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INTER ALIA

Tax regulation

When during the course of the Budget debate the Prime Minister, the Honourable R D Muldoon, announced that to enable a more rapid response to economic change he was introducing an amendment to the Income Tax Act 1976 to enable income tax to be reduced by regulation more than a few ears would have pricked up. Would the changes be limited to *reductions* only? If not, would not this be a case of taxation without representation? The short answer to the latter question is No. It would still be within the power of Parliament to change the taxes. But having said that it must be acknowledged that for all practical purposes the link between representation and taxation is becoming increasingly tenuous and the hold of Parliament on economic matters is being increasingly eroded.

Between them, the Customs Act 1966 (which permits modification of the tariff by order in council), the Sales Tax Act 1974 (which imposes sales tax on all goods but allows exemptions by order in council) the ubiquitous Economic Stabilisation Act 1948 (which empowers regulations to promote the economic stability of New Zealand) and the proposed amendment when coupled with other controls, leave little in the field of economic control still needing prior Parliamentary sanction. While increases in the various taxes still require specific Parliamentary sanction, to a very large extent their application does not. And while it may be argued that, for example, sales tax is imposed by statute, a trader who finds goods in which he deals removed from the exempt list by Order in Council is likely to be unimpressed by such juristic nicety.

That this is an age of Government by

regulation does not make further economic control by regulation any the more desirable. What the proposed amendment does is introduce yet another means of economic regulation that may be exercised without subjection to Parliamentary debate or even caucus scrutiny. Reduced income tax may be applauded but the means are thoroughly reprehensible.

Few would disagree with the Prime Minister that the state of the economy is critical to New Zealand's future. For that very reason it is absurd that matters bearing on it should be increasingly removed from the ambit of Parliamentary sanction. If the state of the economy demands instant economic measures, then the matter is surely of sufficient importance to demand the calling of Parliament.

Superficially attractive though this power to reduce taxes may be it is very decidedly a step in the wrong direction.

The Priest and the lawyer

If there is one thing illustrated by the case of *Illingworth v Illingworth* (Supreme Court, Auckland 8 June 1979 Barker J) it is the importance on a second marriage, especially of a wealthy person, of the advice of a lawyer preceding the officiation of the cleric - assuming of course that advice given is taken. It may be emotionally devastating for a prospective husband to be told that he should not settle his nest as a joint family home but if things go wrong he can at least solace himself with the thought that if the marriage fails his bank roll will be reduced by no more than has been negotiated or is considered reasonable in terms of the Matrimonial Property Act 1976.

In the *Illingworth* case the husband acquired an expensive flat (\$150,000 plus) and

settled it as a joint family home on himself and his second wife. The flat was then sold and another property of similar value acquired. The parties separated after a marriage lasting but two and a half years.

Mr Justice Barker in the course of his judgment on matrimonial property matters, indicated that an appropriate division of matrimonial property would have been 80 percent to the husband and 20 percent to the wife. That would have been so had the matrimonial home been owned by the husband, or jointly, or had even been a first property settled as a joint family home. However, on the sale of the first joint family home, then by virtue of s 11 (3) of the Joint Family Homes Act 1964 (as enacted by the 1974 amendment) half of the net proceeds became the property of the wife

and could not but be recognised as her contribution to the second property - her contribution thus approaching equality with that of the husband. Equal sharing was therefore inevitable.

One can but speculate on whether the husband went into the joint family home enterprise with his eyes open or not. However the incident does illustrate that the joint family home legislation should not be treated as just another form of property ownership but has effectively attained the status of a very specialised tax, estate, and family finance planning tool and one to be treated with the caution due to Medusa. While a slip of the shield will not turn a settlor to stone it may nonetheless shock him rigid.

Tony Black

TOWN PLANNING

PRACTICE NOTE - COSTS

(This note supersedes practice note 3, NZTPCA 244)

1 Where an appeal is withdrawn, the Tribunal will normally award costs against the appellant in favour of the other parties, but only when an application for costs is made. If costs are sought in respect of preparation for hearing, particulars of the claim should be given by the applicant for costs.

If the request for withdrawal is made by letter, an application for costs may be made by letter.

2 Where an appeal under s 49 of the Town and Country Planning Act 1977 or an appeal under s 26G of the Water and Soil Conservation Act 1967 has proceeded to a hearing, costs will not be awarded to any party save in exceptional circumstances.

3 In other cases the Tribunal will as a general practice order an appellant who has failed to obtain the relief sought by his appeal or any substantial modification of the decision appealed against, to pay costs to the other parties to the appeal. In those cases where the Tribunal considers that costs should be awarded, either the Tribunal will fix a specific sum in its decision or will award costs reserving the amount. In the latter case, those entitled to costs should make a claim by letter (supported by particulars).

4 As a general rule the Tribunal will not award costs against the public body from whose decision an appeal is brought.

5 One factor which will be relevant to an award of costs, and in fixing the amount of an award, will be whether any party has been required to prove undisputed facts which in the Tribunal's opinion should have been admitted by the other parties. In this regard, attention is drawn to reg 69 (2), which applies to appeals under the Water and Soil Conservation Act 1967. But in its relation to costs, the principle stated there is of general application.

6 Attention is drawn to the power conferred by s 147 (2) to award costs to the Crown in certain circumstances.

Not long ago I heard a defended charge of drunkenness. The defendant conducted his own case, which was set down for 2.15 pm. It was quite obvious when he came to give evidence that he had fortified himself for the occasion, and he then admitted that he had drunk half a bottle of rum before lunch to provide the necessary Dutch courage. When I had convicted him and was about to sentence him I said, "Mr X, I think that you have got a drinking problem." "No sir, he replied, "that's where you're wrong. I have no problem about drinking. I just have a problem stopping." — Mr B H Blackwood SM in *NZ Justice Quarterly*.

CASE AND COMMENT

Administrative law: Void and voidable again

In a short note included in [1977] NZLJ 284, the decision of the Court of Appeal in *Reid v Rowley*, since reported in [1977] 2 NZLR 472, was discussed along with *Twist v Randwick Municipal Council*, a decision of the Australian High Court reported in (1976) 12 ALR 379. We now have a decision of the Privy Council in *Calvin v Carr* (1970) 22 ALR 418, where both cases were considered. The Privy Council unanimously advised that the appeal from the decision of Rath J, sitting in the Equity Division of the Supreme Court of New South Wales, be dismissed.

The case concerned the disqualification of the appellant by the stewards after the running of a race at Randwick Racecourse. An appeal taken under the Rules of Racing to the Committee of the Australian Jockey Club was dismissed. In the Equity Division, it was decided that, although there had been "cured" by the hearing de novo conducted by the Committee.

The first issue before the Privy Council was whether the Committee had jurisdiction to hear the appeal. Was there a "decision" from which an appeal could be taken? This led to a discussion of void and voidable, a distinction which Lord Wilberforce who delivered the judgment in *Calvin v Carr* had expressly refrained from recognising or endorsing in the *Anisminic* case [1969] 2 AC 147, 208. In *Calvin v Carr* he observed at pp.425-426:

"Their Lordships' opinion would be, if it became necessary to fix upon one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent."

This statement can be seen as preserving the stance of at least some members of the Privy Council who have declined to accept the void/voidable distinction. Instead it was con-

cluded that the "decision" of the stewards had "sufficient existence in law to justify an appeal". This was seen as consistent with *White v Kuzych* [1951] AC 585 and *Annamunthodo v Oilfields Workers' Trade Union* [1961] AC 945. The decision of Speight J. in *Denton v Auckland City Council* [1969] NZLR 256 was described as being out of line with other authorities. This case is referred to hereunder.

The second issue was whether an appeal could "cure" the defect in the first hearing conducted by the stewards. *Denton*, supra, answers this in the negative. Numerous authorities, including earlier decisions of the Privy Council as well as by Australian, Canadian, New Zealand and United Kingdom courts were cited and discussed. *Annamunthodo*, supra, was not seen as a case of "curing the defect". The defect affected both the original and appellate decisions. *Pillai v Singapore City Council* [1968] 1 WLR 1278 (P.C.), *Meyers v Casey* (1913) 17 CLR 90 and *Reid v Rowley*, supra, seem to have been accepted as the most authoritative and useful precedents. The cases cited include those dealing with both domestic and statutory tribunals. The distinction is important; the first result from agreement, which is the basis of the jurisdiction of the courts to review, and the second are created by legislation which it is the function of the courts to ensure is observed.

Three propositions or categories emerged from the Privy Council's analysis of the authorities:

First, there are cases concerning decisions of domestic tribunals where in contractual terms it can be said that the parties agreed to accept the decision of the first and the appellate body. "Curing" by the second hearing can be said to have been accepted by the parties.

Secondly, there are cases where the individual is entitled to a fair hearing at both the original and the appellate stage. There can be no "curing" here. Thirdly, there are intermediate cases. Here the court has a discretion and may decide that "at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they found the association" (p.429). It was recognised that some breaches would be

flagrant and the consequences so severe that the most perfect appeal or rehearing would not produce a just result.

It should be noted that breaches by statutory tribunals are discussed only in the context of the second proposition or category. It cannot be said that a party before a statutory tribunal has "agreed" or "accepted" the result in the sense that the first and third propositions describe those subject to the jurisdiction of a domestic tribunal as having done so. The question remains uncertain, therefore, as to the consequences of breach by an inferior statutory tribunal of the requirements for a hearing and the likelihood of this being "cured" by the hearing by an appellate body. This was the situation in *Denton*, where "curing" was rejected. It was however accepted in *Twist*, supra by Mason J (see [1977] NZLJ 285).

The remarks of the Privy Council in relation to *Reid v Rowley*, supra (itself a domestic tribunal case concerned with trotting) may be summarised thus:

First, *Reid v Rowley* decided that an appeal to a domestic or administrative (statutory?) tribunal "does not normally cure a breach of natural justice by a tribunal of first instance so as to oust the jurisdiction of the courts to redress such breaches but that the exercise of such a right of appeal is a matter that may be taken into account by the courts in considering the grant of discretionary remedies". [emphasis in original]

Secondly, the Court of Appeal did not adopt an automatic rule that there can be no "cure" for a breach by the inferior body; it recognised that there may be instances of "insulation" or "curing" after a full hearing on appeal. This result follows from the exercise of the discretion not to intervene.

The Privy Council concluded at pp 431-432 that the proceedings before the Committee of the Jockey Club were

"in the nature of an appeal, not by way of invocation, or use, of whatever original jurisdiction the committee may have had. . . The decision [of the committee after a rehearing] is to be 'upon the real merits and justice of the case'. . . The section [s 32 of the Australian Jockey Club Act 1873] is then to be construed as supplemental to and not in derogation of or limited by the Rules of Racing. This brings the matter of disputes and discipline clearly into the consensual [sic] field . . . In addition to these formal requirements, a

reviewing court must take account of the reality behind them [the Rules] . . . It is in order to enable decisions reached in this way to be reviewed at leisure that the appeal procedure exists. Those concerned know that they are entitled to a full hearing with opportunities to bring evidence and have it heard. But they know also that this appeal hearing is governed by the Rules of Racing, and that it remains an essentially domestic proceeding, in which experience and opinions as to what is in the interest of racing as a whole play a large part, and in which the standards are those which have come to be accepted over the history of this sporting activity. All those who partake in it have accepted the Rules of Racing, and the standards which lie behind them: they must also have accepted to be bound by the decisions of the bodies set up under those rules so long as when the process of reaching these decisions has been terminated, they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits.

"In their Lordships' opinion precisely this can, indeed must, be said of the present case. The appellant's case has received, overall, full and fair consideration, and a decision, possibly a hard one, reached against him. There is no basis on which the court ought to interfere, and his appeal must fail."

The Privy Council found it unnecessary to rule on the other issues, including election and waiver, raised by the appellant.

The thrust of the passages already quoted is clear. The decision is based on the fact that the Committee (and the stewards) was a domestic tribunal acting under the Rules of Racing accepted by the appellant. The case fell within the third category discussed earlier in this note. The parties could be said to have agreed in advance to a decision taken in these circumstances being binding because it is fair.

But doubt remains about the application of this principle and the existence of either a first or third category if the tribunal is one created by legislation, not agreement. While the author would be ready to concede that all departures from natural justice are not equally vicious and that to have the decision branded a nullity in every case, irrespective of whether the complainant was prejudiced by the breach, is to look for perfection in an imperfect world. A similar result, which does not call for the recognition of the first or third categories, can

be achieved by an exercise of the discretion of the court, as was done by Speight J in *Wislang* [1974] 1 NZLR 29, noted in [1972] NZLJ 34 and [1973] NZLJ 387.

J.F.N.

Tort-Fire The relationship of liability under *Rylans v Fletcher* and negligence

In *Nolan v Millar, Nolan and Anor* (Supreme Court, Dunedin 31st August 1978 (No. A48/73), White J. Had to consider the vexed questions of liability under the rule in *Rylands v Fletcher* (1866) LR 1 Ex 265, and how this relates to liability for the negligence of a servant. The judgment was in respect of a claim for damages for loss of property and consequential damages for loss of profits as a result of a fire which destroyed the plaintiff's sawmill at Wanaka on 23 June 1972. The defendant had, in fact, settled the plaintiff's claim prior to the hearing of the case, and the matters in dispute thus became the issues between the defendant and the two third parties.

The facts

The facts were that the defendant, who owned a piece of land at Wanaka adjoining the piece of land on which the plaintiff's sawmill was situated, approached the first third party (a bulldozer operator) with a view to having the section cleared of the dense undergrowth (manuka, blackberry, fern, rushes etc) with which it was covered. The first third party agreed to do the necessary machine work, such as bull-dozing and drainlayer, but he did not feel in a position to do the manual work. However, the first third party did approach (he said as a favour) the second third party and arrange for him to do the necessary manual work of cleaning. There was conflicting evidence as to whether the second third party was the employee of the defendant or of the first third party.

The sawmill (of timber construction) was fairly close to the boundary of the section being cleared and between it and the boundary was a stack of sawn timber. Across the boundary there was a heap of sawdust from the mill which had run down on to the defendant's section.

During June 1972 Taylor (the second third party) was working around the section cutting scrub and burning it in small heaps. These small heaps would not burn for long and would go out fairly early in the late afternoon because of the wet and swampy nature of the ground.

On the morning of the fire Taylor arrived

at the site and commenced clearing. He lit a small fire on swampy ground which had already been cleared. This fire smouldered for about an hour and a half (being continually fed by Taylor). According to Taylor (although there were no records of the fact) a whirlwind then came up the street, which lifted the embers and ashes out of the bonfire and into the air. They flew into some dried manuka in the uncleared scrub, about 50 or 60 yards away from the bonfire. The manuka started to burn. The fire was obviously rapidly getting out of control. Taylor borrowed hoses and a trailer from the nearby fire station and tried to bring the fire under control. The wind had increased to gale force; some of the heaped sawdust caught fire, a burning ember blew into the mill, landing beside the diesel motor where there was waste oil on the floor; the fire spread up the wall of the mill to a drum of diesel fuel and "that was the end of the mill" (The fire brigade was on the site but had no water in its hoses.)

The issues

The defendant claimed that the second third party was primarily liable under (a) *Rylands v Fletcher* and (b) negligence, and that, therefore, the defendant was entitled to indemnity or contribution from the second third party as joint tortfeasor under the Law Reform Act 1936. The defendant also claimed to be entitled to contribution from the first third party in respect of (a) his breach of contractual duty for the negligence of his servant, the second third party, and (b) the first third party's liability under *Rylands v Fletcher*.

Counsel for the second third party had submitted that the defendant should not have settled the claim. His argument was that the rule in *Rylands v Fletcher* could not apply because there had been no evidence to establish a non-natural user of the land. Alternatively he argued that the defence of Act of God (in the shape of whirlwind) was available. He also argued that there was a master and servant relationship between the defendant and the second third party so as to make the defendant liable for his employee's negligence.

Counsel for the first third party adopted the same general submissions but he also argued that the second third party was not the servant of the first third party.

The law relating to liability for fire has always been a complex area, but it seems that the old rule of strict liability for fire has now been enveloped though not superceded or suspended by the rule in *Rylands v Fletcher* (This was certainly the view taken by Somers J in

Mount Fortune Pastoral Co Ltd v Nehoff (No. A. 674 November 1975 unreported). Nor is it entirely clear what the effect of *Rylands v Fletcher* is on the Fire Prevention (Metropolis) Act affords no defence to a *Rylands v Fletcher* fire (see Fleming, *Law of Torts* (fifth edition) pp. 335-338).

In the present case therefore White J was faced not only with a complicated fact situation but also with complex problems relating to legal liability. He concluded that the requirement that there must be a non-natural user of land before liability can arise under *Rylands v Fletcher* is part of the law of New Zealand (see in particular *Holderness v Goslin* [1975]2 NZLR 46, *MacKenzie v Sloes* [1959] NZLR 533 and *New Zealand Forest Products v O'Sullivan* [1974]2 NZLR 80), although this does not necessarily resolve the difficulties of deciding what is meant by the phrase "non-natural user" (see Newark, "Non-Natural User and *Rylands v Fletcher*", (1961) 24 Mod. L. Rev. 557 and David W. Williams, "Non-Natural User of Land" [1973]CLJ 310). White J referred to an exhaustive number of cases (in particular *NZ Forest Products v O'Sullivan* (supra), *Hazelwood v Weller* (1934) 52 CLR 268 and the unreported decision of Somers J in *Mt Fortune v Nehoff* (supra), in which the Court had accepted that although the burning off of scrub was a well-established practice that was not sufficient to make it a "natural user". It must always depend on the circumstances). In the present circumstances although the weather conditions were suitable, the possibility of strong winds, the relationship of the dangers on the neighbouring property, and the likelihood of harm, had to be considered. White J therefore concluded that there was a "non-natural" user of the defendant's land and that the fire escaped in consequence of that non-natural user.

The question then was that although the defendant would be liable (and he had accepted liability), was he entitled to counterclaim against either third party on the ground that either or both of them was an "occupier" or person in control of the land. White J. concluded that in fact the defendant was in control of the activities on his land, and that neither third party could be described as a "stranger". (In taking this view White J followed *H. & L. Emanuel Ltd v Greater London Council* [1971]2 All E.R. 835 and *Holderness v Goslin* [1975]2 NZLR 46.) White J also decided that Taylor (the second third party) was not the employee of the first third party and whatever the relationship between Taylor

and the defendant, the defendant was liable for his own negligence in failing to adequately supervise the dangerous activities on his land (*Erikson v Clifton* [1963]NZLR 705). The defendant, rather than either third party, was therefore liable both under *Rylands v Fletcher* and for negligence in failing to supervise the activities.

In view of his conclusion that *Rylands v Fletcher* (a tort of strict liability) was not available against a non-occupier, White J perhaps did not need to consider whether Act of God (a possible defence under *Rylands v Fletcher*) covered the whirlwind which was alleged to have accelerated the spread of the fire, but as it had been argued by counsel for Taylor (the second third party), he duly considered it. The learned judge concluded, as had Somers J in *Mount Fortune v Nehoff* (supra), that a whirlwind could not be regarded as sufficiently unprecedented or extraordinary so as to constitute an Act of God; it was a possibility and, like a high wind, was a risk which could be anticipated and against which precautions could be taken.

This still left the final question for White J's consideration, namely whether Taylor, (the second third party) had been negligent in allowing the fire to escape and if so, could be held liable to contribute under s.17(1)(c) of the Law Reform Act 1936. His conclusion was that although the defendant was absolutely liable for the non-natural user, the second third party was under a contractual obligation of care in the performance of his duties, and in relation to that duty he had been negligent in a manner which either caused or contributed to the escape of the fire (see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] A.C. 555). As White J said "Causative factors as well as blame- worthiness must be taken into account in deciding what apportionment is just and equitable." He concluded that although the defendant ought to bear the greater share of the responsibility for the escape of the fire, that escape had been contributed to by the negligence of the third party, whose contribution White J. fixed at 15 percent.

The importance of this judgement lies in the fact that it makes it clear that whilst *Rylands v Fletcher* is available in New Zealand, being a tort of absolute or strict liability it is only available against a person who is in occupation of land. Although the occupier may have delegated responsibility is absolute (this must be contrasted with the doctrine of vicarious liability). But the application of a notion of absolute responsibility does not prevent

a contribution being available if the employee's negligence has in fact contributed to the final or ultimate harm; in the present case the spread of the fire rather than the

escape of the fire.

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TOWN AND COUNTRY PLANNING

PERMANENT PRIVATE OPEN SPACE

Two sorts of fragile natural environment are today posing problems of conservation, for which our present planning and protection codes are proving inadequate. The first is the sea coast, still frequently under rural zoning, that is increasingly – and most insistently around Auckland and in the north – coming under pressures for speculative subdivision. The second is privately owned indigenous forest, often in small stands surrounded by farmland and unprotected by any discriminant zoning. Forest companies are offering increasing incentives, for the cash crop either for sawlogs or chipping; and owners are commonly being urged that, with increasing environmentalist pressure, such offers should be accepted without delay.

In principle, the town and country planning code, strengthened by the new Act of 1978, could control both: by making forestry a conditional use; and excluding, by protective zoning, the subdivision of choice maritime environment. This is not widely happening. District planning authorities, usually rural country councils, are still too numerous and understandably enough – motivated by local and sectional considerations. Often with inadequate planning staff, and dependent on rating yield, or the attraction of population by residential and holiday subdivision, they are the wrong bodies to come up with coastal policies coordinated for regional or national need.

Regional input of planning advice is especially needed with choice coastline; but regional planning authorities, with adequate powers and staff, do not, for most of our coastline, yet exist. The maritime planning jurisdiction embodied in the new Town and Country Planning Act 1977 has not yet been invoked; and no maritime planning authority has so far been constituted. Nor have we yet anything resembling the Coastal Commission advocated by Morton, Thom and Locker, in their *Sea Coast in the Seventies*, that might – in acceptable form – have assisted the local authorities with a conservation burden at present in their sole hands. The public image of such a commission was not helped by the hastily drafted Bill introduced by M K Moore MP in 1975, and subsequently withdrawn.

Zoning subject to a regular five-yearly Scheme revision has proved an insufficient safeguard.

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Sustained pressures can clearly be exerted upon district planning authorities by developers holding for subdivision land with present rural zoning. Not surprisingly, these pressures are not always, or for long, resisted; and development-minded counties do not commonly see the need to do so.

The environment movement has long been pressing for an acceptable procedure that could extinguish the development potential of environment worthy of preservation, and replace it with a secure conservation status. The present philosophy in New Zealand, as expressed in the Reserves Act 1977 and the Queen Elizabeth II National Trust Act 1977, is to do this by obtaining voluntary conservation easements over rural or natural land.

In other countries, for a generation past, the debate has increasingly centred on "community value". The Uthwatt Report, issued in Britain in 1942, recommended that all development rights in undeveloped land should be vested in the state, and that land for future development should be publicly purchased at a value reflecting its existing use, and leased back at full open-market value. The Town and Country Planning Act 1947 (UK) partially implemented this Report, introducing a 100 percent charge on the realised difference between development value and existing use value. A Global Fund of 300 million dollars was set up to compensate owners who lost existing development value.

A quarter of a century of repeals and reversals, with ebb and flow of political and economic tides, has for the present culminated in Harold Wilson's Community Land Act of 1975, to allow the community to control the development of land according to its needs and priorities, and to restore to the community the increase in the value of land created by its efforts.

This Act provides for public aggregation of rural land with a view to coordinated development. Such a procedure operates today in a

number of overseas jurisdictions (including, until recently, New South Wales); and was bravely attempted — in effect — by the Kirk Government, for its scheme for a satellite town at Rolleston.

For voluntary restraint of development, in the interest of natural conservation, the incentives offering in New Zealand have always been insufficient. If Mr Peter Wilkinson's Private Open Space Bill, introduced as an Opposition Private Member's measure in 1974, had reached the statute-book, rural land-owners would however have been offered a dispensation few could have failed to find attractive. That Bill, which foundered in the Select Committee, would have given a farmer, in consideration for a conservation covenant, the whole difference between present use value of rural land, and its computed development value, and this regardless of whether it was even zoned for development. Such a payment might have exceeded existing market value for outright purchase as a farm property. It would also have breached an important settled principle of New Zealand planning: that just as "betterment", a levy on added value accruing to land as the result of favourable operation of town and country planning, has never been exacted (though it was provided for in the original 1926 Planning Act): conversely no "worsement" ought to be flow as compensation for loss alleged from failure to "up-zone" a piece of land to allow its development.

Few of the generous expectations of the Wilkinson Bill have materialised in two measures enacted under the present government: The Queen Elizabeth II National Trust Act 1977 and the Reserves Act 1977. The first of these owes much to the conservation impulse within Federated Farmers that produced the Heritage Trust proposals. The Queen Elizabeth II National Trust Board is empowered to negotiate open space covenants with the owners of choice environment, for the long-term preservation of its natural features. Such covenants, when negotiated and accepted by the Board, are registerable upon the land, and run with the title against the owner's successors. Full ownership and control remain in private hands, and each covenant, subject to agreement with the Board, may incorporate such features as the owner wishes. These covenants are subject to a review for effectiveness in five years, and to a further review, for continued relevance. They are not terminable save with the agreement of the Minister, the Trust Board and the present or subsequent owner.

Being initially voluntary for the owner, it is not easy (apart from the express provision for termination) to see what such new covenants offer, that could not in the past have been imposed on himself and his successors, by any

owner desirous of conserving natural features. Such a restriction would almost certainly involve some sacrifices of sale value; though the Queen Elizabeth II National Trust Board have hoped that a conservation covenant over a piece of choice environment could in time generate a prestige increment to value, as might occasionally arise in a city from a preservation order upon an historic home. But in the vast majority of cases, the compensations, available under the Reserves Act or the Queen Elizabeth II National Trust Act, would clearly be insufficient to compete economically with the alternative options open to an owner, normally motivated to seek the best economic return from the land on which he depends for his living.

The incentives that can be offered under the present Acts would seem few and meagre. Section 87 of the Reserves Act allows the Minister to contribute to the rates where provision has been made for public access, or the land is of a quality that would otherwise qualify it for classification as a nature or scenic reserve. Under s 77 the Land Settlement Board may, where the land is held under lease from the Crown, agree to a rent reduction. The Queen Elizabeth II National Trust Act 1977 leaves contribution to rates by the Board entirely discretionary, and limited — as will be clear — by the Board's own sources of income. Though not specified in the Act, assistance could also be available towards the cost of fencing bush or other natural features against cattle. Exemption from stamp, estate and gift duties will apply only where the land is being formally conveyed into the ownership of the Queen Elizabeth II National Trust, and is not allowable on change of private ownership. Assessment for estate duties would presumably be lowered in so far as the existence of a restrictive covenant had diminished the land's economic value. Finally, the Trust Board is empowered to contribute to the potentially expensive costs of any survey of land being placed under covenant, though such contribution and its amount are placed by s 22 in the discretion of the District Land Registrar.

Against these existing provisions, the proposal now advanced, for the creation of a planning category of "Permanent Private Open Space", makes a stronger approach, with incentives that should more often prove adequate, to the preservation of fine environment held in private tenure. It contemplates continued private ownership and seeks to restrain the destruction of good natural environment, such as coastline and forest, without the costly procedures of designation as reserves and acquisition into public ownership. For too long, over the past decade in New Zealand, both local action and innovative thought have been

stultified by the assumed logic: "If you want to preserve it, let the public buy it".

With the present inflated land values, inherited from the uncontrolled property boom of 1972-1975, public acquisition is already so costly as altogether to preclude its adequate use for the protection of natural environment. Nor was this ever the primary purpose of designation, which has always (apart from public works) been in contemplation of reserves of a recreational character to which the public could be admitted and encouraged.

"Permanent Private Open Space" (PPOS) would be a species of zoning incorporated into, and operating under our town and country planning code. Its most distinctive characteristic, would be to outlast the present scheme review period of five years. Land so zoned would lose its attractiveness for speculative buying-up, as rural land, but in anticipation of zoning change, often as the result of sustained pressure on a district planning authority, it would mean the end, as well of a practice still too frequent, of the upward change of the underlying zoning of land already designated as reserve, so benefiting the owner with a steep escalation in the price of acquisition. There would thus be a protective zoning, for land of high environmental quality, that would be permanent, so far as in a changing social and planning climate, even in a changing environment, there can be any permanence. Though it could come under periodic review for effectiveness or continued relevance, the presumption would be that — in the absence of strong evidence for its variation — it would continue intact.

The land affected, like much of Britain's National Park system (including the National Coastline of England and Wales, the best-protected albeit some of the most population-pressed coasts in Europe) would remain in the private owner's hands. It would continue untrammelled in its actual existing use, subject only to the requirement that the environment should not be detrimentally altered from its present state. Regard would be required to the environmental standards specified in its particular zoning code. These would be tighter in many respects than unrestricted "Rural" zoning. For example, on land that had not been previously cleared for farming, and which carried indigenous bush or forest of high quality, farming or production forestry could obviously not be a predominant or conditional use. On existing farm lands preservation might also extend to old or historic buildings or other artefacts, subject always to the criterion of reasonableness in respect of the owner's economic operation, and to the demon-

stration of a preponderant or sufficient national interest.

The procedure for placing land under PPOS zoning would in some ways resemble the present "designation" of a reserve and land for public purposes. It could be initiated at the instance of (a) a Regional planning authority, (b) a district planning authority, under whose respective schemes its administration would fall. Or it could be initiated by the Crown, advised by the Queen Elizabeth II National Trust Board or other constituted authority; or at the instance of the owner himself. In every such case, the zoned land would be incorporated into the appropriate district or maritime scheme. An appeal against such zoning would lie to the Planning Tribunal, where evidence of high or outstanding environmental quality could be called in support of its proposed protected classification. But obviously unlike the present designation of a reserve, the owner would have no right to an order for purchase against the designating authority, or the alternative uplifting of the protection.

The incentives and compensations offered to owners of PPOS should clearly be generous enough to ensure a wide climate of acceptance by owners whose interests and enjoyment consist in living on the land, for production or leisure, rather than in realising an inflated capital gain from its detrimental change of character. For the equitable operation of any protective zoning, compulsory powers would have to be ultimately available. But so desirable would be the owner's free consent, within a confident climate of fair dealing, that it would seem preferable to let a piece of high quality environment be occasionally lost, rather than let PPOS be seen as an oppressive source of bureaucratic threat.

There can today be no realistic thought, neither is there economic sense or equitable need, for buying out with a lump sum the potential development value of land intended to remain rural. Recompense for the loss of development value should lie in the full removal of the land affected from liability to property rating. On whatever basis it is levied today, property rating by counties or municipalities, would seem to contemplate two main functions. The first, needing today increasing bolstering from central government or National Roads Board subsidies, is the financing of county works and services, foremost among them road and bridge maintenance. The fact that so much of our maritime countryside is today enjoyed as a heritage by travellers from far beyond the local area, could be an argument not only for government subsidy, but against the whole appropriateness of major reliance on farmer rating. Second, the

accumulated payment of rates could be regarded as an anticipatory levy on the prospect of large capital gain. Its peculiarity is that it is exacted from the rural community at large in contemplation of a gain many would not wish to realise, rather than discriminantly levied *ex post facto* on those fortunate enough to have recouped such a gain.

The weight of property rating today, especially in attractive coastal areas, is being rightly pleaded by owners as one of the most powerful incentives to subdivision. Land with its development value effectively removed can no longer be an appropriate object of property rating. Some ultimate absurdities of rating practice existing today may be cited from the Auckland Regional Authority's annual liability for rating of \$500,000 to the Manukau City Council for airport land, and of \$100,000 to the Waitemata City Council in respect of the Centennial Memorial Park of the Waitakeres.

It is proposed that land zoned PPOS should cease to carry any assessable value for county or municipal property rating, and that the Valuer-General should be so instructed by appropriate legislation or Order-in-Council.

Further, such land, in addition to its relief from rating, might be transferrable *inter vivos* without liability for stamp duty, or passed by will or on intestacy without incurring estate or succession duties. In certain circumstances, depending on the strategic and economic relation of the land zoned PPOS, to the owner's total holding, and any effects of such zoning on the value or productive yield of his conventionally zoned land, such immunities might in whole or in part extend to such adjoining land.

As well as exemptions from rating and duties, there could in suitable cases be positive incentives to the owners, of the kind contemplated by the Queen Elizabeth II National Trust, for assistance with fencing or other protection of fragile environment. The owner would, in addition, be entitled to separate payment for any easement allowing the public, with proper safeguards, to pass through the land as to the sea coast or to an adjacent public reserve.

But PPOS would not in the absence of agreed provision carry any presumption of entry to the public. To secure reserves for public use and enjoyment, the proper procedure would continue to be designation and assumption into public ownership, by acquisition at market price or arbitrated valuation. PPOS zoning would seek no more than to keep the options open, by forestalling the despoilment of high quality environment. By the same means, areas of scientific value, such as forest or wetlands, could be preserved;

and prospects of visual beauty could be enjoyed by the public, without entry, as part of an extended coastal or rural landscape. There would be the wider planning advantage of restraining the spread of urban development, with its attendant social disadvantages and diseconomies.

It should never be deemed necessary or economically desirable, with most of our choice rural or coastal land, to take it into public possession, or maintain it as expensive authority-farmed parks, or unproductive public domain. But where public advantage could be shown in transferring PPOS land into public ownership, it could be accepted by the Crown, as with land or buildings or valuable artefacts conveyed to the British National Trust, in payment of death duties on private land in the same parcel or title. But the day of adequate conservation by public acquisition has already passed us by. The financial down-turn of the public sector has seen to that, even before anything effective has been provided in its place.

In fact, if not in legal form, the changes advocated here have already been introduced in small measure in New Zealand. A foretaste of PPOS is given in the Taupo County Empowering Act, a local enactment of 1971, entitling it to remit rates in respect of 35,000 acres of land permanently zoned as lakeshore protection land.

The implications of the proposed rating exemptions on county finances, and the need for central government alternatives, have not been overlooked, even if they cannot be explored here. Suffice it to predict, that a frontal approach to the adequacy and equity of property rating must soon be undertaken, with changes far more comprehensive than the merely tangential effects of PPOS.

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Why not increase the information contained on the land register, to include such things as the siting of the mains and any local government orders that might affect it such as smokeless zone bylaws. At present every time the property changes hands the solicitor laboriously and expensively investigates features which would be immediately apparent on an expanded land register. Although this would mean more work for the civil servants it should make house transfer rather more like buying a car and rather less than a heart transplant — *The Economist*.

TRUSTS AND TRUSTEES

ESTATES, TRUSTS AND MATRIMONIAL PROPERTY: THE JUDICIAL VARIATION OF THE PRIVATE TRUST

The New Zealand Supreme Court in the judicial variation of private trusts denies itself comparable powers that it exercises when varying trusts to allow claims against deceased persons' estates. And yet the Trustee Act 1956 (as amended) is a living piece of legislation and the application of s 64A to permit the express variation of the trust ought to be governed by the economic climate of the time, so that what is almost readily available under a cluster of other statutes is made mutatis mutandis accessible under the Trustee Act 1956. Indeed it is not only almost unyielding inflation but changing fiscal, familial and social values that demand both legislative innovation and reformation as well as a more realistic judicial attitude.

That potentially available section (64A) represents a judicial paradox for it conflicts with preconceived notions of what is reasonable, possible and equitable, and simultaneously exemplifies legislative regression.

Formerly subs (2), s 64 of the Trustee Act 1956 had seemingly anticipated and avoided the judicial quandary of what activity lies within the ambit of those vital words "varying or revoking" by its use of the comprehensive word "rearrange". That subsection allowed the variation and modification of the beneficial interests under trusts to be effected by way of rearrangement of the terms of the trusts. The former section does not appear to have ever been judicially applied and was repealed in 1960.

By then the House of Lords had given its decision in *Chapman v Chapman* [1954] 1 All ER 799; [1954] AC 429; England had enacted the Variation of Trusts Act 1958; and the New Zealand Legislature (pursuant to s 9 (1) of the Trustee Amendment Act 1960) dutifully copied into the new s 64A the amorphous statutory formula denoted by the words "varying or revoking".

New Zealand's innovation in the English-speaking world of trustee law was abandoned.

Private trusts are sometimes capable of variation by invocation of statute and resort to the Supreme Court by the parties themselves (provided they can meet the conditions implicit under the rule in *Saunders v Vautier* (1841) 4 Beav 115) and (much less frequently) by the instrument that created the trust or settlement

Part I of a two-part article by

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The first method is inherently judicial; the latter two extrajudicial.

The House of Lords' decision in *Chapman* produced in Canada, Australia and New Zealand comparable legislative action as in England (and Scotland and Northern Ireland) but whereas the latter legislative activity is now virtually non-existent some jurisdictions of Australia and Canada and the New Zealand jurisdiction have extended either the criteria and/or the ambit of judicial intervention for the variation of beneficial interests arising under trusts. No comparative study of that legislation has been made. Neither expansive nor current is the separate treatment of legislation in *The Comparative Law of Trusts in the Commonwealth and the Irish Republic* by G W Keeton and L A Sheridan (Barry Rose, 1976) because, inter alia, Canadian and Australian jurisdictions failed to gain deservedly fine commendation. The law on the judicial intervention of trusts is not static outside the United Kingdom.

Alberta is the only jurisdiction to provide in its enactment (The Trustee Act, RSA 1970 c 373, s 37,) that the Court may approve an arrangement for inter alia "the resettling of any interest under a trust" but fails to specify whether such order extends to the transfer of trust property upon trusts either identical with or different from the trusts of the original settlement. Comparable legislation of *Alberta* has been recommended in *Manitoba* because of the Law Reform Commission Report (1975) on the rule in *Saunders v Vautier* approves the conferment of a direct power of variation on the Court of all trusts. In *Alberta* all arrangements must be both beneficial and of justifiable character; but the Legislature has not indicated how such justifiability is to be measured (although possibly it must not be unwise, unjust, unreasonable or improvident from the standpoint of the beneficiary).

Queensland has legislated equally significantly. Section 95 of the Trusts Act 1973 can be invoked for the greatest variety of subject-matter

of all the variation of trust enactments: implied, resulting trusts, deeds, wills, intestacies, constructive trusts; and it allows a person to whom trust property has been mistakenly or wrongfully transferred the defence of change of position.

None of the legislation in the Commonwealth defines nor casts any illumination on those vital words "varying or revoking all or any of the trusts". Indeed, Parliamentary draftsmen appear to have had a "field day" in their compilation of either imitative or divergent enactments that expressly or implicitly rely upon the Variation of Trusts Act 1958 (Eng) because seemingly without reason, law draftsmen have plucked from their dictionaries synonyms and antonyms so that the reader is perplexed by "benefit" in one, "detriment" in another, then "justifiable character" and finally "prejudicial" as well as "varying or revoking" and finally "variation or revocation . . . or resettling".

The first of those words "benefit" (in the Variation of Trusts Act 1958 (Eng)) and the last of those words "resettling" (in the Alberta Trustee Act 1970) appear warranted when accompanied by the recital "varying or revoking or terminating".

The best conveyancers cannot provide for every eventuality, particularly in a long-term trust when unforeseen developments can occur within a family or in social and economic life (that now includes almost unyielding inflation).

Parliaments have said in statements of great generality that the Courts may make orders varying or revoking all or any of the trusts (and Alberta has allowed the resettling). However, to mean something does not mean to think of it for as Wittgenstein says (in *Philosophical Investigations* (Blackwell 1953, translated G E M Anscombe, para 692)) to suggest that a person did or did not mean to include something within a general directive does not necessarily mean or involve saying that he had previously contemplated it. The grammar of the verb *to mean* is different from that of *to think* (para 693).

The mere fact that the thought of such a thing as "x" hadn't occurred to me does not imply anything about what I did or did not intend: MacCallum, "Legislative Intent", 75 Yale Law Journal (1966) 754 (at 772).

The essence of the dilemma is that if the Legislature wished to give the word "vary" some unusual or inhibited meaning then the obvious question is why in the world did it not do so. It could have easily said that variation shall not extend to any attempt to modify or alter the beneficial interests under the trust fund or to settle and resettle the trusts of the settlement upon new trusts either identical with or different from those of the subsisting settlement. Nothing

of that nature was attempted in any enactment.

All then that the Chancery Division of the High Court may seemingly allow itself to do under the Variation of Trusts Act 1958 is to prune or pollinate the flowers on the tree. It may not transplant the trunk of that tree into different or similar soil no matter the promise of fertility. The High Court can approve an arrangement where the difference between the old provisions and the new relate to detail but do not extend to substance. The substratum of the trust must always remain the same. In New Zealand though, the little-known decision of Woodhouse J in *Re Bodle's Trust* [1970] NZLR 750 may well represent a bud of a branch of trustee law that may later emerge to give strength and flexibility to the modern trust.

The use of the words "varying or revoking all or any of the trusts" potentially conferred considerable powers upon the Court but the judicial exegesis of those words would scarcely occupy a postage stamp. Megarry J in *Re Ball's Settlement* [1968] 1 WLR 899 began to examine linguistically the words "varying," "revoking" and "resettling" but without analysis of any facts failed to reach any sustainable conclusion. He thereupon (at p 905) fell back on the assumption that "the substratum of the original trust remains" even though the settlor's life interest had been abandoned accompanied by a new substitutional moiety of the trust fund for each son and certain of his issue. Megarry J in effect allowed a resettlement, and yet in *Re Holt's Settlement* [1969] Ch 100; [1968] 2 WLR 653 he denied that the Variation of Trusts Act 1958 (Eng) conferred jurisdiction upon the Court to approve an arrangement that provided a resettlement of the trust fund.

"Vary", itself, is apt enough to describe the substitution of one trust for another: *Re Dyer* [1935] VR (FC) 273 (per Gavan Duffy J at p 287). *Dyer* supplied Megarry J in *Ball* with the substratum test that justifies the modification of the beneficial interests under the subsisting trust provided that such activity does not cause its demolition.

Nevertheless there are emerging detectable strains in judicial thinking that the Variation of Trusts Act 1958 (Eng) is for some purposes at least a statutory effectuation of the rule in *Saunders v Vautier* equating beneficiaries not sui juris with adult beneficiaries and (concomitant with that) the recognition that resettlement as well as variation is permissible (upon the realisation that the latter cannot exclude the former): see *Holmden's Trusts* [1968] 1 All ER 148 (HL) and Lord Reid (at pp 149, 150, 151) and Lord Wilberforce (at p 159). That may be an optimistic view and in any case it will take many

decisions for the full implications of such comments to be worked out.

Inhibiting both the recognition and the right to assertion of ownership of beneficiaries not sui juris has been the pervasive regard paid in all jurisdictions in the judicial variation of trusts to the settlor (and the testator) whose inalienable powers of disposition must be protected and their direction preserved. It is therefore construed as a question of preservation of freedom but in that context it must be asked *whose* will? The will of a settlor who has parted with his property? The will of a dead testator?, or the will of living persons who are the recipients of property that belonged once to that settlor or testator?

The judicial attempt to maintain the indomitable desire of the testator and settlor when dealing with Trustee Act variations finds no parallel when the same Courts are concerned with Family Protection, Testamentary Promises and Matrimonial Property variations. The former attitude results in rigidity and artificiality whereas the latter evidences fluidity and economic commonsense.

What is needed is a uniform code on trusts and what is immediately required is an unequivocal expression by all legislatures of how trusts may be varied and for whom and what exactly are the conditions precedent to such judicial intervention and the statutory criteria upon which Courts may rely. There is no reason why New Zealand legislatively (and indeed judicially) should not again assume some of the leadership in so important a branch of law. Indeed New Zealand may well discover that there is now no longer any justification for discrimination between adult beneficiaries and beneficiaries not sui juris so that neither is disadvantaged when they are both collectively, and separately, interested in the same trust fund. Both sets of beneficiaries should be able to transplant the trust into new soil. The topic is worth examining rather than it being merely accepted that such disability must always be.

New Zealand's near-identical sections

Since *Chapman* New Zealand has had two sections that give the Supreme Court jurisdiction to make orders concerning trust property.

Section 64 deals with the "Power of Court to authorise dealings with trust property and variations of trust". That section gives the Court a general supervisory capacity.

Section 64A is concerned with the "Power of Court to authorise variations of trust". That section endows the Court with a proprietary jurisdiction to act in a representative capacity equally with the other beneficiaries and for all such persons with the Court to join in documents

for the termination of the trust and (again conceivably) for the resettlement on new or different trusts as the Court and beneficiaries decide. The Court acts as the statutory agent for parties unable to execute personally the variation document. Neither section provides for the settlor appearing or otherwise being heard. Both sections have a disconcerting similarity so that they can constitute a trap for the unwary practitioner: see for example *Re Lyell* [1977] 1 NZLR 713.

Under s 64A of the Trustee Act, the New Zealand Supreme Court considers that it has been given a wider discretion than that under the Variation of Trusts Act 1958: *Re Smith* [1975] 1 NZLR 495; *Re Bryant* [1964] NZLR 846; but it certainly has been neither given or attempted to exercise (apart from *Re Bodle's Trusts* [1970] NZLR 750) any wider jurisdiction other than that conservatively followed in England for there is no reported case in New Zealand that squarely faces the problem of what "varying or revoking" encompasses. A restrictive interpretation has invariably followed all dicta. The use of the words "clearly envisages alterations to the original dispositions going beyond simple changes of a verbal or machinery nature. The true test in my view is whether the proposed changes still accord with the testator's primary or predominant intention" said Casey J in *Re Ormerod* (unreported, Christchurch, 5 February 1975 A 158/74). Nothing in s 64A warrants such a statement that purports to endow the Court with a cy-pres jurisdiction nor was any reference made to Megarry J's comments in *Ball's Settlement* [1968] 1 WLR 899 (at pp 903, 905) and the illuminative dicta of the House of Lords in *Holmden's Settlement* [1968] 1 All ER 148 (HL).

Host of statutes allow variation

A cluster of statutes permit the judicial variation of trusts:

- (i) The Family Protection Act 1955 as amended
- (ii) The Law Reform (Testamentary Promises) Act 1949 as amended

The signal consequence of the innovation of the Matrimonial Property Act 1976 as a code is the abolition of the previous statutory power on the judicial variation of trusts relating to the division of property between living spouses under the Matrimonial Property Act 1963, the Matrimonial Proceedings Act 1963 and the Domestic Proceedings Act 1968.

The Patchwork effort made legislatively on the availability of judicial variation of trusts no matter how arising may mean that wives who have deserted their husbands and/or who have committed adultery may be more favourably treated

than faithful widows. Anomalies judicially are inevitable when legislation is piecemeal.

The Trustee Act 1956 as amended has been stripped of its positive powers for the rearrangement of beneficial interests arising under trusts, and yet paradoxically the Trustee Act should contain all the powers of variation, modification, settlement (on trusts identical with and different from the original settlement), termination and revocation as well as the conditions precedent upon which these powers may be exercised by the Supreme Court pursuant to the four above-mentioned Acts.

Moreover there should be adequate definition of the extent of the estate against which orders for the judicial variation of trusts shall operate. The exact nature of the Court's powers and the exact extent of the property against which they may be exercised could be contained in a composite uniform trustcode. That should be made the dominant enactment instead of all machinery provisions being dispersed among such a wide variety of statutes. Legislative uniformity would ensure equitable accessibility.

Application under the Family Protection Act 1955 seeks provision for maintenance and support whereas the Matrimonial Property Act 1976 enables the claim to refer to a share in property grounded upon direct and indirect contributions. The former statute is almost invariably construed as embracing "moral duty" as well as need, in contradistinction to contribution under the latter statute and moreover the concept of competing claimants markedly differs under the Family Protection Act 1955.

Moral connotations have been added by the Supreme Court and by the Legislature in the performance of the judicial duties under the first and fourth statutes (enumerated). Salmond J in *Allen v Manchester* [1922] NZLR 218 elevated the statutory aim of the Family Protection Act 1908 (now 1955) as one being "... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making adequate and proper provision after his death for the support of his wife and children..." That phrase "moral obligation" (and moral duty) has achieved imprimatur even though remedying the breach of moral duty on the part of the testator has never been specifically authorised in any Family Protection Act of New Zealand. The phrase appears a harmless one devoid of significant meaning. The Court's duty to see that reasonable financial provision has been made for the testator's wife and children is much more relevant and appropriate.

The Trustee Act's s 64A demands that the Court ensure that the arrangement for the vari-

ation of the trusts is not to the detriment of the applicant and in ensuring its absence the Court may have regard to all benefits that may accrue to him directly or indirectly including the welfare and honour of his family. That last-mentioned phrase appears ponderous and pontifical for the 20th century nuclear unit that is frequently characterised by transience and impermanence. Surely the "maintenance and well-being of the family" would be both apt and realistic.

Indeed, "the welfare and honour of the family" in *Re Aitken's Trust* [1964] NZLR 838 meant the probable saving of a substantial duty assessment. Therefore as revenue considerations loom large as the motivating force behind many variation of trusts applications, surely it is such savings that ensure the maintenance and well-being of the family in the 20th century and not some medieval concept of "the welfare and honour of the family".

Apart from the signal decision in *Re Bodle's Trust* [1970] NZLR 750, New Zealand has made little use of s 64A, usually in a partly administrative and partly judicial function in the alteration of vesting dates (*Re Whittome* [1962] NZLR 773; *Re Aitken's Trusts* [1964] NZLR 838; *Re Babbage Trust* (unreported, Supreme Court, Wellington, 5 July 1962); *Re Parker Trust* [1964] NZLR 573; and *Re Beetham's Trust* [1964] NZLR 576. *Re Bryant* [1964] NZLR 846) concerned the termination of a life interest with provision being made for covenants affecting life insurance to protect the interests of unborn grandchildren. No New Zealand decision has examined the meaning of the words "varying or revoking all or any of the trusts" while in *Re Lyell* [1977] 1 NZLR 713 Beattie J simply referred to s 64A where the Court is empowered to act as a statutory agent to vary beneficial interests". *Lyell* is a retrograde decision (and is discussed fully later).

The absence of criteria in the Family Protection Act 1955 means in effect that the Court has been granted an unfettered discretion by the Legislature and one that has become controlled by the development of case-law.

There are some "guidelines" in the Trustee Act 1956 in the form of "detriment", "benefits" and "welfare and honour" of the applicant's family; and the Court generally evidences vigilance against any departures from such guidelines (for what they may be worth).

Clearly, there are grounds for judicial division in the availability of variation under some statutes and the non-availability under another statute – and it is in this division that arises the grounds for denial and not the furtherance of natural justice that may not have been intended by the Legislature. Over-anxiety to maintain and follow

artificial rules may well result in questionable utility that prevents equity from adhering to its remedial role; a role that should constitute its rationale.

Discretion is separate from jurisdiction

Often the method adopted by the Court to formulate an answer does not differentiate between jurisdiction and discretion. The first element is essential to the second element because it provides the necessary vital precondition; but the exercise of the discretion itself always remains distinct from the presence of jurisdictional matters.

Broadly, the consequences that may flow from that differentiation can initially be loosely formulated in this way: The Court must first decide whether it has jurisdiction and then after successful determination it may exercise its discretion to make *an* order, whether the criteria is in the statute itself or in case-law. It is not obliged to make *any* order. Moreover, it has a discretion to approve or not to approve *the* order which is sought in cases where the parties proffer a consent order for the Court's approval.

That broad statement warrants application to the Law Reform (Testamentary Promises) Act, the Trustee Act, and the Family Protection Act.

Under the Law Reform (Testamentary Promises) Act 1949 it can be confidently asserted that it is mandatory for the Court to order a variation of the trusts through the making of an order once it has determined it has jurisdiction to deal with that claim; and a similar confidence can be asserted as to the Trustee Act 1956 but with a diminished degree of confidence as to the Family Protection Act 1955 because of the absence of any statutory criteria.

That varying degree of confidence may not have been the intent of the Legislature in the enactment of legislation for the judicial variation of trusts.

In testamentary promises litigation, the claimant must prove an express or implied promise by the deceased to reward him by testamentary provision for the rendering of services to or the performance of work for the deceased: s 3 (1), Law Reform (Testamentary Promises) Act 1949. The effect is that once the Court is of the opinion that grounds exist in law then the claim *shall* be enforceable against the personal representatives of the deceased. Accordingly it is mandatory for the Court to make an order for the enforcement of the claim once it has determined that it has jurisdiction to deal with it.

In variation of trust proceedings under s 64A of the Trustee Act, the applicant must demonstrate the absence of detriment in the arrangement and once the Court is satisfied that there is no

detriment to any person defined in that section, it has jurisdiction and may then exercise its discretion to approve or not approve that arrangement.

In family protection litigation, the applicant must prove that adequate provision is not available from the deceased's estate for the applicant's proper maintenance and support s 4 (1) of the Family Protection Act 1955. If the Court decides it has jurisdiction then it may in its discretion order that such provision as it thinks fit be made out of the estate of the deceased. Accordingly, the Court must decide whether it has jurisdiction and then it may exercise its discretion to make *an* order. But it is not obliged to make *any* order and it has the discretion to approve or not approve the parties' proffered consent order. Its discretion is not limited to either approving or not approving an order because the Court retains its discretion to make any other order after disregarding the order sought.

The concept of jurisdiction has apparently been confused with the concept of discretion in the drafting of the Family Protection Act 1955 so that two may be construed as coinciding. That appears an unsatisfactory consequence and one that creates pitfalls in the technique of judicial decision-making particularly when it is considered that the variation of trusts under the Family Protection Act is a fairly common occurrence.

Unwittingly or otherwise, the Family Protection Act 1955 may conceivably create exceptional grounds for not being directly equated with the Trustee Act 1956 and the Law Reform (Testamentary Promises) Act 1949 because of the implicit element of discretion exercisable by the Court in first deciding whether or not adequate provision has been made available to the claimant. There is nothing laid down in the statute for the exercise of this judgment that is arguably coterminous with the inherent jurisdictional matter. The Law Reform (Testamentary Promises) Act 1949 gained strength in the new substitutional subs (1) of s 3 of the 1961 Amendment but there are no such guidelines available for the Family Protection Act 1955. Logically, it may be contended, then, that some kind of discretion must be exercised by the Court when it decides (or before it decides) whether the Court has jurisdiction and then upon having decided that it has such jurisdiction it may then exercise its discretion remedying the situation. The point appears arguable.

The rules that determine jurisdiction cannot be confused with the criteria for the exercise of discretion once jurisdiction has been obtained. That failure of the Court or the Legislature to differentiate arises when a statement of rules is

confused with and invoked as an aid to prediction. When the position in law is clear in the statute then the solicitor can confidently assert how the Court will decide when certain facts have been established before it. The rules are not a prediction and cannot be used in themselves as an aid to prediction, and certainly not in the variation of trusts under the Family Protection Act for while the generality of the rule has been indicated there are no criteria present for the discretionary exercise.

Section 4 (1) of the Family Protection Act 1955 contains a conditional statement of generality with no indication of the grounds of the exercise of the discretion; so that all that may be said is that the Order of the Court in the form provided in the statute is at the unrestricted discretion of the Court and that it may be made subject to such conditions as the Court thinks fit.

There are, then, three vital matters — the presence of an express or implied promise with resultant inadequacy of testamentary provision, the absence of detriment in the proposed arrangement and the failure of the deceased to leave testamentary provision for his dependants that give the Supreme Court jurisdiction and oblige it to give its consent to an order; but, of course, not necessarily to the order that any or all of the parties seek because the nature of the order and how it falls on the estate are at the discretion of the Court.

All those vital matters give the Supreme Court jurisdiction and once they are present the Court may exercise its consequential discretionary powers and (as the case may be) alter the beneficial interest under the trust or change its substratum by a resettlement, or vest property and or money in the testamentary promises claimant or award lump sum or periodical payments, or create a class fund to or in favour of the successful applicant in family protection litigation.

Conceivably, once any of the vital matters is present and the Supreme Court has therefore jurisdiction to make an order (but, again, not *the* order sought where the parties are unanimous) then Rule 538 of the Code of Civil Procedure would allow approval being sought to a general deed of family arrangement containing the parties' agreement that would not attract gift duty if there were present the necessary element of compromise. See for example *Chittick v Chittick* [1940] GLR 235 (CA). There appears however a paucity of authority on this point. The rule itself cannot confer jurisdiction because it essentially regulates the Court's processes if there is jurisdiction: *Re Ebbett* [1974] 1 NZLR 392 (per Perry J at 395).

Under the Matrimonial Property Act 1976, jurisdiction to make any judicial variation of trust through an order that divides matrimonial

property between husband and wife or determines their respective shares must first be established in terms of section 25: the husband and wife are living apart or are separated, their marriage is dissolved, one spouse is endangering matrimonial property or diminishing its value, or either spouse is an undischarged bankrupt. This is a factual jurisdictional issue. Even when jurisdiction is established the order is not mandatory. The Court must consider and may in its discretion exercise any of the matters contained in sections 26-33 inclusive. Jurisdiction is distinct from discretion.

Under the Domestic Proceedings Act 1968, jurisdiction to make an interim maintenance order must be first established under section 25 (because the condition precedent is whether the wife is not receiving or is likely not to receive proper maintenance from her husband.) That is the sole factual jurisdictional issue; but on its periphery are the matters contained in s 27 (1): the needs of the wife and her ability to provide for her needs. Again, even when jurisdiction is established the making of the order is not mandatory. The Court has a discretion in the exercise of the matters in sections 27 (2), 28 and 29.

The exercise of jurisdiction is different from the exercise of a discretion by the Court once a precondition is satisfied. The Canadian Acts necessitate the Courts being satisfied on the presence of benefit (and in Alberta that the arrangement is of justifiable character) before the Court can approve the arrangement. That is the vital condition precedent, and yet Pennell J in *Irving* (1976) 66 DLR (3d) 387 referred (at p 391) to this as the Court's "only other direction" with the statutory discretionary power that "The Court is to be governed throughout by 'what it thinks fit' ". That amounts to an erroneous equation of the condition for the exercise of jurisdiction with the broad grounds for the exercise of the judicial discretion. Similarly, Lord Denning MR in *Re Weston's Settlements* [1969] 1 Ch 223 equated (at p 245) the exercise of discretion with the need for the presence of benefit; and then rationalised his opposition to the arrangement on the ostensible grounds of moral-social benefit but in reality on his patent hostility towards the financial benefit that tax avoidance would engender.

Somers J in *Re Julso* [1975] 2 NZLR 536 did not (at pp 538 and 539) differentiate between matters of *jurisdiction* under s 4 (1) of the Family Protection Act 1955 ("once the evidence satisfies the Court that there is not available for the claimant the provision referred to in s 4 (1) of the Act") and the matters for the exercise of the Court's *discretion* ("The provisions of s 8 of the Act as to the protection of provision awarded, s 12 as to variation of orders and the mandatory pro-

visions of s 13 as to social security benefits all indicate the special nature of the jurisdiction"). They do nothing of the kind. They characterise the special nature of the Court's discretion. It is subs (1) of s 4 that denotes "the special nature of the jurisdiction", and once the applicant proves to the Court's satisfaction that there is not adequate provision available from the estate for his proper maintenance and support, then the matter of remedy or relief is one for the exercise of the Court's discretion that allows it to vary the testamentary trust in deciding upon what part of the estate the burden of lump-sum or periodical payments or the superimposition of a class fund may fall.

Moreover the learned Judge is but partially correct when he says (at p 539 lines 8 and 9) that "the Court has a discretion to approve or not approve the order which is sought". The discretion of the Court is not limited to that alternative. The Court has a discretion to make any order it thinks fit regardless of the order sought by the parties.

No evaluative criteria

"As it thinks fit" in subs (1) of s 64A indicates the discretionary condition once the applicant attains fulfilment of the precondition for the Court's jurisdiction. Discretion is always a relative concept for it is axiomatic that discretion must be exercised pursuant to specific standards. Yet those evaluative criteria are presupposed for in s 64A (as indeed in all variation of trust legislation) there is no statutory recital of the grounds that the Court may invoke when approving an arrangement. What is being sought or should be given is not a subjective decision "This is good" but an evaluative and objective statement by the Court of its approval to the arrangement with demonstrable reasons that apply and invoke statutory criteria.

All that the variation of trusts legislation suggests as their respective precondition for the exercise of the appropriate jurisdiction by the particular Court is the presence of benefit (England, Northern Ireland, Queensland, Victoria, British Columbia, Manitoba, New Brunswick, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan, Yukon Territory) and justification (Alberta) or/and the absence of detriment (New Zealand, Western Australia) or the absence of prejudice (Scotland) and then each section demands that the Court make some form of evaluative judgment that must of necessity be essentially subjective because of the absence of any statutory criteria.

All the Courts are hindered by the failure of the Legislatures to indicate the evaluative criteria on which the exercise of the discretion must be grounded. All that has been provided is the

essential precondition for the exercise of the Courts' jurisdiction, and accordingly when that is present and the applicant falls within one of the statutory categories then ipso facto approval must be given of the arrangement. However, since the words of Lord Evershed MR in *Re Steed's Will Trusts* [1960] 1 All ER 487 (CA) (at p 493); [1960] Ch 407 (at p 421) the Courts invariably find it necessary to go much further and consider the proposal as a whole: whether it is fair and proper; whether it equates with the purpose of the trust as appears from the trust instrument and from any other relevant evidence available.

Steed is an early decision and such obiter dicta have been accorded with persuasiveness and pervasiveness but with no measurable advance in the true jurisprudence of the judicial variation of trusts.

In New Zealand absence of detriment has been substituted for the presence of benefit and accordingly the Court has jurisdiction once it is satisfied that the arrangement is not detrimental: the first proviso to subs (1) of s 64A of the Trustee Act 1956 as amended. Cooke J in *Re Smith* [1975] 1 NZLR 495 construed (mistakenly it is suggested) (at p 498) the whole of that proviso as "(A) condition precedent" whereas jurisdiction is indicated by the words "the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment"; and the exercise of discretion is indicated by the permissive use of the word "may" in the succeeding words: "the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement including the welfare and honour of the family to which he belongs". Jurisdiction is separate from and is the condition precedent to discretion.

Suggested criteria

The exercise of the Court's discretion should be grounded upon specified criteria in the Family Protection Act:

The Court shall have regard to:

- (i) the financial resources and financial needs of the applicant;
- (ii) the financial resources and financial needs of any other applicant and any beneficiary;
- (iii) the obligations and responsibilities that the deceased had towards any applicant;
- (iv) the size and value of the estate;
- (v) the physical and mental disability of any applicant or beneficiary;
- (vi) the fulfilment of financial provision made by the deceased to the applicant during the lifetime of the deceased;
- (vii) and any other matters including the

conduct of the applicant or any other person that in the circumstances of the case the Court may consider relevant including the conduct of the applicant towards the deceased and his or her family.

Indeed there appears no reason why that criteria should not be contained in a composite uniform trustcode and made applicable to all variation of trust applications no matter under what statute jurisdiction for the application is invoked.

PATENTS AND COPYRIGHT

COPYRIGHT IN ARTISTIC WORKS: THE EXTENSION TO MECHANICAL DESIGN

A. Introduction

In New Zealand and the United Kingdom, the law of copyright has taken its place along with patent and registered design law in the protection of mechanical design. Subject to some qualifications the originator of a product which falls within the "mechanical domain" can restrain copying by a competitor by virtue of copyright subsisting in his product drawings. No registration procedure is required as a condition precedent to the subsistence of this copyright. Further, such protection is available equally to products having designs dictated solely by function and to products relying on aesthetic appeal. It therefore must be emphasised that the protection now available by virtue of copyright is not limited to the industrial application of what have traditionally been regarded as "works of art".

Although copyright has been extended to mechanical design in both New Zealand and the United Kingdom, it has come about quite differently in the two countries. The separate developments will be examined before considering selected aspects of the common case law. The paper concludes with a discussion of the merits of this extension in the law of copyright.

B. Fundamental developments

(1) United Kingdom

The passing of the Copyright Act 1911 (on which the New Zealand Act of 1913 was modelled) marked a major step in the development of copyright law. As well as codifying the piecemeal law up to that time the Act allowed copyright to subsist without registration and gave effect to the Berne Convention. However, whereas the Berne Convention did not distinguish between works of art and works of applied art (*a*) (ie works of art applied in industry) the 1911 Act did, and by s 22 provided that the Act should "not apply to designs capable of being registered under the Patents and Designs Act 1907, except designs

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which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process". The intention was that art applied industrially or intended to be applied industrially should receive protection under the registered designs legislation or not at all. The efficacy of s 22 was tested in 1941 in *King Features Syndicate v O & M Klee-man* (the "Popeye" doll case) (*b*). In that case the defendant was producing "Popeye" dolls, and the plaintiff, who had licensed another to produce such dolls, alleged that its copyright in cartoon drawings was being infringed. The House of Lords held that "intention" meant the intention of the author at the moment of creating the work, and in that case since he did not have any such intention to apply the work industrially, s 22 did not operate so as to exclude copyright under the 1911 Act.

The Copyright Act 1956 which replaced the 1911 Act attempted to plug the gap and dropped the intention test. By s 10 it was not to be an infringement of copyright to do anything which "would have been within the scope of the copyright in the design if the design had, immediately before that time, been registered in respect of all relevant articles" and the design has been applied industrially by the owner. As with the 1911 Act, the 1956 Act did not apply where a design had in fact been registered. The effect of s 10 was examined in *Dorling v Honnor Marine* (*c*) by the Court of Appeal in 1963. The issue in that case was whether s 10 prevented the plaintiff from relying on copyright in the plans of a kitset boat against the defendant who was manufacturing the kitset parts. The Court of Appeal held that s 10 was not a bar to the plaintiff's action. While the basis of the decision is difficult to ascertain with certainty from the two reported judgments, it

(a) It did not at that time make any specific reference to applied art.

(b) (1941) 58 RPC 207.

(c) [1964] RPC 160.

seems generally accepted that the case is authority for the proposition that s 10 excludes from copyright only designs which are capable of registration. The plans were not registrable as designs since the Designs Act excluded designs for printed matter primarily of a literary or artistic character, and the parts of the boat were not registrable as they were solely functional and accordingly not "designs" within the meaning of the Designs Act.

Section 10 then, can be seen as being directed only to designs which have been registered and designs which are capable of registration. It allows copyright to subsist in unregistrable mechanical designs. Section 10, as with s 22 before it, thus failed in practice to exclude the totality of industrial design from the ambit of copyright. Not only did it fail to do that but it had the strange result that more functional and less "artistic" designs were able to receive much longer terms of protection than designs considered to have aesthetic value.

The ostensible barrier to the application of the Copyright Act to mechanical design having been largely swept aside, what were the provisions in the Act by which copyright could subsist in engineering drawings to prevent copying of products manufactured in accordance with such drawings? Although the plaintiff succeeded in *Dorling v Honnor Marine*, these provisions were not closely analysed in either the Court of Appeal or Chancery judgments (*d*). The applicability of the Act apart from the s 10 issue was in fact conceded by the defendant and although in two later cases (*e*) attempts were made to challenge the basic premise (*f*), the assumed reasoning in *Dorling v Honnor Marine* has always been followed. Essentially the reasoning must have been as follows. The plans of the boat were "drawings" as defined in s 2 (1) [NZ section numbers] and "drawings" were "artistic works" irrespective of artistic merit: section 2 (1) [this broad definition of artistic works was introduced by the 1956 (UK)/1962 (NZ) Acts]. Therefore, there was a work in which copyright *could* subsist. The plans were "original" and were published in the United Kingdom by the sale of the boat parts which were reproductions of the plans. Therefore copyright *did* subsist in accordance with s 7 (2). The plaintiff owned the copyright: s 9 (1) (NB publication and ownership are presumed unless put in issue by the defendant: s 27). The defendant, by producing boat parts, had

committed an act restricted by the plaintiff's copyright in that he had reproduced the plans in a material form: s 7 (4). "Reproduction" includes the conversion of a two-dimensional work into three-dimensional form: s 2 (1), unless the object so produced would not appear to a non-expert in such objects to be a reproduction: s 20 (8). The judge, considering he was a non-expert, held there was a reproduction. Finally the defendant had copied the plaintiff's plans. The requirement of "copying" is not actually spelt out in the Act and in many cases what the defendant has copied is not the copyright work itself but a reproduction of it (the object). Case law had established that a copy of a copy is sufficient.

The number of designs not registrable, and therefore following *Dorling v Honnor Marine*, entitled to copyright, was increased by the decision of the House of Lords in *AMP v Utilux* (*g*) where it was held that if a designer makes an article in a certain shape solely to make that article meet functional requirements and not to make it appeal to the eye of a customer, the design is not registrable. (It had previously been thought that if the functional requirements could be met by a different shape then a design was not dictated solely by the function the article had to perform).

This then is the foundation of the law of copyright in relation to mechanical designs in the United Kingdom. The Design Copyright Act 1968 is of less significance. This Act simply amended s 10 of the 1956 Act by postponing the loss of copyright for industrially applied designs which were capable of registration for a period of 15 years. Thus, for those designs in the totality of mechanical design which are registrable, dual protection is available, but only for a period of 15 years.

(2) New Zealand

The Copyright Act 1913 was virtually identical to the Copyright Act 1911 (UK), although there was an optional registration procedure. The equivalent to the United Kingdom s 22 was s 30. The Copyright Act 1956 (UK) was not automatically adopted to New Zealand and a statutory committee (The New Zealand Copyright Committee) was set up to recommend appropriate legislation for New Zealand. In the event, large portions of the Copyright Act 1956 (UK) were recommended (*h*), but there were a number of changes, one being of paramount importance in

EIPR October 1978.

(f) That is that engineering drawings are "artistic works".

(g) [1972] RPC 103.

(h) Report of the New Zealand Copyright Committee (1959).

(d) Some of the relevant provisions were referred to very briefly by Cross J in the Chancery action: p 211 lines 32-40.

(e) These were *British Northrop v Texteam* [1974] RPC 57 and *L B (Plastics) v Swish Products* [1977] FSR 87: See Budd, "The Future of Industrial Copyright",

the present discussion. The Copyright Committee recommended that s 10 (UK) be not adopted in New Zealand, and further, that the proposed New Zealand legislation should not distinguish between industrial art and other forms of artistic work. Upon the new Act (1962) coming into force the copyright situation in respect of all industrial design was the same as that pertaining to unregistrable designs in the United Kingdom following *Dorling v Honnor Marine*. That is, copyright subsisted in industrial designs, whether registrable or not, by virtue of the Copyright Act 1962 for the author's lifetime plus 50 years. In addition, if a design was registrable it was also capable of protection under the Designs Act 1953 for a term of 15 years.

From the above it would appear on the face of it that the situation which had been reached somewhat unintentionally in the United Kingdom, had been deliberately sought in New Zealand. However, it is suggested that the situation in New Zealand was deliberate only in so far as registrable designs were concerned. The Committee in their report were concerned solely with removing the distinction between pure and applied *art* and there is no evidence in their report indicating that they had addressed their minds to predominantly functional designs. In their report they concluded: "there is no reason to suppose that the complete repeal of s 30 would create any difficulties of definition . . . it would not extend copyright into a completely new field but would merely ensure that all artistic works, whatever the field of their application, would have protection . . ." (i) (emphasis added). This view is supported by an examination of the writings of Dr Miles (j) a former Assistant Commissioner of Patents and the representative of the Justice Department who made the leading submissions to the Copyright Committee. Accordingly it would seem that in order to allow copyright to subsist in registrable designs, a mechanism was chosen which allowed copyright to subsist in all mechanical designs. The situation appears to be exactly the inverse of that in the United Kingdom where the mechanism selected to exclude copyright for applied art inadvertently permitted copyright to subsist in predominantly

functional designs. In both cases the issue of "dual protection" seems to have been considered to the exclusion of the wider ramifications. This question of inadvertence has been deliberately dwelt upon since law brought about largely by chance will likely be given close scrutiny in any review of copyright law and as such is a target for legislative reform.

As a result of the 1962 Act coming into force, an action of the *Dorling v Honnor Marine* type was immediately available. However, apart from a case which dealt with engravings (k), no such action was heard until 1974. This was the case of *Johnson v Bucko Enterprises (l)*, the leading case in New Zealand. This case confirmed that an action for copyright on the basis of engineering drawings was indeed available under the Act, and comprehensively (m) reviewed the relevant provisions of the Act (n).

Taking into account the Design Copyright Act 1968 (UK), the copyright situation in New Zealand as it applies to industrial design differs from that in the United Kingdom only in that in New Zealand *registrable* designs are entitled to the full term of copyright whereas in the United Kingdom their term is limited to 15 years. It is quite remarkable that the legal situation in the two countries should be so similar bearing in mind the conflicting intentions of the legislatures in the two countries.

C. The nature and scope of the extension: questions arising

This section discusses some of the elements required by the Act if a plaintiff is to succeed in a copyright action of the type under consideration. The format used is to briefly take examples of the way in which the statutory provisions have been interpreted in the cases and to look at some of the more interesting practical issues which arise therefrom.

(1) The work

In this context the works at issue are drawings which may take the form of sketches of products, full working drawings, or pictorial drawings pre-

and applied art which had been created by the British legislation contrary (as he saw it) to the tenor of the Berne Convention. That countries were free to interpret "applied art" very narrowly did not derogate from the basic principle.

(k) *Martin v Polyplax* [1969] NZLR 1046.

(l) [1975] 1 NZLR 311.

(m) Except for the issue of "copying from a copy" which appears to have been passed over.

(n) Already referred to in the notional reconstruction of the reasoning of *Dorling v Honnor Marine*.

(i) Ibid, Para 308.

(j) "Some National and International Aspects of the Law and Administration Relating to Industrial Property in New Zealand", LLD thesis, Victoria University of Wellington (1945), p 64 on; "Copyright and Industrial Design Law in British Commonwealth: Its Future Development in Relation to the Berne Convention and the Paris Convention for the Protection of Industrial Property", *Record of the Third Commonwealth and Empire Law Conference Sydney 1965*, p 541. Dr Miles was concerned to eliminate the distinction between pure

pared for promotional work. Although not generally considered "mechanical designs" textile patterns, and garment patterns give rise to similar issues, as do architectural plans. In the bulk of cases the "drawing" in fact consists of a set of drawings, each showing a different view (plan, elevation, cross-section etc) and also includes written notations. Counsel for the defence in *Temple Instruments v Hollis Heels* (o) attempted to make use of these practical points. He argued: (1) there was no independent copyright in a combination of separate works (here the two views shown had apparently been executed on separate days); (2) it was impossible to say whether the defendant had reproduced in three-dimensions any one view since it, by necessity, showed only two-dimensions; (3) the two views could not be linked without reading the written notations but these conveyed ideas and were not part of the artistic work; and (4) there could not be reproduction in three-dimensions of a sectional drawing as there would be no means of comparing the two without cutting the object. Without detailed reasoning (the action was interlocutory) Graham J held that drawings obviously relating to the same article could all be looked at, that it was unreal not to give effect to written notations, and that a person comparing the object with the sectional drawing would have no difficulty in saying it reproduced it. This interpretation has since been confirmed in *L B (Plastics) v Swish Products* (p) and *Solar Thomson v Barton* (q). However, what if a drawing contains many views but only some are reproduced? Can these drawings then be dissected out as a separate artistic work, the copyright in which can then be said to have been infringed? (see further discussion under item 3 below).

(2) Originality

Section 7 states, inter alia, that copyright shall subsist in "original" works. What does "original" mean in this context? Does it mean "novel" or does it mean "not copied"? Can a drawing be too simple to be "original"? In *Martin v Polyplas* (k) it was held that original skill and labour in execution was required and not originality of thought. This definition was applied in *Johnson v Bucko Enterprises*. However in *British Northrop v Texteam* (r), it was held that original meant that the work must originate from the author and not be copied from another work. It was also there held that simplicity was no disqualification. The definition adopted by the New Zealand courts would seem less stringent than that stated in *British Northrop v Texteam*. In

Martin v Polyplas the work at issue was a coin engraving which had been prepared by copying as accurately as possible a photograph of a coin design due to another. With respect, it seems that a definition which leads to a copy being held original is quite unsatisfactory. No amount of skill and labour expended in the course of making a copy has ever allowed a defendant to escape infringement.

In *Beazley Homes v Arrowsmith* (s), the issue of originality was also taken, but the judge did not expressly state the definition he applied. He did, however, hold that plans which were slight modifications of earlier plans were original, and that they had been reproduced by the defendant even although his plans included modifications apparently at least as great as those which rendered the plaintiff's plans original.

In *Johnson v Bucko* and in *Martin v Polyplas* it appears the Court leaned to the view that what the plaintiff had copied to produce the work being sued upon was a mere idea. The difficulty defendants have had in using this argument will be mentioned under item 4 below.

(3) Reproduction

A provision vital to the present area of copyright is the statutory definition of "reproduction" (s 2 (1)) which "includes a version produced by converting the work into a three-dimensional form". This is qualified by the infamous "non-expert" test of s 20 (8): "the making of an object of any description which is in three-dimensions shall not be taken to infringe the copyright in an artistic work in two-dimensions, if the object would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work." Before considering the qualification (about which must have been said) how is the basic definition to be interpreted? Most engineering drawings do not show pictorial views but only views of the object in one plane. Clearly a two-dimensional view cannot be reproduced in three-dimensions as it does not supply any information about the third dimension. If copyright in engineering drawings is to be infringed by the making of an object, it would seem a logical necessity that at least two views shown in the "drawing" must be considered. The only case where this issue was explored was *Temple Instruments v Hollis Heels*, which has been mentioned in item 1 above. In a number of cases this point has been overlooked. Two of which are *Sifam v Sangamo Weston* (t), which involved a front view

(o) [1973] RPC 15.

(p) [1978] FSR 32 (CA).

(q) [1977] RPC 537.

(r) [1974] RPC 57.

(s) [1978] 1 NZLR 394.

(t) [1973] RPC 899.

only of an electric meter, and *Solar Thomson v Barton* (u), which involved a diametrical cross-section (the side elevation was not relied upon) of a pulley wheel. Is it sufficient for infringement if one can look at an object from a particular angle amongst all possible angles and detect a similarity with the single drawing in which copyright subsists? The point may be worth arguing as it was one on which judicial concern was expressed in *Gomme v Relaxateze Upholstery* (v).

The apparent restriction placed on three-dimensional infringement of a two-dimensional work by s 20 (8) has received considerable judicial comment because of the difficulties of interpretation it presents. It contains a triple negative. It appears to go to evidential quality and maybe even contemplates evidence from non-experts. In the event the judges have applied the test themselves feeling they are well qualified as non-experts. It has been said that the purpose of the test is to exclude engineering drawings(w), or at least sectional drawings, on the basis that a non-expert would not understand these. On the other hand some (x), say it exists to prevent infringement from being found when what has been copied is a mere idea. The Courts until recently appear to have accepted this rationale, to the extent they have accepted any at all, on the basis that if it takes an expert to see reproduction there cannot be copying. However, it is suggested that s 20 (8) does not operate to exclude copying of ideas, that the need for expert evidence does not determine absence of copying, and that s 20 (8) does not operate to exclude complex engineering drawings. The first two points are dealt with in item D below. As to the third point it is submitted that s 20 (8) has been misinterpreted. It does not say that the comparison is to be made by an intelligent layman ('intelligent' has let in many sectional drawings (y), but simply says that the comparison is to be made (notionally at least) in the eyes of "persons who are not expert in relation to objects of that description" [emphasis added]. The notional comparator could well be a highly skilled draughtsman or engineer so long as he was not expert in the particular object concerned. This view has received approval by the Court of Appeal in *L B (Plastics) v Swish Products*.

(4) Copying

The Act does not actually refer to "copying" as a requirement for infringement, but this is in-

(u) [1977] RPC 537.

(v) [1976] RPC 377.

(w) Eg Budd (See note 5). This seems to have been the intention of the Gregory Committee whose recommendations led to the 1956 Act: *Report of the Copyright Committee* (Cmd 8662, 1952) para 250.

(x) Hillyer, "Recent Developments in the Law of

herent in the fundamental notion of "copyright", as is the limitation that there can be no copyright in a mere idea. As has been mentioned before, what the defendant copies, if he has copied anything, is not the copyright work itself (the drawings), but a reproduction of it in the form of the product. Usually he has no knowledge of the drawing at all. However a copy of a reproduction of a copyright work is an infringement of the copyright in the work itself: *Martin v Polyplax* following *King Features Syndicate v O & M Klee-man*. In some situations there is not one link between the work and the copy, but many. Thus the plaintiff must establish a "chain of causation" deriving from the original work. This is necessary because even if some of the reproductions near the defendants' end of the chain are themselves copyright works (products are not) he may not own the copyright in them.

A link in the chain may be somewhat less substantial than a drawing or a product. The possibility of oral communication of the ingredients of the copyright work (or a reproduction of it) was raised in *Gleeson v Denne* (z). In that case it did not appear on the facts that more than the basic idea had been communicated but the feasibility of an oral link was not dismissed. Indeed, in the subsequent case of *Solar Thomson v Barton* it was held that instructions given to an independent designer from a person who had seen a reproduction of the copyright work were sufficiently detailed to preserve the chain of causation. It is clear that what is communicated must be the idea as expressed and not simply the idea itself, but even so might there not be some cases where the recipient can claim not to have used what he received but only the basic idea? This could just as validly account for differences between the "copy" and the original work as McMullin J's proposition in *Beazley Homes v Arrowsmith* that "dissimilarities do not destroy the notion of copying once established. They may indeed further establish it" (aa). It would appear that the former argument gained acceptance in the Court of Appeal in *L B (Plastics) v Swish Products*.

(5) The limits of protection

Just how far does the new law go? Time-wise, it would be reasonable to think that drawings produced before the commencement of the 1962 Act would not be entitled to the extended protection created by that Act. However, this situation is

Copyright" (Legal Research Foundation Seminar 1 September 1977).

(y) Eg *Merchant Adventurers v Grew* [1973] RPC 1; *Solar Thomson v Barton*.

(z) [1975] RPC 471.

(aa) [1978] 1 NZLR 394, 404 para 4.

governed by cl 9 (1) of the First Schedule to the Act which states, "Copyright shall not subsist by virtue of this Act in any artistic work made before the commencement of this Act which, at the time when the work was made, constituted a design capable of registration under the Designs Act 1953 . . .". As *Dorling v Honnor Marine* has made abundantly clear the effect of this provision must be limited to *registrable* designs, and drawings embodying designs which are unregistrable for functional reasons, or whatever, will not be disqualified by virtue of age.

In another aspect a limit may have been set in this expanding area of copyright where, until *L B (Plastics)* went to the Court of Appeal, defendants could virtually never throw up enough obstacles to persuade a Judge against the plaintiff. It now seems, although the case has not gone beyond the High Court, that a plaintiff may not be able to sue on patent drawings or their equivalents. This case is *Catnic Components v Hill & Smith (ab)*, and suffice to quote Whitford J's words:

"In my view, by applying for a patent and accepting the statutory obligation to describe and if necessary illustrate embodiments of his invention, a patentee necessarily makes an election accepting that, in return for a potential monopoly, upon publication, the material disclosed by him in the specification must be deemed to be open to be used by the public, subject only to such monopoly rights as he may acquire on his application for the patent and during the period for which his monopoly remains in force, whatever be the reason for the determination of the monopoly rights" (*ac*).

D Assessing the result

It will not suffice to pass off this extension in the law of copyright as a natural development of the common law satisfying a need thrown up by a society increasing in complexity. The matter will receive the scrutiny of Parliament sooner or later since a number of pressure groups are calling for a review of the Copyright Act and the industrial design aspect will not pass unnoticed (*ad*). In deciding whether the position should be left as it is or whether it should be changed to either extend or restrict the law, the following matters ought to receive consideration.

The first point is very simple and that is, that as the end users, industry must become involved in

this issue. They may well not speak with one voice — there was considerable conflict in the views of British industry (*ae*) — but the involvement of industry will deflect any future charge which may arise that the question was settled by the legal profession for its own benefit.

The second point is also very practical and it relates to the costs of making use of the protection afforded by the new law and the likely compensation receivable under it. Copyright litigation will normally be less technical than patent litigation, for example, and therefore ought to be cheaper and faster. With the availability of conversion damages (*af*) the plaintiff stands to gain much more than might be the case following successful patent litigation. On the other hand do conversion damages have a place in industrial property law?

With the situation at present there is no proper reconciliation between the Copyright Act, the Designs Act and the Patents Act. Despite the fact that the protection given by the Designs Act is said to be a "monopoly" it seems evident from the cases that copyright is probably more valuable. As a result the Designs Act would seem to be virtually redundant. There is at present also an overlap between the Copyright Act and the Patents Act which has received little attention. This pertains to solely functional articles which of course are not registrable under the Designs Act. As is further mentioned below, in some circumstances the Copyright Act may afford protection for ideas and thus compete with the Patents Act. Hitherto society has seen fit to be very discriminating in protecting ideas and the Patents Act includes provisions for ensuring that in return for the monopoly given, the applicant gives good "consideration". The Copyright Act contains no such safeguard. The Copyright Act may also be seen as weakening the Patents Act in another way. A traditional justification for the granting of a patent monopoly is that upon expiry of the patent, the invention falls into the public domain. If the invention, or at least an embodiment of it, also receives protection by virtue of the Copyright Act, then this justification is severely weakened since on the expiry of the patent, copyright will remain for a considerable number of years. Even if the recent case of *Catnic Components v Hill & Smith* represents the law, this issue will remain since many patentees will have drawings depicting various models of their product which were not used in the preparation of their patent drawings. Even apart from this matter there seems no justifi-

election manifesto included an intention to review the industrial property laws.

(ae) See *Copyright and Designs Law* (Cmnd 6732, 1977) (Whitford report) chapter 3.

(af) Section 25.

(ab) [1978] FSR 405.

(ac) *Ibid*, at 427.

(ad) The Queen Elizabeth II Arts Council is co-ordinating such groups which include the New Zealand Institute of Patent Attorneys. The National Party's 1978

cation in maintaining a term of copyright equal to the authors life plus 50 years in the industrial field.

If after consideration of all other factors it is concluded that the extension in copyright fulfills a need for the protection of unpatentable technology (and it is suggested that a copyright system would have advantages over a petty patent system) the question of why technologies outside the "mechanical" domain should not be similarly treated, will arise. One of the many effects, (*ag*) which the non-expert test of s 20 (8) has had is to limit the application of the extension in copyright to those technologies where drawings represent physical forms. The expression of an idea in the electrical field, for example, does not receive full copyright protection because the expression takes the form of a circuit diagram which cannot be understood by persons who are not expert in the object represented. The same applies to other technologies where ideas are expressed in symbolic form. This inconsistency could be easily removed by repealing s 20 (8), allowing copying to be assessed on the basis of evidence presented to the Court which could be the evidence of experts where appropriate.

Finally it is urged that when assessing a development such as the present, the economic

context must be kept in mind. Other criteria which many will be tempted to use include such concepts as the "right" to the products of ones own labour, or the doctrine of "unfair" competition. Both these concepts are ultimately founded on value judgments and it is suggested that such criteria are no more than secondary in a thoroughly commercial area of law such as this. Is the copying of a competitor's product "unfair"? Different people in different cultures will give different answers, and it is for this reason — that the truth of such a proposition cannot be ascertained by reason alone — that the writer advocates an economic test. By this is not meant something like "if it is worth copying it is worth protecting" — this is begging the question. To assess intellectual property rights from an economic point of view involves the balancing of the advantages to society of free competition in the production of goods against the advantages of limiting that competition by conferring property rights. Society has hitherto seen it as an advantage to encourage innovation and the creation of intellectual and industrial property has been a means of achieving this (*ah*). However, the balance must be carefully chosen to optimize the benefits which flow, and the present extension of copyright has inevitably resulted in a shift of the previous balance.

(*ag*) One presumably unintended effect is that in some circumstances section 20 (8) permits the effective protection of ideas. As every engineer knows, and as every lawyer appears not to know, a drawing may tell all. A drawing of a nut and bolt conveys not merely the expres-

sion of an idea but the idea itself of threaded fasteners.

(*ah*) The function of property in society, and intellectual and industrial property in particular, is explored in more depth in; Moon, "A Functional View of Copyright, Designs and Patents", (1976) 8 VUWLR 300.

ACC Report Some time ago the Accident Compensation Commission pruned its mailing list and the ACC Report was forwarded only to those who requested it. As a result there may be a number of firms who have not received the special issue put out in February. Apart from the usual case material, that issue includes a very good summary of the Accident Compensation Amendment Act 1978 and includes a useful table dealing with the territorial limitations on cover. These provisions were amended in 1978. Particular points that may arise concern those who are likely to be on pleasure yachts or aircraft travelling beyond the twelve mile limit, the question of cover for those employed on or sightseeing on an oil rig, and the question of those on aircraft sightseeing over Antarctica - to mention a few cases. Superimposed on that are the complications

arising if with non-residents. The table will be an invaluable guide to those faced with advising in this area.

Those who have not been receiving the ACC Report have been missing out on a most useful publication. Topics covered have included sports injuries and their avoidance, design of comfortable office furniture, home safety, and many other general and industry related articles that are well worth a browse - that is, if you manage to get to them before your staff gets down on the issue.

A measure of self-interest in promoting the publication must be admitted. If more of the suggestions and recommendations in it were generally adopted there just might be less accidents and therefore less claims and therefore - just possibly - a lower ACC contribution.