duly sanctioned under s 205 can, by appropriate wording *(o)*, apply in a winding up to contract out of or vary the pari passu rule (s 205 (2) and *Re Marlborough Concrete Constructions*) and the statutory right of set off (*Halesowen*).

(3) An informal arrangement will be ineffective to contract out of or vary the statutory pari passu rule and right of set off for reasons of public policy (*Halesowen, British Eagle, Rendall* and *Re Jack Andrews Builders*) unless (possibly) *all* the creditors agree (*Re The New Zealand Imperial Cash Register Co* and *In re Stephens*). However, in the light of the recent cases the authority of the latter cases is in doubt and it would probably be safest if the statutory rules were strictly observed and such adjustment as is necessary was made between the creditors themselves thereafter. The informal arrangement may, however, be the subject of relief under the Illegal Contracts Act 1970.

(4) Even though an informal arrangement might otherwise give rise to quasi estoppel by election (*Re Walker Construction, In re Luxford*), relief is also barred on the grounds of public policy *(p)*.

(5) There may be exceptional circumstances of unconscionability tantamount to equitable *(q)* fraud, which, though ineffective by themselves to contract out of or vary the statutory rules, may nevertheless motivate the court to exercise its discretion to sanction an ad hoc departure from the statutory rules by an order under s 240 (1) (d) and s 294 (1) (a) *(r)*. Although it is doubtful whether the possibility of the provision serving such a purpose was in the minds of those responsible for its enactment, such an interpretation is sensible (*Re Walker Hare*) and is perhaps an application of the principle that Equity does not allow a statute to be an instrument of fraud *(s)*. The circumstances will have to go beyond general principles of fairness and commercial morality and it would be unsafe merely to obtain the sanction of the committee of inspection. (*Re Walker Construction* and the bankruptcy cases read in the light of *Re Walker Hare, Rendall* and *Re Jack Andrews Builders*.) Since the Court's power is to sanction the payment of any class of creditors *in full* it is uncertain whether this provision can be used where it is not possible to pay them in full but merely to pay them a higher dividend than the other creditors. It is arguable that this latter situation might come within the compromise provisions of s 240 (1) (e) and (f).

(6) Directors and even assenting creditors run risks under the fraudulent trading provisions of s 320 if the arrangement is not approved under s 205 and the company continues to carry on business *(t)*.

In conclusion it must be admitted that the present position is far from satisfactory *(u)*. Australia has the procedure of official management, which facilitates a moratorium, in addition to receiverships and schemes of arrangement. The Macarthur Report *(v)* recommended its adoption here. However official management has not been the success that its promoters had hoped and it is not greatly used in practice *(w)*. It is submitted that what is needed is a speedier, cheaper and more flexible scheme of arrangement procedure such as that being introduced in Canada *(x)* and which is currently under consideration by the Cork Committee in England.

(o) See *Ex parte Stutchbury* (1888) 9 NSWR 164. Cf *In re Stephenson* (1888) 20 QBD 540 (both these are bankruptcy cases).

(p) See the authorities cited in Spencer Bower and Turner op cit paras 140 et seq, especially para 147 and the *Halesowen* and *British Eagle* cases.

(q) *Re Walker Construction.* See also *Troughton v Gitley* (1766) Amb 630; 27 ER 408 but cf Jessel MR in *Ex parte Ford* (1876) 1 Ch D 521, 528 and Bacon CJ in *Ex parte Harris* (1876) 2 Ch D 423, 427-429. For a suggestion that common law relief for fraud may be available in such circumstances see Abbott LCJ's summing up to the jury in *Wood v Roberts* (1818) 2 Starkie 417.

(r) Cf *Re Cider (NZ) Ltd (in Liquidation)* [1936] NZLR 374 where Smith J, following English bankruptcy cases, held that the principle that the Court in bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate where insistence would manifestly produce an unjust or dishonest result applied to the official liquidator. The bankruptcy cases are reviewed in Spratt & McKenzie's Law of Insolvency (2nd ed) [1514] et seq. See, however, Newton J in *Re Walker Hare* in relation to applying this principle to authorise paying any class of creditors in full.

(s) See *McCormick v Grogan* (1869) LR 4 HL 82, 97 per Lord Westbury.

(t) See FB Adams J in *Re Walker Construction* [1960] NZLR at p 533.

(u) See Lord Simon of Glaisdale and Lord Kilbrandon in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785, 809D, 824C.

(v) Para 439 et seq.

(w) See my article "Corporate Insolvency and the Law" [1976] Journal of Business Law 214, 219-221 and 231 for some empirical data about official management.

(x) See ss 98-133 of the Bankruptcy and Insolvency Bill – Bill 5-11, and the Background Paper pp 14 et seq.

OFFICE MANAGEMENT

MANAGEMENT BY OBJECTIVES IN A LAW FIRM ENVIRONMENT

By DENIS ORME, *office manager*

In recent times when involved in discussions with practitioners who are principals of law firms it has become apparent that on all but a few occasions, partners within those firms have never decided on the objectives for their partnership.

"Management by objectives" can be broadly defined when related to the law firm environment as the setting of goals of all facets in relation to law firm management. Implicit in any kind of goal setting of this firm objective, working level objectives may follow and this, for example, may include purely more effective time utilisation or better achieved. All decisions taken by a firm should be considered in the context as to whether they are able to advance the ultimate objectives of the firm. For example, a firm objective may be to achieve a fifty per cent profit on gross fees level. From the setting of this firm objective, working level objectives may follow and this, for example, may include purely more effective time utilisation or better control over expenses.

The importance of objective determination is related to the existence of the firm as an entity and the persons within that firm striving to meet the "purpose" set. On numerous occasions conflicts have arisen in law firms because there is no consensus on such important issues as the proper role of profits, the ratio of partners to productive staff, the client base of the firm, the range of work undertaken by the firm, and professional responsibility of the partnership, the social responsibility of the partnership and remuneration levels, job satisfaction etc for all personnel.

Incoming partners tend to be accepted on the basis of their skill as practitioners, rather than emphasis on compatibility with existing partners on the agreed "purpose for the partnership".

It is necessary to stress at the outset that no purpose will be served by embarking on a discussion in relation to objectives unless all persons involved in that discussion realise and actively participate in the commitment which results.

For example, if broad objectives were set for the firm, individuals will have to make a commitment in order to meet the target aspect of those goals which they participated in setting. An example of this would be where there was an agreement to improve client service. Personnel normally providing service for a client should then undertake to review all aspects of the service they provide and commit themselves to improve that service wherever it was found wanting.

By determining the overall firm objectives only a starting point has been taken, and the second stage is to develop working level objectives in relation to each of the broad areas which form the firm objectives. At working level objectives, goal setting may be made individually by each person within the firm or in conjunction with a principal of the firm. Obviously, the degree of commitment to the working level objectives will have a significant influence on the implementation which follows. Performance in relation to the objectives set for individuals within the firm are generally assessed at the end of an agreed time period and related to the specific goals.

The internal objectives for the firm fall into clearly identifiable areas which require a full partnership discussion. Within any partnership there is a wide range of attitudes and opinions and this is healthy for the growth of the firm. In order to minimise conflict within the partnership following a discussion on objectives it may be necessary on occasions for personal attitudes and opinions to be down-graded in the partnership interest. By having rationalised the objectives for a firm any discussion with a potential partner should highlight the partnership purpose, and be used as a discussion point in relation to compatibility with the existing partnership.

Objectives in the broad areas which may form the basis of discussion within your firm are:

Clients

Factors to be considered in this discussion should include:

- Who are your clients ie whether there are any discernible groupings?
- what attracts clients to any specific services you offer?
- what is the level of service provided to existing clients?
- how can that level of service be further advanced?
- do you desire to obtain more clients within the same groupings?

In this discussion not only are you looking at the

clients by group but you are also looking at the range of legal services offered by your firm, ie is it the partnership wish to offer a broad base of legal services and supplement that with developing specialities or is it considered desirable to practice in only some areas of the law.

Professional responsibility

Consideration in this area will include not only the ethical standards required in the profession but an obligation to provide some of the firm resources in order to advance the profession you are involved with. This would include a firm commitment in relation to:

- a percentage of chargeable time being allocated to the various committees of the Law Society
- how your firm could initiate participation in a legal observation scheme, by liaison with your nearest law school;
- and a professional responsibility to provide training for recent graduates although there may be economic cost in doing this.

Social responsibility

This responsibility will include "firm" commitment to the community you are involved with in:

- membership of community organisations;
- the relationship of community organisations to the type of clients and work mix you are trying to attract to your firm;
- obligation to provide either gratuitous or reduced cost legal service.

Human resources

All personnel within your firm will be part of this firm discussion. This includes a discussion at various levels with all your staff. Factors to be considered are:

(i) Job satisfaction.

(ii) Motivation, the discussions between principals of the firm and other personnel should include the range of work currently being undertaken, whether this range can be broadened to increase job satisfaction, whether there are other tasks which would improve the job satisfaction for that person.

(iii) Reasonable opportunity for leisure.

(iv) Opportunities for self-development, not only will this discussion encompass the range of tasks currently being performed or which are capable of being learnt in your firm, but should additionally provide for courses held externally.

(v) Good working conditions.

(vi) Fair rewards, an example of this would relate to your fee earning staff and could provide a bonus where your expectations were exceeded, ie if you expected to recover 2.5 times salary or 3 times salary and performance in fee billing was above that level then the person should be invited to share in the personal productivity gain. This could be by way of a bonus or a profit-sharing arrangement.

The firm

Recognition of the firm as an entity must occur. Discussion in this area will ensure the future economic growth and prominence of your firm and its image as reflected to the community and the profession.

Focal points will be:

(1) *The profitability of the firm*

A consensus should be reached on an acceptable profit level and a decision taken in relation to whether earnings should be retained in the firm for future development or whether development should be undertaken by the use of other funds. This recognises the fact that principles of a firm are remunerated not only for their skill and expertise as experienced practitioners but additionally should receive a return on investment which they could expect by their capital contribution to the partnership.

(2) *Multi-location*

Following a consensus being reached in relation to groupings of clients who are desirable in the firm's interests and the range of matters to be undertaken, attention should be paid to whether a multi-location presence can best meet the needs of those clients and will result in growth of the firm.

(3) *Promotion*

Again, after having rationalised the client and work mix for the firm, consideration should now be given to determining how additional work of a similar type or how clients of the same grouping can be attracted to the firm. Factors in this area would be by attention to:

(i) the range of community organisations your firm is involved in,

(ii) reputation advancement in the selective legal services, ie preparation of articles,

(iii) the presentation of lectures etc.

(4) *Partner admission*

Development of the firm may result in consideration being given to new partner admission. Factors in this area will be:

(i) loss of a specific skill or expertise;

(ii) the gaining of a new skill or expertise;

(iii) the effect on the short term and long term profitability;

(iv) in order to form a new work group to

meet client needs ie a new partner heading a team of qualified staff to develop work undertaken on behalf of a specific client or to develop a new type of work for the firm.

It is only by deciding on the broad objectives for your firm and therefore having a partnership "purpose" that working level objectives can be developed. For example if your firm fixes on a given profitability level which has a target aspect in order to reach that target, the economic nature of each of your activities should be discussed. This will include whether all activities in your firm are undertaken at a profitable level and if this is not the case whether that particular work type should remain unprofitable or whether an increased charge should be made for the work, or the work delegated to a profitable level within your firm. If profitability improvement is desirable in your firm's interest, expenses should also be looked at with working level objectives set to reduce either the overall percentage of expenses or attention turned to significant items which are capable of better control.

As you can see by this example the broad objectives for your partnership form the basis for a plan of action by you, and specific objectives may be set in any area. It will now be appreciated that my reason for stressing the degree of commitment required by partners, should you embark on a partnership discussion in relation to objectives. Goal setting at the working level with a reporting back mechanism will ensure that your firm pays attention to all areas highlighted as being desirable for you to achieve a *"firm identity"*.

TAXATION

ESTATE PLANNING CHECK LIST

By JOHN PREBBLE, *an Auckland practitioner. This is the third in a series of articles adapted by the author from lectures given by him in Auckland, Whangarei, and Tauranga as part of the Continuing Legal Education Programme of the Auckland District Law Society. Earlier articles appeared in [1979] NZLJ 20 and 47.*

Previous articles have emphasised that estate planning should involve a detailed examination of the whole of the client's financial affairs. A piecemeal approach is unlikely ever to be satisfactory. While it may well be possible for one or another asset to be dealt with independently of the rest of the estate, closer scrutiny will often show that the needs of the estate and the family as a whole could have been better served by some other decision. The estate and the family must be considered in toto.

The estate planning adviser must bear in mind a great variety of matters all at once: estate duties; gift duties; income tax; all the various items of property of the client; the client's taxable income; the cash flow of the client's business; and the income and asset position of the client's wife and family. It is easy to overlook something. Accordingly, it is believed that a list of the various things that should be borne in mind in almost any estate planning exercise will be valuable both as an aide-memoire and as a framework around which the solicitor and his client can construct the details of a plan.

This check-list serves a further function, also. It has been suggested in the second article that after the broad outlines of an estate plan have been established the solicitor should furnish his client with a letter setting out the plan in detail. The check-list summarises the various items that should be included in such a letter, though not necessarily in the particular order adopted for the purposes of this article.

There are several further advantages in reducing a plan to writing rather than simply discussing proposals with one's client and then putting the appropriate conveyancing exercises into motion. The composition of a written opinion embodying an estate plan helps to crystallise the thoughts of the legal practitioner concerned, and gives him a valuable opportunity to identify mistakes, inconsistencies, omissions, and areas where improvements can be made. From the client's point of view, a fully documented opinion allows him to discover whether he really does completely understand what his lawyer has been telling him, and if he understands, whether he agrees. (On the other hand, the client will also discover whether the lawyer has fully understood the instructions given by the client). For both parties, a written plan of action is an invaluable guide for the future. The operation of an estate plan will need to be reviewed periodically. Where the whole plan has been set out systematically in a written document, when it comes to a review of the operation of a plan both the client and the solicitor will find it much easier to call to mind just what they had been intending to do when the plan was drawn up,

perhaps some years previously. Finally, there are usually several parties who are involved to some extent in the client's estate planning, but who will not have been privy to all the discussions between the client and his legal adviser. These people could include the client's wife, his adult children, his accountant, his bank manager, the manager of his trust company, assuming the services of a trust company are to be called upon, his life insurance agent, and possibly a trusted senior manager in his business. In most cases, at least one or two of these individuals will need to be acquainted with the full details of the estate plan. In some cases, while it may not be strictly necessary for a particular person to know everything that is proposed, it may well be desirable. For example, where the client has a large overdraft and his bank is somewhat concerned about his possible death duty liability, a copy of the estate plan furnished to the bank manager will often be a good deal more effective in promoting confidence than a brief verbal explanation accompanied with, perhaps, copies of trust and other documents that have been drafted for the client's purposes. Just how far the plan is distributed in any particular case will depend upon the circumstances, and the degree to which the client wishes to keep his affairs completely confidential between himself and his professional advisors.

With that note of explanation, it is suggested that the following matters should be included in an estate planning report to a client.

Details of the client and his family. Occasionally, it will be discovered that the client has failed to mention a grandchild or some other relative who he wishes to include in (or perhaps exclude from) his estate plan. A list of full names, correctly spelt, and dates of birth is also a valuable reference point, particularly when it comes to drafting agreements or transfers in respect of assets to be moved out of the client's estate. While this information will probably have been supplied by the client at some earlier stage, it is valuable to give him an opportunity to check its accuracy.

A list of the assets and liabilities of the client, with their respective values, and an estimate of his current estate duty liability. Again, this list provides a valuable check to see if anything has been missed out. The estimate should be an estimate only in the sense that it is based upon asset values supplied by the client. With the ready availability of calculators these days an accurate calculation of duty is no onerous task for the professional adviser. It is often appropriate also to calculate the likely duty on the estate of the surviving spouse, making the assumption that the client's property will devolve according to whatever are the existing terms of his will. The principal purpose of setting out the assets and liabilities of the estate is of course to establish the base point from which the estate plan is to operate. However, solicitors experienced in the estate planning field will be familiar enough with the client who is uncertain as to whether he really wants to go ahead. A clear statement of the current liability of the client's estate should he die in the immediate future, coming towards the beginning of the solicitor's report, performs a very useful function in keeping the client's attention focused on the matter in hand.

A discussion of the objectives of the client's estate planning. The major objective will, of course, be to reduce death duties, by reducing the dutiable estate. But a carefully drafted plan should state just how far the process of reduction is to go. Other aims should also be set out clearly. For example, is it a major consideration that there should be income available for the benefit of the client's spouse after his death, or is she already sufficiently well provided for? Does the client wish to treat his children equally as far as possible? Does a particular son or daughter have some special need that should be recognised in the plan? Has any long-term thought be given to what will ultimately become of the client's business? In many cases this information will almost appear to be statements of the obvious. However, it is important that the legal adviser should have some check that he has correctly understood just what his client wants to do. Moreover, this preliminary statement of objectives furnishes a useful standard against which the advisability or necessity of particular estate planning proposals may be judged. For example, if the client intends that his son should take over his business, and the son is ready, willing, and able to do so, there will probably be little point in constituting a trust to hold the business assets.

A statement of the duration for which the plan is supposed to run. Duration of the plan is of greatest significance with respect to the length of the programme of debt forgiveness. The programme must be realistic taking into consideration the client's actuarial life expectancy, and his state of health. The client's life expectancy is also important as regards the question of how much wealth he should retain. For example, a man with a life expectancy of twenty years would rarely be well advised to dispose of all his appreciating assets.

An individual discussion of each of the client's assets (eg farm or business, family home, batch, furniture, shares in public companies, other investments, life insurance, motor car, and so on). This discussion should state what is to be done with each asset and, if it is to be left alone, that must also be stated.

A discussion of the legal steps that will be taken to effect the estate plan (eg constitution of a trust, preparation of wills, alteration of the articles

of a company). The purpose and effect of the significant provisions of the various documents that will be necessary should be set out.

To some extent, this section will be merged with the previous one. For example, it might be mentioned that the client's home, now a joint family home, should be made eligible for the matrimonial home allowance by the client purchasing his wife's share; or, where a trust is to be constituted to hold the client's portfolio of shares, that trust might be mentioned as part of the general discussion of how the shares will be disposed of pursuant to the plan.

A table setting out the estate duty savings at which the plan aims, in respect of both the client and his spouse. Some sort of future estimate of the impact of inflation on the client's assets, and the resulting benefits flowing from pegging of values within the estate, is also worthwhile. While these latter figures in particular can only be estimates, within that limitation they should be as precise as possible. In particular, the appropriate estate duty calculations should be carefully indicated. In this manner the client is given a clear picture of the sort of benefit that will accrue to him and his family as a result of the adoption of the estate plan. It is thought that this kind of information is only rarely supplied to clients by their advisers. This information is not absolutely necessary to the operation of an estate plan, and will generally require at least one or two hours' work to prepare. Nevertheless, it is contended that the work is worth the effort. It has been mentioned before that solicitors often find their clients suddenly going cold on the idea of estate planning, even when it is fairly clear to the professional adviser that major steps are necessary. The client should be properly informed of the benefits of what is being proposed.

An outline of the income tax benefits to the client's family that may be expected to result from the adoption of the plan proposed. The reasons for this are the same as those mentioned in the previous paragraph.

A statement of the projected annual cash resources to be available to the client and his wife for personal expenditure. The case resources available to a client will, of course, be mainly of an income nature: any salary and directors fees that he continues to receive from his business, interest payments on outstanding loans, income arising from investments that he has retained, and so on. But many estate plans will also provide some opportunity for the client to live on capital, in the form of cash payments in reduction of the price left owing on the sale of assets pursuant to the estate plan. Most plans will have the result of the income of the client going down while his wife's income goes up. The projected income statement should deal with the couple's total income so that the relative position of the family unit can be assessed before and after the adoption of the plan. The statement of annual cash resources available will usually be set out together with the outline of income tax benefits. One will often find that, despite quite major tax saving, the disposable income of the client and his wife taken together has increased.

An outline of the programme of gifts and debt forgiveness to be followed by the client from year to year. Where there is to be a major giving programme, allowance must be made in the statement of available cash for gift duty liability.

An explanation of the measures embodied in the plan to ensure that the client and his spouse are adequately protected and will be comfortably off despite the transfer of assets out of the client's estate. Matters for consideration here could include the following: some appreciating asset retained as a hedge against inflation; a restructuring of company shareholding to give the client control as governing director at the same time as passing over the asset-backed shares to his family; options available to the client to charge interest on outstanding loans or demand capital repayments, should he so wish. While all these matters will have already been covered in other contexts, it is useful to gather them together in one place so that the client, and perhaps more importantly his wife, can see how the plan protects their interests.

A discussion of how estate duty is to be met if the client dies prematurely. If particular assets must be regarded as at risk until the estate has been reduced below a certain figure, then this must be stated. If more life insurance is to be purchased, allowance must be made in the cash statement for premiums, and a decision should be made on who will take out the policy, and how it is to be owned.

A clear statement that the plan must be reviewed regularly, and that it can be modified if necessary. While many of the steps taken pursuant to estate plans are irrevocable, there will always be some modifications available. The extent will depend upon the circumstances, and the way in which documents, particularly deeds of trust, have been drafted. The client should be clearly informed as to just what changes can be made should alteration prove necessary or desirable. Some of the possible modifications will already have been discussed under the category of measures embodied in the plan to protect the interests of the client.

A list of the documents needed to put the plan into effect. There is intrinsic value in the client knowing just what it is that he is signing.

An example of an estate planning opinion containing and illustrating the various matters discussed above will be published shortly in this journal.

TORTS

LIABILITY FOR PRE-TRIAL NEGLIGENCE

By JOHN HUGHES *Lecturer in law, University of Canterbury.*

The decision of the House of Lords in *Saif Ali v Sydney Mitchell & Co (a firm) and others, P (third party)* [1978] 3 All ER 1033 has narrowed the scope of immunity from claims for negligence in the conduct and management of litigation. The House, Lord Russell and Lord Keith dissenting, held that giving advice on who should be a party to an action and settling pleadings in accordance with that advice fell outside the area of immunity granted to counsel. As a result of the decision, barristers may now be subject to claims based on damage arising from their negligence in advice given or work done before a case comes to trial. Lord Wilberforce, Lord Diplock and Lord Salmon approved the test laid down by McCarthy P in *Rees v Sinclair (a)* that, for the purposes of immunity, each piece of pre-trial work should be tested against one rule: that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that the cause is to be conducted when it comes to a hearing, and that the protection should not be given any wider application than was absolutely necessary in the interests of the administration of justice. Lord Wilberforce understood "necessity in the administration of justice" as being the justification for the test but felt that the test itself lay in the requirement for an intimate connection with the conduct of the cause in court. The test was described as one which properly related immunity for acts out of court to the immunity relating to the trial itself, and was seen as a "helpful expansion" of the narrower consensus of opinion in *Rondel v Worsley (b)* that the protection covered pre-trial work broadly classified as that connected with the conduct and management of a cause in Court *(c)*, this latter case, since it dealt with the rights of a lay client to bring an action for negligence in respect of acts or omissions during criminal proceedings, could not be said to lay down a "sharp definition" of immunity in the context of pre-trial acts or omissions in a civil suit.

It is interesting to compare this assessment of McCarthy P's test with the assessment of Woodhouse J in *Biggar v McLeod (d)*, where he expressed the view that McCarthy P intended in no way to limit the breadth of what had been said by Lord Reid in *Rondel v Worsley* concerning the policy reasons underlying the existence of the immunity or the circumstances which would give rise to it. In this context it is worth noting that Lord Reid considered the same policy considerations to apply when drawing pleadings or conducting subsequent stages in a case prior to trial as applied to work in Court *(e)*. Woodhouse J also approved, in the same case, the judgment of Bridge L J in the Court of Appeal in *Saif Ali* when he stated that "the considerations of public policy which make it appropriate for the law to extend immunity to counsel in his conduct of litigation . . . in Court are equally clearly applicable to what he does in the conduct of litigation in its preliminary stages and in advising in relation to it" *(f)*. *Biggar v McLeod* was not referred to in *Saif Ali*.

The background to the decision

The plaintiff was injured in March 1966 when a van driven by a Mr Akram, in which he was travelling as a passenger, collided with a car being driven by a Mrs Sugden. Mrs Sugden subsequently pleaded guilty to driving without due care and attention and there was no doubt that she was at fault. Both the plaintiff and Mr Akram consulted Sydney Mitchell and Co, on whose instructions the barrister settled proceedings and drafted a statement of claim. The statement of claim was drafted against Mrs Sugden's husband, on the basis that he was the owner of the car and his wife had been acting as his agent in using the car to drive their children to school; Mrs Sugden was not sued. When Mr Sugden's insurers suggested that his wife's agency might be disputed and that there had been contributory negligence on the part of Mr Akram, Sydney Mitchell and Co sent instruc-

(a) [1974] 1 NZLR 180.

(b) [1966] 3 All ER 657 (CA) [1967] 3 All ER 993 (HL).

(c) In *Saif Ali*, Lord Diplock described this as the 'highest common factor' to be discerned in the individual speeches in *Rondel*.

(d) Unreported Court of Appeal 7th March 1978 (CA 129/76). Noted [1978] NZ Recent Law 298.

(e) [1967] 3 All ER 993 at p 1001.

(f) [1977] 3 All ER 744 at p 749.

tions to the barrister to consider amending the pleadings. The barrister, or so it was alleged, orally confirmed earlier advice that no amendment was necessary. Later he advised in writing, by which time the three year limitation period had elapsed and it was too late to sue Mrs Sugden and Mr Akram. On the basis presumably of *Launchbury v Morgans (g)*, Mr Sugden amended his defence in 1972 to deny his wife's agency, which had previously been admitted. Proceedings against him were then discontinued; by this time, any action by Mr Ali against Mrs Sugden or Mr Akram was time barred. Mr Ali, who had started five years earlier with an unanswerable claim for damages, found that he had nobody whom he could sue. He therefore brought proceedings against his solicitors for negligence. The solicitors issued a third party notice against the barrister, who was then joined as an additional defendant to the proceedings by the plaintiff. A summons to strike out the claim against the barrister as disclosing no reasonable cause of action succeeded before a High Court Registrar. It was then restored by Kerr J, but only to be struck out by the Court of Appeal *(h)* on the ground that the barrister was immune from suit.

In the Court of Appeal Bridge L J adopted McCarthy P's test but held that the work in this case satisfied the test. However, Lord Denning MR described the test as "somewhat restrictive, perhaps unduly restrictive" of the barrister's immunity, which he would have extended "not only to the work in the Court itself but also to the preparatory work beforehand" in which he included not only the pleadings and advice on evidence but also any opinion given before commencement of the action *(i)*. His view was based primarily on the role played by barristers in the administration of justice. The duty of counsel to the Court to see that the Court's processes were not abused was considered to be of paramount importance by all members of the Court of Appeal; as Lawton LJ put it, barristers provide a "sieve" through which cases usually pass before they are considered by the court and if they make a mistake in performing that function they should not be liable for negligence *(j)*. The Court of Appeal accepted *Rondel v Worsley* as establishing a principle covering not only liability for negligence in court but pre-trial negligent advice. Certainly there were strong obiter dicta in *Rondel v Worsley* to support the Court of Appeal in their view and, in the House of Lords, Lord Wilberforce described these obiter observations as ones which – in the particular circumstances – should be given much more weight than obiter dicta usually received *(k)*. Apart from Lord Reid's observation that the public duty to assist in the administration of justice applied when drawing pleadings and, in some cases, when litigation was impending and that immunity should follow *(l)*, Lord Pearce had related the need for "fearless independence" on the part of barristers directly to opinions and other paperwork and was clearly of the view that immunity attached to counsel when preparing such work *(m)*. In an example that was almost a mirror image of the *Saif Ali* case, Lord Upjohn had remarked that "counsel in settling pleadings would, in my present though not final view, be immune from action if, being properly instructed on the relevant facts, he failed to plead the relevant Statute of Limitations" *(n)*.

The duty question

Over recent years there has been a considerable extension of liability for negligence to acts which had not previously been regarded as giving rise to a duty of care; this extension has largely been disregarded in cases concerning barristers' immunity. *Hedley Byrne & Co Ltd v Heller & Partners Ltd (o)* was discussed in *Rondel v Worsley* but largely on the narrow issue of whether it affected the basis for immunity which supposedly lay in counsel's inability to sue for his fees *(p)*; in deciding that the immunity did not rest on this basis, the House of Lords held that *Hedley Byrne* had not altered the position in regard to counsel's liability for professional negligence. However, as Lord Diplock pointed out in *Saif Ali*, since *Rondel v Worsley* in 1967, the extension of liability for negligence in doing things which were not previously thought to give rise to a duty has gone on apace. In the face of what was described as this "broad trend" his Lordship felt that it was necessary to avoid uncritical acceptance of the "highest common factor" in *Rondel v Worsley (q)*. Lord Wilberforce, in analysing McCarthy P's test, remarked that "in principle, those who undertake to give skilled advice are under a duty to use reasonable care and skill. The immunity as regards litigation is an exception from this and applies only in the area to which it extends. Outside that area, the normal rule must apply" *(r)*. Clearly the ever-widening scope of liability for professional negli-

(g) [1972] 2 All ER 606.
(h) [1977] 3 All ER 744.
(i) Ibid at p 748.
(j) Ibid at p 749.
(k) [1978] 3 All ER 1033 at p 1037.
(l) [1967] 3 All ER 993 at p 1001C.
(m) Ibid at p 1030 D–C.
(n) Ibid at p 1036B.
(o) [1963] 2 All ER 575.
(p) [1967] 3 All ER 1033 at p 1036I, 1038G, 1022 F & I cf Lord Reid at 1001D.
(q) [1978] 3 All ER 1033 at p 1044.
(r) Ibid at p 1039.

gence weighed heavily with the majority in the House. Lord Salmon, recognising that it was "most unpleasant" for a barrister to have to fight an allegation of negligence, felt that it was no more an unpleasant experience than that undergone by physicians, surgeons, architects or accountants *(s)*. No mention was made of the distinction in this respect drawn by Lord Pearce in *Rondel v Worsley*, that "the whole judicial process is anomalous to other professions. It is a thing on its own" *(t)*.

However, in so far as negligence was concerned, Lord Wilberforce was careful to describe *Saif Ali* as a "fringe decision" rather than one establishing a new pattern. The decision of the House was a decision on the limits of the immunity restated in *Rondel v Worsley*.

The application of Rees v Sinclair

The precise allegations of negligence against the barrister were threefold. First, delaying until after the limitation period had expired to advise on whether the proceedings should be resettled, in view of the non-admission as to the agency of the defendant's wife and the potential allegation of contributory negligence on the part of Mr Akram. Secondly, failing to advise until a late stage that a conflict of interest might exist between the plaintiff and Mr Akram. Thirdly, failing to advise the plaintiff that he should sue Mr Sugden and/or Mrs Sugden and/or Mr Akram and advising that proceedings should be issued only against Mr Sugden. In its way what Lord Wilberforce described as the case's "leisurely pace" was a classic instance of the law's delay.

For the majority in the House the question was whether the allegations, if correct, came within McCarthy P's test in *Rees v Sinclair*. Was the work on which all, or any, of these allegations were based, "so intimately connected with the conduct of the cause in Court that it could fairly be said to be a preliminary decision affecting the way that cause was to be conducted when it came to a hearing"? The apposite basis of immunity, applying the analysis in *Rondel v Worsley*, would seem to be the barrister's duty to promote the "smooth and speedy conduct of the administration of justice". Drawing an analogy with the conduct of the trial itself, does advice on the proper defendants to an action fall into the same class as, eg, the pruning of irrelevant points from cross-examination, on which much store was set in that case. Obviously there is a temporal distinction, but the determining factor has been said to be the relationship between the work in question and the barrister's role in the conduct of litigation *(u)*, and the immunity is not limited to the conduct of the case in the Courtroom *(v)*.

According to the majority in the House in *Saif Ali*, advising who was to be a party to an action and settling pleadings in accordance with that advice fell outside the area of immunity as set out in *Rees v Sinclair*; "well outside" according to Lord Wilberforce. In so deciding, Lord Diplock noted that the work from which the action arose was all done out of Court *(w)* and Lord Salmon felt that it was "not even remotely connected with counsel's duty to the court or with public policy" *(x)*. All of the House were at pains to point out that, if there was oversight or failure to consider the consequences of not adding Mrs Sugden as a defendant, this may have been defensible.

The emerging test

The difference in approach between the majority of the House in *Rondel v Worsley* and those dissenting appears to have resulted in part from opposing views of the consensus in *Rondel v Worsley* as well as McCarthy P's test. Lord Russell, dissenting, accepted "without qualification" the House's decision in *Rondel* and could find no distinction between the conduct of a criminal defence and the conduct of civil proceedings. Given that the immunity should exist at all, he felt that it should extend to "areas which affected or might affect the course of conduct of litigation, in which were to be found the public duty and obligation of the barrister to participate in the administration of justice" *(y)*. However Lord Wilberforce, in suggesting that McCarthy P's test was not a double test requiring intimate connection with the conduct of the cause in court *and* necessity in the interests of justice, considered that such a "double test" would be entirely new *(z)*. Nevertheless, it is submitted that there is no substantial difference between this supposedly "entirely new" test and the above formula put forward by Lord Russell as representing the majority view in *Rondel v Worsley*. Indeed it was by casting the "administration of justice" factor as the justification for the test, rather than an integral part of it, that Lord Wilberforce narrowed the more general formula emerging from *Rondel* based on "conduct and management of litigation". Once the test is narrowed to intimate

(s) Ibid at p 1049.

(t) [1967] 3 All ER 993 at p 1028E.

(u) Per Richardson J in *Biggar v McLeod* Unreported (CA 129/76).

(v) Per McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180 at p 187.

(w) [1978] 3 All ER 1033 at p 1046.

(x) Ibid at p 1050.

(y) Ibid at p 1053. Since the dissenting judgments reflect the reasoning set out at length in *Rondel v Worsley*, they are not dealt with in detail in this note.

(z) [1978] 3 All ER 1033 at p 1039.

connection with the cause in court alone, the conclusions of the majority of the House – and in particular their divergence from obiter dicta in *Rondel* – become understandable. This is reinforced by an examination of the dissenting judgments of Lord Russell and Lord Keith, where the "proper administration of justice" argument is at the forefront. Whilst Lord Russell refers to this factor as the "justification" for the immunity, it is clear from the tenor of his judgment that he regards it as being in itself part of the test also; it is the barrister's liability to a *claim*, he said, that might interfere with his duty to participate in and contribute to the "ordinary, proper and expeditious trial of causes in the Courts" *(aa)*. Lord Keith for his part saw the immunity as applying to all situations where there was the possibility of conflict between the barrister's duty to the Court and to the proper administration of justice, and the personal interests of his clients; this possibility was considered by the majority in *Rondel v Worsley* to exist in relation to all aspects of a barrister's work in connection with litigation and Lord Keith considered that McCarthy P's test was not consistent with the principal ground of the decision in that case *(ab)*.

There can be no doubt that the narrow test adopted by the majority in *Saif Ali* on the basis of the test proposed in *Rees v Sinclair* is inconsistent with the strong obiter dicta in *Rondel*, to which full effect was given in the Court of Appeal and the dissenting judgments in the House. Of the five judgments in those two Courts opposed to continuation of the action against the barrister in only one, that of Bridge L J, was McCarthy P's test adopted. Bridge L J held that all of the allegations of negligence satisfied the rule *(ac)*. This leads one to speculate on the approach that might have been taken by the New Zealand Court of Appeal on the same facts. In *Biggar v McLeod*, Woodhouse J quoted with approval Bridge L J's assertion that the immunity should extend to the conduct of litigation in its preliminary stages and in advising in relation to it *(ad)*. Richardson J, whilst citing *Rees v Sinclair*, stated that "what is decisive is the nature and purpose of the work in relation to the conduct and management of the litigation" *(ae)*. In both judgments the role of public policy was stressed. This indicates a rather wider approach to the question of immunity, and the impact of *Rees v Sinclair*, than that taken by Lord Wilberforce in *Saif Ali*. Additionally, in *Rees v Sinclair*, in holding that the alleged negligence in question was intimately connected with the manner in which the case was to be conducted at the hearing McCarthy P stated by way of explanation that it "governed the tactics to be adopted in Court" *(af)*: here the alleged negligence involved, broadly, failure to adduce evidence and incorrect advice as to the challenging of one of the trial documents prior to the hearing. Would not the decision in *Saif Ali* as to whether or not Mrs Sugden and/or Mr Akram should also have been sued have likewise "governed" the tactics at any trial and, on this approach, have been held to satisfy the test? Certainly a considerable difference in the presentation of Mr Ali's case would have resulted from joining Mr Akram as a defendant as opposed to entering the court with him as a co-plaintiff.

In partial explanation of the narrower view taken by the majority of the House in *Saif Ali* two matters may be raised. First, there was an obvious trend of thought that if the House had not gone too far in *Rondel v Worsley*, taking that case in isolation, their decision hardly reflected the recent generous extension of liability in negligence to other previously protected areas – particularly in the field of professional advice. Accordingly, if their construction of the test in *Rees v Sinclair* involved a narrowing of the immunity as compared with the more general scope of the words "conduct and management of litigation", this narrow approach would be "quite right" *(ag)*. Secondly, whilst it is always dangerous to speculate about the impact of individual circumstances on the development of a principle through a series of cases, one cannot resist the observation that there can rarely have been a more undeserving plaintiff than Mr Rondel nor a more unfortunate one than Mr Ali; can the House have been immune to this feature in each case? Certainly, as Lord Salmon put it, it would be a "shocking reflection" on the common law if in the circumstances Mr Ali had no remedy against those responsible for his plight *(ah)*.

(aa) Ibid at p 1053.

(ab) Ibid at p 1055.

(ac) [1977] 3 All ER 744.

(ad) CA 129/76 Unreported.

(ae) Ibid.

(af) [1974] 1 NZLR 180 at p 187. See also Lord Russell in *Saif Ali* at p 1053 "A decision which shapes, or may shape the course of a trial should be within the umbrella . . . of freedom from claims whether it is arrived at before trial or during it".

(ag) [1978] 3 All ER 1033 at p 1039.

(ah) Ibid at p 1048. The position of the solicitors, Sydney Mitchell and Co, is interesting. Whilst a solicitor is not liable to his client for negligence on the part of counsel whom he instructs (*Lowry v Guildford* (1832) 5 C & P 234), he cannot relieve himself of responsibility on a matter where the law would presume him to have knowledge (*Godefroy v Dalton* (1830) 6 Bing 460 at p 469); the issue seems to be Was it a matter on which there was reasonable doubt and no want of ordinary care on the part of the solicitor? (*Potts v Sparrow* (1834) 6 C & P 749). It follows that the drafting of pleadings

What protection remains?

In his dissenting judgment, Lord Keith remarked of the rule in *Rondel v Worsley* that "there is merit in the maintenance of a rule which is relatively simple and easy to apply" *(ai)*. It must be said that the test emerging from the majority judgments in the House in *Saif Ali* is not so simple. In deciding that inasmuch as the alleged negligent acts in fact prevented the case from coming to Court they could not be said to have been intimately connected with the conduct of the cause in Court, their Lordships gave little indication of where they would draw the line. Lord Wilberforce gave no examples of pre-trial work attracting immunity under his interpretation of McCarthy P's test, save for a reference to the illogicality and unfairness of not protecting pre-trial decisions of the same nature as decisions at the trial itself; he was referring here to interlocutory or pre-trial proceedings *(aj)*. The only direct examples given of pre-trial work attracting immunity both involved consideration of potential devices to circumvent the immunity attaching to the trial itself. Lord Diplock instanced the case where the practice is for the barrister to advise on evidence at some stage before the trial: in such a case, he said, the barrister's protection from liability for negligence in the conduct of the case at trial is not to be circumvented by charging him with negligence in having previously advised the course of conduct at the hearing that was subsequently carried out *(ak)*. Lord Salmon, in reconsidering his judgment in the Court of Appeal in *Rondel v Worsley*, said that immunity might *sometimes* extend to drafting pleadings and advising on evidence. His Lordship gave the example of counsel stating in an advice on evidence that he will not call as a witness a person whom he believes his client wishes to call solely to prejudice his opponent and continued that "it would be absurd if counsel who is immune from an action in negligence for refusing in Court to call a witness could be sued in negligence for advising out of court that the witness should not be called" *(al)*. Whilst one must bear in mind the House's reluctance to attempt a catalogue of pre-trial work attracting immunity it must be said that if these two examples are illustrative of the extent of immunity which remains, that immunity will rarely be present. In both examples the damage, if any, will have resulted from acts or omissions in the course of the trial and the potential cause of action will accrue at that stage and be covered by the established immunity under *Rondel v Worsley*; in this event, as well as being covered by public policy, the pre-trial advice would be ancillary to – rather than the foundation of – any action for negligence against counsel. The examples might have been based on the facts in *Rees v Sinclair* itself, where the defendant advised before the trial that certain allegations should not be made and, at trial, refused to put them forward. However the approach adopted by Lord Salmon and Lord Diplock in some ways represents a subtle shift of emphasis from that present in the judgment of McCarthy P in that case. McCarthy P saw the intimate connection as arising because the advice governed tactics to be adopted in Court, the emphasis being on protection of counsel when acting in an advisory capacity; their Lordship's emphasis was on the trial itself and counsel acting in their capacity as advocates, in respect of which their immunity was not to be narrowed by resort to the "back door" of pre-trial preparation. It is submitted that McCarthy P's emphasis would result in a wider immunity than that posited by the majority of the House in *Saif Ali*.

As with all of the UK authorities on barrister's immunity, the House in *Saif Ali* were dealing with a split profession. It is becoming rare for solicitors in the UK to settle any but the simplest of pleadings in the County Court and virtually unknown for pleadings in the High Court to be settled by solicitors, so that *Saif Ali* will have little application to that branch of the profession in the UK. For New Zealand, the question is whether the immunity of a practitioner who practices both as a barrister and a solicitor is co-extensive with that of a barrister simpliciter in relation to pre-trial advice

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usually falling to counsel, a solicitor is not liable for negligence for proceeding with an action which ultimately fails owing to an error in counsel's pleading unless his instructions were at fault (*Manning v Wilkin* (1848) 12 LTOS 249, *Ireson v Pearsman* (1825) 5 Dow & Ry KB 687). The claim for indemnification under the third party notice against the barrister in *Saif Ali* was based on the grounds that at all material times and in all material matters the solicitors had instructed him as counsel for the plaintiff and that, in the matters in respect of which complaint was made in the plaintiff's claim against them, they had acted on his advice; there was also an allegation of unreasonable delay in giving the advice. On the question of the law relating to agency and its bearing on the pleadings, the solicitors would probably be covered by the above cases. However there are one or two grey areas in their potential liability. Was it wise for them "unconditionally" to assent to re-amendment of the defendant's pleadings to deny agency, as they did? Should they have issued their writ earlier, in which event the case might have come to trial before *Launchbury v Morgans* in 1972? Apparently counsel had been in a position to assess general damages in 1968; why was the case not brought to trial shortly thereafter, assuming that the injury had stabilised?

(ai) Ibid at p 1056.
(aj) Ibid at p 1039.
(ak) Ibid at p 1046.
(al) Ibid at p 1051.

and the drawing of pleadings; this question remains unresolved. McCarthy P, in *Rees v Sinclair*, hinted that it might be in stating that:

> "The protection . . . is not conferred for the benefit of the individual, but in the interests of the administration of justice. It may be argued that on this reasoning the protection should also be extended to solicitors, when they are appearing in Court or performing duties incidental to such appearances" *(am)*.

If for "performing duties incidental to such appearances" one may read "performing pre-trial work intimately connected with the conduct of the cause in Court so as to form a preliminary decision affecting the conduct of the cause in Court", then the immunity would be co-extensive. Macarthur J, in stating in *Rees v Sinclair* that the only practical test was to confine the immunity to the "true work of an advocate", thought that there was good reason for applying McCarthy P's "intimate connection" test for immunity to solicitor advocates *(an)*. Neither MacArthur J nor McCarthy P expressed a decided opinion on the point, but there would not seem to be any compelling reason for differentiating between the two branches of the profession in New Zealand. This is particularly so now that the emphasis in assessing the scope of immunity for pre-trial acts may be said to rest on the course of the trial itself. The majority of the House in *Saif Ali* held that a solicitor acting as an advocate in court enjoys the same immunity as a barrister; should there not be co-extensive immunity outside the Courtroom too?

Perhaps the major protection that now remains in the field of pre-trial work is that not every error is necessarily "negligent", particularly in an area which necessarily involves a considerable degree of personal discretion. The difficulty in drawing a line between breach of duty and error in judgment will be considerable in most cases involving alleged pre-trial negligence. Such an argument was put forward for the plaintiff in *Rondel v Worsley* before the Court of Appeal, in an attempt to minimise the effect of the "looking over the shoulder" argument ie that the imposition of a duty of care would cause barristers to be unreasonably circumspect in the exercise of their skill, for fear of an action being brought against them; however the House of Lords in *Rondel* seemed to be of the view that this argument supported immunity in so far as it reduced the potential hardship to the public which resulted from the operation of the rule – "assertions of negligence could readily be repelled" *(ao)*. The question was taken up by Lord Diplock in *Saif Ali*; stating that the barrister's necessary exercise of finely balanced judgment on matters about which different members of the profession might take different views did not justify the granting of absolute immunity, he continued:

> "No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from . . . errors of judgment, unless the error was such as no reasonably well informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted on . . . [T]he argument founded on the barrister's competing duties to court and client . . . loses much of its cogency when the scene of the exercise of the barrister's judgment as to where the balance lies between these duties is shifted from the hurly-burly of the trial to the relative tranquillity of the barrister's chambers" *(ap)*.

Lord Diplock felt that the kind of judgment which a barrister has to exercise in advising a client as the barrister had done in the case before him did not differ from any other professional prognosis; additionally, the Judge before whom any subsequent action based on the advice was tried would be well qualified to distinguish between error amounting to negligence and reasonable – though mistaken – exercise of judgment. It is regrettable that the House did not extend this reasoning into the area of the trial itself and reconsider *Rondel v Worsley* in its totality *(aq)*; Lord Diplock found counsel's failure to put forward the more radical submission that the immunity of advocates in Court ought no longer to be upheld "an unsatisfactory" feature of the appeal *(ar)*, but in all probability the sheer recency of *Rondel* would have been weighed against acceptance of such a submission *(as)*. Nevertheless, whilst the immunity for work within the context of trial stands, to quote Lord Salmon "it can only be in the rarest of cases that the law confers any immunity on a barrister against a claim for negligence in respect of any work he has done out of

(am) [1974] 1 NZLR 180 at p 186. This point was exhaustively discussed by Mahon J at first instance [1973] 1 NZLR 236.

(an) Ibid at p 190.

(ao) Per Lord Morris [1967] 3 All ER 993 at pp 1011–1012.

(ap) [1978] 3 All ER 1033 at p 1043.

(aq) For arguments in favour of such an approach see eg Symmons "The Duty of Care in Negligence: Recently Expressed Policy Arguments". [1971] MLR 394 at pp 528–533, Heerey "Looking Over the Advocate's Shoulder" 42 ALJ 1 at p 7.

(ar) [1978] 3 All ER 1033 at p 1045.

(as) Ibid at p 1037.

Court" *(at)*. Whether this will result in many successful actions being brought remains to be seen.

(at) Ibid at p 1051.

SALE OF LAND

"WITHOUT PREJUDICE" COMMUNICATIONS - ANOTHER RED LIGHT FOR PRACTITIONERS

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It is not so long ago that a decision of the English Court of Appeal and a series of decisions of the Supreme Court in this country seemed to suggest that a solicitor could unwittingly and unawares all too easily bind his client to a contract. It was a prospect which caused "consternation" (Lord Denning's word) amongst conveyancing practitioners. Happily that consternation was alleviated by subsequent decisions of the Courts of Appeal of the two countries in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 and *Carruthers v Whitaker* [1975] 2 NZLR 667 respectively.

As a result of the recent judgment of Quilliam J in *Philip Morris (NZ) Ltd v American Cigarette Company (Overseas) Ltd* (Supreme Court, Wellington, 7 September 1978) it may now be the turn of commercial lawyers to experience a consternation akin to that felt by their conveyancing brethren four or five years ago. The *Morris* case arose out of contested trade mark applications and took the form of a claim for specific performance of an alleged contract by way of settlement. The terms were contained in a letter from the solicitor of one party to the solicitor for the other, and the reply thereto. Both letters were headed "without prejudice". From the learned judge's finding that the two letters did constitute a contract, it appears to follow that a solicitor cannot prevent his letter being treated as a binding acceptance simply by marking it "without prejudice", even in a situation where there may be further matters requiring negotiation, and where it is envisaged on both sides that the principal parties will themselves in due course be entering into a formal written contract.

It is worth recalling what was established in those earlier appeal cases which reassured conveyancing practitioners in 1975. *Tiverton Estates Ltd v Wearwell Ltd* affirmed that a solicitor is not to be taken to have admitted a contract for his client when he uses words which expressly deny that any contract presently exists. *Carruthers v Whitaker* affirmed that parties are not to be impressed with a contract unless and until they intend to be bound by it. Those two propositions are so elementary that it comes as a shock to find that they could ever have been doubted. The reason why they were in doubt, it is believed, goes back to a basic confusion between contract and agreement. A good many lawyers seem to take it for granted that parties who have reached agreement on terms have thereby necessarily entered into a contract on the terms so agreed. Why in its turn this view should be current is another story which is is hoped to investigate on a later occasion. In the meantime, though, it is sufficient that our own Court of Appeal has reaffirmed in *Carruthers v Whitaker* that mere agreement as to terms is not enough. To agreement must be superadded an intention to contract. The importance of this distinction is well illustrated by reference to the possible roles of solicitors in the negotiation of contracts. In law, there is a world of difference between principals on the one hand using intermediaries to negotiate and agree on the terms which will appear in the contract to which the principals will in due course bind themselves and, on the other, using intermediaries to negotiate and enter into a contract on their behalf. In the first case the solicitor acts as an agent to negotiate, the word "agent" meaning "doer" or "actor". Only in the second case is he an agent in the strict sense of an agent to enter into a contract on his principal's behalf.

It is submitted that it ought not too lightly to be assumed that a solicitor engaged to negotiate on his client's behalf has also been engaged to bind his client to a contract. In the light of *Carruthers v Whitaker* it seems that such an authority is not readily to be implied where negotiations relate to a sale of land. It may also prove not to be a common understanding that solicitors ex facie have the power to contract on behalf of corporations, such as companies and local authorities.

However, the *Philip Morris* case, though it was between corporations, involved the alleged settlement of a lis between the parties. In such cases it is beyond doubt that both solicitors and barristers prima facie have authority to bind their clients. Accordingly, if a legal advisor wishes to avoid binding his client in such a case, he ought to take

steps to rebut the usual inference from his position. The obvious way to achieve this would be to make the settlement "subject to confirmation" or "subject to ratification" by his client. In the *Philip Morris* case, what was at issue (inter alia) was whether the use of the expression "without prejudice" could have a similar effect.

The primary significance of the formula "without prejudice" is evidential. As a means of encouraging the settlement of actions, the law treats as inadmissible without consent any communication so marked and forming part of a genuine attempt to negotiate a settlement. It is very clear, however, that once an offer marked "without prejudice" has been accepted, *and a contract formed*, it loses its privilege. It has become the basis of the contract of settlement and hence must necessarily be admissible to prove the contract terms. But though the primary use of the formula is to prevent the writing being admitted in evidence as an admission, it has also been used more loosely for substantive rather than evidential reasons. In other words, it has been used to indicate that the writer reserves his position in law or is not prepared to be bound in law to what would otherwise be the effect of his writing. That the use of the formula can have a substantive intention and effect was recognised by, for example, Dixon CJ and Fullagar J in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 and, more recently, Ormrod J (dissenting) in *Tomlin v Standard Telephones & Cables Ltd* [1969] 3 All ER 201 (CA). All three judges saw the formula as relevant to intention to contract. Of course, recognition that the words "without prejudice" can perform such a function presupposes an appreciation of the place and significance of intention in the formation of a contract. One would not expect courts or counsel who equated contract with agreement to see the formula as going to anything other than admissibility. It is significant, therefore, that Williams J in the *Tellerman* case and Danckwerts LJ and Sir Gordon Wilmer in the *Tomlin* case, who all saw the effect of "without prejudice" as purely evidential, appear also to have equated the reaching of an agreement with the conclusion of a contract.

Returning now to the *Philip Morris* case, it was put to Quilliam J that, while tentative agreement might be achieved on certain points, that might be no more than part of the negotiating process and the tentative agreement could be withdrawn through a lack of agreement on other points. The learned judge's response to this was that it was, of course, a well-recognised situation, but there was nothing to prevent final agreement being achieved upon some only of matters in dispute so long as it was clear that the parties intended that result. While it would be unfair to read that passage from the judgment as though it were a statute, the emphasis was none the less on intention to agree rather than on intention to contract. It was also submitted by counsel that the use of the words "without prejudice" in the alleged letter of acceptance was an indication that the solicitor concerned was reserving his client's position and that the acceptance letter was merely a step in a series of negotiations. It was submitted, in other words, that the formula was intended to have substantive effect. But his Honour's response to that submission appears to have been prompted by purely evidentiary considerations. He said:

> "It is difficult to attribute any very clear motive to the use of the expression 'without prejudice.' It is used frequently and loosely and in many instances in circumstances when it can achieve no legal significance at all. If Mr McLean's letter was indeed a clear acceptance of an offer then I am unable to see how he could protect himself from it being regarded in that way by simply marking it 'without prejudice'. I think that having regard to the contents of his letter the use of that expression had no significance."

It is submitted that the words "without prejudice" can in law have substantive effect, and ought to have been read in the *Philip Morris* case with that possibility in mind. Nevertheless, it remains true that whether those words have had a substantive effect in a particular case can never be any more than a matter of impression in the light of all the relevant circumstances. A legal practitioner wishing to reserve his client's legal position would still, therefore, be well-advised to use some more explicit method of doing so.

A wide-ranging discussion of "without prejudice" communications will be found in an article by David Vaver in (1974) 9 UBC Law Review 85.

Criminal costs – a hint

It is a curious anomaly that while the accused will recover the costs of his scientific evidence and the obtaining of it he will not recover the costs of his counsel whose skill was involved in marshalling and presenting that evidence let alone his skill in preparation and the general conduct of the defence. Had I been permitted by the Act to award costs in full I would have discounted them by 20 percent to cover those aspects of the accused's conduct which attracted a suspicion of criminality. Chilwell J in *R v Mosley* (Supreme Court, Auckland 13 July 1978 T 223/77).