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INTER ALIA

Suspicion is not guilt

Speaking ill of the dead is no crime. Nor is harking back to unpalatable truths. There are occasions when it is necessary. There are others when it is demeaning.

The expulsion of the Russian Ambassador drew attention to subversive activities conducted from the Russian Embassy. It was by no means unreasonable for attention to be drawn to previous activities. The Sutch affair could hardly escape mention.

Dr Sutch was found not guilty in 1975 of charges under the Official Secrets Act. A finding of not guilty is not a declaration of innocence. The Prime Minister does not believe him innocent. Chances are he is not alone in that belief. Possibly, he may even be right.

But his "guilty as sin" comment was meaningless. The Prime Minister has not said what offence Dr Sutch was guilty of. Evidence of long association with the Russians may cause suspicion. It may call for surveillance. It certainly suggests the need for caution. But alone it does not make a criminal. A jury found Dr Sutch not guilty. One would expect a contrary assertion to be backed by evidence. But what is there?

The release of extracts from the "top secret" Powles Report adds nothing — except wonderment about its classification. It should have been released years ago. That it was not suggests a blatant misuse of the excuse of "national security" as a justification for withholding information. Illustrations such as this are few but underline the need for more satisfactory arrangements for access to Government information.

Subversion is a detestable business — as much as anything because it requires a country

to engage in deceitful and secretive practices to counter it. These practices may become regarded as acceptable, as both Watergate and the Tinkerbell affair in England illustrate. Subversion and those who practise it we can do without.

In view of this it is sad that, having an opportunity to take a strong moral lead against both the Russian invasion of Afghanistan abroad and subversion at home, the Prime Minister instead caused widespread offence by uttering a judgment on a matter better left to history.

Relevant earnings for accident compensation

The use of assessable income as a basis for calculating earnings-related compensation under the Accident Compensation Act 1972 has the merit of simplicity. It works well in the majority of cases and, just as the pay-out is based on assessable incomes, so is the premium.

Entitlement to tax deductions distorts the picture. In that case real income and assessable income are entirely different. Those who are encouraged by tax benefits to pursue such nationally desirable goals as farming and export development may well find themselves indirectly penalised when it comes to making an accident compensation claim.

Two recent cases illustrate the type of situation that can arise.

A solicitor who received a substantial professional income also operated a farm at a loss that exceeded the amount of his professional income. Why the farm ran at a loss was not specifically mentioned in the report but from

the amount of money poured in it is reasonable to conclude that substantial development was being undertaken. The applicant suffered a personal injury by accident and because his assessable income was nil his relevant earnings were assessed on a minimum income basis.

Another case concerned a farmer who, after his accident, purchased new equipment and claimed the very substantial first year depreciation write-off. This had the effect of reducing his post-accident earnings and he claimed that he should receive, by way of earnings-related compensation, the difference between his post-accident assessable income and his before-accident assessable income. In the event the depreciation claim was ignored in assessing post-accident earnings. That decision may be regarded as controversial for under s 113 (3) of

the Accident Compensation Act the Commission has power to reduce the amount of post-accident earnings (which would be for the benefit of the claimant) but not to increase them.

The moral would seem to be that those conducting one profitable and one tax-deductible business are better off as an employee of the profitable business while those whose assessable income is reduced by tax deductions may well find it desirable to arrange private insurance to make up any possible compensation short-fall in the event of an accident.

Tony Black

*The decisions are *Re Dragicevich* (No 266) and *Re Herbert* (No 301). Both will be reported in NZAR.

OFFICE MANAGEMENT

WORD PROCESSING IN THE LAND TRANSFER OFFICE

The introduction of word processing to law offices and its use in the preparation of Land Transfer Office Documents is seen by some as creating a problem for the Land Transfer Office. I believe however that the opposite is the case and that the change can be made to work to your advantage as well, so long as you take this opportunity to guide that change, from its beginning, in a direction that will assist in making your own job easier.

"Word Processing" in its simplest form is the transferring of the spoken word to written form. At the present time the expression has become more particularly associated with modern technology incorporating "memory typewriters" of various degrees of sophistication. The most recent development in this field comprises various brands of equipment incorporating a visual display "work station" and a separate printer. As an example of the growth in this field I would mention that within the past 12 months there have been eight Auckland legal firms instal this equipment. The reason for this growth should be self-evident when I quote as an example what the author's office has been able to achieve through the use of such equipment. Prior to introducing a word processing system and equipment my firm consisted of two partners and two employed solicitors supported by five secretarial staff. In addition we were faced with the prospect of needing to employ another staff member to cope with

Mr D B THOMAS of Auckland argues for better use of word processors for land transfer. This paper was presented to the conference of District Land Registrars, Auckland, October 1979.

the written output of those four "authors". We were only then able to maintain a work turnaround of anything from one to five days. The writer and other solicitors who are involved in community work of various types such as the Citizens Advice Bureaux are seeing an increasing consumer resistance and questioning of the level of solicitors' fees and the time taken by solicitors to complete work. For this reason the ever increasing costs of maintaining the above staff levels and a time lag such as that previously experienced by my firm is of considerable concern to the writer.

At the present time our office now comprises the same four solicitors, a legal executive and four secretarial staff comprising one operator, one administrative assistant (secretary) and two staff who work an alternate roster as an operator/administrative assistant. In this configuration we are currently able to maintain a same day or, at longest, next day turnaround in our work. I believe this situation will further improve in that we see the existing secretarial staff as being sufficient to support the work of a further productive staff member in the form of a legal executive. Such an improved produc-

tive/support staff structure is obviously of prime importance in the management of a law practice if public relations problems are to be solved. Accordingly implementing such a system was seen by me as being essential if my own firm was to be able to continue to provide affordable legal services, in a reasonable time span, to clients. This type of overall staff saving is then being further proven as practical for firms of all sizes by the experiences of other firms who are already using the systems and equipment both here and in Australia. I suggest that the use of these systems and equipment can only increase as more and more offices become convinced of the need to fix or reduce overheads in relation to production. That rate of increase must then escalate as word of mouth and user firms spread the evidence of the improvements that can be attained in this area using word processing systems and equipment.

To be able to attain this type of improvement there needs to be a continuing ability to channel the maximum possible work through the new system, and thereby reduce the need to have an alternative work method available to handle non-conforming work. The time and difficulty involved in having word processing equipment complete pre-printed forms breaks down the advantages of the system and so the logic of the process requires that the entire document be completed by the word processing system. Part of our saving is presently due to our having been able to produce Land Transfer documents through the system without being bound to printed forms as we had obtained approval for the preparation of our Land Transfer documents by the word processing system. The initial documents used by us for the past eight months were simply a conversion or copying to the system of existing pre-printed forms used by our office. These forms are illustrated by the transfer and mortgage forms set out in appendices A & B. (The asterisked numbers contained in the examples represent our system's method of locating and adding variable information to the precedent document and this will be demonstrated at the conference.)

In our present situation our two secretaries have only limited typing capacity as they act as secretaries for two to three authors and are fully committed in non-typing functions and the completing of printed forms such as Housing Corporation and other institutional mortgage documents, Magistrate's Court summonses etc which we have not yet been able to have changed to the system. The re-introduction of printed Land Transfer documents would require us to employ an additional secre-

tary and thereby nullify a large part of the savings we have been able to achieve through the adoption of word processing.

At present users and subsequent newcomers to the field develop their capabilities with word processing equipment they too will be turning their minds to form preparation including Land Transfer Office forms. With this background there can only then be increasing pressure on the Land Transfer Office to allow documents of the type produced by word processing equipment. It is accordingly my suggestion that the problem must be considered and resolved now, in order to lay down guidelines and criteria that will allow firms to take full advantage of the cost benefits of word processing systems and equipment while at the same time making your own task easier. I accept that our savings will be illusory if we cause the Land Transfer Office problems with dealings that in turn slow down the processing of work by your staff. At the same time however I firmly believe that with your co-operation we can both make the system and equipment work to our mutual benefit.

Initial usage of our original documents over the past eight months has shown that there appear to be three areas of concern comprising:

- (1) The possibility of authors or firms varying a form from that approved by the Land Transfer Office. Insertion of variable information, and in some cases the deletion or replacement of unnecessary words in the standard precedent, mean that there are "cosmetic" changes to the form approved, in that the positioning of words, sentences and paragraphs does not conform exactly with the original. In addition it is equally as easy to insert, amend or delete the "standard" portions of the document. Concern has been expressed that this then means that Land Transfer Office staff are obliged to check the entire form to ensure that it contains the necessary variable information and operative clauses, which obviously would mean a considerable increase in staff time per dealing.
- (2) The identical nature of the wording on a completed document, where both the standard and variable information comprise typewritten words, means that the variable information that needs to be checked and extracted by Land Transfer Office staff is not readily apparent so that additional

time is involved in locating and checking that information.

- (3) The documents presently being used by my office, because of the additional pages and binding tape, increase the bulk of each individual document and thereby the Land Transfer offices' problems in the storage of documents.

For the purpose of this paper I am working from the premise that your conference will accept that word processing is here now, that the preparation and presentation of documents such as those now presented to you will have to be allowed, and that therefore the problems mentioned must be faced and solved in such a manner as will assist both parties involved. On this premise then I see the possible answers as follows:

- (1) A feature, and in fact a justification, of the use of word processing equipment is that changes to a standard document are possible, and are in fact readily affected, without being obvious so that there is no way that this problem can be avoided. Unless some other idea presents itself to any member of the conference, then it would appear that the respective offices can rely only on a firm's undertaking, expressed or implied, not to depart from the form approved by the Registrar General or the individual Land Transfer offices. I would however put to you the question, how is that situation, in practical terms, any different from the present situation where the need to obtain a new approval to any reprint of a document appears to have fallen by the wayside, in particular with the advent of the various Law Societies and private printing firms in Auckland and Christchurch selling pre-printed forms in bulk. As well the advent of the photocopying machine and plastic overlays has further eroded the original principles behind the approving of a pre-printed form. Also I would suggest to you that even under the original system any person wanting to deliberately effect a document change, for whatever reason, can do so. The chances of detection of such a change were then and are now remote.

I can only comment that the purpose of word processing is to reduce document handling and alteration so that the practicality of the situation

means that changes are unlikely in the normal course of a dealing. In any event the adoption of forms such as those proposed in this paper would mean that the number of words able to be altered are reduced, as are then the chances of a change through human error or otherwise. In the case of documents such as mortgages and cross leases where various contractual and empowering clauses are required, then a format similar to the annexure D could be used, with the second and subsequent pages (in the samples typewritten) being "printed" in the traditional sense of that word so that no checking is needed of those pages.

- (2) If it is accepted that there is no magic to a particular format of a Land Transfer form then the traditional layout of printed forms can be amended to that of the suggested forms in annexures C & D, with these being approved by the Registrar General under s 238 of the Land Transfer Act 1952, or by the amendment of the Schedule forms. The suggested format places the variable information in a grouping at the commencement of the form where it is distinct from the balance of the document, with the operative clauses then following in the second half. The adoption of such a format would be of obvious advantage to your office in saving staff time in checking and extracting information from forms lodged for registration as part of any dealing.
- (3) I understand that Registrars have a growing preference for single page documents. This is also preferable in a word processing system as paper feed methods make two sided a page difficult or time consuming. Because of this most such documents would instead be lodged for registration in the form of the annexure C, where the reverse of the document is completely clear.

Also you might care to consider, as a logical development of the idea of the printed standard clauses suggested above having those printed clauses registered as a separate document in the Land Transfer Office on one occasion, with the subsequent (one page) documents referring to the relative

paragraphs from the master document.

I would in closing suggest that the above comments illustrate my opening paragraph's claim. The use of word processing to prepare Land Transfer documents can in fact assist in the day-to-day operation of Land Transfer offices, while allowing law firms to take the maximum advantage of word processing systems and equipment.

ANNEXTURE A

Approved by the District Registrar, Auckland, No 4343/79

Under the Land Transfer Act 1952

MEMORANDUM OF TRANSFER

*1*of *10*being registered as proprietor of an estate *11*subject however to such encumbrances, liens and interests as are notified by memoranda underwritten or endorsed hereon in all that parcel of land situated in the Land District of North Auckland containing *12*(*2*) more or less being Lot *3*on Deposited Plan *4*and being all the land comprised and described in Certificate of Title *5*(North Auckland Registry) SUBJECT TO: *3*.

IN CONSIDERATION OF the sum of *4*(\$*6*)(including the sum of \$*7*for chattels) paid to me by *8*of Auckland *9*(hereinafter called "the Transferee")(the receipt of which sum is hereby acknowledged)
DO HEREBY TRANSFER to the Transferee all the said estate and interest in the said piece of land above described.

IN WITNESS WHEREOF these presents have been executed this day of *15*.

SIGNED by the above named *1*in the presence of:-

Correct for the purposes of the Land Transfer Act.

Solicitor for the Transferee.

ANNEXURE B

MEMORANDUM OF MORTGAGE

MORTGAGOR: *1*of*11*

MORTGAGEE: *2*of*12*

COVENANTOR:*13*

LAND: Estate *14* North Auckland Land Registry
All that parcel of land containing *15*more or less being Lot*16*on Deposited Plan *17*and being all the land comprised and described in Certificate of Title *18*(North Auckland Registry) SUBJECT TO*19*

PRINCIPAL SUM: *3*

DATE OF ADVANCE:*4*of*5*

REPAYMENT: The Mortgagor shall repay the principal sum of *4*day of *6*

INTEREST: Higher rate *7*percent per annum Lower rate *8*percent per annum calculated quarterly from the date of advance.

First Interest Payment due on the *4*day of *9*.

Subsequent interest payment dates on the *4*days of *10*

The Mortgagor covenants with the Mortgagee as set out in Schedule A and as above set forth. The Mortgagor acknowledges receipt of the principal sum and for the better securing of the principal sum and interest and other moneys the mortgagor hereby mortgages to the mortgagee all their estate and interest in the said land above described. Mortgage executed this day of *20*.

Signed by the above named *1*as mortgagor in the presence of:-

Correct for the purposes of the Land Transfer Act.

Solicitor for the Mortgagee.

ANNEXURE C

Under the Land Transfer Act 1952

MEMORANDUM OF TRANSFER

TRANSFEROR:- *1*of *10*

TRANSFEE:- *2*of *11*

ESTATE:- *11*

REGISTRATION DISTRICT:-

North Auckland

LAND

AREA:-

3

LOT:-

4

DEPOSITED PLAN:-

5

OTHER DESCRIPTION:-

6

TITLE REFERENCE:-

7

ENCUMBRANCES:-

12

PURCHASE PRICE:- *13*(\$*8*)

(including the sum of \$*9* for chattels)

THE TRANSFEROR being registered as proprietor of the estate in the land described above and subject however to such encumbrances, liens and interests as are notified by memoranda endorsed hereon

IN CONSIDERATION OF the purchase price paid to the Transferor by the Transferee (the receipt of which sum is hereby acknowledged)

DO HEREBY TRANSFER to the Transferee all the said estate and interest in the said piece of land above described.

IN WITNESS WHEREOF these presents have been executed this day of *14*.

SIGNED by the above named *1*in the presence of:

Correct for the purposes of the Land Transfer Act.

Solicitor for the Transferee.

ANNEXURE D

MEMORANDUM OF MORTGAGE

MORTGAGOR: *1*of *13*and*2*of *14*
 MORTGAGEE: *3*of *15*and*4*of *16*
 COVENANTOR: *17*
 ESTATE: *18* North Auckland Land Registry
 AREA: *19*
 LOT: *20*
 DEPOSITED PLAN: *21*
 TITLE REFERENCE: *22*
 ENCUMBRANCES: *23*
 PRINCIPAL SUM: *5*
 DATE OF ADVANCE: *6*day of *7*
 REPAYMENT DATE: *6*day of *8*
 INTEREST: Higher rate *9*percent per annum
 Lower rate *10*percent per annum
 REST PERIODS: *24*

FIRST INTEREST DATE: 6*day of *11*.
 SUBSEQUENT INTEREST DATES: *6*days of *12*
 INSTALMENT DATES: *6*day of each *25*
 INSTALMENT AMOUNTS: *26*
 OPERATIVE CLAUSES: 1—12 incl and *27*

The Mortgagor covenants with the Mortgagee as set out in the operative clauses of Schedule A. The Mortgagee acknowledges receipt of the principal sum and for the better securing of the principal sum and interest and other moneys the mortgagor hereby mortgages to the mortgagee all his estate and interest in the said land above described. Mortgage executed this day of *27*.

Signed by the abovenamed *1*and
 *2*as mortgagors in the presence
 of:-

Correct for the purposes of the Land Transfer Act.

CASE AND COMMENT

Taxation of earnings of New Zealand residents overseas

Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue Supreme Court, Auckland. 14 September 1979 (A413/79) Beattie J. The applicant was a New Zealand company engaged in long-term aid projects abroad. Its employees were recruited in New Zealand, but they worked for extended terms overseas, on the aid projects. Those who were married took their wives and children with them, and established dwellings near their work.

The issue was whether the salaries paid to the employees were taxable, in which case the applicant company was obliged to deduct PAYE tax from the gross payments. Sections 241 and 242 of the Income Tax Act 1976 were of prime importance. Section 242 (b) provides that all income derived from New Zealand shall be assessable for income tax, whether or not the recipient is resident in New Zealand. Beattie J held that, where income is wages and salaries for personal services, that income is derived from the place where the services are performed, and not from the place whence payment comes. Accordingly, the employees were not taxable under s 242 (b).

Section 242 (a) provides that a person who is resident in New Zealand at the time when he derives income is assessable on that income, whether it is derived from New Zealand or from elsewhere. Were the employees resident in New Zealand? By s 242 (1) an individual "shall be deemed to be resident in New Zealand . . . if his home is in New Zealand". His

Honour held that this provision furnishes an exhaustive definition of "resident". Accordingly, the question was what was the meaning of "home".

The learned Judge held that "home" did not mean "domicile"; nor did it mean "permanent home". Rather, home is where the heart is. It is the place where the centre of gravity of one's domestic life is to be found. A man's home is where his wife lives.

On these criteria, the employees were not resident in New Zealand. The fact that some of them owned houses in New Zealand did not affect the issue, unless those houses were ready at all and any times for their occupation. In fact, as one might expect, the employees rented their houses to tenants while they were abroad. His Honour held that retaining ownership of a New Zealand home was not enough to render a person still a resident of this country. Accordingly, the salaries of the employees were not taxable in New Zealand.

It is to be noted that in reaching this conclusion, Beattie J overruled three cases of lesser authority: *In re M* (1945) 4 MCD 341; *W v CIR* (1961) 10 MCD 168; and *TRA Case 25* (1976) 2 TRNZ 388. Those cases had applied a test of "home" as being rather akin to "domicile". On that test, the employees of the applicant would clearly have been taxable in New Zealand.

Until relatively recently, the Commissioner had operated what was known as "the 15 months rule". This was a rule of thumb for administrative purposes to determine whether a taxpayer ceased to be a New Zealand resident;

if he left the country for more than 15 months, he was treated as not a resident. Application of the rule in individual cases was, of course, subject to any objection that might be sustained. From the evidence led on behalf of the Commissioner, it appears that the Department decided that the 15 months rule was being abused, and taxpayers who should be regarded as residents were avoiding liability by staying out of the country for a short time beyond 15 months. Accordingly, the rule was modified to make it more flexible. Even though a taxpayer might leave the country for more than 15 months, if he was a New Zealand citizen, and an employee of a New Zealand company paid from New Zealand, who had previously been living in New Zealand, and whose employment overseas was for a fixed term, he would continue to be a resident of New Zealand. It was as a result of this modification of Tax Department policy that the present case arose. Under the 15 months rule, the employees of Geothermal Energy New Zealand Ltd would clearly not have been taxable. It would appear, however, that the net result of the effort to make the rule more flexible in favour of assessability may, in fact, be the reverse. That is, it would appear from the judgment of Beattie J that New Zealand residents going abroad, taking their wives and families with them, and renting out their home in New Zealand, should not be taxable on their overseas earnings, even though the term of their absence from the country may be considerably less than 15 months.

Procedure

The case was brought as an application for review under the Judicature Amendment Act 1972. Counsel for the respondent Commissioner of Inland Revenue raised the defence that the respondent had not in fact exercised a "statutory power of decision" as defined in s 3 of the 1972 Act. The substance of this submission was that no "decision" had in fact been reached by the Commissioner.

The factual basis for this submission was that there had been certain correspondence and discussions between the taxpayer company and the Inland Revenue Department. An official of the Inland Revenue Department gave evidence that on the basis of the information gained from this correspondence and discussion, in his view the employees of the taxpayer should be considered as New Zealand residents for tax purposes. He claimed, however, that the Commissioner had made no formal decision characterising the applicant's employees as New Zealand residents. Be that as it may, the Commis-

sioner did require that the applicant should deduct PAYE tax from the salaries it paid, on the basis of the Commissioner's decision.

While agreeing that the Commissioner did have power under the Income Tax Act to decide whether or not a particular salary should be subject to PAYE deductions, the learned Judge held that on these facts it could not be said that there had been a statutory determination by the Commissioner. The Commissioner was awaiting further information.

It is not easy to assess the implications of this decision. Would the position have been different had the taxpayer company simply written to the Commissioner stating that it had no more information that it could supply? One would think that the answer would have to be affirmative. And yet, this seems a strange result. The Commissioner had come to a conclusion on the basis of the information supplied to him. Accordingly, if the taxpayer was aware that it could not usefully let the Commissioner have any further relevant information, it may be questioned whether the Commissioner should be regarded as not having made a decision.

It appears that the effect of the judgment may be to exclude from the ambit of the exercise of a statutory power of decision, the making of a decision that could be described as "interim". If that is so, the narrowing of the occasions for a remedy under the Judicature Amendment Act 1972 may be regretted. The extension and simplification of the power of judicial review of administrative action contained in the Act has been generally welcomed, and there is no evidence that an excessive amount of litigation has resulted, putting unreasonable burdens on government administration.

It is possible, in any event, that *Geothermal Energy New Zealand Ltd v CIR* would not be followed in this respect. Apart from holding that the Commissioner had not exercised a statutory power of decision, the learned Judge found that the application to review would lie. This was because, on a detailed examination of the Income Tax Act 1976, it was apparent that the taxpayer could have availed itself of the ordinary objection procedures under the Act. In those circumstances, the privative provisions of s 27 of the Income Tax Act prevented the taxpayer from objecting to the Commissioner's decision except pursuant to the procedures laid down in the Act.

John Prebble

Confidentiality in tax cases

Auckland Medical Aid Trust v Commissioner of Inland Revenue [1979] 1 NZLR 382. This case involved the question of whether a certain trust that administered an abortion clinic was entitled to charitable and therefore tax-exempt status. However, its major interest for present purposes is that at the beginning of his judgment Chilwell J let fall some carefully considered remarks on the question of whether tax cases should be held in camera, and whether the names and details of objectors should appear in public judgments.

Chilwell J stated that it was his opinion, shared by many Judges before whom he had appeared as counsel, that income tax cases should be heard in camera. This is the position in respect of cases before the Taxation Review Authority.

His Honour pointed out that the whole tenor of the relevant provisions of the Land and Income Tax Act 1954 (now the Income Tax Act 1976) and of the Inland Revenue Department Act 1974 is the preservation of secrecy with regard to one's taxation affairs. Simply because a taxpayer exercises his right to request a case to be stated for the determination of the Court, he should not be placed in peril of publicity.

It may be hoped that the comments of the learned Judge will be sympathetically received by his brethren. There are, of course, many cases reaching the Courts where the issue boils down to whether or not there has been tax evasion. In such cases, publicity is probably reasonable, at least as much as in respect of a criminal trial. Other cases are such that it is not particularly important whether the taxpayer receives publicity or not. For example, it is probably of little moment to the Travel Agents' Association of New Zealand (Inc) for it to become publicly known that the Association disagreed with the Commissioner on the question of whether the interest paid on its bank account was taxable (*Travel Agents' Association of New Zealand Inc v CIR* Supreme Court, Christchurch, 12 April 1979 (M386/77) Casey J).

But there is a very large category of cases where there can be little legitimate public interest in details of the personal or business affairs of the taxpayer. Two recent judgments, from Auckland and Hamilton, may be thought to furnish good examples.

Andrews v CIR; Muir v CIR, Supreme Court, Auckland, 29 May 1979 (M517/77) Sinclair J, involved the assessability of a fee charged to the Asian Development Bank by a firm of con-

sulting engineers for work performed in Fiji in the income tax year ended 31 March 1972. The published judgment included not only the fact that the fee was \$10,352.72, but also that the declared assessable income of the partnership for the year was \$81,092.

The published judgment in *Te Awamutu Grain Ltd v CIR*, Supreme Court, Hamilton, 10 May 1979 (M309/77) Bisson J, sets out that the taxpayer derived an income in the financial year ended 30 September 1976 of \$112,690. The taxpayer claimed an exports incentive deduction of \$135,922. The case turned upon whether the particular product exported, dehydrated maize, qualified for the incentive deduction. Accordingly, neither the total income of the taxpayer nor the size of the deduction claimed was in principle a relevant factor.

In the case of neither taxpayer in *Andrews* and *Te Awamutu Grain Ltd* could there be any suggestion of attempted tax evasion. In both cases it was simply a question of correct interpretation of the income tax legislation. Nevertheless, both taxpayers had their assessable income for the year in question, and some other details as well, divulged to the public. It is to be hoped that the fact that each taxpayer was successful mitigated whatever chagrin he may have felt at the publicity.

John Prebble

When must a partnership be evidenced by writing?

Stewart and Tozer v Smith (Supreme Court, Auckland, judgment 11 April 1979, A No 163/75) raises the question when a partnership must be evidenced by writing in order to satisfy s 2 of the Contracts Enforcement Act 1956 on account of the fact that land is involved. In that case, so far as is relevant to this matter, the plaintiffs were claiming to be entitled to be regarded as tenants in common in equal shares with the defendant in respect of certain land which he had purchased. They asserted that an oral partnership agreement had been entered into in 1973, that the defendant had entered into an agreement for sale and purchase of the land for the purposes of, and in the course of, the partnership business and had subsequently acquired the land for that purpose. Hence, argued the plaintiff, the land was partnership land which the defendant held in trust for the partnership. The defendant denied the existence of the partnership and specifically pleaded s 2 (2) of the Contracts Enforcement Act 1956. Chilwell J, having carefully sifted a welter of evidence, found that it was common

ground that the parties had contemplated an arrangement in the nature of a partnership or joint venture. His Honour also found, however, that the bargain was never actually finalised for, although the defendant's solicitor prepared two draft partnership agreements, they were never engrossed and that the parties fell out at the end of 1973, since when they had been "at arm's length awaiting some resolution of their misfired adventure". In the end, his Honour concluded thus:

"It is impossible for the plaintiffs to maintain that a partnership came into existence at the time of that meeting. There was no agreement reached upon some particularly essential terms such as the acreage to be taken over by the defendant, the purchase price to be paid by the defendant to the partnership for that acreage, when precisely and how he was to obtain title, the terms upon which he or his company was to occupy the appropriate acreage pending title, the terms of any lease including the commencing date, the terminating date and the actual terms and conditions themselves. Nor had they agreed upon a rent. The provision of capital to the partnership was vague.

The one thing which I was looking for and which, in my judgment, never emerged was any clear evidence that the essential terms of a partnership agreement had been agreed upon".

There was, therefore, no ultimate necessity for Chilwell J to consider whether there was any need for compliance with the Contracts Enforcement Act 1956. Nevertheless, his Honour noted the following points:

- (i) The 1956 Act was a statute for the reform of the previous law.
- (ii) Section 2 of that Act was worded differently from s 4 of the Statute of Frauds 1677 and from s 40 of the Law of Property Act 1925 (UK).
- (iii) Since the passing of the 1956 Act, the New Zealand Courts had continued to interpret s 2 of the 1956 Act as if s 4 of the 1677 Act were still in force, as a result of which the Courts look more to the case law under the 1677 Act than they do to the precise words of the 1956 Act.
- (iv) Whether or not the approach mentioned in (iii) (supra) is the right one "will doubtless one day merit the attention of our Court of Appeal."

- (v) If the correct approach was that in (iii) above, "then I express the obiter view that a partnership contract of the type advanced by the plaintiffs in this case must comply with the Contracts Enforcement Act 1956" thus rejected the argument of counsel for the plaintiffs that the arrangement between the parties was not a contract for the sale of land.

- (vi) *Imrie v Nesbitt* (1908) 27 NZLR 783, *Cody v Roth* (1909) 28 NZLR 565 correctly expressed the law of New Zealand and *Caddick v Skidmore* (1857) 2 De G & J 52; 44 ER 907 appeared correctly to state the law of England.

His Honour did not, of course, need further to dilate upon these cases. In the first of them, Denniston J held that oral agreement *to become partners*, the aim of the projected partnership being that the parties should become joint purchasers of a specific piece of land, over which one party held an option to purchase, in order to subdivide and sell it profitably, was caught by the Statute of Frauds 1677. He refused to follow *Drysdale v Pryde* (1908) 27 NZLR 645. In *Cody v Roth* (supra), Sim J was also faced with a parol agreement *to become partners*, this time the purpose being to buy a specific parcel of land, for the purpose of speculation, from the Wanganui Education Board. Following the decision of Denniston J, Sim J saw the agreement as one whereunder the *proposed* partners would each get an interest in the land to be purchased by one of them and held that the agreement was caught by the Statute of Frauds 1677. *Caddick v Skidmore* (supra) was, in effect, similar. It was there held that an agreement to the effect that the parties were *to become partners* in a colliery with intent to sublet at a royalty and divide up the profits fell within the Statute of Frauds 1677, the agreement, once again, being for the purchase of an interest in land. (Reference may further be made to the decision to the same effect in *Isaac v Evans* [1899] WN 261).

- (vii) In cases of a single adventure, as in the case under review, it made "no difference whether the contended for partnership precedes the acquisition of land or any interest therein or is entered into subsequently to the ac-

quisition by one partner of the land or the interest therein."

- (viii) On the facts, the doctrine of part performance could not help the plaintiffs because there was no clear evidence of a contract certain and defined in its terms. If there is a sufficient act of part performance, then the case is taken out of the Statute of Frauds 1677, as is recognised by the Irish decision mentioned in passing by Chilwell J, viz *Crowley v O'Sullivan* [1900] 2 IR 478.

In fact, Chilwell J found it possible to find in the plaintiffs' favour upon a ground not relevant to this discussion, viz, that the defendant had made and signed a valid declaration of trust in respect of the land.

The crux of the above case for present purposes is that the parties never were partners. Where the parties have acted as partners, however, and the partnership is to deal with land, then the matter becomes different entirely. The agreement of partnership may then be proved by parol evidence. This has long been accepted, and authority therefor may be found in *Gray v Smith* (1889) 43 Ch D 208, at p 211; *Re de Nicols* [1900] 2 Ch 410 and in the older cases of *Forster v Hale* (1800) 5 Ves 308 and *Dale v Hamilton* (1846) 5 Hare 369; and, on appeal, 2 Ph 266, very clearly explained by Denniston J in *Imrie v Nisbett* (1908) 27 NZLR 783, at pp 788-791, especially at p 789. This difference may be shown by reference to *Griffiths v Graham* a case briefly reported in (1920) 15 MCR 41. The parties were both land agents who launched out in a land speculation as partners in the purchase of some land in Blenheim. they resold it profitably before they paid for it. On completion of the resale the defendant pocketed the whole of the profit and refused to account to the plaintiff for his share. the defendant, when sued, pleaded the Statute of Frauds 1677, and Hollings SM, rightly it is submitted, *having expressly found that the parties were partners*, held that the plaintiff's claim was not one to which the Statute of Frauds applied. "It is not", he said (at p 42), "an action to recover land or any interest in land, but it is a claim by one partner against the other to recover his half share of the partnership profits in a partnership undertaking. If the Statute of Frauds can defeat this claim, then the Statute of Frauds can be used to perpetrate a fraud and cover dishonesty, which it has always been the policy of the law of disallow."

The difference is also apparent from the decision of the Supreme Court of British Col-

umbia in *Johnson v Murray* (1951) 2 WWR (NS) 447. Macfarlane J expressly found that the relationship between the parties was that of partners and that their partnership had been entered into with the aim of putting two lots of land belonging to the defendant into shape for sale by the plaintiff's buying two houses and moving them onto these lots. The agreement was evidently not made in compliance with the Statute of Frauds 1677 and was to the effect the defendant would be paid the value of her lots out of the proceeds of sale and that the plaintiff should be repaid his expenditure in buying, moving and finishing the houses, and that any surplus was to be divided. Applying *Re de Nicols* (supra), the learned Judge held that the Statute of Frauds did not bar the plaintiff's claim, declared that there was a partnership, the principal purpose of which was to put the lots in shape for sale, and directed an account to be taken.

P R H Webb

Domestic Proceedings Act 1968 — Interim maintenance

Smith v Hill, Supreme Court, Auckland; 29 October 1979 (No M1285/79); Sinclair J, was a case stated from a Magistrate's Court in relation to the interpretation of s 77 of the Domestic Proceedings Act 1968. The particular question was whether an interim order for \$40 per week for the respondent's wife and four children was valid by reason of its having been expressed as a global sum. Put another way, should the \$40 have been expressly apportioned between each of the recipients? Or should a separate order have been made for each recipient in a specific sum?

The matter revolves around s 77 (3) of the 1968 Act, which reads:

- "(3) An order under this section shall direct the defendant or, as the case may be, the applicant to pay such weekly sum as the Magistrate thinks reasonable towards the future maintenance of his or her wife or husband and any of his or her children until the final determination of the case or until the order sooner ceases to be in force."

His Honour, having considered the terms of s 25 (1) of the Domestic Proceedings Amendment Act 1971, decided that they related only to final maintenance orders. He added that it could

"be readily appreciated why the efficacy of final global orders in respect of more than

one person was called into question because maintenance for wives was dealt with in Sections 25-30 inclusive of the 1968 Act, while maintenance for children was dealt with in Sections 35-39 inclusive of the same Act. When one examines the provisions of the Statute relating to each it will be seen immediately that, depending upon the circumstances, different considerations can apply with regard to the making of a maintenance order in respect of a wife and the making of a maintenance order in respect of a child and, depending upon the circumstances, a maintenance order in respect of a wife could be very much greater than that which would be made in respect of a child."

Passing to orders under s 77, it was observed that the Legislature contemplated that they would be in force only for a limited period. Sinclair J went on to say that:

"normally and usually such orders are made to cover an emergency or interim situation. The circumstances which may require the making of an interim order can vary immensely. For example, one order may be required during a period of illness at a particular rate and at a lesser rate when the final order is made, or an order may be required to meet a situation where wife and children have been left without any maintenance whatever and an interim order is necessary to ensure that until proper inquiry can be made some maintenance is available for their support.

"In either of the cases just mentioned it may be inappropriate, inadvisable or impossible to inquire fully into the financial circumstances of each of the parties with the result that any order which is made can but be a temporary expedient and therefore of an interim nature. It may well be impossible to consider the separate needs of the wife and of each of the children and it must be remembered that the requirements of each of the children may well be different and that in such a situation a global order is the only proper order to make in the circumstances.

"I am satisfied on a proper reading of s 77 (3) that that situation was recognised by the Legislature and that s 77 ought to be regarded as a code of its own to meet this interim situation.

"When one looks at subs (3) of s 77 I am of the view that the wording is such that but one order was contemplated and

that the Court has power to order that the person against whom the maintenance order is made is to pay such weekly sum as the Magistrate thinks reasonable towards the future maintenance of the wife and any of her children until the final determination of the case or until the order sooner ceases to be in force. The word "and" is used in reference to the spouse and the children and to my mind that means that the whole group can be considered as one group and they need not be considered as separate individuals".

His Honour thought the submission had been rightly made that:

"the use of the word "children" in the plural further fortifies this concept rather than the making of individual orders in respect of the wife and each child. The way the subsection is framed in my view contemplates the making of global orders in respect of one unit or group and it is noteworthy that the authority for the making of a maintenance order in respect of both the wife and children in these circumstances is included in the one section and not in different sections in the Statute."

Comment

Most family lawyers probably thought that global interim orders made under s 77 were properly made, but it is very satisfactory to have the matter authoritatively settled. It is interesting to note that *Cannell v Cannell* (Supreme Court, Hamilton; (No GR216/73) O'Regan J) was drawn to the attention of Sinclair J. In that case an interim global order had been made by a Magistrate and had been varied on appeal by the Supreme Court, which appeared to have assumed that there was power to make a global interim order without the matter being really argued.

P R H Webb

INTERNATIONAL LAW

HOW STRONG IS NEW ZEALAND'S CLAIM TO THE ROSS DEPENDENCY?

The Ross Dependency lies 1,750 miles south of New Zealand in the coldest region in the world covered almost entirely by ice hundreds of feet thick. It covers an area of 170,000 square miles of land and 130,000 square miles of permanent ice shelf. Before the second world war only intrepid explorers and scientists journeyed there. Whatever mineral wealth lay hidden was then incapable of extraction. It has remained, until recently, as a laboratory where larger nations have spent funds as much for prestige as for scientific knowledge. All is now changing. Oil has been discovered in Northern Arctic lands and is being extracted notwithstanding the cost. What will be the attitude of nations to the Antarctic if oil there would solve the present shortage? It is time New Zealand looked south to the Ross Dependency which it administers; for in 1973 while drilling for scientific purposes on the Ross Sea shelf a flow of natural gas was produced at a shallow level.

Under international law unoccupied land may be acquired through occupation. In order to acquire title to territory it is not enough to rely on discovery alone. "Discovery and a formal declaration of possession may constitute a root of title, but such title must be perfected by acts of effective occupation. A state must continuously and peaceably administer the territory. The extent of the authority which must be asserted and the area over which administration is exercised depend upon the circumstances, and in particular the physical characteristics, of the territory in question." (18 *Halsbury's Laws of England*, 4th ed, p 756, para 1473).

History is full of dramatic incidents of explorers placing the flag of their country on newly found lands but invariably this is supported by taking possession or where this is not feasible by exercising sovereignty. On this basis it is doubtful whether any of the claimants to the Antarctic own more than the landfall originally discovered and a reasonable area surrounding it. This would leave hundreds of

By The Public Issues Committee of the Auckland District Law Society*

thousands of square miles belonging to nobody. It has been suggested that those countries claiming land on the perimeter of the Antarctic continent are entitled to a segment culminating at the South Pole. This is a doctrine of geometric convenience but has no basis in international law.

In 1959, 12 nations signed an Antarctic Treaty under which the signatories acknowledged the "substantial contributions to scientific knowledge resulting from co-operation in scientific investigation in Antarctica and the conviction that the establishment of a firm foundation for the continuance of such co-operation would be well based on a treaty consistent with the purpose and principles of the United Nations Charter." The Treaty defines the Antarctic as all land, sea and ice, south of 60 degrees south and provide for non militarisation, preventing nuclear explosions and disposal of nuclear wastes and preservation of the unique resources. There are provisions for inspection and conservation of living resources. The countries signing the Treaty were United States of America, Great Britain, USSR, Australia, New Zealand, South Africa, Norway, Belgium, Chile, France, Argentina and Japan. The Treaty has since been adopted by Poland, Czechoslovakia, Denmark and the Netherlands. The Treaty has inspection provisions and surprisingly has been an example of great international co-operation between the signatories and there have been no difficulties reported. Although Japan is a party to the Treaty, under its war time peace treaty it renounced all claims to the Antarctic. But there is a doctrine of international law that treaties expire with time and circumstances and as the years march by, Japan may be less inhibited in reaffirming any Antarctic claim. In any event the Treaty may expire after 1991 by which time it is crucial that the sovereignty and control of the Antarctic be clarified for many issues which have now arisen were not contemplated in 1959 when the Treaty was signed. What then are

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New Zealand's rights?

The first discovery was made by Captain Ross, an Englishman in 1841 and until Captain Scott valiantly journeyed to the South Pole in 1911 only three British expeditions had visited the area. In 1923 an Order in Council passed by the United Kingdom Parliament granted "peace, order and good government of the Ross Dependency to the Governor-General of New Zealand". Any claim to the Dependency by New Zealand must date from 1923 and it is necessary to examine what New Zealand did between that date and the date of the Antarctic Treaty in 1959 to see whether any claim at international law can be made for the Dependency. An international law principle known as "the inter se rule" may assist New Zealand; for the Dependency has been treated by both the Government and public as New Zealand territory and it has been assumed that the United Kingdom would give any confirmation that was necessary.

However, this assumption may not be correct, for the Kermadecs, the Cook Islands and the Tokelau Islands were formally transferred to New Zealand by Great Britain. As the United States has shown considerable interest in the area and because the most convenient access by either sea or air is from New Zealand, we have been able to establish regular visits and in some instances permanent occupation at Scott Base. We have issued in total 15 stamps for the Ross Dependency. The 8d and 7c stamps show New Zealand and the Ross Dependency area marked in colonial red. On none of the stamps does the word "New Zealand" appear but around the Queen's head on the 15c issue and on the general background the initials "NZ" appear hundreds of times almost invisible to the naked eye. The issue of postal stamps does not of course confirm any title to the lands but has always been an indication of the exercise of sovereignty. The USA and the UK have operated token post offices and the Argentinian Government which still claims the Falkland Is (notwithstanding long British occupation) regularly issues stamps for the Islands. But New Zealand has done virtually nothing to confirm any rights in the area and one is left with the inevitable legal conclusion that we would need formal authority of the UK Parliament to transfer British claim to the Ross Dependency to New Zealand. It is surprising over the years, that while the Governor-General of New Zealand has appointed magistrates and coroners for the Dependency they have not exercised authority there. Even our bureaucracy militates against our claim. A New Zealander

going to the Antarctic and requiring US dollars for purchases at the American base at McMurdo Sound (within the Ross Dependency) must obtain a Reserve Bank permit to export money from New Zealand. A returning officer has been appointed for the Dependency but no electoral roll has ever been made. In the northern hemisphere, Canada has taken great steps to confirm its sovereignty to the Arctic territory to the north. No effort has been spared in appointing administrative officials to conduct trials and give every scientific expedition a colour of the administrative control. Our attitude may have been economically sensible at the time; as the cost of maintaining expeditions and keeping personnel in the area is substantial. Without the US presence it is doubtful whether New Zealand could afford to maintain any regular activity in the Dependency.

What then should we do? After 1991 the Antarctic Treaty is to be reviewed and signatory nations can withdraw in certain circumstances. But if oil is discovered in quantity meanwhile the signatories to the Treaty might not continue their peaceful accord and the grab for the Antarctic could start. At the time the Treaty was proposed New Zealand suggested that the area should come under the control of the United Nations. While this is an attractive idea it may not be feasible because of the large areas claimed by the great nations of the world. New Zealand's best approach would be to acquire by legal process the British rights to the Dependency. If the Antarctic Treaty expires after 1991 at least she would have the strength of a claim at international law behind her. Because of the tremendous expense in administering the area and the even greater expense for the extraction of oil and minerals (should that be permitted) consideration could be given to a condominium or partnership with the UK or the USA.

Alternatively New Zealand could mount an international-wide programme to protect the unique and important environment of the Antarctic. Because we have neglected opportunities to assert our rights to the Ross Dependency this would at least be the logical answer to our approach of inaction. If the Antarctic Treaty expires and is not replaced then New Zealand must consider exercising control of the Dependency. Now is the time to consider what we must do.

Singapore fell because the guns only pointed one way. New Zealand's economic planning and defence is only pointed to the north while the white south of the Ross Dependency looms in importance.

SALE OF LAND

"SUBJECT TO SOLICITOR'S APPROVAL" — ANOTHER DEVELOPMENT

The condition "subject to my solicitor's approval" and its variants have been in use long enough to have prompted an article by Dr AP Molloy in [1974] NZLJ 214 and articles and a note by the present writer in [1976] NZLJ 40 and 326 and [1978] NZLJ 170. But in at least one important respect the effect of such clauses has remained very uncertain. An aspect which has been clear all along is that if any contract is to be formed in advance of the solicitor's approval, there must be some constraints upon the exercise of his discretion. If he were to be free to act solely on his client's instructions there could be no immediate contract because the client would have undertaken no present obligation, unless it be just to communicate with his solicitor. More must have been intended than that. Until now, however, the only judicial discussion in this country on the extent of the solicitor's constraints has been in some obiter dicta of the Court of Appeal in *Frampton v McCully* [1976] 1 NZLR 270, 277 and *Boote v RT Shiels Ltd* [1978] 1 NZLR 445, 451.

In the latter case the Court said "... we think that the solicitor's approval could not be withheld capriciously or merely on the instructions of his client but was meant to ensure that the conveyancing aspects of the transaction were satisfactory from the purchaser's point of view. The case thus resembles *Caney v Leith* [1937] 2 All ER 532 rather than *Frampton v McCully* [1976] 1 NZLR 270, 277." In the *Frampton* case the Court of Appeal had expressed much the same view, in the course of contrasting a situation where a present contract was intended with one such as that before them where it was not. As was mentioned in [1978] NZLJ 170, the constraints thus proposed were in two parts. So far as the solicitor's state of mind was concerned it was sufficient that in withholding approval he did not act capriciously, though to this it might be added, from the dicta in *Frampton v McCully* (supra), that his approval could not be withheld for reasons patently unreasonable or extraneous. By contrast, the subject matter upon which the discretion could be exercised was to be confined quite narrowly to "conveyancing aspects."

In *Provost Developments Ltd v Collingwood Towers Ltd* (Holland J, judgment 15 November

By BRIAN COOTE *Professor of Law, University of Auckland.*

1979) the Supreme Court has now, for the first time, had to consider the scope of the constraints on a solicitor as part of its *ratio decidendi*. The essential facts in the case were simple enough. The plaintiff as purchaser and the defendant as vendor were parties to an agreement dated 23 June 1978 for the sale and purchase of some tenanted properties at a price of \$85,000 of which \$5,000 was payable by way of deposit and the balance, to be secured by a mortgage, was to be paid within six months. The sale was to be with vacant possession. Inserted in the agreement was the term "subject to solicitor's approval by Friday, 30 June 1978 by 5 pm." Despite the placing of the apostrophe in "solicitor's", this term appears to have been intended to apply to both parties. In this respect it differed from those considered in the earlier reported cases. The plaintiff's solicitor notified his approval on 28 June but on the following day the solicitor for the defendant gave notice that his approval would be withheld. The day after that, the defendant entered into an agreement with a third party to sell the properties for a price of \$87,000 subject to existing tenancies but with a warranty that the tenancies were monthly ones. Payment was to be in cash on the date of possession, 29 August 1978.

In his judgment, Holland J said he was satisfied that the defendant's solicitor disapproved of the agreement with the plaintiff because he was concerned about the delay in cash payment and the provision requiring vacant possession "but primarily because he felt confident that his client was able to get an agreement on better terms. Had there not been another prospective purchaser in the offing and had not (the solicitor) at the time felt confident that a better offer could have been obtained, I doubt if he would not have approved the agreement." In His Honour's view, the parties had concluded an immediate conditional contract. That meant the solicitors must act honestly and reasonably and not from mere caprice. But he did not accept that their approval must be limited to the technical conveyancing aspects

of the transaction. The words "conveyancing aspects" used by Cooke J in *Boote v RT Shiels Ltd* were, he thought, intended to mean "arising out of the duties and obligations owed by a solicitor to his client when acting for that client and advising concerning a conveyancing matter." That must include a considered view or opinion as to the transaction . . . as a whole." If the solicitor were not "entitled to apply his mind to the appropriateness of the bargain as distinct from the legal validity of the contract" there would be very little in respect of which a solicitor could exercise his discretion. Had the solicitor approved the agreement but withheld approval solely because of the instructions received from his client that would have been to act capriciously and in bad faith. But that had not been the case on the facts before him. He accordingly gave judgment for the defendant.

The test propounded by Holland J, gives a solicitor so wide a discretion that it is difficult to think of any limits to it beyond mere caprice whether on his part or on the part of his client. One matter which might fall outside the test is a consideration which would be reasonable in the client but extraneous to the agreement as a bargain. An example would be a vendor's finding himself unpopular at home for having agreed to sell the family holiday house, as happened in *Daubney v Kerr* [1962] NZLR 319. But it is not at all certain that such a matter would be held irrelevant to "a considered view as to the transaction as a whole." Interestingly enough, in *Henning v Ramsay* (1963) 81 WN Part I (NSW) 71 the Court of Appeal of New South Wales held that a condition "subject to . . . solicitor's approval of that contract" prevented the formation of any immediate contract. Holland J interpreted the clause before him as though it were expressed even more widely than that.

As already mentioned, an unusual feature of *Provost Developments Ltd v Collingwood Towers Ltd* was that the agreement was subject to approval by the solicitors of both parties. Prima facie the learned judge's interpretation of the condition appears to have given the parties something approaching the sort of opportunity to take and act upon professional advice after signing the agreement which in England they would, by the ethics of the land agents' profession there, be entitled to have before signing a binding contract. And conceivably that is precisely what the condition in the *Provost Development* case was intended to achieve. If so, and since it applied to both parties, it would hardly be a criticism that its use made it possi-

ble for one or other party to "gazump" or be "gazumped". As the English law Commission concluded a few years ago (Report on "Subject to Contract" Agreements (1975) Law Com 65) that is the price that has to be paid and is worth paying for so extensive a degree of protection.

On the other hand, a similarly broad interpretation of a condition expressed to be in favour of one party alone might work rather less fairly in some cases. Its effect would be to give the fortunate beneficiary the best of both worlds: freedom to cast around for something better coupled with an absolute hold over the other party. He would have a form of option the price for which would be just that his solicitor would not thereafter act from mere caprice. But the very fact that the parties have chosen to enter into an apparent contract rather than an option would tend to suggest that something more than an option was intended. And the further fact that the apparent contract purports to bind one party absolutely might, it is submitted, be some ground for inferring a greater degree of commitment by the other of them than would be the case if the obligations of both were conditional. It may well be significant therefore that *Frampton v McCully* (supra), *Boote v RT Shiels Ltd* (supra) and *Henning v Ramsay* (supra) were all cases involving conditions in favour of one party only. If so, the Court of Appeal's suggested limitation to "conveyancing aspects" may yet be held to apply in its narrower sense to at least some unilateral conditions while in some other cases a unilateral conditions may still, where appropriate, be interpreted as a condition precedent to the existence of any binding contract.

Should arguments along these lines fail, a party against whom a solicitor's approval condition operates might try to show that the condition attached not to an immediate contract but to the offer or acceptance, as in *Buhrer v Tweedie* (supra) and *Frampton v McCully* (supra) respectively. If that were established there would of course be no contract unless and until the condition were fulfilled. However, the findings in those two cases were very much facilitated by the fact that the parties had used a form of agreement couched in terms of offer and acceptance. The argument would be much harder to sustain where formation had been through the exchange of signed forms of contract.

The system under which land sales are conducted in New Zealand no doubt works well enough in the great majority of cases. Given willing buyers and willing sellers and an absence of complications, almost any system

would. But it is a system ill-adapted to meet occasional difficult cases. In 1975, in the Report already referred to, the English Law Commission concluded that no realistic system of conditional contracts could provide adequate protection to the parties. At the time, the present writer suggested in an article in [1975] NZLJ 123 that the answer for New Zealand might lie in a statutory cooling-off period to apply unless abridged or excluded by parties who had

already had legal advice. That suggestion appears to have fallen on stoney ground (with an impact like that of thistledown), perhaps deservedly so. But the problems remain, as the *Provost Developments* case demonstrates. It does seem odd that in an age of consumer protection we should regard so complacently a system which, after careful enquiry, another country has deliberately rejected as being dangerous for the parties and at least potentially unfair.

CORRESPONDENCE

Dear Sir,

Battery and Accident Compensation

While I am grateful to Mr McInnes for his comments — [1979] NZLJ 405 — on the tort of battery I fear he and I may be debating at cross purposes.

There are probably as many definitions of battery as there have been Judges who considered such cases and learned authors who commented on their decisions but to explore the question of which actions constitute a battery, and why, is not necessarily to elucidate the nature of this particular tort. Moreover, such definitions — whether like *Cole v Turner* they date from 1705 or like *Letang v Cooper* they date from 1965 — are necessarily rationalisations after the event since the writ of trespass, of which battery is a part, was already well established at the time of the Statute of Westminster II — that is, 1285.

It may seem unduly erudite to go back so far in history but it was from that Statute that the present distinction between torts actionable per se and torts actionable upon proof of special damage stems. The latter, in so far as they relate to personal injury, are now clearly abolished by s 5 (i) of the Accident Compensation Act 1972 but it is my contention that the former — except in so far as they can provide compensatory damages — are not. The reason, I suggest, lies in the nature of such torts.

After more than 700 years it may be difficult to perceive why a particular tort came into being. Those torts which are actionable upon proof of special damage clearly derive from the Statute of Westminster II; they were actions on the case. Torts actionable per se, however, have an earlier derivation. A discussion of the derivation of the Action of Trespass can be found in Richardson and Sayles *Select Cases of Procedure Without Writ under Henry III* (1941) Selden Society at cviii. The learned authors there attempt to trace the procedural development of this action and, interestingly from the present point of view, they consider that it was based upon the even older appeal of felony. That is to say, its objective was to punish the wrongdoer and protect the peace, not to compensate the plaintiff for injury (be it physical injury or mental consequences). Once the wrongdoing was established damages became payable; only in later centuries has the law developed the distinctions between the various types of damage — nominal, compensating or punitive.

If one accepts this, — admittedly much abbreviated — historical analysis then, in my view, it becomes clear that no action in respect of torts actionable per se (including

battery) is a proceeding for damages arising directly or indirectly out of a personal injury — except in so far as the plaintiff seeks to increase the damages by claiming compensatory damages based directly upon a personal injury. Even in that case, the cause of action itself arises from the wrongdoing of the defendant; it is only the particular head of damages which relates to personal injury.

Three other points should be made in reply to Mr McInnes.

(1) If s 5 (i) of the Accident Compensation Act 1972 applies to bar the right of action whenever there is some element of affront to the plaintiff's pride, honour or dignity — which seems to be Mr McInnes's position — then it could even extend to the tort of defamation. Admittedly, that tort is not primarily concerned with the plaintiff's wounded feelings but without injury to such feelings what plaintiff would care about exposure to hatred, contempt or ridicule.

(2) Touching the adequacy of criminal sanctions alone as a check to official high-handedness one could cite eminent historians who have regarded the liability of over-officials to pay damages out of their own pockets as one of the foundations of personal liberty under the Common Law. Of course, such historians have rarely been lawyers so their views can, perhaps, be discounted. The lawyer's answer must be that the criminal law alone cannot be an adequate check when it contains provisions such as s 378 of the Crimes Act 1961 and s 77A of the Summary Proceedings Act 1957.

(3) Since entering this debate I have been concerned at the number of cases coming to my notice in which allegations of battery are made against policemen, traffic officers and others in authority. The two instances mentioned at [1979] NZLJ 263 are now but the tip of the iceberg. If the action for battery claiming punitive damages is not available and — as some of the cases brought to my attention have shown — criminal sanctions are insufficient then I wonder what, if any, steps remain open to the private individual to protect himself against over-zealous officials. Unless the law provides an adequate remedy aggrieved individuals will sooner or later seek their own consolation — and there is already too much violence in our society for that prospect to be treated with equanimity.

Yours faithfully,

K I BULLOCK

INDUSTRIAL PROPERTY

ASPECTS OF ENFORCEMENT OF INDUSTRIAL AND INTELLECTUAL PROPERTY RIGHTS

Parties to proceedings

Plaintiffs: Practice, based on good sense, requires that all parties who may have suffered damage from the infringement should be joined. The owner of the right and any predecessor in title within the period of infringement are first. Licensees are next and since the 1949 British Patents Act, which has been generally followed, the exclusive licensee has had the right to sue in his own name¹. It is not clear to me why he did not have that right anyway, but the practice appears to have been to sue in the name of the patentee. In Canada, the 1947 Privy Council decision in *Fiberglas Canada Ltd v Spun Rock Wools Ltd*² recognised the right of a licensee to sue for patent infringement. I gather that there may be some debate as to whether this applies to non-exclusive as well as exclusive licensees.³

Of course the right to sue depends upon the wording of the relevant statutory provisions and, in relation to designs, trade marks and copyright there are differences.

In principle however, I think much confusion is generated by the somewhat inaccurate use of the word "licence" which has become prevalent. Originally the word was used to describe an authority or permission unaccompanied by any proprietary interest. It was this lack of proprietary interest that precluded the right to sue infringers. "Licence" is used for example to describe the right which a purchaser of a patented article has to deal with it as he chooses, including the freedom to re-sell without fear of infringement.⁴

Now however a licence generally is a grant of an interest in the proprietary right — which is, in many jurisdictions, registrable against the patent or trade mark. I do not see why that interest should not carry with it as right to sue for infringement.

Of course in the case of a non-exclusive licensee, he may face difficulties in proving damage, but in my view he should not be denied the chance to try.

I like the provision in the South African Pa-

This is the text of an address given by Mr TM GAULT of Wellington to the 1979 Annual Meeting of the Patent and Trademark Institute of Canada. He ranges over a number of topics (including injunctions) common to patent and trade mark lawyers in common law countries.

tents Act 1978 (s 65) which reads:

"(1) Subject to the provisions of section 53 (3), proceedings for infringement of a patent may be instituted by the patentee or an exclusive licensee mentioned in section 56 (1).

"(5) The plaintiff in any such proceedings shall give notice thereof to every licensee under the patent in question whose name is recorded in the register, and any such licensee shall be entitled to intervene as a co-plaintiff and to recover any damages he may have suffered as a result of the infringement."

Then there is the party which suffers damage but has no right to sue. An exclusive distributor of a patented product would seem to have no remedy in the absence of a claim in contract against the patentee for breach of an assurance of exclusivity. If the distributor has such a right, is the patentee entitled to claim as part of his damages for infringement that for which he is liable to his distributor?

Defendants: At law, each party in the chain of distribution is liable and may be a defendant. But bear in mind that if one party in the chain compensates the plaintiff for his damage, the other defendants will not have to pay also. Similarly, if the plaintiff elects an account of profits he thereby condones the infringement so that parties acquiring the infringing articles lower down the chain have that implied licence to deal in them.

In practice the target is the party highest up the chain which is of sufficient substance to compensate the plaintiff. Similarly injunctive relief at the top of the chain generally turns off the tap.

¹ Blanco White, *Patents for Inventions* 4th ed, para 12-102.

² [1947] AC 313.

³ "Recent Patent Cases" by George Fisk PTIC Series 7

Volume 35, p 458, 462.

⁴ *Betts v Wilmott* (1871) LR 6 Ch 239, 244; *Badische Anilin v Isler* (1906) 23 RPC 173, 180.

Of course there may be special considerations where stocks in the hands of wholesalers or even retailers are very damaging. In those cases, they would be made additional defendants.

The interesting decision of Graham J in *Morton Norwich Products Inc & others v Intercen Ltd*⁵ shows how it may be possible to attack the true villain, the initiator of the infringement. In that case the defendant, the report informs us, was associated with that well known and inveterate defendant Centrafarm BV. It purchased the chemical product from licenced and unlicenced sources in mainland Europe and supplied English companies for re-sale in Britain. It was found that the defendant was a joint tortfeasor with the English companies and so an infringer of the British patent.

That decision incidentally, seems fully to support the views expressed by Mr R H MacFarlane in his address to your 1974 meeting⁶. The following two short passages summarise the decision on this point.

"I hold that if there is a concerted design by two people to sell goods which in fact infringe an English patent, then the parties who have such design and do so sell are in fact joint tortfeasors and both infringe the patent whether they knew that such a sale would be an infringement or not."

"Provided a tort is in fact committed in the United Kingdom and it is proved that the defendants had a common design to commit it, it does not in my view matter whether the agreement which is the basis of such design was made in this country or outside the jurisdiction, nor does it matter that the person sued has not himself done within the jurisdiction any act which taken by itself could be said to amount to several infringement."

In countries such as yours and mine where there is a good deal of importation from more highly industrialised neighbours, this decision will be helpful. I wonder however whether subsequent cases might require evidence of closer concerted design than merely the supply and purchase of the patented product for resale. Already it has been distinguished, quite cor-

rectly in my submission, where the foreign supplier sold only a component which was used within the jurisdiction in the manufacture of a patented product — factors of "inducement" being absent.⁷

Exhaustion of rights

Importation of infringing goods leads to the subjects of "limited licence" and (should it not be or) exhaustion of rights. As I apprehend, the position in Canada (at least until the Trade Marks Bill becomes law), the United Kingdom (setting aside EEC law for the moment⁸) and New Zealand is that a national patent or trade mark can be asserted against importation of infringing goods in all cases except when the goods are sold in the country from which they are imported by the owner (but not licensee) of the right sued upon.⁹ Further, the owner himself can by notice limit the implied licence for the purchaser to deal with the goods so as to prevent importation into another country.

In the United States and the EEC the first sale of the product exhausts the right not only in the jurisdiction where the sale takes place but also in the jurisdiction into which the product is imported — so long as the rights have a common origin. The implied licence upon the first sale cannot be limited.

Exhaustion of rights is a creature of convenience to reconcile national industrial property rights with the free movement of goods throughout the common market. It should not be exported.

In Australia, it has been suggested that the right can be asserted against all importation including goods originally marketed overseas by the owner of the Australian right, and that even *Betts v Wilmott* might not apply in that country.¹⁰ If that is so it is the position I favour.

So long as it is necessary to seek separate national rights (at not inconsiderable cost these days) their territoriality should be respected. The *Betts v Wilmott* rule is somewhat anomalous. It leaves a licensee in a better position than the owner of the right. In modern commerce a purchaser frequently neither knows nor cares whether his supplier is owner or licensee of the right. If the purchaser wishes

⁵[1978] RPC 501.

⁶"Contributory Infringement" by R H MacFarlane PTIC Series 7, Vol 35, p 470, 478.

⁷*Dow Chemical A G v Polysar International SA* (unreported) High Court Ch D Whitford J, 19 December 1977.

⁸See the helpful article by N J Byrne "Exhaustion of Patent Rights in EEC Competition Law" EIPR June 1979 p 150.

⁹*Betts v Wilmott* (supra); *Societe Anonyme des Manufac-*

turers de Glaces v Tilghman's Patent Sand Blast Company (1871) LR 6 Ch 239; *Briscoe & Co v Washburn and Moen Manufacturing Co* (1891) 10 NZLR 85.

¹⁰See *Norbert Steinhardt and Son Ltd v Meth* (1960) 105 CLR 440 — patent infringement and threats; *Textile House Pty Ltd v Carmody* (1976) 50 ALJR 497 — trade mark; *Time-Life International (Nederlands) BV v Interstate Parcel Express Co Pty Ltd* [1977] ACL 072 — copyright.

to sell in another country he must ascertain whether or not he is free to do so in any event. Why should his right to sell depend upon whether the patentee has retained or licensed or sold the right in that country?

The Court

In infringement proceedings, you have a choice between provincial Courts and the Exchequer Court. I do not know the position in the provincial courts but I am advised that you have a Federal Court Rule 492 which provides for the appointment of assessors at the instance of the court or upon application by a party. I am also advised that it has not been used in any patent cases in order to assist the court in technical matters.

In England there is a rule which has been invoked once since 1935. That was in 1973¹¹ when the Court of Appeal appointed an independent scientific advisor. It is readily understandable that such appointments would not be necessary to assist the specialist patent Judges.

Like you, we do not have specialist Judges and there is not too much enthusiasm for them.¹² We also have provision for the appointment of scientific advisors. The first such appointment recently has been made on the application of the appellant from a decision of the Assistant Commissioner in one of the innumerable oppositions involving Beecham Group Ltd and Bristol-Myers Company.¹³ It is, no doubt, designed to relieve any hesitance the judge may have in differing from the experienced hearing officer.

I suspect this will lead to similar applications and I see disadvantages from counsel's viewpoint. I acknowledge however that the whole object is to assist the Court.

It is a development we will be watching with interest.

Interlocutory injunctions

As I understand it, an "interim injunction" is granted for a specified limited period and an "interlocutory injunction" is granted until the trial of the action. I will use the expression "interim injunction" for both.

The conduct of litigation, particularly industrial property litigation, is taking longer and longer. Court congestion, complexity, the fact that one (or more) of the parties is frequently outside the jurisdiction, pressure on advisors, and tactical manoeuvres all contribute. Interim injunction is a valuable form of relief which can be obtained quickly in appropriate cases.

A plaintiff first must accept the risk of taking up the liability for damages arising during the period of the injunction under the undertaking or indemnity that is invariably required. In my experience, this is seldom a deterrent. Generally the view is that it is commercially worth accepting the risk to secure the market.

The general principles for determining whether or not an interim injunction should be granted were thought to be well settled in most common law countries until the decision of the House of Lords in 1975 in *American Cyanamid Co v Ethicon Ltd*¹⁴. Lord Diplock, with whom the other members agreed, formulated the principles which apply to patent infringement actions as well as to other actions. He rejected the requirement that a plaintiff must make out a *prima facie* case — or in the case of patent infringement a strong *prima facie* case. He said that the court only need be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried and he relegated any consideration of the relative strengths of each party's case to a last resort to tip the balance of convenience which otherwise is evenly balanced between the parties. Even then it should be considered,

"Only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party."¹⁵

Similarly the long maintained objective of preserving the status quo until the trial was relegated to a "counsel of prudence" where other factors are evenly balanced.

Lord Denning¹⁶ and others were not slow to criticise the decision and to refer to an apparently conflicting earlier decision of the House of Lords¹⁷. The Courts in England are bound by decisions of the House of Lords and

poration [1979] RPC 450.

¹⁶ *Fellowes & Son v Fisher* [1975] 2 All ER 829; [1975] 3 WLR 184, described as "trenchant criticism" by Griffiths J in *Teledyne Industries Inc v Lido Industrial Products Ltd* (1977) 17 OR (2d) 111, 114; Wilson, "Granting an Interlocutory Injunction" [1975] NLJ 302, Prescott (1975) 91 LQR 168.

¹⁷ *JT Stratford & Son Ltd v Lindley* [1965] AC 269.

¹¹ *Valensi v British Radio Corp Ltd* [1973] RPC 337.

¹² Report of the Royal Commission on the Courts, NZ 1978 pp 90-96.

¹³ *Beecham Group Ltd v Bristol-Myers Co* (unreported) Barker J Supreme Court, M285/78, Wellington, 11 May 1979.

¹⁴ [1975] AC 396.

¹⁵ *Ibid*, p 409. But see how the Court of Appeal have interpreted this in *Newsweek Inc v British Broadcasting Cor-*

because the points of conflict were not argued in the earlier decision they have felt bound by the later *American Cyanamid* decision¹⁸.

Applying the decision in subsequent cases, the English Courts, particularly the Court of Appeal, seem to have had some difficulty in assessing the balance of convenience without reference to the relative strengths of each party's case¹⁹. In the High Court, there has been a willingness to examine the merits in some detail to determine the preliminary question of whether there is a serious question to be determined²⁰.

Reaction to the *American Cyanamid* decision in other countries has been mixed.

In Australia the Full High Court in 1968 in a patent infringement action²¹ adopted the principles then understood to be laid down by the British authorities. The New Zealand Court of Appeal did the same thing in 1974²² as had the full bench of the Transvaal Provincial Division of the Supreme Court of South Africa²³. In those countries the courts have been presented with the choice of going with *American Cyanamid* or staying with the previous approach. The results make interesting reading.

In Australia after flirting with *American Cyanamid*²⁴ they seem to be turning away from it,²⁵ although the Full High Court has not yet considered the question.

In South Africa, in yet another Beecham Group Ltd case,²⁶ *American Cyanamid* was rejected.

In New Zealand, with only two exceptions I have found²⁷ *American Cyanamid* has been applied at first instance²⁸. The Court of Appeal in

a very recent case²⁹ while not deciding which approach should be preferred, kept its options open by finding that the plaintiff had shown a strong prima facie case.

I have found the situation in Canada equally fascinating.

The majority of the Supreme Court in a design infringement case³⁰ in 1968 referred only to Halsbury and appear to have taken a view not too far from *American Cyanamid*. They said that since there were very substantial grounds of defence it was necessary to go on to consider the balance of convenience. This could be taken as suggesting that if a strong prima facie case is made out it is not necessary to consider the balance of convenience. The Exchequer Court appears to have said both "yes"³¹ and "no"³² to this.

One thing was clear before *American Cyanamid*. In the case of patent infringement, it was established practice that to obtain an interim injunction a plaintiff was required to show a prima facie case of infringement and of validity.³³ Notwithstanding the statutory presumption of validity in s 47, an injunction would not be granted to restrain infringement of a new patent. It was necessary to show a court decision as to validity or long active and uninterrupted enjoyment of the patent.³⁴ A period of six years was about the minimum. This is the rule of practice that Lord Diplock very firmly said in *American Cyanamid* had been rendered obsolete.

Since *American Cyanamid* its principles have been applied in Canada in fields other than industrial property in the Trial Division of the Federal Court³⁵ and in British Columbia,³⁶

¹⁸ *Fellowes & Son v Fisher* (supra) Browne LJ [1975] 2 All ER 841.

¹⁹ *Fellowes & Son v Fisher* (supra); *Alfred Dunhill Ltd v Simoptic SA* [1979] FSR 337; *Newsweek Inc v British Broadcasting Corporation* (supra).

²⁰ *Eg Lyngstad v Anobas Products Ltd* [1977] FSR 62 *Wombles Ltd v Wombles Skips Ltd* [1975] FSR 488.

²¹ *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

²² *Northern Drivers etc Industrial Union of Workers v Kawai Island Ferries Ltd* [1974] 2 NZLR 617.

²³ *Griessel v Phoenix Foundry* 1929 TPD 806.

²⁴ *Eg Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309, Lush J.

²⁵ *Firth Industries Ltd v Polyglas Engineering Pty Ltd* (1975) 132 CLR 489, Stephen J, High Court; *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] NSWLR 729, CA for NSW.

²⁶ *Beecham Group Ltd v B-M Group (Pty) Ltd* [1977] RPC 220.

²⁷ *Collins v Akatarawa Sawmilling Co* (unreported) O'Regan

J, 9/7/77 Wellington, 11 March 1977; *Wairarapa Co-op Dairy Co Ltd v Dalefield Co-op Dairy Co Ltd* (unreported) Jeffries J, 6/7/77 Masterton, 5 August 1977.

²⁸ *Eg Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35.

²⁹ *Congoleum Corporation v Poly-Flor Products (NZ) Ltd* (unreported) CA 48/79, 19 July 1979.

³⁰ *Lido Industrial Products Ltd v Melior Manufacturing Ltd* [1968] SCR 769.

³¹ *Iamatteo v Rosita Shoe Co* (1976) 25 CPR (2d) 157.

³² *Ciba Products Corp v Metropole Flushwood Door Inc* (1970) 65 CPR 82.

³³ *Vapor Canada Ltd v MacDonald* (1972) 6 CPR (2d) 204 (FCTD); *Aurele Murois Inc v International Fiberglass Ltd* (1971) 1 CPR (2d) 148 (FCTD).

³⁴ Fox, *The Canadian Law Relating to Letters Patent for Inventions*, 4 ed, 441.

³⁵ *The Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 1 FC 487.

³⁶ *Professional Maintenance Systems of Canada Ltd v Smits* (1978) 40 CPR (2d) 160.

Manitoba,³⁷ Nova Scotia³⁸ and Ontario³⁹. They have also been rejected in Ontario.⁴⁰ More recently in Ontario, Steele J has said that he does not consider the earlier principles and those of *American Cyanamid* to be substantially different.⁴¹

In the field of industrial property the prima facie case requirement is maintained in Quebec⁴². In Ontario in *Yule v Atlantic Pizza Delight Franchise (1968) Ltd et al*,⁴³ a breach of contract case, the Divisional Court took the view that *American Cyanamid* (a patent case) is applicable to most situations but:

"... may not be ... suitable ... in all situations. For example, the highly specialised technical and esoteric field of patent law has established a long-standing practice that might be offended by the application of the *American Cyanamid* test."

Reference was then made to *Teledyne Industries Inc et al v Lido Industrial Products Ltd*⁴⁴ a patent case in which counsel agreed that the principles to be applied were those previously applied in Canada in such cases. The Court of Appeal therefore left open the question of the effect of *American Cyanamid* in patent cases in Ontario.

It is rare that interim injunction applications reach the higher Courts. For this reason, it may be a long time before it is determined in each country whether or not to go with the House of Lords. Meantime the present divergence of view can be expected to continue.

My own view is that *American Cyanamid* has created as many problems as it has solved. In particular, I see difficulties in the way in which the decision suggests an order in which factors are to be considered. This is highlighted by the tendency to take the analysis of the principles made by Browne LJ in *Fellowes & Son v Fisher*⁴⁵ and to use this in the manner of a check list.

I cannot accept that the relative strengths of the parties' cases should be considered only if all other factors are in balance.

I believe that in practice the various factors interact and that their respective importance will differ from case to case. Flexibility to do justice in the particular case must be retained. For example the stronger one party's case ap-

pears from the affidavits the greater inconvenience might be imposed upon the other.

Consider an example; a defendant established in the market with a clearly infringing product, for commercial reasons wants to hold out for as long as possible. He challenges validity on specious grounds. The patentee because he is also developing other markets is slower entering the market. Upon discovering the defendant's activities, the plaintiff seeks an interim injunction to protect a ready, but limited, market.

The matter comes before a non-specialist Judge who decides to apply *American Cyanamid*. Because it is a patent action he is unlikely to be persuaded that there is no serious question to be determined so he will move straight to the balance of convenience which in a commercial sense clearly favours the defendant.

A similar injustice could result from a pirate, being first on the market with a misappropriated trade mark, moving to restrain use of the mark by the true owner.

On a strict application of *American Cyanamid* there would be no room for an argument that one of the parties came to the Court without clean hands. That would require an examination of the merits.

It is interesting to note that the Court of Appeal in England in the *Dunhill* case was attracted to an argument that *American Cyanamid* would permit an examination of the merits where on the evidence there is no credible dispute on the primary facts and that a blatant fraud would otherwise go unrestrained.⁴⁶ The point was left open however. The same Court, differently constituted (including Lord Denning) in the *Newsweek* case went further and said that in cases such as that *American Cyanamid* has no application.

In evaluating the *American Cyanamid* decision, I think it is important not to throw out the baby with the bath water. If it is nothing else, it is a timely reminder that the remedy of interim injunction is discretionary, that it is to be reserved for cases where urgent relief is necessary and that rules should not become entrenched which might fetter the discretion or limit the flexibility of the remedy. I wonder

³⁷ *Griffin Steel Foundries Ltd v CAINAW* (1978) 1 WWR 35; 5 CPC 103.

³⁸ *Aspotogan Ltd v Lawrence* (1976) 14 NSR (2d) 501.

³⁹ *Labelle v Ottawa Real Estate Board* (1977) 16 OR (2d) 502; 34 CPR (2d) 79.

⁴⁰ *Cradle Pictures (Canada) Ltd v Penner* (1975) 10 OR (2d) 444; *Indal Ltd and Brampton Aluminium Products Ltd v Halko* (1976-1977) 1 CPC 121.

⁴¹ *Carlton Realty Co Ltd v Maple Leaf Mills Ltd* (1979) 22 OR (2d) 198, 203.

⁴² *Stiefel Laboratories (Canada) Ltd v ICN Canada Ltd Dugas J* (trademark infringement) 38 CPR (2d) 182.

⁴³ (1978) 17 OR (2d) 505.

⁴⁴ (1977) 17 OR (2d) 111, affirmed, (1978) 19 OR (2d) 740.

⁴⁵ *Alfred Dunhill Ltd v Sunoptic SA* (supra).

⁴⁶ Which is certainly not what Browne LJ intended.

whether the prima facie case and six years presumption of validity rules may not have become rather too entrenched.

Is it not better that all factors, including the apparent merits, go into the balance to be weighed in each case?

Damages as an adequate remedy

Whatever test is to be applied on an application for interim injunction, it will include the important rule that an injunction will not be granted if damages would adequately compensate the plaintiff. This was referred to by Lord Diplock as "the governing principle" although in *American Cyanamid* he did not specifically refer to it when evaluating the facts. His speech does not make it clear whether he regarded it as a preliminary question to be determined before moving to the balance of convenience, or one of the factors to be placed in the balance. Whichever it is, it is my submission that, in the field of industrial and intellectual property, damages will not adequately compensate a plaintiff.

Of course it can be said that in any area of commercial activity, a sum of money, so long as it is large enough, will heal all ills. That is not what is meant by adequate compensation by an award of damages. It is rather a question of whether the proprietor of the right can be restored to his former position. In my view the very nature of the rights involved make this impossible.

Take trade marks first because they differ from the other rights in that they are not of limited duration. The essence of the right is distinctiveness. Loss of distinctiveness resulting from infringement cannot be restored by the payment of money. Even if the plaintiff's trade mark is not in use at the time, he is entitled to have likely loss of distinctiveness weighed in the balance against the defendant's commercial loss.

Turning to the other rights, Dr Fox in his book on Copyright and Industrial Designs said this:⁴⁷

"... it should be remembered that copyright is a property that is a wasting asset. It is subject to depletion. Every time an infringement takes place so much of the plaintiff's property has been taken and consumed, never to be recovered. Copyright is not an inexhaustible store that can be

drawn on at will without detraction."

This applies with even greater force to patents and designs because of the shorter terms of protection. The protection gives the owner a monopoly in the market and, to the extent that infringement might cause identifiable loss of sales, the damage is quantifiable and compensatable with money. However there is the other benefit which can be of immense value and which is neither quantifiable, nor capable of reinstatement. As Lord Diplock put it:⁴⁸

"... much of the benefit of the monopoly granted by the patent derives from the fact that the patented product is given the opportunity of becoming established and this benefit continues to be reaped after the patent has expired."

The Court of Appeal in England has recognised the importance of establishing a market position during the term of protection from which to meet competition when it expires.⁴⁹ In that case an interim injunction was granted because the expiry of the patent was near. In my submission, the principle should apply at any time during the limited term of a patent or design.

Because I take that view, I have great difficulty with another decision of the Court of Appeal in *Polaroid Corporation v Eastman Kodak Company*.⁵⁰ An interim injunction was refused specifically because the plaintiff could be adequately compensated by damages in the event of succeeding at the trial. Of course these cases turn on the evidence adduced, and in that case the plaintiff relied on certain damage to its business which the Court considered to be too remote. The Court appears also to have been influenced by the international nature of the dispute. They are matters for the balance of convenience. If the decision had been as it was, on the Court's evaluation of the factors in the balance, I would have no difficulty. However the view that Polaroid Corporation could be adequately compensated in damages is one I cannot see.

I hope that in what I have said you have found something of interest.

I conclude with a reference to the field of pharmaceuticals in which, those of us practising industrial property law, have long looked upon Canadian law and practice as "different". I had not realised how different until I saw in the 25 January 1979 issue of *New Scientist* a brief note which commenced:

"Dubious dealing is, apparently, still part

⁴⁷ Fox, *The Canadian Law of Copyright and Industrial Designs*, 2 ed, p 459.

⁴⁸ *American Cyanamid v Ethicon Ltd* (supra) p 410.

⁴⁹ *Corrplast Ltd v George Harrison (Agencies) Ltd* [1978] RPC 761.

⁵⁰ [1977] RPC 379.

and parcel of the drug business. In Canada, for example, the household name of Hoffman La Roche is being prosecuted for "restraint of trade". The firm's Canadian subsidiary is charged with selling the tran-

quilisers Librium (chlordiazepoxide) and Valium (diazepam) to hospitals at 'unreasonably low prices . . . designed to have the effect of lessening . . . competition or eliminating . . . competitors'."

ADMINISTRATIVE LAW

STATUTORY POWERS — THE DUTY TO ACT REASONABLY

Downes v Commissioner of Lands and South Springston Domain Board [1979] Butterworths Current Law 861. The Reserve and Other Lands Disposal and Public Bodies Empowering Act 1924 empowered the respondent Board to grant licences of occupation over the Lake Ellesmere Domain. The Act further provided that "such licences shall contain such terms and conditions as the Board thinks fit." Pursuant to this power the respondent Board adopted a list of conditions that licensees were required to accept prior to the grant or transfer of any licence. One of these conditions provided that before any alterations to existing buildings were undertaken, written approval was needed from both the Ellesmere County Council and the Board. The applicant in this case, a licensee, sought to extend his hut. The Council approved his plan but some months later the Board declined approval. The Board asserted that the applicant's proposal did not comply with the Council's district scheme relating to maximum yard coverage and space from the boundary. The applicant, who appeared in person, sought an order from the Court that the Board should approve his proposal.

The applicant did not argue issues of administrative law but Somers J considered the two essential issues in this case were (a) whether the condition giving the Board power to decline approval to plans for alterations was within the scope and purpose of the Act, and (b) if the conditions were valid, whether the refusal of the applicant's proposal in this particular case was a reasonable exercise of the Board's discretion. Answering both questions in the affirmative, Somers J found for the respondent Board.

His Honour's judgment provides a valuable reminder that a statutory power is subject to

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legal limits even if it is nonpublic in character. The power to grant licences typically involves questions of contractual law relating to licensor and licensee but Somers J rejected the private law contractual approach "as being neither sufficient nor appropriate to the circumstances." As with any other statutory power, the power to impose conditions in licences (a power which had been conferred in the widest subjective terms) was necessarily limited by the scope and purpose of the empowering Act. However Somers J had little difficulty in holding that the 1924 Empowering Act which expressly contemplated the Board's approval to original building plans, also authorised the requirement of the Board's approval to any plans for alterations.

Holding the condition to be validly imposed, Somers J stated that the Board's discretion to approve plans in a particular case also had to be properly exercised according to law. Although when viewed as a matter of pure contract the Board might not be bound to act reasonably, Somers J considered the position to be quite different when a statutory discretion is involved.

Somers J reaffirmed that acting unreasonably in the context of administrative law is quite different from the simple objective test of reasonableness adopted in the law of negligence. For in administrative law "it is not in doubt two reasonable people may reach different views on the facts without thereby being convicted of unreasonableness." He stated the Court will only hold a statutory power to be unreasonably exercised if no

reasonable authority could have exercised it in that way. In that situation, he held, Parliament is taken not to have authorised such an exercise of the power and the Court, exercising its supervisory jurisdiction, can hold the power to be unlawfully abused. On the facts of this case Somers J held that just because the Board chose to adopt a higher standard than the Council in a particular case did not mean the Board was acting unreasonably in the relevant sense.

His Honour's comments on "unreasonableness" are orthodox and entirely consistent with the views expressed by the House of Lords in *Secretary of State for Education v Tameside Metropolitan BC* [1976] 3 WLR 641 and adopted by the Court of Appeal in *Van Gorkam v Attorney-General* [1978] 2 NZLR 387. The insistence that the ground of unreasonableness must come under the umbrella of ultra vires and lawfulness has also been seen in analogous cases concerning the imposition of Town Planning conditions eg *Hall v Shorehamby Sea UDC* [1964] 1 All ER 1, *Mixnam Properties v Chertsey UDC* [1964] 2 All ER 627, [1965] AC 735, *Lange v Town and Country Planning Appeal Board* [1967] NZLR 898.

Yet it can be argued that this test of unreasonableness is really only different in degree from that adopted in the law of negligence. As the *Tameside* case shows, the question of whether a decision is so unreasonable that no reasonable body could have reached it necessarily involves considerable factual assessment and some consideration of the correctness of the decision. On other occasions where conditions have been invalidated on the grounds of unreasonableness the rigorous requirements derived from Lord Greene's classic judgment in *Associated Picture House v Wednesbury Corporation* [1948] 1 KB 223 have scarcely been satisfied. Lord Greene declared a finding of unreasonableness would require overwhelming proof and would apply only to the highly exceptional situation of "something so absurd no sensible person could ever dream it lay within the powers of the authority." It is arguable whether a condition imposed by the Education Minister providing for married women to receive lower transfer expenses than married men could truly be so described. (*Van Gorkom v Attorney-General* [1978] 2 NZLR 387, 393.) Similarly, it is debatable whether a condition imposed by a local authority requiring a developer to set aside land for an ancillary road really fell into this category of obvious absurdity and capriciousness (*Hall v Shorehamby Sea UDC* [1964] 1 All ER1). Thus however forcefully the Courts reject an appellate role, their

very use of unreasonableness as a separate ground of review must inevitably move them closer to concern with the merits and substance of decision making.

It may be though that where local bodies exercise powers of a legislative character comparable to the making of bylaws, the broader test of unreasonableness which has long been used to review bylaws at common law may be available. In this case Somers J noted in passing that the Board's conditions were in substance close to bylaws and there is a line of cases such as *Mixnam Properties v Chertsey UDC* [1963] 2 All ER 787 suggesting that in such circumstances the additional grounds of review are available. However the careful definition of a bylaw in s 2 Bylaws Act 1913 may preclude this argument being adopted in New Zealand.

A couple of other points emerge from this judgment. One of the applicant's basic arguments was that the Board had not been consistent in their requirements as to the requisite space from the boundary. Although Somers J rejected this argument on the facts it does raise again the possibility of administrative action being invalidated on the grounds of inconsistency. The basis for attack on this ground has been laid in *HTV Ltd v Price Commission* [1976] ICR 170 and in dicta from *R v Brighton Corporation ex parte Tilling Ltd* (1916) 85 LJKB 1552, 1555. Recently Barker J in *Tongia v Minister of Immigration* [1979] Butterworths Current Law 445 indicated that in compelling circumstances inconsistency may be used as a ground of review under the guise of the need "to act fairly." We can expect to hear more of this argument in the coming years.

Finally a major issue in the case concerned the question of whether the Board had the power to grant leases in lieu of a licence. Section 168 of the 1924 Act empowered only the Governor-General to grant leases; however the applicant argued that subsequent Acts contained provisions inconsistent with s 168 and that s 168 must thereby have ceased to be in force. Somers J rejected this argument but pointed out "a curious feature of jurisprudence" is the lack of an authoritative list of statutes in force. He commented it was not a feasible task to consider every enactment on Crown lands passed since 1924 in an effort to discover if s 168 had been repealed. He therefore decided to rely on the Butterworths annotations and accept it had not been repealed. One cannot help but wonder at the state of our statute books if even the courts cannot be absolutely certain of the law contained therein. Reform is surely suggested.