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INTER ALIA

Grey Lynn Neighbourhood Law Office

The Government has, "after the most careful consideration," announced its intention to stop its subsidy of the Grey Lynn Neighbourhood Law Office. The amount involved is $20,000. This represents about half the operating cost of the office.

The office provides inexpensive legal services not otherwise available to financially or culturally disadvantaged people living in the Grey Lynn area. Ninety-five percent of them could be described as poor. As to the extent of the services, in the words of the President of the New Zealand Law Society, Mr L H Southwick — "in the past year about 6,000 people with low incomes had been helped by the office. A high proportion were Maoris and Pacific Islanders worried about housing, matrimonial and immigration problems, or facing criminal charges often arising out of their lack of understanding of New Zealand laws and customs. The office was very informal and every attempt was made to eliminate cultural and other barriers."

The scheme has been operating for three years. It served 6,000 people last year. It is extraordinary that the Government announcement states — "*if* the long-term need for a neighbourhood law office has been established . . . ." 6,000 cases! The Government just does not want to know.

And what evaluation has been carried out over the past three years. Again, from Mr Southwick:

> "The Justice Department had actually embarked on a proposed survey of the work done by the Grey Lynn office, but after an inept initial approach had stalled on the matter for nearly a whole year. Most of the department's more unworkable and ethically unacceptable suggestions had now been abandoned, however, and it appeared that the survey had been almost ready to proceed when the Minister's announcement had been made."

It is understood the "unacceptable suggestions" involved breach of solicitor/client privilege. Even the disadvantaged are entitled to that.

Against this sorry background of delay one can better evaluate the observation "that the Law Society had chosen initially to go it alone without reaching agreement with the Government as to the nature of the service itself and how it was to be funded once it had passed the pilot stage." Good heavens! Had the Society waited it would still be waiting.

Members of the profession will be pleased to know that the withdrawal of Government financial support need not result in the closure of the Law Office — "it is open to the Society to provide further funds from its own resources if it so wishes." It would seem that the Government is not prepared "to commit itself to a permanent grant of funds to provide a service that is substantially the function of the legal profession." Government unwillingness to fund legal services is neither new nor needs to be spelt out. Other illustrations include prevarication over raising the level of fees for offenders' legal aid and a petty bias in respect of travelling allowances. When travelling allowances for lawyers under the Offenders Legal Aid Regulations and for doctors under the Social Security Regulations were adjusted in 1978, the rate for doctors was set at double that for lawyers.

(While speaking of doctors, it could be men-

tioned that, at the same time the termination of the neighbourhood law office subsidy was announced it was also announced that plans were being prepared for the Government to provide better medical facilities at Mt Eden prison. If the Government is to be consistent surely it should regard the provision of medical services as a function of the medical profession).

As for the legal profession assuming financial responsibility for meeting an established social need, the suggestion is, in the succinct retort of the Secretary-General of the New Zealand Law Society, Mr W M Rodgers — "absurd".

Members of the legal profession are already participating voluntarily in citizens advice bureaux; prison visiting schemes, and on law reform committees; forgoing profits in legal aid; and operating a duty solicitor scheme and providing legal aid to offenders at rates of remuneration that hardly cover the outgoings associated with the office tea-break. To suggest the profession should shoulder the lot is an insult (or at best a back-handed compliment) to those who are already doing so much. What other profession, it may be asked, incorporates a similar level of unremunerative community work within its field of professional activity?

There is a social need. In America and Britain the legal needs of the socially deprived, of the underprivileged, of the culturally disadvantaged, and of the poor are recognised. There society assumes its proper responsibility usually by way of assisting with some form of neighbourhood law service. The Government's fatuous excuses (for they cannot be dignified as reasons) for shirking this responsibility are unconvincing. In responding to them, our President showed remarkable restraint. But then he is too much of a gentleman to give full rein to the anger that is undoubtedly felt by those, including himself, who have worked so hard to make this scheme a success.

This decision will amply support the belief of those who feel that when lawyers or legal services are mentioned in Government circles reason is blanketed by the comforting crackle of burning witches. The mental flames of a witch-burning pyre will not warm the people of Grey Lynn.

Antarctic Crash — The interim report

The Chief Inspector of Air Accidents is charged with investigating air accidents and reporting to the Minister of Civil Aviation on "the circumstances of the case and his conclusions as to the cause of the accident, together with any observations and recommendations that he thinks fit to make with a view to the preservation of life and the avoidance of similar accidents in the future." It is then for the Minister to decide whether to publish all or any part of the report.

How the Chief Inspector goes about his investigation is very much over to him. He is to act independently of the Secretary for Civil Aviation and other officers of that department. The Minister of Civil Aviation though is given power to intervene in the investigation in the public interest (Civil Aviation (Accident Investigation) Regulations 1978, reg 15 (4)) and a provision in the Civil Aviation Act 1964 (s 15 (2)) that he is to have "such special duties and functions as may be imposed or conferred on him . . . by the Minister" suggests he is not to be entirely free of Ministerial supervision. A natural justice type requirement is imposed by r 15 (1) in that he is required to notify those persons to whom blame may be attributed of that fact so that they may make a statement, give evidence and "examine any witnesses from whose evidence it appears that he may be blameworthy".

In the normal course of events it may not matter particularly how the Chief Inspector goes about his investigations. After all the purpose of an accident investigation is not to fix liability but to find out why an accident happened with a view to preventing a recurrence.

The DC10 crash in Antarctica has features that take it out of the run-of-the-mill class of investigation. Whatever its statutory purpose the report of the investigation into that crash will, in fact, be used as a guide to the formulation of claims arising out of the accident. The inaccessability of the accident site makes this inevitable. This, it may be suggested, imposes on the Chief Inspector and the Minister a particular duty to act in a manner that is fair to all prospective parties to any litigation that may follow.

Furthermore, the accident involved our national airline — Air New Zealand. It is not for a moment suggested that either the Minister or the Chief Inspector would attempt to minimise any responsibility for the accident (if any there be) on the part of employees of Air New Zealand, but there may be those who would see advantage in making that accusation. For that reason also it is important that the manner in which the investigation is conducted and the report prepared gives no grounds for any suspicion.

The Chief Inspector has announced that a copy of an interim report of his investigation will be made available to certain parties who

may share responsibility for the accident. It is presumably being supplied as a form of compliance with the requirement to give notice that blame may be attributed to them. As the Chief Inspector is directed to report to the Minister, and as the Minister would have grounds for displeasure if the content of the report were first to be disclosed to anyone else, it may fairly be assumed that he has approved this course of action. The Minister cannot disassociate himself from the partial distribution decision. Nor can he disassociate himself from any criticism that may follow.

The comment has been made that there is nothing in the regulations requiring the report to be provided to other interested parties such as representatives of those passengers who died in the crash. But more to the point there is nothing in the Act or Regulations preventing the interim report from being made available to them and indeed the Minister is expressly given power to publish the Chief Inspector's report without mention of qualifications such as "interim" or "final".

In making the report available the Chief Inspector has stepped beyond the minimum requirements of the statute and regulations and into the area where there are no rules except, as suggested above, those fairness demands. It may be that no changes at all will be made to the interim report. But that is not the point. Potential plaintiffs will know the interim report will be given very detailed consideration by experts who will have potential litigation in mind. It would be naive to suggest they will make no attempt to influence the form and content of the final report. Changes are hardly likely to be in the interest of potential plaintiffs.

Potential plaintiffs will also know that potential defendants have been given time that they have not — and time is a very valuable commodity to those initiating complex legal proceedings. In California the time limit for filing proceedings is 12 months from the date of the accident and it is understood that this time limit caused problems in the case of the Pago-Pago litigation. Given this sort of time limit the recently announced decision of the Attorney-General to direct a public inquiry will be of little help. Public inquiries take time to organise, to hold, and to report. It will still be to the Chief Inspector's report (non-publication of which would be utterly unacceptable) that litigants will look when drawing pleadings.

At the end of the day, we suggest that those parties who have been denied the opportunity to share in a review of the interim report are justified in saying that they have not been treated fairly and for that reason in particular both the Minister and the Chief Inspector are urged to reconsider the decision not to make the report available to the representatives of those who died.

Tony Black

PROPERTY

LIABILITY FOR WITHDRAWAL OF SUPPORT OF LAND

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

"In recent years the law of negligence has been transformed out of all recognition." (per Lord Denning MR in *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] 2 WLR 493, 497). Judicial readiness to extend liability into new areas has been particularly significant for excavating landowners (eg *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741), for developers (eg *Batty v Metropolitan Property Realisations Ltd* [1978] 2 WLR 500, *Mt Albert Borough and Sydney Construction Co Ltd v Johnson Court of Appeal*, 18 October 1979, CA 160/77), for builders (eg *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394), and for local authorities responsible for inspection (eg *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, *Hope v Manukau City* (Chilwell J) Supreme Court, Auckland, 2 August 1976, No A 1553/73, *Anns v Merton London Borough Council* [1977] 2 WLR 1024, *Mt Albert Borough and Another v Johnson* (supra).) An interesting attempt to extend the liability of a subdivider/developer even further than the modern principles of negligence would involve was recently turned down by the New Zealand Court of Appeal, affirming the decision of Jeffries J. In rejecting strict liability however, two members of the Court of Appeal expressly affirmed the existence of duties of care in this

area, a reality which subdividers and the like no doubt find sufficiently alarming without more. The case is *Blewman v Wilkinson* (18 October 1979, CA 60/77). The plaintiffs/appellants acquired a sloping section, lot 7, in a subdivision which had been completed some eight years earlier by the defendant/respondent. One boundary of lot 7 was a bank resulting from the cutting of a right of way to give access to other sections. During the original purchaser's ownership of lot 7 the upper part of the bank had proved susceptible to erosion by wind and rain but he had done nothing to control this. The problem was apparent at the time of the appellants' purchase. Their claim in respect of further erosion was based on the respondent's interference with the natural right of support of lot 7 by excavating the right of way adjacent to it boundary. There was no allegation of negligence in the design or construction of the subdivision. The appellants' case was put in two ways. First that the situation came within a well-established principle of strict liability for interference with the support of land by land. Alternatively that that principle should be extended to cover this situation "where, at the time the excavating owner carried out the work, all the land was in his ownership and the damage occured only after he had subdivided the land and sold the section subsequently affected by the original excavating" (per Richardson J at p 2 of his judgment).

Regarding the first argument each member of the Court of Appeal accepted the existence of a principle of strict liability for interference with the support of land by land but not its applicability to these facts. Cooke J described the principle in these terms (at p 1 of his judgment):

> "It has long been accepted that a landowner has a right to enjoy his own land in its natural state, unaffected by any act done by way of excavation on the adjacent or subjacent land. If and when an excavation which has interfered with the support of land by land causes damage by subsidence, the landowner for the time being has a right of action against the original excavator. Liability is strict in that negligence need not be proved."

The principle was taken to have been authoritatively established in New Zealand by the Court of Appeal decision in *Byrne v Judd* (1908) 27 NZLR 1106 and has been recognised more recently in *Bognuda v Upton and Shearer Ltd* (supra) and again in *Bowen v Paramount Builders Ltd* (supra). The judgments in *Byrne v Judd* were in fact not primarily concerned with the position of the original excavator because he had died before the subsidence of the plaintiff's adjoining land occurred. As the tort is not complete until damage occurs it was clear that the excavator could not in that case be liable. The judgments were therefore directed at the position of the excavator's successor in title who had done nothing to maintain the artificial support originally substituted for the natural support by the excavator. The Court of Appeal was unanimous (reversing Stout CJ on this point) that no liability attached to the successor in title. The premise of this decision, however, was that responsibility in the normal situation would lie with the original excavator even after he had parted with the land. This principle was explicitly recognised in the judgments of Cooper J (at p 1126), Edwards J (at p 1121) and Chapman J (at p 1133) and was implicitly accepted by Denniston J. That the excavator's liability is strict according to this principle and not dependent on negligence was recently affirmed in *Bognuda v Upton and Shearer Ltd* (per Turner J at p 760) and *Bowen v Paramount Builders Ltd* (per Cooke J at p 425). The scope of the principle was less clear however, in particular its application to the case where the excavator at the time of the excavation had also owned the land subsequently affected by subsidence. In support of the wider view of the principle, attaching liability even in that case, counsel for the appellant relied primarily on a dictum of Lord Blackburn in *Dalton v Augus* (1881) 6 App Cas 740, 808-9:

> ". . . the owner of land has a right to support from the adjoining soil; . . . a right . . . which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support . . . . . No doubt the right is suspended, or rather perhaps cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed) not a right to complain of what has been already done, but a right to have the support in future."

This "perhaps rather oracular statement", as Cooke J described it, was ambiguous on the very point in issue. Did "what has been already done" refer to the excavation *work* or to *damage* already caused by it and was "the support" to which the new owner was entitled only that

degree of support which the land enjoyed *at the time of severance* or was it the degree of support enjoyed *before the excavation*? Cooke J thought that Lord Blackburn might possibly have meant "that after severance a purchaser could sue for fresh subsidence caused by the old digging" but he regarded that interpretation as "far from certain" (p 6). In any event he was not prepared to follow it. Richardson and Somers JJ were more definite in their rejection of the interpretation of Lord Blackburn's statement contended for by counsel for the appellants. They considered that he had meant only "that the purchaser had the right to the support actually afforded his land at the time of severance" (per Richardson J, at p 3). Somers J produced other dicta which tended to support this narrower and more sensible view of the principle. Apart from Lord Blackburn's equivocal dictum the only other judicial support which counsel could produce for the wider version of the principle was the view taken by Laskin JA delivering the judgment of the Ontario Court of Appeal in *Petrofina Canada Ltd v Moneta Porcupine Mines Ltd* (1969) 9 DLR (3d) 225. He apparently considered that fresh subsidence from excavation work carried out prior to severance could entail the excavator'slaibility. However the point had not been considered in depth in that case and there was also the distinguishing feature that the plaintiff had apparently been unaware of the mine workings at the time of this purchase.

Both Cooke J and Richardson J accepted that there was some force in the appellants' alternative argument that the *Byrne v Judd* principle should be extended to cover this situation where the person excavating owned all the land at the date of excavation. Richardson J commented (at p 5):

> "No doubt it can be said . . . that the land owner, whose land subsides as a result of excavation work carried out many years previously, suffers the same loss in the same way whether the excavation occurred when all the land involved was in the same ownership or whether it happened after severance of the adjacent lands . . . ."

In a similar vein Cooke J observed (at pp 7-8):

> "Presumably, in a typical *Byrne v Judd* type of case, if a neighbour has excavated, a purchaser may buy land manifestly threatened by the excavation (making whatever use he can of that risk in his negotiations with the vendor) and then sue the excavator when a subsidence occurs — subject only to the plaintiff's duty to act reasonably to mitigate his damages. From the purchaser's point of view it can be urged that it should be immaterial whether or not the excavation happens to have occurred before or after the initial severance of title."

This perhaps overlooks the possibility that a purchaser who bought with full knowledge of the risk and at a depressed price might have his claim for subsequent subsidence met by a defence of consent. It is clear that that kind of defence may operate even in relation to torts of strict liability such as *Rylands v Fletcher* (see eg *Kiddle v City Business Properties Ltd* [1942] 1 KB 269). In any case Cooke J saw stronger reasons against extending the principle. They are best conveyed in the learned Judge's own words:

> "First, New Zealand conditions. A great many urban subdivisions have taken place in steep or sloping terrain, with extensive earthworks. The idea of imposing strict liability on a subdividing owner when a subsidence occurs perhaps many years later, and notwithstanding that he acted on proper professional advice at the time, is unattractive. Unless he or his agents can be shown to have been at fault it seems to me more just to leave the loss lying where it falls. Hillside subdivisions and the like are so typical in this country and slips and other subsidences such commonplace hazards that, unless fault can be demonstrated, a purchaser can fairly be expected to accept the risk. Insurance (if any) should be his concern." at (p 8)
>
> "Secondly it is important to stress the related point that when strict liability for depriving land of natural support by excavation on neighbouring land was established the law of negligence was in its infancy. . . . . Now the pervading tort of negligence extends to this field also, as witness the *Bognuda* and *Bowen* cases. In my opinion a subdividing owner prima facie owes to subsequent owners of the lots a duty of reasonable care in respect of planning and construction of his subdivision. . . . . [I]n general the owners of the lots will have such remedies as the modern flexible law of negligence gives. I am not satisfied that it would be just to give them any greater protection against either the original subdivider or his agents." (p 9)

Richardson J relied on the same considerations in rejecting the extension of strict liability in this context. Dealing with this aspect more briefly Somers J simply observed that justice

here did not call for extension of the principle of strict liability. He stressed that "the condition of the land sold by the defendant was at all times visible." (p 6)

The case clearly illustrates the pervasive influence of the fault principle in the modern law of torts. While isolated pockets of strict liability (often supported only by history rather than sound current policy considerations) remain to prevent the complete rationalisation of overlapping torts they seem unlikely to be perpetuated indefinitely and even less likely to be extended in the face of the developing law of negligence.

AN EXPERIMENT THAT FAILED

By a disillusioned human Auckland practitioner.

Heralding the dawn of the computer age for lawyers came the denizens of the word processing empires each armed with his own TV screen on which words characters flashed and disappeared changing shape and form with such frequency and apparent simplicity that one might have been excused for believing that the hieroglyphics on Cleopatra's Needle were to be the form of legalese.

The enormity of these concepts and the simplicity with which the lawyer would now be able to shuffle words entranced us, as visions of the future.

We must have one.

No self-respecting partnership attuned to the coming Age of the Computer could possibly admit that it still conducted its work on a typewriter — even if it was electric.

We must woo this Vision of the Future and be her first suitor — away with typewriters — away with typists: they are but human with all the human failings — let us wed ourselves firmly to this new being, alive with its great square eye on which our words will flash and form themselves into flowing unison, whilst our opposition is still scratching out his first draft in longhand.

Enthused as were were, we ordered "a system" — nay, two systems — for our size and stature demanded that we must not do things by halves: two screens, one printer, the life-giving systems disk — and a suitable refurnishing to accommodate this new creature: all in white formica as befits the perfect bride.

Caution and respect of our new helpmeet demanded that we should instal a host of gilded systems: this letter for Her, that printed form to the human; that document for Her, this receipt to the human — and do the photocopying yourself!

Nature's requirements said we should have a dictaphone for each: one to speak to Her — the other for the human. Her won't provide carbons — the human will need another xerox. Her won't print envelopes — the human can change to window ones. Her won't print cheques — the human can do them by hand. Her won't print receipts — the human will have to sort that out for himself. Her won't answer 'phones, or get cups of coffee, or take messages, or see the client that only wants to sign his will, or make toll calls or look pleasant sitting outside the boss's door — that's what those human secretaries do.

But alas. Her (She who must be obeyed) has driven out our secretaries — she has taken unto herself all our interesting work — the interest and concern in what our client was doing: was he able to finance his house — did he buy that business — did he get that divorce? Now there is no one to take an interest in these human ventures, no single soul who knows it all, save the boss himself — and if he's out Her won't tell the client how its going — Her won't tell the client there's a letter on the way, or the documents ready for signing, or whatever.

And so we gradually awoke from our bemused philandering with the Future, we turned aside the saleman's blandishments of greater things to come when (he says) all words will emanate from his Creature, and all figures and things arithmetic too. Like a cast-off toy, for indeed she was, we set her to one side and let her concentrate her efforts on the Wills and leases and other horrid complicated things that human typists sometimes have to do.

And there she sits, with just one loving operator tending to her needs — while beyond her room there rings out the happy beat of busy typewriters each with their human mistress, and once more the office rejoices with happy female chatter and partners go about their work with renewed zeal and smiling faces — joyful that once more they have a place of humans working — brighter, faster, happier, and

A Bloody Sight More Economical.

CONTRACT

A TRADESMAN'S RESPONSIBILITY FOR HIS ESTIMATE

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

Some months ago, television viewers were treated to a series of sequences in which a customer left an article (or in one instance an animal) with a tradesman for the performance of some service to it. In each case an estimate of cost was first obtained and in each case the estimate was grossly exceeded. Though the programme, an American one, was satirical in vein, none of the cases shown seemed much more extreme than a recent example known to the present writer where an electrician's estimate of about $150 was followed by a bill for $530. The problem, it seems, is neither uncommon nor confined to one country. Nor is the answer always the obvious one of obtaining a firm contract price since for various reasons tradespeople very often decline to give one. It was into this somewhat shadowy and emotive area that Casey J had recently to venture in *Abrams Ltd v Ancliffe* [1978] 2 NZLR 420.

Of course, there are many reasons why an estimate may turn out to be too low, of which, one might hope, the least often encountered would be deliberate deception or dishonesty. But sheer carelessness, encouraged by a belief that an estimate is in no way binding, may be more common. Other possibilities include unexpected complications encountered as the work progresses, the execution of work beyond that asked and estimated for, price escalation where work is delayed or spread over a period, and incompetence whether in making the estimate or in performing the work.

In law, a job on a "cost plus" basis without more is treated as being for a reasonable amount (*Hudson's Building Contracts* (1970) 10th ed, p 571) and this must also be true of such a contract where an estimate has been given but lacks legal significance (eg *MacKissok & Thomas v Black* (1912) 21 WLR 424). But to dispute an account on the ground that the work done is not worth the amount charged may well be uneconomic because of the cost of litigation, including the cost of expert evidence. Moreover, the customer's complaint may be, not that the work is not worth what he has been charged, but that had the estimate been more accurate he would not have embarked on it at all, or would have gone about it in stages or in a different way. His first concern will be, if he can, to hold the contractor, if not to the precise amount of the estimate, then to a figure bearing at least some relation to it. Alternatively, he will want to know whether he can gain appropriate redress against a contractor whose estimate has lead him into a commitment he would not otherwise have made.

In any given case, the precise status of an "estimate" must, like any other question of construction or interpretation, depend on the intentions of the parties in the particular case, to be deduced from the words used seen against the surrounding circumstances. It is hardly surprising therefore to find that in the reported cases "estimates" have been treated at one extreme as stating a fixed contract price (*Croshaw v Pritchard and Renwick* (1899) 16 TLR 45; cf *Daniell Ltd v Kebbell* [1919] GLR 156) and at the other as a mere expression of the contractor's judgment and of no contractual significance (*MacKissok & Thomas v Black* (supra); cf *Abrams Ltd v Ancliffe* (supra), 430). In *Croshaw v Pritchard and Renwick* (supra) the word "estimate" was really a misnomer. The document in which it appeared was an offer made in response to a call for tenders. In other cases an intermediate position has been taken and it has been held that although the estimate need not be exact it must at least come fairly close to being accurate. Thus in *Cana Construction Co Ltd v R* (1973) 37 DLR (3d), 418, where the Crown had made estimates of overheads for the use of tenderers, it was held responsible for inaccuracies exceeding 10 percent either way. And in *Moneypenny v Hartland* (1826) 2 C & P 378, Best C J said of the duty of a surveyor that a man should not estimate a work at a price at which he would not contract for it himself for, if he did, he deceived his employers. Factors which the Courts have taken into account in deciding the extent to which a contractor has bound himself to his estimate include the difficulty of being exact (*Cana Construction Co Ltd v R* (supra)), the customer's insistence on the need for accuracy (*Daniell Ltd v Kebbell* (supra); *Abrams Ltd v Ancliffe* (supra)) and the customer's dependance on the expertise of the contractor (*Daniell Ltd v Kebbell* (supra); *Esso*

Petroleum v Mardon [1976] QB 801, where a petrol company, as an expert, was held bound in contract as well as in tort by its estimates of throughput).

Assuming, though, that an estimate is held to be non-contractual, in the sense that no promise has been made as to its accuracy, it may still have legal significance. If it is not an actionable representation of what the cost will be, it will at least be a statement of the Contractor's opinion and that may involve a representation not only that the opinion is honestly held, but also, in appropriate cases, that grounds exist upon which the opinion could reasonably be held. A blameless mere misrepresentation may be of small value to the customer because its inaccuracy may be discovered too late for rescission to be possible. But if it has been made dishonestly or recklessly the customer will have a remedy in fraud (*Cheshire and Fifoot's Law of Contract*, (1974) 4th NZ ed p 229). Short of dishonesty the estimate may have been made carelessly, and it is at this point that the recent decision of Casey J in *Abrams Ltd v Ancliffe* (supra) has special relevance.

In the *Abrams* case, the owner of a section wished to erect two home units on it for resale. His builder's initial estimate of $26,000 was revised to $30,500 in March 1974 on the basis of sketch plans. When the architect's final plans and specifications became available to the builder on 16 August the owner made it clear that a revised estimate was required. Some preliminary sitework was done in September and substantial work on the foundations was undertaken in October. It was not until 9 December that the builder let it be known that his revised estimate was $57,500. In the meantime, work worth $8,463 had been done and $4,500 had been paid by the owner. The owner was in a dilemma. At the price now estimated the units would cost considreably more than they would be worth on resale. On the other hand, to abandon the project at this late stage would also have meant a heavy loss. So the owner discharged the builder, called tenders and accepted the lowest, of $38,754. This brought the total cost of construction to $47,217, still well above the market value of the units.

In an action brought by the builder for the balance due to him before his contract was terminated, the owner alleged inter alia an undertaking by the builder that the final price would not differ materially from the estimated $30,500 and that, if it did, the owner would be free to withdraw. Casey J held that all that had been required of the builder at that time was an honest estimate and this he had given. There had been no breach of duty on his part at that stage. On the other hand, the learned Judge thought the present case was "very different from the more usual situation of a party accepting an estimate and making a deliberate election to go ahead without any further inquiry or reservation." Once the final plans and specifications became available it was, to the builder's knowledge, of great concern to the owner to know, before work had progressed too far, what the final cost would be. The builder's delay in giving his revised estimate had been unreasonable and on that account he was liable for the loss suffered by the building owner. The Judge found that there had been a breach of duty under the *Hedley Byrne* tort. That makes his decision a modern equivalent of *Daniell Ltd v Kebbell* (supra) where Chapman J held a builder similarly in breach of duty, but on the basis of an implied contract. In so holding his Honour relied on *Nocton v Lord Ashburton* [1914] AC 932, the case on which in due course the decision in *Hedley Byrne* was largely based.

From these cases it would seem that if a customer relies upon the expertise of a tradesman in giving an estimate, the tradesman if he knows this must exercise an appropriate degree of skill and judgment subject, of course, to his right to qualify his obligation. Nor is his duty necessarily confined to the quantification of the estimate. Where relevant it can extend to its timing as well.

On the other hand, if the customer's claim is not that the estimate was careless or too late but merely that it was inaccurate, the judgment of Casey J, in *Abrams Ltd v Ancliffe* suggests only that it must be honestly given. As against that can be set *Daniell Ltd v Kebbell* (supra) where the builder's "estimate" was treated as being in effect the equivalent of a tender. The difference between the two conclusions only serves to emphasise that, as with every problem of construction and interpretation, each case falls to be decided on its own facts.

It follows from all this that it would be dangerous for any tradesman or contractor to assume that just because he has used the word "estimate" he can afford to be lax, either in arriving at his figure in the first place or subsequently in executing the work. If that were not so, careless, unskilful or unscrupulous tradesmen would have an unfair and unacceptable advantage over their competitors in securing contracts.

LAW REFORM

RETROACTIVE LEGISLATION IN NON-CRIMINAL MATTERS — PARTICULARLY THE PROPOSED ADOPTION LAW REFORM

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

1 Introduction

1.1 The Law Society has as its motto "Fiat justitia ruat coelum" — "Let justice be done though the heavens fall". This might be thought to have an ironic twist to it when some folk find themselves the hapless victims of retroactive change in the law. Well might they then think that the heavens have opened on top of them so that justice might be done for others. Must this necessarily be so?

1.2 Usually, when the law is changed, retroactivity is avoided by providing that the new law will operate only from the time of the passage of the legislation. Where necessary, careful steps are usually taken by way of transitional provisions to ensure a smooth changeover in people's affairs from the old legal system to the new. But sometimes, whether by accident or by design, this is not so.

1.3 Some people may act in perfectly good faith and irrevocably commit themselves to a course of action which, under the existing law, entitles them to expect a certain result to follow. But then they wake up one morning to find that the law has been improved and the law has been changed so that the result of their own actions is now the very opposite of what they intended. Well might they think that their faith in the law has been betrayed.

1.4 Earlier this year, this Public Issues Committee published a paper on the subject of retroactivity in Criminal Law. In the light of certain proposals to reform our adoption laws it is timely to look at the subject of retroactivity in civil and social law as it affects, not convicted criminals, but ordinary people like us.

2 Avoidance of retroactivity

2.1 Last century, the first version of our *Family Protection Act*, was enacted, protecting a testator's family from capricious foolish or unjust disinheritance. But, wise and fair though this innovative new law was, care was taken to avoid upsetting any testamentary provision made before the Act was passed, because such testamentary provisions would have been made in the light of the existing law, not the new.

2.2 More recently the *Status Of Children Act* was passed in 1969 to remove legal disabilities of children born out of wedlock. Under that Act, a provision in a will or other instrument for "children" included "illegitimate" as well as "legitimate" children, thus reversing the former law in this regard. But the legislation was careful to avoid retroactive effect by declaring that the new law did not apply to wills or other instruments executed before the law was changed — even though it might be said that a testator could always change his will once the law was changed.

2.3 Again, in 1972 the *Accident Compensation Act* abolished the old legal system of compensation for accidental injury and death, and updated it with a new system. But the new code of laws which this Act introduced was expressed not to affect proceedings for damages arising out of personal injury by accident or death resulting therefrom if the accident occurred before the new Act came into force.

2.4 Lately, however, there have been a few instances of a fundamental change in the law being made with inadequate saving or exception to cover anomalous situations arising from past actions. We must look at such cases to see if the need to reform the law is so great that such anomalies must be brushed aside.

3 The Matrimonial Property Act

3.1 The much criticised Matrimonial Property Act of 1976 gave results to property transactions directly opposite to those intended by the parties at the time.

3.2 Before that Act was passed, in deciding whether a husband or wife should have any, and if so, what interest in matrimonial property

*Members of the committee are: RBG Mahon (convener); GB Chapman; JG Hannan; RE Harrison; GJ Judd; LJ Newhook; CM Nicholson QC; EW Thomas; PFA Woodhouse; MG Weir.

the Court would look only at the contributions each had made to the property.

3.3 For example, take the case of a wife entering into marriage with considerable personal assets. Though much in love with her husband at the time she may have thought him to be something of a fool with other people's money. Accordingly she could have kept her property in her own name so that he would not be able to deal with it. For the common use and benefit of the whole family including her husband, she might then have spent part of that separate property to purchase assets such as a motorcar, a holiday home or a boat or even the family home. Acting on advice as to the law in such matters at the time, however, she not only purchased them and kept them in her own name, but also ensured that all payments of outgoings, maintenance, repairs and upkeep of these assets were made only by her. In this way, she could expect that, if anything happened to their marriage, the law would keep intact her original separate property for herself and the children.

3.4 But then, overnight, everything was changed in 1976. Because she had spent her money on property acquired *for the common use and benefit of them both*, the law would now entitle the husband to a half share in them all. There is nothing she could do to predict or avoid this result, and there is no way she could undo what the law had done to her, unless she could point to some extraordinary circumstances rendering equal sharing repugnant to justice.

3.5 It has been firmly decided that disparity in contributions to the marriage partnership as a whole is not enough to show in such cases, unless the disparity can be described as "gross". Nor is it enough to show that the law was changed after the actions of the parties — even in a case where parties had separated and the proceeding between a husband and wife had been actually commenced but not brought to a hearing before the law was changed.

3.6 In the example given, the wife could have avoided the unintended result of her actions if she could have predicted what the law was to be. Within the ambit spirit and intent of the new law, she might have established a family trust, or she might have seen to it that, before spending her separate assets on property for their common use and benefit she and her husband would have first entered into a contract together preserving the new property as her own separate property. Either course might now be no longer available to her when the law changed.

3.7 So an unfortunate aspect of retroactive legislation is that it can place its victims at this special disadvantage. When the law is known people can direct their affairs within the law to produce the desired result. Before the law is known, they cannot. Unfortunately the application of the Matrimonial Property Act is full of such cases of injustice which its victims have no means of avoiding.

3.8 What had happened in the matrimonial property field was that there was a growing feeling that what was thought to be the spirit and intent of the original legislation in 1963 had been eroded by a series of decisions of the Courts. Under some pressure from groups the 1976 Act attempted to put the clock back so as to restore what many claimed was originally intended to be the overriding policy of the 1963 legislation — community sharing of all matrimonial property. This was mainly to give a "better deal for wives".

In its anxiety to be seen to be liberal in the field of social legislation and a champion of women's causes, it is suggested, the Government of the day did something of a disservice to the various groups for whom it was intending to provide.

4 The Adoption report — Confidentiality provisions under the present law

4.1 With this concern in mind we now look at the Report entitled "A Review of the Law on Adoption" which was actually presented to the Minister of Justice last January but only recently released to the public. The aspect touched on in this report which is receiving most public attention currently is the question of access by adopted persons and others to original birth records and to adoption records.

4.2 The present legal position is that original birth and adoption records are kept confidential by statute. We avoid the term "secrecy provisions" as used in the Report as emotive and misleading in favour of the term "confidentiality" which better reflects the intention behind these provisions.

4.3 Once a child is adopted, nobody — not even the natural parents, the adoptive parents or the child — can have access to such records except in special limited cases. The intention appears to have been twofold — to try to give to adopted families the same degree of protection from outside interference in the development of their children that natural families enjoy, and to give to the parents (the mother) of a child the best opportunity to make a new start in life — having made her difficult decision to agree to the adoption of her child, the legis-

lation wanted to give her the best opportunity and encouragement to come to terms with it. In weighing the alternatives, the legislation preferred the finality of a complete break with the past for all concerned rather than the uncertainty of trying to attain conflicting aims by a sort of compromise.

5 Confidentiality provisions overseas

5.1 The author of the Report, Patricia M Webb, having studied the laws of England, Scotland, New South Wales, South Australia, Ontario, Holland and Sweden as well as New Zealand, gives only the English/Scottish example of a country where there is any relaxation of the principle of complete confidentiality.

5.2 England, following Scottish law, since 1975 now permits an adopted person to have a copy of their original birth certificate provided that he or she:

(a) Is 18 years of age or over, and
(b) Is informed about the counselling services which are required to be available, and
(c) Has actually attended an interview with a counselling officer if the adoption took place prior to the change in the law.

Access to adoption records is, however, still generally restricted in England.

6 The Report's recommendations on confidentiality

6.1 The author of the report appears to advocate now total removal of confidentiality in respect of both original birth certificates and adoption records for the natural and adoptive parents and the child (after 18 or 20).

6.2 This would mean that such records would be available not just in respect of adoptions made after the Act is amended, but also in respect of those made many years ago. In order to soften the objections of opponents the author of the Report makes two rather grudging but vague concessions.

6.3 In respect of access by natural parents she says (p 94): "So far as existing adoptions are concerned it *may* be that *some* restriction would be justified" (emphasis added) and in respect of access by adopted children she says (p 95): "With *perhaps* the proviso that an interview with a counsellor be first required in the case of an adoption completed before the passing of the legislation".

6.4 Were it not for these two concessions there would be clearly a case of serious retroactive legislation of the kind of which we are complaining, and the concessions expressed do not really go far enough to remove the problem.

7 The case of natural parents

7.1 The report reads (p 94):

> "So far as natural parents are concerned the problem [of access to birth and adoption records] would seem to be the provision enabling adopters to be anonymous as far as the former are concerned and the possibility that the adopted person has not been told of the adoption. Neither factor should be regarded as a stumbling block in respect of future adoptions, in view of the trend towards openness in the process and the generally accepted view that it is wrong to withhold the information from the child. So far as existing adoptions are concerned it may be that some restrictions would be justified".

7.2 Now so far as existing adoptions are concerned we would have thought that a *total* restriction would be absolutely necessary. Those ordinary people, the adoptive parents, entered into the commitment of adoption when the law assured them that their identity would be a confidence to be respected and protected by the law. Are we justified in breaking that confidence because of what it hailed as a "trend towards" openness in adoption? A "trend towards" openness today is not the same thing as a public acceptance of openness and may well be no part of the thinking of those whose commitments were made many years ago. Many of them may sincerely believe that the liberalism which is fashionable today may not be a good thing in their own family situations. And indeed they may be right, in their own family, however beneficial greater candour in the adoption process may be generally thought to be today.

7.3 The argument about telling a child about his adoption is rather puzzling. It is agreed that children should be told, and told soon. But it is also a generally accepted view that it is best for the adoptive parents to tell their children at their own time and in their own way and this is the reason for preserving their confidence — not to encourage adoptive parents never to tell their children at all.

8 The case of adopted children

8.1 The following things are said in the Report (pp 90-91):

> "The main argument — if not the only one — raised against the proposal to allow access to the records seems to be the possibility that the natural mother who has

> managed to 'live down' her past will one day find herself confronted by an adult son or daughter whose existence has never been disclosed to her family and whose belated appearance on the scene will wreck an otherwise happy marriage and contented family life."

And at p 93:

> "I think that in the absence of considerable research among the people who have actually given up a child for adoption it is an unwarranted assumption that the unexpected but tactfully handled appearance of a grownup son or daughter would be a traumatic experience for them".

8.2 The fact of the matter is, however, that a significant number of girls, when being advised as to the consequences of the making of an adoption order in respect of their child have specially sought to be assured that, *so long as they wish*, their identity will remain confidential. The incidence of this sort of question has been greater in recent years because they seem unsure and a little apprehensive as to how far the new liberal approach will affect them. They have all been advised in accordance with the law as it then stood, and on the faith of that, have been reassured and have consented to the adoption.

8.3 Now if that faith is one of the bases of their consent to adoption, are we able to break that faith *without their consent?* With the greatest of respect for the ability of those who would have the responsibility of "counselling" the children the slim proviso offered in the report might not give adequate real comfort to the natural parent in such cases.

9 An alternative to avoid retroactivity

9.1 What should the law do? It has to walk a fine line in such cases. On the one hand, the law should ensure that it treats an important and sensitive matter like adoption in accordance with the most enlightened views and wisdom of experience available even if that means disappointing some people. On the other hand it must fulfil its necessary quality of certainty. A law that nobody knows or that nobody has the means to know is necessarily a bad law.

9.2 The recommendations contained in the Review of the Law on Adoption can be said to have the effect of overturning some people's lawful and responsible expectations by reversing the laws on which these expectations by were quite properly formed. It is just not enough that we believe that people today think in a more liberal and enlightened way than they did once and may still do. In any case, it is possible to avoid retroactivity of this kind.

9.3 The only reason, it seems, for seeking a change in the confidentiality provisions of the Adoption Act is so that the Act will not stand in the way of the adopted child and the adopted parent if they should wish to obtain information about each other or make contact when the child reaches mature years. To the extent that the Act now stands in their way it would seem most desirable to remove that obstacle if and to the extent that this is consistent with the desire of each party for privacy and confidentiality. To go further than this and to open up records with no respect for privacy or confidentiality would, we suggest, not only be a breach of faith, but would also amount to the imposition upon the individual of personal morality and opinions by legislation.

9.4 This objective could be achieved by providing that, in the case of all adoptions, whether made before the Act or subsequently, copies of birth certificates and/or access to adoption records can be given to the natural parent and the adopted child once the child has attained 18 or 20 years of age upon the following conditions:

(a) The adopted child or the natural parent as the case may be must first consent to whatever is requested.

(b) The adoptive parents must first be notified, though their consent would not be necessary.

(c) The availability of counselling services who would act as an intermediary if requested should be made known to the applicant.

9.5 As to (a) simple procedures can be devised for a form of consent to be filed at any time by the parent and upon having attained 18 or 20 years by the child specifying whether the consent is as to birth or adoption records or both, and, if desired, a form of revocation of consent could also be capable of being subsequently filed. These should be filed in duplicate so that copies can be placed on birth and adoption files respectively.It is suggested that a consent on file should operate even after the death of the consenting party, and could also be given by a personal representative after death if so directed by will or other writing.

As to (b), this would be desirable so that adoptive parents should be aware of what is going on. After all they will be the best counsellors of the adoptive child if there is an application by a natural parent.

As to (c) this is suggested both to enable a

proper approach to be made to the other party for consent and to enable the parties to have the benefit of any special services and experiences if a meeting is desired.

9.6 Because of experience overseas it is stressed that as a part of the adoption process the information which would be available from adoption records would only have to be accurate and fair. It should also be detailed and full and updated if possible from time to time so as to be of real help and benefit to someone with a genuine and reasonable need to know.

9.7 In this way the very undesirable effects of retrospective legislation will be averted while leaving the way clear for the present healthy trend towards greater openness in adoption matters, in the words of the Report "to develop naturally as far as possible".

TRANSPORT

ILLEGAL AIR SERVICES — TWO RECENT APPEAL DECISIONS

By T S RICHARDSON, *a Whakatane Practitioner.*

There has been much discussion recently on the vexed question of delicensing the aviation industry. Not surprisingly those operators who have worked hard to establish their agricultural or transport services, often making personal, financial and other sacrifices to ensure that the public gets the service to which it is entitled, see the delicensing lobby as a serious threat to their security and future viability.

Agricultural airwork and air transport operators alike will be heartened by two recent decisions of the Air Services Licensing Appeal Authority upholding Air Services Licensing Authority decisions to refuse to grant new licences to operators who had endeavoured to attract business by irregular or illegal operations. Thus, while licensing remains, established operators may be reassured that so long as they maintain a proper service to the public in accordance with the terms of their licences they will receive that measure of protection which the licensing system is designed to provide.

Appeal Decision No 71 (*Southland Aerial Co-operative Society Limited v Farmers Aerial Topdressing Company Limited & Others* — 18 July 1979) dealt with an appeal against a decision to refuse to authorise new air services involving aerial topdressing, aerial liquid topdressing and aerial spraying. The Southland Aerial Co-operative Society Limited claimed in its evidence that it was conducting its operations in a lawful manner similar to that held to be within the law in the *Makarau Lime Co-op* case ([1973] 1 NZLR 208). It relied on work undertaken by it as indicating a demand for its services. It sought the mandate of a licence to provide "healthy and reasonable competition", "cheaper airwork services", "an alternative to farmers who have had a reasonable cause for complaint with existing services" and to enable it to obtain a refund of motor spirits duty into the bargain.

It is clear from the Appeal Authority's decision that comprehensive argument was addressed to him on the principles of licensing and the common law principle of restraint of trade.

Of major importance to this case was the acknowledged fact that the appellant's services had not been operated in accordance with the modus operandi outlined in the *Makerau Lime Co-op* case and that the operations for a considerable period had been conducted illegally.

Amongst other things, it was contended on behalf of the licensed operators that there was nothing less fair by way of competition than illegal operations. The appellant claimed that even if the illegal operations were ignored there was adequate evidence of demand arising from services provided by the society legally within the few months prior to it making application for an air services licence.

The Appeal Authority quite bluntly rejected the suggestion that the evidence of illegal operations should not weigh against the appellant when at p 4 of the decision he said:

> "The Authority was fully justified in completely rejecting any evidence of the applicant's operations whilst it was operating illegally. It could hardly be claimed that such operations provided fair and reasonable competition. Counsel for Appellant submits that the operations of the applicant subsequent to June 1977 provide sufficient evidence to justify the grant of a licence. Whilst the evidence of such operations was entitled to full consideration, the Authority would, in my view, have been entitled to take the view that the operations of the applicant were tainted with illegality from the beginning and that it had built up its membership and business in that manner."

The Appeal Authority further upheld the findings of the Licensing Authority that no monopoly existed and that it had not been established that the existing service was unsatisfactory. The decision appealed against was upheld.

Appeal Decision No 73 (*Kawerau Aviation Services Limited v Bell-Air Executive Air Travel Limited* — 22 November 1979) dealt with an appeal against a decision to refuse to authorise a new air charter and air taxi service at Kawerau. Kawerau Aviation Services Limited had claimed in its evidence that its joint venture involving the Waikato Flying School had the approval of the Civil Aviation Division, but it had been conceded by its counsel initially that some of the operations were illegal and later that all of the appellant's air service operations had been illegal.

The Appeal Authority again took a bold stand against the illegalities of the appellant when at pp 5 and 6 of the decision he said:

> "It is clear from the parts of the Authority's decision referred to by me that the illegal operations of the Appellant constituted the main reason for the Authority's decision. Having read and considered the evidence and exhibits, I must say that in my view, the Authority was fully justified in taking a serious view as regards such illegal operations and holding this factor against the Appellant."

The appeal was accordingly dismissed.

These two decisions of Mr W F Brown, S M, the present Appeal Authority, do not establish new principles in air services licensing law, but they are both bold in their condemnation of unfair competition from illegal operations. It is always heartening to see an element of consistency in decisions from any Appellate Authority and where the personnel making up the authority change there are times when such consistency may seem lacking. The present Authority has, however, continued the firm line of his predecessors.

CORRESPONDENCE

Sir,

Assembly Line Justice

Mr Dugdale's article under the caption "Assembly Line Justice" (5th February) draws attention to an issue which should be the concern of us all; whether to adhere to principles or whether "'tis nobler in the mind to suffer the slings and arrows of outrageous fortune" — in other words to depend for your degree of success or failure on a lottery, namely which Judge hears your case.

Personally I still have a certain respect for principles. I recollect that the judgment of the Court of Appeal in *Benson v Kwong Chong* [1931] NZLR 81 occupied 30 pages and referred to 24 cited cases. The Privy Council (NZPCC p 456) reversed the decision in 12 pages without any citations at all, Lord Blanesburgh stating at p 469, "In the view which their Lordships take of the facts and findings, it is unnecessary for them to discuss any of the delicate questions of law so much canvassed in the Court of Appeal and before thenm," and Sir Kenneth Gresson, on his retirement from the Court of Appeal protested against "over-citation of authority which had become prevalent," [1963] NZLJ 123. We appear to have reached the stage when it is evermore difficult to see the wood for trees.

Yours etc,

F G Opie
Palmerston North

Dear Sir,

Processing words

Mr D B Thomas in his Paper on Word Processing in the Land Transfer Office presents some useful and thought provoking ideas for the future of the Land Transfer Office and his comments are appropriate at this stage when there is a review of the Land Transfer Act at present in progress. Unfortunately, however, I see that in his illustration of the various forms he perpetuates the use of the word "annexure" if indeed it can be classed as a word. What is wrong with the word "annex". That word is as much a noun as it is a verb and although unfortunately the so called word "annexure" is now gaining some recognition, could I suggest that it is not yet a "word" as such. Look what happened to "man" when they added the letters "ure".

Yours faithfully,

T P Broad

Privacy goes international — "The means by which we live have out-distanced the ends for which we live. Our scientific power has outrun our spiritual power. We have guided missiles and misguided men." Martin Luther King Jr, 1963.

TAXATION

A FARMING ESTATE PLAN

Four essays on estate planning by John Prebble, an Auckland practitioner, were published earlier this year at [1979] NZLJ 20, 47, 78 and 105. The last of these was an example of an estate plan drawn up for the owner of a manufacturing company.

Since that plan was drafted, the rates of estate and gift duties have been substantially changed in the Estate and Gift Duties Amendment Act 1979. Accordingly, an example of another estate plan is published below, taking into account the new rates of estate duty.

By way of contrast and comparison with the earlier example, the present case concerns a farmer. Readers will note the special arrangements that are necessary to take account of the particular provisions of the Income Tax Act 1976 that relate to the disposal of livestock. These are discussed in more detail by Dr Prebble in three articles at [1978] NZLJ 349, 373, and 396.

A further point to note particularly is the effect on the pattern of estate planning now that practitioners can look forward to duty-free estates up to $250,000, with the matrimonial home allowance on top of that. The result is that a man with assets of up to about $600,000, including his home, can virtually eliminate duty on his estate simply by transferring up to 250,000 worth of assets to his wife, and then leaving to her a life interest in his matrimonial home and the balance of the estate. Assuming the couple is happily married, this type of arrangement is a good deal simpler than the establishment of a family trust, although it will be noted that further measures may be necessary in order to forestall the effect of increasing property values and inflation, by at least some element of estate freezing. Even if the client does not have full confidence in his wife, it is not unlikely that a fairly equal division of assets will reflect what would happen anyway under the Matrimonial Property Act 1976, if the worst came to the worst.

Finally, in connection with the Matrimonial Property Act, it will be appreciated that the Courts are now willing to make orders under s 25(3) of that Act in cases where the parties are still living happily together. See *Re E* [1978] 2 NZLR 40.

By JOHN PREBBLE *(Introduction and Problem) and* B M LAIRD *(Solution), Auckland practitioners.*

Problem

Benjamin Britten is a farmer owning a well-developed farm near the coast east of Warkworth. He is 65 years old and his wife, Charlotte, is 55. He has three married daughters, all in their twenties, living in Auckland. None of their husbands wants to go farming. Felicity, 29, is married to Brian Cole, an engineer; Harriet, 26, is married to Henry Cox, a teacher; and Susan 24, is married to David Jones, a research student.

Britten's farm is quite large. It needs two men to operate it full-time, and extra labour from time to time. About one-quarter of the farm, near the coast, is suitable for subdivision for holiday cottages. Moreover, Britten can be reasonably confident that planning permission would be obtainable. Cutting off this quarter of the land would also be beneficial from the farm management point of view, as the land would then be more compact and able to be managed economically and effectively by two men without further help.

Britten's health is fairly good at the moment, but he would like to retire as soon as reasonably possible. This will mean bringing in a farm manager on a salary or, more likely, on a profit-sharing basis. Britten and his wife plan eventually to acquire a retirement home, but for the next five years or so would like to remain in the farm-house, though in retirement.

Britten's assets are:

	$
Farm, including farm-house, buildings and cottage for married couple	450,000
Stock	130,000
Plant and implements	70,000
Life insurance (value if died today, including bonuses)	25,000
Car 1	15,000
Car 2	4,000
Furniture	15,000

Half interest in remainder in his father's estate.

Life tenant is Britten's stepmother, aged 73.
Father's estate now valued at $150,000.

The farm is mortgaged for $60,000. Britten's net taxable income last year was $20,000. He has no income apart from the farm, and his wife has no income of her own.

Solution

ESTATE PLAN

Mr Benjamin Britten
RD
Warkworth

Dear Mr Britten,

re: ESTATE PLANNING

You have instructed us to advise you how to arrange your estate in such a way as to minimise its liability to estate duty in the event of your death, while at the same time preserving for you a comfortable standard of living. We accordingly now set out a scheme or estate plan which incorporates our suggestion. In the course of this plan we have endeavoured to take into account your wishes in respect of your immediate working life and your plans for retirement, but please feel free to discuss with us any particular aspect of the plan which you may feel does not conform with your expectations for the future.

(1) You have farmed all your life and for the past more than 10 years have farmed your property near Warkworth comprising approximately 300 acres and have developed it to a high state of production.

(2) According to our instructions, you have three children (all daughters), all of whom are married, living in Auckland. Their particulars are as follows: Felicity, aged 29, married to Brian Cole of Auckland, Engineer; Harriet, aged 26, married to Henry Cox of Auckland, Teacher; Susan, aged 24, married to David Jones of Auckland, Research Student.

None of your daughters yet has children of her own.

(3) You are aged 65 years and your wife 55 years. You are in good health at the moment but you wish to retire as soon as reasonably possible. For the next five or so years of your retirement you wish to remain in the farmhouse on your present property but at the end of that time you would like to settle yourself and your wife in a retirement home away from the farm.

(4) You advise that your assets are as follows:

ASSETS AND LIABILITIES

Assets

300 acres near Warkworth (land and building only)	$450,000.00
Stock (at market value)	130,000
(We understand that stock has been recorded in your farm accounts at Standard Values which represent approximately one-half the market value of the stock)	
Plant and implements (at market value)	70,000.00
NMLA Whole-of-Life insurance policy (Proceeds (including bonuses) should you die today)	25,000.00
Furniture	15,000.00
Car 1	15,000.00
Car 2	4,000.00
Half-interest in remainder in your father's estate (your stepmother aged 73 being life tenant); the value of the estate is now $150,000	$46,895.25
The gross total (excluding furniture) is	$740,895.25
Liabilities	
Mortgage of the farm (secured against land and buildings only)	60,000.00
Net Estate	$680,895.25
less Matrimonial home allowance (estimated)	25,000.00
Net Dutiable Estate	$655,895.25

Your net taxable income from the farm last year amounted to $20,000. You derive income from no other source.

Your wife has no assets of any value and has no income of her own.

(5) Estate duty payable in respect of your estate should you die today would be $214,858.00 but should you survive to 1 April 1982 and your estate retain its present value, the estate duty would amount to $162,358.00. It would be unwise for you to assume that your estate will remain at its present value by reason of the proximity of your farm to the coast, its suitability for subdivision, and the likely increase in stock values over the next three years.

Income Tax payable in respect of your income is approximately $9,074 per year which leaves you with approximately $11,000 pa net.

(6) We are proposing for you a five year Estate Plan which, if implemented, could result in no estate duty being payable in respect of your estate or that of your wife following its completion. The plan incorporates a gifting programme and is as follows:

(a) *Furniture* — under s 35B(2) of the Estate and Gift Duties Act 1968 chattels passing to a spouse are completely exempt from estate duty and as it is likely that your will predecease your wife (and in view of the overall Estate Plan proposed) we suggest that the chattels remain your property.

(b) *Cars* — Motorcars are a depreciating asset and accordingly their value will reduce as time goes by and we suggest you retain ownership of both cars.

(c) *Life Insurance* — We have ascertained from the National Mutual Life Association that the surrender value of your policy, at present, is $10,500 and we recommend that your transfer this policy by way of gift to your wife as soon as you have the funds available for payment of gift duty. The policy is increasing in value and of course the net proceeds are considerably in excess of the purchase price.

You should continue to pay the premiums due in respect of the policy as these will be available as a deduction from your income for income tax purposes.

(d) *The Farm* — This particular aspect of your estate caused us some trouble. We, at first, thought that it would be useful to prepare a plan of subdivision and sell the sections progressively to provide you with liquidity to assist you in making gifts to your children and to the Trust. We have learnt, however, that the capital cost of roading, reserve contributions, kerbing and channelling and the many other incidental costs and risks associated with the development and sale of the land in the manner indicated would be considerable and beyond your present financial resources and, we believe, would not follow your inclination.

We recommend that a trust be established and that you subdivide from the farm property that quarter of the farm near the coast which has been zoned by the County for future subdivision as residential sections and that the balance (of 225 acres) be sold to the Trust and the residential land be retained by you.

It would also be practical for you to include in the plan of subdivision which will be necessary to provide for the above, for a further one acre section to be severed from the residential land and upon which you will ultimately build your retirement home. We believe this section would have a market value of $15,000 and the remaining 74 acres would have a market value of approximately $210,000.

(e) *Farm Sale Price* We understand that the value likely to be accepted by the Inland Revenue Department for the consideration on sale of 225 acres to the Trust is $225,000. We suggest that the mortgagee of the farm be approached and his agreement obtained to the mortgage of $60,000 remaining secured against the 225 acres to leave the residential property unencumbered. This would be done when the mortgagee's consent was being obtained to the transfer of the farm to the Trust. The mortgagee will almost certainly wish to retain your personal covenant.

(f) *Mortgage of Farm* The consideration payable in respect of a sale of the farm to the Trust (namely $165,000) should be secured by way of an unregistered second mortgage of the farm due upon demand and free of interest. We suggest that this mortgage be immediately transferred to Mrs Britten and that you take either a sub-mortgage for $165,000 free of interest due upon demand or that she sign a Deed of Acknowledgement in this amount.

(g) *Coastal Land* We suggest that the 74 acres (excluding the one acre which you will retain for your retirement home) be sold at the earliest possible moment. We understand that there is a strong demand from investors and others for coastal property with subdivisional potential and in reasonable proximity to Auckland. We expect that you would obtain a price of at least $210,000; we strongly recommend that prior to sale you register an appropriate restrictive covenant against the title to the 74 acres to ensure that the view from the section you are retaining will not be impaired by any buildings erected on adjoining land.

(h) *Tax on Proceeds of Sale* You will not

pay any income tax on the sale of the farm and the subdivisional area of 74 acres. You will avoid the operation of s 67 of the Income Tax Act 1976 by reason that you have owned the property for more than 10 years and that you originally purchased the property for farming purposes and no other.

(i) *Farmhouse* It will be necessary for the trustees to lease the farm-house to you at a market rental. We do not anticipate that the rental will be more than $25 per week but the final figure will have to be negotiated between the trustees and the Inland Revenue Department and it will be necessary for you actually to pay the amount of the rent in cash at proper intervals during the term of the lease.

(j) *Stock* It will be necessary for you to sell up to one-quarter of your present stock numbers to allow for the reduced area of farm land available to the Trust. We suggest that you sell the stock at such time during the next 12 months as (having regard to seasonal price fluctuations) you consider you will get the best price for it. For the purpose of the calculation appearing in the tables below we have assumed that you will receive in return for the sale of stock one-quarter of the total herd's present value; that quarter will amount to $32,500. The balance of the stock should be sold to your three daughters at Standard Values pursuant to s 89 of the Income Tax Act 1976 and an Instrument by way of security taken from the three daughters to secure to you the unpaid purchase money which would amount to $43,750 (being the total of SV but one-half market value). Gift duty will be payable on the difference between the standard values and market value (ie $43,750) and will amount to $4,187.50. The funds would be available to you to enable payment from the proceeds of sale of the other stock.

(k) *Spreading Stock Proceeds* Tax will be payable on the one-quarter of your stock sold on the open market. We suggest that in view of the fact that you will be retiring from active farming that you exercise the right available to you under s 93 of the Income Tax Act to apply to the Commissioner to have the taxable amount of $16,250 spread over the year of sale and the next three years to avoid having to pay income tax on that amount in the first year.

(l) *Plant and Implements* You should sell plant and implements to the Trust at current market value. We suggest that an instrument by way of security be taken from the trustees to secure the purchase price upon demand and free of interest. The instrument by way of security should include a clause permitting the trustees to allow those plant and implements to be used by any person for the time being carrying on a farming business on the property to which the plant and implements belong and to recover a rental in respect thereof. The trustees should be responsible to maintain the plant and implements, but not be liable for fair wear and tear.

(m) *The Farming Business* We suggest that the farming business on the 225 acres be conducted by your three daughters through a manager. You have instructed us that your daughters' husbands are not interested in farming. We have no doubt, however, that your daughters have an instinct for farming and would readily accept a proposal that they as owners of the stock should appoint a manager to run the farm at least for the period of this Estate Plan. In any event, you will be at the property, and although it is essential, in order that the provisions of s 93 of the Income Tax Act can be used by you in order to spread the proceeds of the sale of the one-quarter of your stock for tax purposes, that your are not actively engaged in any farming activity whether as an employee or otherwise, you would be available to advise your daughters on the selection of a manager and independently to report to them from time to time. It would also be possible for you to carry out limited and occasional farm work from time to time by way of advice or possibly stock selection.

(n) The trustees should lease the farm property to the three daughters for a market rental which should be the minimum acceptable to the Inland Revenue Department but also to cover rates, interest, insurance premiums and other standing charges payable by the trustees from year to year.

(o) *The Trust* The Trust should be a standard discretionary family trust under which the trustees have the power to distribute capital and/or income from time to time among such of your wife, three daughters, their husbands and grandchildren, as the trustees shall from time to time think fit. We suggest that you discuss with us whom may be appointed as trustees of the Trust; we do not recommend that you act as a trustee, but a worthwhile combination of trustees could be formed by your accountant, solicitor and possibly your eldest daughter. You could consider the appointment of a corporate trustee but in considering this you should take into account the initial fee charged by corporate trustees when they accept office and also the additional annual charge for administration. This Estate Plan allows you certain liquidity at the outset to pay legal costs,

stamp duty, subdivisional costs, etc, but we do not think it practical to provide for the cost of the appointment of a corporate trustee at this time.

(h) *Tax on Proceeds of Sale* You will not pay any income tax on the sale of the farm and the subdivisional area of 74 acres. You will avoid the operation of s 67 of the Income Tax Act 1976 by reason that you have owned the property for more than 10 years and that you originally purchased the property for farming purposes and no other.

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(n) The trustees should lease the farm property to the three daughters for a market rental which should be the minimum acceptable to the Inland Revenue Department but also to cover rates, interest, insurance premiums and other standing charges payable by the trustees from year to year.

(o) *The Trust* The Trust should be a standard discretionary family trust under which the trustees have the power to distribute capital and/or income from time to time among such of your wife, three daughters, their husbands and grandchildren, as the trustees shall from time to time think fit. We suggest that you discuss with us whom may be appointed as trustees of the Trust; we do not recommend that you act as a trustee, but a worthwhile combination of trustees could be formed by your accountant, solicitor and possibly your eldest daughter. You could consider the appointment of a corporate trustee but in considering this

you should take into account the initial fee charged by corporate trustees when they accept office and also the additional annual charge for administration. This Estate Plan allows you certain liquidity at the outset to pay legal costs, stamp duty, subdivisional costs, etc, but we do not think it practical to provide for the cost of the appointment of a corporate trustee at this time.

(p) *Your Father's Estate* The present value of your half-interest in remainder in this estate is $46,895.25 based on the tables in the second schedule of the Estate and Gift Duties Act 1968; this is the value of your interest which would be included in your estate for estate duty calculation purposes were you to die today.

We have ascertained that there is no restraint in your father's will on your alienating your half-interest in remainder in the estate and we suggest that you sell your interest to your wife at the sum of $46,895.25 forthwith and that the purchase money be secured to you by way of a deed of acknowledgement due upon demand. Your interest in remainder in your father's estate is rapidly increasing in value having regard to your stepmother's age and the sale of this interest to your wife means that the future increase in value will be added to her estate and not your own.

(q) *Retirement Section* This may be retained in your name and you should commence building a home as soon as possible (perhaps initially a cottage or bach which can later be increased to a substantial house, to enable your estate to gain the benefit of a matrimonial home allowance. Perhaps the Trust could later start paying you and your wife interest in respect of moneys owing under the mortgage of the farm to enable you to use portion of your invested capital to erect the house).

(7) For the sake of clarity we show hereunder a schedule of your asset position at the end of the 12 months after the sale of the farm and you have taken the initial steps to implement the foregoing recommendations:

Cash			
(a) Proceeds of sale of one-quarter stock		$32,500.00	
(b) Proceeds of sale of 74 acres (subdivisible)		210,000.00	
		242,500.00	
Less			
(i) Gift duty on $43,750.00 (difference between market value and SV of stock sold to daughters)	$4,187.50		
Gift duty re NMLA policy	$2,625.00		
(ii) Stamp duty and Legal expenses re transfers, etc, (estimated)	9,000,00		
(iii) Survey & legal costs re severence (estimated)	5,000.00	20,812.50	
			221,687.50
Mortgages			
(a) Sub-mortgage — C Britten		165,000.00	
(b) Stock mortgage — Cole, Cox & Jones		43,750.00	
(c) IBWS — Plant & implements Benjamin Britten Trust		70,000.00	
			278,750.00
Other			
(a) Deed of Acknowledgement — C Britten		46,895.25	
(b) Cars		19,000.00	
(c) Furniture $15,000.00 (non-dutiable if passing to your wife on death)			
(d) Section		15,000.00	80,895.25
			$581,332.75

The aim of this Estate Plan is to reduce your estate to something under $250,000 at the completion of the giving programme suggested below. It is also hoped that on completion of the giving programme the estate of Mrs Britten will be roughly equal to that of yours.

(8) *Wills* In these circumstances, it is important to ensure that the estate of each of you will not be increased by the transfer of assets on the death of one of you; to this end we suggest that wills be drawn up immediately including the following provisions:

(a) Mr Britten
  (i) Forgiveness of moneys owing by Mrs Britten in respect of the sub-mortgage, mortgage of life policy and the Deed of Acknowledgement and that the Estate pay the estate duties (if any) in respect of these dispositions.
  (ii) Forgiveness of the moneys owing by the trustees and the three daughters and that, once again, the Estate pay the duties (if any) in respect of such gifts.
  (iii) The furniture should pass to Mrs Britten absolutely (no duty payable).
  (iv) Mrs Britten should have a life interest in the balance of the estate after payment of the debts, duties (if any) and administration expenses.

(b) Mrs Britten
  (i) Furniture and any motorcar in her name should be transferred absolutely to Mr Britten.
  (ii) A life interest in the residue of the estate after payments of debts, duties (if any) and administration expenses.

Although it would be wise for the terms of these Wills to be reviewed every two years, the terms have been suggested to avoid the need for any major alteration therein if the gifting programme that follows is adhered to reasonably closely.

(9) While at the present time, there is no liquid cash available for payment of estate duty, your executors could readily realise this amount by selling the farm property as soon as possible after your death or by calling up the mortgage of the farm, thereby forcing the sale of the farm. This should not be necessary once the coastal land is sold. At the end of the first year there would be ample liquidity for duty from the proceeds of sale of the 74 acres. It is suggested that you invest the cash proceeds mentioned in the above statement as soon as possible in fixed-interest investment. We suggest that you invest $10,000.00 for 12 months, a further $10,000.00 for two years, a further $10,000.00 for three years, a further $10,000.00 for four years and the balance, after deducting a modest amount for contingencies, for five years. We have discovered that you will receive not less than 14 percent per annum on funds invested for two years or more with reputable finance companies and 1 percent per annum per year less than that should you invest the funds with a trading bank. The funds invested for one year may return only 11 percent.

We have calculated that if you were to invest your funds in the way suggested, that your net tax-paid income (after taking into account the extra tax payable in respect of the proceeds of sale of stock which are spread for the next three years) will be in excess of the tax-paid income received by you last year by a small amount and that you will be considerably better off by the fifth year. It is in the fifth year that we recommend that funds be used to commence building your retirement home on the section which you have retained from the subdivisible area and on completion the value of this section and dwelling will form part of a matrimonial home allowance in respect of your then estate.

(10) *Giving Programme* It is suggested that a giving programme be adopted roughly along the following lines:

GIFT PROGRAMME

(a) *Year 2*	
Forgive the stock mortgage (Cole Cox Jones)	$ 43.750.00
Forgive part of the moneys due by Mrs Britten under the Deed of Acknowledgement in respect of the remainderman interest in your father's estate	23,000.00
	$ 66,750.00
Gift duty payable thereon	$9,937.50

(b) *Year 3*

Forgive balance of moneys owing under Deed of Acknowledgement	$ 23,895.25
Reduction in moneys owing under Instrument by way of Security on Plant and implements (Benjamin Britten Trust)	$ 42,500.00
	$ 66,395.25
Gift duty payable thereon	$9,848.75

(c) *Year 4*

Forgive balance owing under Instrument by way of Security of plant and implements	$ 27,500.00
Reduction in moneys owing by Mrs C Britten under sub-mortgage	40,000.00
	$ 67,500.00
Gift duty payable thereon	$ 10,125.00

(d) *Year 5*

Further reduction of moneys owing under sub-mortgage — Mrs C Britten	$ 40,000.00
Gift duty payable thereon	$ 3,250.00

(11) In Year 5 it would be practicable for you to sell a car to Mrs Britten and forgive the purchase price, paying a modest amount of gift duty, if it seemed appropriate to do so.

(12) We have suggested that your retirement home be built by the end of year 5; we estimate that this will cost $85,000 and that you use part of the funds on fixed interest investment for this purpose. Income thereby lost may be recouped by calling on the trustees to pay interest on the balance of the farm mortgage to your wife, and on your wife to pay interest on her sub-mortgage (now $85,000) to you, to provide roughly equal amounts of income for you and your wife. It may not be necessary for you to charge interest to your wife, and allow the income she is receiving by way of interest to supplement your income from reinvestment of your capital moneys. This would only be necessary if the income being received by you from your other investments was insufficient to maintain you and your wife at the standard to which you had become accustomed.

(13) After completion of this gifting programme and provided you survive a further three years after completion of the last gift, your estate and estate duty payable thereon, assuming 1979 values, and disregarding accumlated income (if any) would be as follows:

Mr B Britten

Cash		$224,312.50	
Less Gift duty	$39,973.75		
Legal expenses	450.00	40,423.75	$183,888.75
Mortgages			
Sub-mortgage — C Britten		$ 85,000.00	
Other			
Cars	$19,000.00		
Furniture 15,000			
Section	$15,000.00		$ 34,000.00
			$302,888.75
Matrimonial home allowance (when house is built)			
House	$85,000.00		
Section	$15,000.00		$100,000.00
			$202,888.75
Estate duty payable			NIL

Mrs C Britten			
Cash		Nil	
Mortgages			
Benjamin Britten Trust		$165,000.00	
Less sub-mortgage		$ 85,000.00	$ 80,000.00
Other — Remainderman interest (if stepmother deceased)			$ 75,000.00
Life insurance			$ 25,000.00
			$180,000.00
Estate duty payable			NIL
Gift duty paid	$39,973.75		
Estate duty in 1979 (before implementation of plan)	$214,858.00		
Estate duty in 1982 (before implementation of plan)	$162,358.00		

Saving — $174,884.25 (on 1979 duty rates)
or $122,384.25 (on 1982 duty rates)

(14) A comparison of the duties payable now with those in 1987 ie three years after completion of the plan is as follows:

Mr B Britten

	1979	1979 values with Plan	1987 without Plan Assuming 75% increase in values	1987 with Plan Assuming 75% increase in values
Farm	390,000	—	727,500	—
Stock	130,000	—	227,500	—
Plant and implements	70,000	—	122,500	—
Life policy	25,000	—	35,000	—
Furniture				
Cars	19,000	19,000	33,250	33,250
Father's Estate	46,895.25		131,250	—
Cash	—	98,888	—	98,888
Mortgages	—	85,000	—	85,000
House and section	—	100,000	—	175,000
	680,895.25	302,888	1,277,000	392,138
Estate duty (with matrimonial home allowance)	214,858	36,010.80	410,800	NIL
Or	162,358	or NIL		

Total gift duty paid by 1985 $39,973.75

Mrs C Britten

	1979	1979 values with Plan	1987 without Plan Assuming 75% increase in values	1987 with Plan Assuming 75% increase in values
Mortgage of farm	—	80,000.00	—	80,000.00
Father-in-law's estate	—	75,000.00	—	131,250.00
Furniture	—	15,000.00	—	25,000.00
Life insurance	—	25,000.00	—	35,000.00
	—	$195,000.00	—	$271,250.00
Estate duty payable (no matrimonial home allowance)	NIL	NIL	NIL	$ 8,500.00

Gift duty — NIL

(15) The above tables presuppose that Mrs Britten will outlive Mr Britten. Mrs Britten could, after Mr Britten's death, if she were satified that her income from her life interest in Mr Britten's estate were sufficient to do so, release by way of gift all or part of the moneys owing by the trustees in respect of the farm mortgage; in this way it may be possible to avoid paying estate duty in respect of Mrs Britten's estate also.

(16) *Documentation* For the assistance of your solicitors we list the documents which will be necessary to put the Estate Plan into effect:

(a) Wills of Mr and Mrs B Britten
(b) Deed of Trust: Settlor — Mr B Britten
(c) Agreement for Sale and Purchase of 225 acres: Mr B Britten to the Trust
(d) Unregistered Second Mortgage: Trust to Mr B Britten
(e) Tenancy Agreement: Trust to Mr B Britten of farm house for four years with right to renew for one year
(f) Agreement for Sale and Purchase re NMLA policy: Mr B Britten to Mrs C Britten
(g) Agreement for Sale and Purchase re Stock: Mr B Britten to Mesdames Cole, Cox and Jones
(h) Instrument By Way of Security: Cole, Cox, Jones to Mr B Britten
(i) Agreement for Sale and Purchase re plant and implements: Mr B Britten to the Trust
(j) Instrument By Way of Security: Trust to Mr B Britten re plant and implements
(k) Lease of farm property and plant and implements: Trust to Mesdames Cole, Cox and Jones
(l) Management Contract: Mesdames Cole, Cox and Jones with a manager yet to be appointed
(m) Deed between Mr B Britten with Mrs C Britten assigning at $46,895.25 Mr Britten's remainderman interest in his father's estate
(n) Deed of Acknowledgement of Debt: Mrs Britten to Mr Britten for $46,895.25
(o) Formal notice to trustees of Mr Britten's father's estate of assignment of his interest
(p) Deed of Gift re NMLA Policy: Mr Britten to Mrs Britten (and formal assignment)
(q) Documents required each year in form of deed in respect of the various gifts proposed, together with the appropriate gift statements required by the Inland Revenue Department.

Yours faithfully,

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Lawyers agonizing — "It was not about social change at all. It was about that highly ritualised activity of the Courts which produces *Homo Legalis*, a species like *Homo sociologicus, Hom economicus, Homo psychologicus* in that he exists only because each discipline creates him in its own image. It is when he becomes real that he becomes a monster". Book Review by History Professor GM Denning (1977) 11 MULR 139