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INFORMATION ABOUT LAND

Today, thanks to the Torrens System of land registration, the transfer of title to land is a relatively straightforward operation. The emphasis has moved from title and conveyance to land use — or, more to the point, to the physical and legal restrictions on land use.

Finding out about land is an exercise in itself. In respect of a commercial development, for example, a highly paid professional — a lawyer, surveyor, architect or valuer — may visit three different departments of the local council to find out about town planning restrictions, earthquake zoning and fire zoning alone. The council will also have health requirements (room size, ventilation etc) as will the Department of Labour. The requirements may or may not coincide. There will be drainage plans to check and also electricity reticulation. The latter may be recorded at either the council or the local electricity supply authority and, so it has been suggested, may or may not be accurate. If alterations to an existing building are involved the local council may or may not have a set of plans depending on the age and value of the building and its policy towards keeping them. Alterations may or may not be recorded. If the land has previously formed part of a Crown development there is a good chance that drainage and other information will not be held by the local council and those seeking this sort of information do not wax optimistic about the chance of extracting it from the Government departments involved.

As far as residential properties are concerned the position is, if anything, worse — for checks, the cost of which form an insignificant part of the cost of a commercial building, loom large in the budget of a house-buyer. Subsoil conditions are a problem and valuers in particular worry about the lack of readily available information on cut and fill subdivisions. The nature of land subdivision today is such that, with the remoulding of landscapes, a valuer may not be put on notice that there have been major earthworks. Even if he is, he is often unable to track down information as to whether a particular section contains fill and if so whether it has been compacted.

A further problem, again particularly for valuers, arises where there is a substantial area of road reserve between the formed road and the title boundary. Sometimes this may be gleaned from existing survey plans but more often it may not.

For the man in the street the town planning information available to him may be positively misleading. Most libraries hold copies of the local Town Plan but these are not often kept up to date. For that matter it is not unknown for the local authority itself not to have an up-to-date copy (plus proposed changes) of the Town Plan available for public inspection.

And so the list of desirable information available *somewhere* could go on, with government valuation, local body improvement requirements and many others. All that is needed to find it is perseverence and time.

In the face of all this a proposed feasibility study by the State Services Commission into the creation of a centralised Department of Land Record incorporating "the major organisations of Government involved in the creation of land tenure units and the generation and recording of primary, physical, legal and economic data relating to land" may seem to offer a promise of improvement. Certainly much information could, and some say should, be incorporated in the existing land transfer

survey and title records with little difficulty. Government valuation, public drains, and electricity and telephone easements are examples of the specific, factual information that may be related to individual parcels of land.

Other information is not specific and indeed what is often sought is not hard information but an indication as to whether further investigations should be made. Thus it would be an unreasonably expensive undertaking to note on individual titles whether an area of road reserve exists between a formed road and the title boundary. It would not be unreasonable, however, for a local authority to have available, as some do, aerial photographs and maps from which a potential purchaser may make his own assessment and his own decision as to whether it is worth having a surveyor peg the front boundary so he knows exactly what he is purchasing. This type of more general information is more appropriately reposed in the local authority whose personnel may be able to supplement it from their own local knowledge.

The information collected by a local authority accumulates almost as a side-effect of its town planning obligations and its obligations in respect of building and subdivision. It is accumulated for council purposes and used for council purposes. If it is thought of at all as general reference material that thought finds little reflection either in the manner of its organisation or presentation — although, in fairness, lack of money probably has more to do with it than lack of will. That councils tend not to see themselves as a source of reference is illustrated, if unconsciously, by the events leading up to the recent decision of the Planning Tribunal (No 1 Division) in *Davison Properties Ltd v Manukau City Council* (to be reported). The Manukau City Council wished to draw a report on subsoil conditions in a new subdivision to the attention of potential purchasers. It sought to do this by requiring the registration of an encumbrance in its favour against the title securing payment of a nominal rent charge and drawing attention to the existence of the report. For various reasons the condition was held to be unreasonable. Now the Council was obviously looking at the Land Transfer Register as the primary vehicle for conveying information about land and, by that token, was not looking upon itself as a source of reference, probably because it did not expect purchasers to make inquiries. The Council's approach gives credence to the belief that people tend not to seek information from local authorities because it involves such a hassle; while local authorities do not gear themselves to supplying it because nobody asks. This circle needs breaking.

Instead of leaping straight into an inquiry as to centralisation, an inquiry that past experience suggests may founder in internecine strife as to which of the existing Government departments should embrace it, surely it would be better to look first at the information currently available both within Government departments and local authorities, to consider the reasonable needs of those who seek it, and then, and only then, to determine how this information may most usefully be made available. In particular it should be recalled that land use is very much a local authority preserve and there is a good argument for suggesting that what is needed is not centralisation but retaining de-centralisation but coupled with specific and enforced guidance as to what information should be made available and how. Considering what is available, surely better access to land information is not a matter of centralisation but of service.

Tony Black

TORT

NEGLIGENCE LIABILITY IN NEW CONSTRUCTION

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

The case of *Johnson v Mount Albert Borough*[1] has now been considered by the Court of Appeal, whose decision further clarifies the legal responsibilities of developers, builders, and inspecting local authorities in the context of new construction. It has become rapidly but firmly established through a line of cases including *Dutton v Bognor Regis Urban District Council*,[2] *Bowen v Paramount Builders Ltd*,[3] *Anns v Merton London Borough Council*,[4] and *Batty v Metropolitan Property Realisations Ltd*,[5] that duties of care are owed by builders, developers and inspecting authorities to subequent purchasers in respect of actual or threatened physical damage to the buildings themselves and associated economic loss. The Court of Appeal decision in *Mount Albert Borough and Sydney Construction Company Limited v Johnson*[6] clarifies three aspects of the liabilities of such persons in this still developing area of the tort of negligence:

(i) What constitutes the "damage" necessary to complete a cause of action in tort arising out of defective construction or careless certification. (The occurrence of the damage in this sense determines the commencement of the limitation period).

(ii) The nature of the developer's duty of care and the effect of his engagement of an independent contractor to do the actual building work.

(iii) The apportionment of responsibility between a builder or developer on the one hand and the inspecting authority on the other.

Damage and the accrual of the cause of action

At the time of the decision of the House of Lords in *Anns v Merton London Borough Council*[7] the proper approach to the commencement of the limitation period in these cases of latent defects in construction (usually defective foundations) had begun to appear settled in spite of an earlier conflict of judicial opinion on the issue. The view that a cause of action in tort against the builder accrues when the building is negligently constructed with its defective foundations or whatever and that a cause of action accrues against the inspecting authority when the foundations are negligently approved or passed — a view initially put forward by Lord Denning MR in *Dutton's* case[8] — had given way to the view that a cause of action only accrues when the defect emerges or becomes reasonably detectable. This approach, effectively introducing a date of knowledge principle, was adopted in *Sparham-Souter v Town and Country Developments Ltd*[9] by the English Court of Appeal including Lord Denning MR, who expressly withdrew what he had said on the point in *Dutton*. In theory the requirement of actual or constructive knowledge could delay the commencement of the limitation period even beyond the point when the defect causes actual physical damage to the structure (eg cracking of walls, twisting of door and window frames, separation of steps from a building) because these sorts of consequence might go unnoticed for a time. In practice however any such damage that was more than minimal would normally be reasonably detectable. What apparently influenced the Court of Appeal to take the approach it did was the view that the claim in these cases is essentially for diminution in the market value of the building and that diminution does not occur until the defect comes to light, usually, but not necessarily, by causing detectable physical damage. The rejection in *Sparham-Souter* of the date of certification as the time when an inspecting authority's negligence causes tortious damage and the implicit rejection of the date of construction as the

[1] [1977] 2 NZLR 530
[2] [1972] 1 QB 373
[3] [1977] 1 NZLR 394
[4] [1978] AC 728
[5] [1978] QB 554
[6] 18 October 1979, CA 160/77
[7] Supra, note (d)
[8] Supra, note (b)
[9] [1976] QB 858

relevant time for the builder influenced the New Zealand Courts in three subsequent cases viz, *Gabolinscy v Hamilton City Corportion*,[10] *Bowen v Paramount Builders Ltd*,[11] *Johnson v Mount Albert Borough*.[12] None of these cases however clearly resolved the question whether actual or constructive knowledge of the defect is essential before time begins to run or whether it is simply the occurrence of physical damage to the structure that is important. Likewise the House of Lords in *Anns* did not resolve this issue satisfactorily and on one view[13] has left the standing of the *Sparham-Souter* test in considerable doubt. Lord Salmon seemed clearly of the view that time would begin to run when physical damage to the structure first occurred and posed a threat to personal safety whether it was discoverable then or not. (His Lordship pointed out that it would be difficult for a defendant to show that the physical damage had occurred before it manifested itself so that in practice the date of damage and date of knowledge would tend to coincide). Lord Wilberforce, on the other hand, with whose judgment the remaining three members of the House agreed, was less clear on the limitation point. He held that in such a case the cause of action arises "when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it".[14] His Lordship did not specify a *perceived* danger and this suggests a similar view to Lord Salmon's. But in the next paragraph Lord Wilberforce indicated that the cause of action arose when the defects first *appeared*, possibly implying approval of the date of knowledge principle in *Sparham-Souter*. The English Law Reform Committee in its Final Report on Limitation of Actions[15] was troubled by the obscurity of *Anns* on this point and alarmed at the possible endorsement of a date of knowledge principle especially if it might be extended beyond the area of latent defects in buildings or chattels causing loss in market value. The Committee was critical of the *Sparham-Souter* test and preferred Lord Salmon's view that even in this limited area the occurrence of physical damage, not its reasonable discoverability, should start time running. The Committee also pointed out that the basic criterion in *Anns* of danger to health or safety of occupants was of limited value:

> "The test of present or imminent danger to the health or safety of occupiers is plainly applicable only to defects in immovable property, and probably to a proportion of such defects only: it is not suitable for general application."[16]

The Court of Appeal in *Mount Albert Borough v Johnson* also regarded the *Anns* criterion of danger to health or safety as of limited value, pointing out that it was the result of the emphasis in the background legislation on the health and safety of persons. In a joint judgment Cooke and Somers JJ sought a more generally applicable test for the accrual of the cause of action in these cases:

> "In *Bowen* all three members of this Court held that a purchaser in Miss Johnson's position can recover in tort for economic loss caused by negligence, at least when the loss is associated with physical damage. That is the current law in New Zealand. Even apart from the effect of *Bowen* as a precedent we are attracted to that view. Such a cause of action must arise, we think, either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution."[17]

These two times would normally coincide because the occurrence of the damage would usually reveal the defect but where it does not do so Cooke and Somers JJ prefer the view that the limitation period should not commence until the later time ie manifestation of the defect. This amounts, it is submitted, to affirmation of the date of knowledge principle put forward in *Sparham-Souter*. Richardson J did not state a view on this point. It was not strictly necessary for Cooke and Somers JJ to do so either because there was not really an issue of limitation at all on the facts. The plaintiff had purchased her flat in 1970, damage had begun to appear within a year and she had commenced her action in 1973. If a cause of action had accrued to her at all it could only have done so after she acquired her interest in the property and her action was therefore commenced well within the six year period. The real issue then was not limitation but whether a cause of action had accrued to her at all ie whether she had suffered actionable damage. This in turn

[10] [1975] 1 NZLR 150

[11] Supra note (c) and see Smillie 'Liability of Builders, Manufacturers and Vendors for Negligence' (1978) 8 NZULR 109, 126

[12] Supra, note (a)

[13] The English Law Reform Committee in its Twentyfirst Report (Final Report on Limitation of Actions) September 1977, Cmnd 6923, para 2.19

[14] Supra, note (d) at p 760

[15] Cmnd 6923, 1977

[16] Ibid para 2.19

[17] pp 10 — 11

depended on whether distinct damage had been caused to the flat during her ownership. The defendants argued that the cracking and other physical damage which occurred after her purchase was merely the continuation of earlier damage that had manifested itself in 1967 and had been the subject of ineffective remedial work, including extra piles. If that argument were accepted then, depending on what view was taken of the problem of continuous damage, the plaintiff might fail, not because she had commenced her action out of time but because no cause of action would ever have accrued to her. (Nor had a prior cause of action been assigned to her). The Court of Appeal however regarded the damage occurring in 1970 and after as distinct from that which occurred in 1967 and therefore giving rise to a separate cause of action. In reliance on observations in *Bowen*[18] this issue was treated as "a question of fact and degree".

> "Between the slight damage during the ownership of the original purchasers and the considerable damage after Miss Johnson bought there were a difference and an interval marked enough to justify treating the later damage as distinct."[19]

Richardson J reached exactly the same conclusion on the facts.

The developer's duty

A second defence raised by Sydney Construction, which was only a development company and did not do the building work itself, was to the effect "that the interposition of a [firm of builders] as independent contractors shielded Sydney from liability to the plaintiff".[20] The Court of Appeal rejected this line of argument for two reasons, one turning on the particular facts of the case, the second being of more general significance. The first factor was the very close relationship between Sydney and the firm.

> "It was not a case of a landowner engaging a firm of builders and leaving everything to them. While not quite such a cooperative project as the one between the development company and the building company in *Batty*, it is sufficiently analogous to warrant treating the parties as jointly liable for the purposes of this case."[21]

The second reason was that in the Court's view the duty of care owed by a developer to subsequent purchasers is a non-delegable one.

> "We would hold that [the duty of a development company] is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."[22]

The learned Judges were aware of no direct authority on this point but considered that the effective protection of purchasers justified such a ruling.

Contribution

The third main issue was the apportionment of responsibility between Sydney Construction and the inspecting authority (Mount Albert Borough). In the Supreme Court Mahon J had regarded the two defendants as equally to blame. Since his decision however the House of Lords had decided *Anns* in which Lord Wilberforce expressed the view that the primary responsibility for construction in accordance with bylaws lies with the builder, the inspector's function being merely supervisory. This influenced Cooke and Somers JJ's conclusion that the Council's negligence should not "be put on a par [with Sydney's] in the matter of fault".[23] The learned Judges continued:

> "As well as that intitial factor, there are further factors here: the omission of Sydney and its contractors in 1967 either to take thorough remedial action or to tell the Council anything about the problem that had arisen. The Council were thus deprived of the opportunity of inspecting and requiring more fundamental remedial measures at that time — measures which could well have resulted in rectification before Miss Johnson purchased."[24]

In the result they apportioned responsibility between the defendants as four-fifths to Sydney and one-fifth to the Council.

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[18] per Cooke J at p 424
[19] per Cooke and Somers JJ at p 13
[20] per Cooke and Somers JJ at pp 8 — 9
[21] per Cooke and Somers JJ at p 14
[22] per Cooke and Somers JJ at p 15. This aspect of their judgment was concurred in by Richardson J
[23] per Cooke and Somers JJ at p 17
[24] Idem

ADMINISTRATIVE LAW

THE DUTY TO ACT FAIRLY IN ADMINISTRATIVE LAW

By J L CALDWELL, *Lecturer in Law, University of Canterbury.*

The concept of "the duty to act fairly" has been clouded by the controversy concerning its application and content. The judgment of Mahon J in *Meadowvale Stud Farm Ltd v Stratford County Council* [1979] 1 NZLR 342 is therefore of considerable significance in that it plainly declares that in both application and content the duty to act fairly is quite separate from the duty to comply with the rules of natural justice. The essence of Mahons J's reasoning is that "It is clearly wrong to take one of the arms of the natural justice doctrine, in this case the nemo iudex principle and to introduce it as an element of fairness to be observed by an official or tribunal exercising an administrative function only." (at p 347).

Such reasoning will disappoint the administrative lawyers who believed that the landmark decision of *Ridge v Baldwin* [1964] AC 40 had finally buried any notion that the rules of natural justice applied only to bodies which could be conceptually classified as "judicial". Furthermore it is submitted that the insistence of Mahon J that the rules of fairness and natural justice are not to be equated may produce substantial uncertainty as to the content of the duty to act fairly.

The facts of the case were straightforward. The applicant had carried on business as a pig farmer for many years without any objection being raised. In 1977 the adjoining occupier of land, a dairy company, complained to the respondent Council about the operations of the applicant. The applicant thereupon applied to the Council for an offensive trades licence in terms of the Council's bylaw and s 54 (1) of the Health Act 1956. The Council, aware of the dairy company's opposition, decided that a formal hearing should be held before a Council sub-committee with both the applicant and dairy company having legal representation. The Council was not expressly bound by statute or bylaw to grant such a hearing. At the hearing the dairy company argued that the pig farm should be closed down. The sub-committee's decision was a recommendation that a licence be granted subject to various conditions. The Council adopted this recommendation. However one of the conditions prohibited the applicant from boiling down dead stock. This activity was essential to the applicant's business, and the condition rendered the licence useless from the applicant's point of view.

The applicant sought judicial review of the Council's decision on the ground that five of 12 councillors were supplying shareholders of the dairy company. Of those five Councillors one was a director of the company who at a previous Council meeting had insisted that the applicant apply for a licence.

Mahon J held that because the Council's function was "purely administrative" the nemo iudex in sua causa principle did not apply. However he held that a duty to act fairly did apply and that this required "the Council to ensure its ultimate decision was reached by a process which would not inspire legitimate distrust by the applicant of the integrity of that decision." (p 348) This necessitated "impartial consideration of the relevant application" (p 348).

Because the Council's decision did not satisfy these tests, Mahon J set the decision aside and ordered the Council to reconsider the application without the presence of the shareholding councillors (unless a quorum was otherwise unobtainable).

On the basis of previous judicial authorities or bias this result is predictable and unremarkable. Moreover the duty to act fairly, as defined, would seem closely akin to the rules against bias. The real significance of the case lies in the firm rejection by Mahon J that he had "covertly applied the nemo iudex principle to a purely administrative function" (p 349). Thus not only have the concepts of natural justice and fairness been rigidly divorced, but the need to make a conceptual classification of decision-making bodies has been reintroduced. Although some administrative lawyers in the past have argued that this is a correct and desirable approach, it is respectfully submitted that it is fraught with difficulty and is inconsistent with leading judicial authorities.

The history of "fairness" prior to Re H K

It is often said that Lord Parker C J introduced the requirement of a duty to act fairly in administrative functions in the case of *Re H*

K (an infant) [1967] 2 Q B 617. this is a misunderstanding of the position. In cases prior to *Re H K* the content of the rules of natural justice was usually equated with a requirement that the decision-maker "act judicially"; however there were abundant dicta in which the rules of natural justice were said to require the decision-maker "to act fairly". It was all a question of phraseology.

In the House of Lords decision *Local Government Board v Arlidge* [1915] AC 120, 133 Viscount Haldane L C used the two phrases indiscriminately when holding that the board should act "judicially and fairly". Similarly in a much cited dicta from the case of *Board of Education v Rice* [1911] AC 179 Lord Loreburn L C, discussing procedural obligations of the Board, held at p 182 ". . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything." Again Lord Greene MR in *Johnson (B) Co Builders Ltd v Minister of Health* [1947] 2 All ER 395, 400 analysed a Minister's duty "to act fairly" in a "quasi-judicial" situation.

Later English cases reveal the same trend. The Privy Council opinion in *Ceylon University v Fernando* [1960] 1 WLR 223, 233 declared that the University "must comply with the elementary principles of 'fairness' . . . or in other words with the principles of natural justice." Harman L J in the Court of Appeal in *Ridge v Baldwin* [1963] 1 QB 539, 578 affirmed that natural justice is "only fair play in action."

Likewise in the important New Zealand case of *NZ Dairy Board v Okitu Dairy Company* [1953] NZLR 366, 402 Finlay J held "there is ample authority that even an administrative body may in some respects in the course of the exercise of its functions be required to act judicially." He therefore concluded at p 404 that the Board should act "according to the fundamental principles of fairness."

Thus Lord Parker CJ in *Re H K* [1967] 2 QB 617 was expressing the content of natural justice in a quite traditional way. Presumably he chose the phraseology of "acting fairly" rather than "acting judicially" because the concept of a duty to act judicially still conveyed the idea that a decision-maker should adopt Court-like procedure. The limited procedural obligations imposed on an immigration officer were therefore best expressed by the language of "fairness".

Indeed the judgments in the Divisional Court make it clear that "fairness" was merely seen as the best description of the rules of natural justice in the particular context. For example Lord Parker CJ noted that the term "acting judicially" was generally understood to indicate an inquiry and stated that the limited extent to which the rules of natural justice applied was merely a duty to act fairly (p 630). More explicitly Salmon LJ held at p 632-3 "I have no doubt at all that in exercising his powers under this section the immigration officer is obliged to act in accordance with the principles of natural justice. That does not of course mean that he has to adopt judicial procedures or hold a formal inquiry, still less that he has to hold anything in the nature of a trial but he must act fairly, as Lord Parker CJ has said, in accordance with the principle of natural justice."

The history of the "duty to act fairly" since Re H K

The terminology of fairness became very popular with the English Courts in the early years of this decade. For instance Lord Denning asserted in *Breen v AUEW* [1971] 2 QB 175, 190 that it was well settled that a statutory body was under a duty to "act fairly" irrespective of whether its functions could be described as judicial, quasi-judicial, or administrative. There were however a few regrettable dicta distinguishing fairness from natural justice and confining it to administrative functions. For example Lord Pearson stated in *Pearlberg v Varty* [1972] 2 All ER 6, 17 "Where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required although as 'Parliament is not to be presumed to act unfairly' the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness." Citing this dicta Laskin CJC recently claimed in *Re Nicholson* (1979) 88 DLR (3d) 671, 680-1 that the requirements of fairness in administrative functions involved less than the requirements of natural justice in judicial functions.

Such dicta were unfortunate for fairness separated from the case-law on natural justice became hazy in its scope. It was perhaps for this reason that in Gregory v Bishop of Waiapu [1975] NZLR 705, 712 Beattie J confessed he found difficulty with the concept of "fairness" and that Mahon J in the Meadowvale Stud Farm case also suggested there is an "inherent difficulty" in appraising fairness (p 346).

Generally the New Zealand cases reveal judicial uncertainty on the question of fairness. Richmond P in Stininato v Auckland Boxing Association [1978] 1 NZLR 1 indicated that fairness only applied to ". . . the exercise of administrative discretions (as opposed to judicial

or quasi-judicial discretions)" (p 5) but in the same case Cooke J at p 24 expressly treated the concepts as synonymous. After a comprehensive review of the authorities in Chandra v Minister of Immigration [1978] 2 NZLR 559 Barker J concluded only tentatively that the doctrines of fairness and natural justice were distinct. He therefore proceeded to discuss the exercise of the Minister's powers on the alternative basis that natural justice and fairness were in fact synonymous.

The alternative reasoning of Barker J would seem to have been more consistent with the simple truth propounded by Lord Morris in *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 to the effect that "Natural justice is but fairness writ largely and juridically . . . nor is it a leaven to be associated only with judicial or quasi-judicial occasions." (p 708) Noting this dicta, McCarthy P emphasised in *Lower Hutt City v Bank* [1974] 1 NZLR 545, 549 that "whether the principles of natural justice should be applied to the function of the Council does not turn on any fine classification of that function as judicial or administrative."

Thus until the cases of *Chandra v Minister of Immigration* and *Meadowvale Stud Farm v Stratford County Council* the weight of high New Zealand authorities indicated the concepts of fairness and natural justice were interchangeable. In 1976 Quilliam J could roundly assert in the case of *Tobias v May* [1976] 1 NZLR 509 that it was "well recognised and established" that the audi alteram partem rule applied to administrative authorities.

Recently this whole matter of phraseology was neatly analysed by Megarry VC in *McInnes v Onslow Fane* [1978] 3 All ER 211, 219. That learned Judge noted that the term natural justice was capable of applying to the whole range of situations indicated by such terms as judicial, quasi-judicial, or administrative; but he suggested that the further the situation was from a judicial or justiciable one the more suitable fairness may be as a term in that it lacked the word "justice".

However now on at least two occasions Judges of the New Zealand Supreme Court have held the concepts of fairness and natural justice to be distinct and have resurrected the classification approach. Problems with this approach become apparent when the judgment in the *Meadowvale Stud Farm* case is examined.

The power of the Council to grant offensive trade licences

The ordinary course of proceedings involved the Council receiving an application and then any objections, notifying the applicant of objections received and finally making their decision after receiving the applicant's response. It will be recalled that in this instance the Council, of its own volition, decided that a formal hearing before a Council sub-committee should be given. If the ordinary course of proceedings had been followed Mahon J felt that not only would natural justice be inapplicable to this power which he described as "purely administrative", but he also doubted, obiter, if lack of fairness would have provided a basis for attacking the decision (p 347). The effect of this dictum seems to be that even though a licensing power may have a crucial effect on a person's livelihood and interests it cannot be assumed a duty to act fairly will apply. The scope and application of the duty becomes even more obscure.

It is however arguable if a power of decision which involves the Council taking cognisance of both an applicant's and objector's point of view can truly be described as "purely administrative". Under the old classification approach the power to grant or revoke licences was often labelled as "judicial" and the rules of natural justice consequently applied. Certainly the Privy Council held otherwise in *Nakkuda Ali v Jarayatne* [1951] AC 66 but rarely has a Privy Council authority been so undermined by distinguishing and adverse judicial comment.

Early English authorities established that the power of local councils to grant cinema licences (R v London County Council ex parte the Entertainments Protection Association Ltd [1931] 2 KB 315) and music and dancing licences (R v London County Council ex parte Akkersdyk [1892] 1 QB 190) were judicial acts, as was the power of licensing Justices to grant beerhouse licences (R v Woodhouse [1906] QB 501). The position of licensing authorities was summed up by Sankey J in R v Brighton Corporation ex parte Tilling Ltd (1916) 85 LJKB 1552. He said at p 1555 "People who are called upon to exercise the functions of granting licences are to a great extent exercising judicial functions; and although they are not bound by the strict rules of evidence and procedure observed in a Court of Law they are bound to act judicially. It is their duty to hear and determine according to law and they must bring to that task a fair and unbiased mind . . . finally they must treat all applicants fairly and alike."

More recently Lord Denning MR in R v Gaming Board of Great Britain ex parte Benaim [1970] 2 QB 417 referred to the influence of Nakkuda Ali and robustly declared at p 430 "At another time it was said the princi-

ples of natural justice did not apply to the grant or revocation of a licence. That too is wrong."

Recent support for these views is found in the South Australian case R v Corporation of the City of Whyalla ex parte Kittel (1979) 20 SASR 386. King CJ discussed the question whether a council's decision on an application to establish a funeral parlour was vitiated for bias and held at p 390 "I have no doubt that the Council in considering applications of this kind is required to act judicially in the broad sense of that expression and is bound by the common law rules of natural justice."

In the past both the New Zealand Supreme Court (*Williamson v Mayor of Auckland* [1925] NZLR 96) and the High Court of Australia (*Banks v Transport Regulation Board* (1969) 119 CLR 222) have held that the power to revoke transport licences attracts the rules of natural justice. As Barwick CJ pointed out in the High Court "The nature of the power given to the Board and the consequence of its exercise combine, in my mind, to make it certain that the Board is bound to act judicially" (p 239). Such a dictum is highly pertinent when considering the power of the Stratford Council to grant an offensive trades licence, for the right of the applicant to continue trading as he had done for many years was obviously dependent on the grant of an effective licence. Thus in substance the exercise of this power was closer to the revocation of an existing licence than to a grant conferring new trading privileges. In such a situation the need for natural justice becomes even more compelling.

The importance and effect of this power to grant a licence was in fact recognised by the Stratford Council itself when it decided a formal hearing should be held. Mahon J rejected the argument that the requirements of natural justice were imported as a necessary corollary of the Council's adopted procedure. His Honour held that the Council had merely chosen an evidentiary process to provide it with information prior to a purely administrative decision. However, because this procedure was adopted it was held that a duty to act fairly did arise.

It is worth comparing this approach with that adopted by the English Divisional Court in an analogous case. *R v Hendon R D C ex parte Chorley* [1933] 2 KB 969 concerned an application made to the Council for permission to develop certain premises. Although not bound by statute to do so, the Council advertised the application and invited and considered objections. The fact that the Council had adopted this procedure influenced Humphreys J in his view that "it was impossible in this case to say that the Council was not acting in a quasi-judicial manner" (p 705). And because of the presence of a financially interested councillor the Council's decision was quashed on the grounds of bias.

Thus the decision of Mahon J highlights the perplexity of the classification approach. Can the other authorities on licensing be reconciled with the reasoning in the *Meadowvale Stud Farm* case? How does one determine whether a power to grant licences is judicial, quasi-judicial, or administrative? Why should different duties flow from different classifications?

Finally in this context the provision in s 55 of the Health Act 1955 for a statutory right of appeal from the Council's decision to a Board of Appeal is of interest. As the Board of Appeal almost certainly has to comply with the rules of natural justice (s 124 of the Health Act 1955), this is an indication that the statute intended the rules of natural justice to apply at the level of the Council's decision (see Willes J in Cooper v Wandsworth Board of Works 14 CB (NS) 180 143 ER 414, 419).

The flexibility of natural justice

Advocates of the separation of the concepts of fairness and natural justice often argue that the obligation of fairness in administrative functions is less than that of natural justice. They also generally claim that whereas the content of natural justice is relatively certain, the content of fairness is less so. Thus in the *Meadowvale Stud Farm* case Mahon J argued that the doctrine of fairness, unlike the principles of natural justice, defied any general classification and he stated at p 346 ". . . it is not possible as it is with natural justice for the law to prescribe a code of administrative procedure."

Yet the assertion that the rules of natural justice are relatively certain in content is difficult to reconcile with the oft cited dictum of Tucker LJ to the effect that the content of natural justice is entirely dependent on the circumstances of the case (*Russell v Duke of Norfolk* [1949] 1 All ER 109, 118). As Lord Atkin put it in *General Medical Council v Spackman* [1943] AC 627 ". . . procedure which may be very just in deciding whether to close a school or insanitary house is not necessarily right in deciding a charge of infamous conduct against a professional man." For this reason it would not be easy even in the context of natural justice to draft a code of administrative procedure.

The content of natural justice in a "purely

administrative context may well be more limited than that in a full-blown judicial context. That is not to say however that natural justice is inapplicable in the administrative context. If, however, fairness involves less than the often minimal requirements of natural justice, it does indeed become difficult to describe the requirements of fairness.

Is the nemo iudex rule more limited in scope than the audi alteram partem rule?

Although the cases of *Chandra v Ministry of Immigration* and *Meadowvale Stud Farm v Stratford County Council* seem to indicate that neither limb of natural justice is applicable to administrative powers, it would be possible to confine the effect of the judgment of Mahon J to the nemo iudex rule. The nemo iudex principle has received less judicial attention than the audi alteram principle and in *Lower Hutt City v Bank* [1974] 1 NZLR 545, McCarthy P at p 549 raised the question whether modern observations extending the audi alteram partem rule would be applied to the nemo iudex rule. In the well-known House of Lords decision *Franklin v Minister of Town and Country Planning* [1948] AC 87, 902 Lord Thankerton held the bias principle was inapplicable to administrative functions and his speech was neither referred to nor criticised by their Lordships in *Ridge v Baldwin*.

However, given that the nemo iudex rule is part of the all-embracing need for a "fair hearing" it is hard to perceive a logical reason for any differentiation between the two limbs. Indeed a common argument for not applying the audi alteram partem rule to administrative functions is inappropriate with respect to the nemo iudex rule. Even if it is conceded that the obligation of some sort of "hearing" leads to undue inefficiency and delay in administrative decision-making, it can scarcely be argued that lack of bias hinders sound administration.

Mahon J in his judgment suggested that in many administrative functions a local authority was of necessity making a determination by which its own rights would be materially affected and that therefore the bias principle should not be applied. However the Courts have already laid down reasonable guidelines on challenges in this sort of situation and complete impartiality and detachment is not required. The Courts merely insist that the body has not completely closed its mind on the issue (see for example *Lower Hutt City v Bank*).

Moreover in the *Meadowvale Stud Farm* case it was the interests of individual councillors rather than those of the Council itself which were at stake. It has been suggested by King CJ in *The City of Whyalla ex parte Kittel* (1979) 20 SASR 386, 392 that different considerations should apply in such a case.

In fact it is a little surprising that the issue of pecuniary interest was submerged in Mahon's J judgment by his emphasis on the appearance of partiality in the decision-making process. It is apparent that the Councillors who were supplying shareholders had a financial interst in the success of the dairy company which was arguing that its production was affected by the continuation of the applicant's operation. The respondent Council argued that "the status of these shareholders could not be presumed to have influenced their consideration of this application for a licence having regard to the minimal interest which they collectively had in the operations of the dairy company." Yet a financial interest is generally said to raise an "automatic" or "irrebutable" presumption of bias (Anderton v Auckland City Council [1978] 1 NZLR 657, 680) irrespective of how small that interest is. Blackburn J observed in R v Hammond (1863) 9 LT 423 that "the interest to each shareholder may be less than a farthing but it is still an interest." If pecuniary interest were to be in issue, it is hard to perceive any good reason why this automatic presumption of bias should arise in judicial functions alone.

Conclusion

The *Meadowvale Stud Farm* decision is not the first decision in New Zealand to attempt to sever fairness from natural justice but it is submitted, with great respect, that such an attempt is unwise. Emphasis on fairness as a concept removed from the content of natural justice may result in beneficial developments in the law, eg the novel suggestion of the need to act consistently in *H T V Ltd v Price Commission* 1976 ICR 170; however it is more likely such an emphasis will result in a return to the uncertainty and conceptualism which so plagued the law during the "twilight period" of natural justice.

Postcript

Since the writing of this article Vautier J has delivered judgment in *Smitty's Industries Ltd v A-G* (unreported), judgment 15 November 1979, Whangarei, A100/78. His Honour raises doubts as to whether the concept of fairness is distinct from natural justice and he adopts the approach of Megarry V C in *McInnes v Onslow Fane* [1978] 3 All ER 211, 219. Although Vautier J does not refer to the *Meadowvale Stud Farm* case his judgment lends some support to the views expressed above.

PRACTICE DIRECTION — DISTRICT COURTS

The following is the mode of addressing District Court Judges and the titles to be used in Court lists when cases are listed for hearing before them.

Mode of Address

District Court Judges when sitting in Court should be addressed as "Your Honour".

Listing

When a case is listed for hearing before a District Court Judge the Court list should refer to him or her as the case may be as "his (or her) Honour Judge X". If there are District Court Judges with the same surname then his or her initials should follow the surname.

Court Documents

In ordinary Court documents such as summonses, orders and the like the correct description is Chief District Court Judge; District Court Judge.

Forms

Existing forms are to be used until supplies are exhausted. Section 19 (6) of the District Courts Amendment Act 1979 provides:

> "Any form that was printed, before the commencement of this section, in the form prescribed by or under, and for the purposes of the principal Act or the Summary Proceedings Act 1957 or any other enactment may be used for such purposes after the commencement of this section, and it shall not be necessary, merely because of any of the provisions of this Act, to alter any printed material in any such form."

The form of intitulment for documents which are not printed is:

> "In the District Court
> Held at Wellington"

Gowns

On the recommendation of the Royal Commission on the Courts a simple black gown will be worn by District Court Judges. However, the wearing of such a gown will be restricted to criminal and quasi criminal proceedings between the citizen and State and does not extend to any proceedings under the Childrens and Young Persons Act or the Domestic Proceedings Act. Counsel are not required to robe when appearing in any proceedings presided over by a District Court Judge. When jurisdiction is given to District Court Judges to preside over criminal jury trials, counsel will not be required to robe.

Transfer of Proceedings

Provision is made under s 12 of the District Courts Amendment Act for the transfer of proceedings from the High Court to the District Court on application. As early fixtures can be given in the District Court for the hearing of civil claims within the jurisdiction of the Court, application should be made where necessary for such transfer.

D J SULLIVAN
Chief District Court Judge

3 March 1980

RECENT ADMISSIONS

Barrister and Solicitors

Allan, C C H	Christchurch	15 February 1980
Archibald, W A	Auckland	15 February 1980
Ashraf, F K	Auckland	15 February 1980
Aspell, P D	Auckland	6 December 1979
Bagia, J	Auckland	15 February 1980
Barker, C G	Christchurch	15 February 1980
Barter, S H	Auckland	15 February 1980
Bartlett, K R	Auckland	15 February 1980
Blackwood, R H	Nelson	25 February 1980
Bouchier, J M C	Auckland	15 February 1980
Boyce, P A L	Christchurch	15 February 1980

Boyle, J D	Auckland	15 February 1980
Boyle, R N	Auckland	15 February 1980
Brennan, R L	Christchurch	15 February 1980
Browne, C P	Auckland	15 February 1980
Bruce, A J K	Christchurch	15 February 1980
Burt, A D K	Auckland	15 February 1980
Bygrave, J A	Auckland	15 February 1980
Carmine, P S	Auckland	15 February 1980
Chang, P M F	Wellington	19 December 1979
Chignell, M E	Auckland	15 February 1980
Chiu, Y K	Auckland	27 September 1979
Clews, G D	Auckland	15 February 1980
Condon, W M	Auckland	19 December 1979
Cone, G P	Auckland	16 November 1979
Corcoran, T S	Christchurch	15 February 1980
Corskie, A J	Christchurch	15 February 1980
Couch, A A	Christchurch	15 February 1980
Couper, B J	Auckland	15 February 1980
Crosby, M R	Auckland	30 November 1979
Cunningham, J C	Auckland	19 December 1979
Dalzell, V A	Christchurch	13 December 1979
Davis, A J	Christchurch	5 December 1979
Deane, K A	Auckland	15 February 1980
De Broekert, M B	Christchurch	15 February 1980
Deere, B J	Auckland	15 February 1980
Dillon, J P A	Auckland	15 February 1980
Durie, J H	Christchurch	15 February 1980
Eastgate, P C	Christchurch	15 February 1980
Edmiston, R N	Auckland	15 February 1980
Edmundson, J B	Christchurch	15 February 1980
Egden, P J	Christchurch	15 February 1980
Etherington, C W	Christchurch	15 February 1980
Farrar, A A	Christchurch	15 February 1980
Feeley, J	Christchurch	15 February 1980
Ferrier, M A B	Auckland	15 February 1980
France, D S H	Christchurch	15 February 1980
France, R H J	Auckland	15 February 1980
Fraser, A L	Auckland	15 February 1980
Fraser, R A M	Christchurch	15 February 1980
Free, D A	Auckland	15 February 1980
Galloway, H L	Christchurch	15 February 1980
Gates, D J	Christchurch	15 February 1980
Gedye, M J	Auckland	15 February 1980
Gifford, M A	Christchurch	15 February 1980
Gin, G W J	Christchurch	12 December 1979
Goldsbury, R M	Wanganui	22 February 1980
Graves, M E	Auckland	15 February 1980
Grice, C M	Nelson	25 February 1980
Griffiths, P B	Auckland	15 February 1980
Gummer, M R	Auckland	15 February 1980
Hallifax, R G De C	Christchurch	15 February 1980
Handley, J R	Wanganui	22 February 1980
Heeps, T R	Auckland	15 February 1980
Hellaby, F J R	Auckland	15 February 1980
Hembrow, S J	Christchurch	15 February 1980
Hetherington, C M	Auckland	19 December 1979
Hitchcock, J M	Auckland	19 December 1979
Hockley, J E	Christchurch	15 February 1980
Hockly, M J	Auckland	15 February 1980
Hunter, A L	Christchurch	15 February 1980
Irvine, G J	Christchurch	15 February 1980
Jackson, D M	Auckland	15 February 1980
Jackson, T C	Auckland	15 February 1980
Jamnadas, D K	Christchurch	15 February 1980
Jeffcoat, M C	Auckland	19 December 1979
Jie, N C	Christchurch	15 February 1980
Joblin, R S	Christchurch	15 February 1980
Kanji, G G	Auckland	15 February 1980
Kearney, A T	Christchurch	15 February 1980
Kellar, P R	Christchurch	15 February 1980
Kelly, L G	Auckland	15 February 1980
Kelsey, E J	Auckland	15 February 1980
Kibblewhite, G D	Auckland	15 February 1980
Kidd, M J	Auckland	19 December 1979
Knight, R C	Auckland	15 February 1980
Knight, R L	Auckland	19 December 1979
Kumar, G	Auckland	15 February 1980
Lal, J D	Auckland	15 February 1980
Langerak, J A	Auckland	15 February 1980
Lawry, J M	Christchurch	15 February 1980
Lawson, A A	Auckland	15 February 1980
Leheron, C J	Wellington	19 December 1979
Lewis, V S	Auckland	15 February 1980
Lind, M S	Auckland	15 February 1980
Luhrs, J A	Christchurch	15 February 1980
McBrearty, D J	Christchurch	15 February 1980
McCartney, M J	Christchurch	15 February 1980
McCoy, G J	Christchurch	15 February 1980
McCully, M S	Auckland	15 February 1980
McDonald, A G	Christchurch	15 February 1980
MacDonald, G S A	Auckland	15 February 1980
MacFarlane, B J	Auckland	15 February 1980
MacKenzie, F K	Auckland	15 February 1980
McLeod, G M	Christchurch	15 February 1980
McShane, H M	Auckland	15 February 1980
Madden, H M	Auckland	15 February 1980
Maehl, A A	Auckland	15 February 1980
Mahon, A G	Auckland	15 February 1980
Manning, W G	Auckland	8 February 1980
Marks, P R	Auckland	15 February 1980
Marshall, R G	Nelson	25 February 1980
Mathias, J B	Christchurch	15 February 1980
Monroe, R A	Auckland	15 February 1980
Moody, H P	Auckland	15 February 1980
Morgan, J	Auckland	15 February 1980
Murray, J D	Auckland	15 February 1980
Nagels, H E	Auckland	15 February 1980
O'Brien, G W	Wellington	19 December 1979
O'Connor, P J	Christchurch	15 February 1980
O'Neill, D J S-F	Christchurch	15 February 1980
Poole, D G	Auckland	15 February 1980
Porter, F R	Auckland	15 February 1980
Poulgrain, R J	Auckland	15 February 1980
Powdrell, S B	Auckland	15 February 1980
Proverbs, P G	Nelson	25 February 1980
Reuhman, C M	Christchurch	15 February 1980
Reuhman, J P	Christchurch	15 February 1980
Rice, J M	Auckland	14 December 1979
Richardson, G P	Christchurch	15 February 1980
Ritchie, S	Christchurch	15 February 1980
Ross, C J	Wellington	29 January 1980
Ruane, C M	Christchurch	15 February 1980
Russell, R J	Christchurch	15 February 1980
Russell, T S	Auckland	15 February 1980
Rutherford, N E	Auckland	15 February 1980
Sames, S C	Auckland	15 February 1980
Saunders, M L F	Auckland	15 February 1980
Savory, R F	Auckland	15 February 1980

Scannell, S J	Christchurch	15 February 1980
Searle, K J	Christchurch	15 February 1980
Shine, L M A	Auckland	3 December 1979
Shorter, R J	Auckland	15 February 1980
Smith, A T H	Christchurch	17 December 1979
Smith, L O	Auckland	15 February 1980
Smith, L R	Christchurch	15 February 1980
Smith, P C	Wellington	19 December 1979
Smith, R I	Auckland	15 February 1980
Spain, T M	Auckland	15 February 1980
Steel, J B B	Auckland	15 February 1980
Stiassny, M P	Auckland	15 February 1980
Stilwell, M F	Christchurch	15 February 1980
Storey, AM	Auckland	15 February 1980
Sullivan, P	Christchurch	15 February 1980
Tanner, G S	Auckland	15 February 1980
Taylor, P B	Auckland	15 February 1980
Taylor, S C	Christchurch	15 February 1980
Tracy, S	Auckland	15 February 1980
Turner, D C	Auckland	15 February 1980
Turton, J A	Wellington	14 December 1979
Vass, K	Christchurch	15 February 1980
Von Keisenberg, R F	Auckland	15 February 1980
Waalkens, A H	Auckland	15 February 1980
Wagg, B T	Christchurch	15 February 1980
Walls, J M	Auckland	15 February 1980
Webster, D B	Auckland	15 February 1980
Whitlock, M D	Auckland	15 February 1980
Wiles, G D	Auckland	15 February 1980
Williamson, P H	Christchurch	15 February 1980
Wojcik, K M	Auckland	15 February 1980
Wong, S A	Auckland	15 February 1980
Woods, W J	Christchurch	15 February 1980
Wotherspoon, M L	Auckland	15 February 1980
Yan, M K L	Christchurch	15 February 1980

TRUSTS AND TRUSTEES

THE CONTINUING DENIAL OF PATERFAMILIAL DUTY

By MICHAEL FLANNERY, *a Wellington solicitor who now adds a "footnote" to his two-Part series on The Judicial Variation of the Private Trust ([1979] NZLJ 275, 300).*

The New Zealand Supreme Court periodically denies applicants seeking the judicial variation of beneficial interests under trusts both the rightful exercise and tangible benefits of the paterfamilial duty with which it is endowed by the first proviso to s 64A (1) of the Trustee Act 1956.

That proviso reads:

> Provided that . . . the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and in determining whether any such arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs.

The Supreme Court supplies the consent for minors, and for incapable, unborn, unascertained and unknown persons. The Court may refuse to approve an arrangement because of the effect it might have on adult consenting parties but the Court cannot override refusal of consent by beneficiaries sui juris. However it is the arrangement as a whole that the Court must approve and so when exercising its discretion, the Court can override the decision of adult beneficiaries to give consent.

The New Zealand section is negative in its form because it directs that the Supreme Court shall not approve an arrangement on behalf of any person (except persons within para (d)) if that arrangement is to his detriment whereas the Variation of Trusts Act 1958 (Eng) directs that the Court shall not approve an arrangement unless the carrying out thereof would be for the benefit of that person. New Zealand, then, prohibits detriment and England demands benefit but New Zealand can look at all benefits that arise directly and indirectly including the welfare and honour of the applicant's family.

New Zealand substituted "no detriment" for "benefit" when it copied the Variation of Trusts Act 1958 (Eng). Its enactment was the first with reference to ". . . the welfare and honour of the family . . ." that may possibly indicate the Legislature's awareness that the status and role of the person and his family are not to be governed exclusively by monetary considerations. That implicit intention has not always found reflection in the work of the Supreme Court where often recently there has been failure to apply the generality of the discretion within the prevailing social, filial and economic climate of the day. Indeed there appears more judicial wisdom in *Re Aitken* [1964] NZLR 838 (McGregor J); *Re Bryant* [1964] NZLR 846 (T A Gresson J); *Re Parker* [1964] NZLR 573 (Hardie Boys J) and in the signal

decision of Sir Owen Woodhouse in *Re Bodle* [1970] NZLR 750 than in a cluster of comparable decisions.

The wording of the first proviso to subs (1) enables the Court to subordinate the interests of an individual to the interests of his family: *Re Bodle*. It expressly confers upon the Court the paterfamilial status which Pennycuick J in *Remnant's Settlement Trust* [1970] 2 WLR 1103 extracted from the differently worded English section: Harris, *Variation of Trusts*, Modern Legal Studies (Sweet & Maxwell, 1975).

Confusion over jurisdictional essential and discretionary power

Jurisdiction is separate from and the condition precedent to the exercise of discretion. That distinction is not always made when s 64A is applied. Once the applicant has jurisdiction by demonstrating the absence of detriment then the Supreme Court "may if it thinks fit by order approve" that arrangement on behalf of the applicant because when the Court considers that the arrangement is to the detriment of the applicant (and for that purpose it may consider all direct and indirect benefits accruing to the applicant including the welfare and honour of his family) then it has no discretion to exercise. The possibility then of "an unfettered discretion" does not and cannot arise.

The Supreme Court may approve the arrangement if it is not to the detriment of the person.

The Supreme Court must not approve the arrangement if it is to the detriment of the person.

Strictly, it is not necessary at all for the Court to examine the nature of the detriment (and whether it is felt to be moral, social, filial, educational, financial or otherwise) because once it has found that there *is* a detriment then there is no discretion to exercise.

A detriment is a detriment — and whether it is real or potential (and perhaps even imaginary or illusory). However the presence of a real or threatened detriment may be offset by a present or potential benefit. Accordingly, it is the availability of that counter-balancing effect in the exercise of the Court's discretion that *has* given the New Zealand Court more than a fractionally wider discretion. It may well be that the New Zealand Court now needs to give specific utterance on that matter and always to differentiate carefully between the matter jurisdictional and the element discretionary so that it can fully carry out its inherent and statutory paterfamilial duty. The Supreme Court in this context has an equitable jurisdiction and it is exercising an equitable discretion to protect the rights of infants and unborn persons. It must act within the law as parens patriae and by its words in its judgments it must be seen to so act. The matter is as simple (and as important) as that.

Indeed the counter-balancing effect of benefit over detriment gained brief, inchoate mention by Sinclair J in *Re the Will of A N Sutherland* (Auckland, 10 July 1979: A1416/76) (that is examined later) when he said that he must remind himself that "the Plaintiff must establish that the persons on whose behalf the Court is asked to sanction the proposal will not suffer detriment or that if detriment is likely to be suffered by them then it is counter-balanced either directly or indirectly by the benefit which will accrue from implementing the scheme. Included in that, of course, are considerations as to the welfare and honour of the family". But the proviso explicitly does not say that the plaintiff must so establish. It simply says that the Court shall not approve the arrangement on behalf of any person if it is to his detriment and so the Court must satisfy itself that the arrangement is not detrimental (and is otherwise beneficial to the applicant both directly and indirectly and also to the welfare and honour of his family) because otherwise it has no discretion to exercise.

The Supreme Court periodically fails to construe s 64Ain the manner suggested above. In *Re Smith* [1975] 1 NZLR 495, 498 Cooke J described the first proviso to subs (1) as "(A) condition precedent . . ." and then later on the same page when referring to "prohibiting approval of an arrangement if it is to the detriment of a person under a disability . . ." he spoke of "not an unfettered discretion, as the condition must still be satisfied".

Absence of detriment in the arrangement (no matter how that is determined, with or without direct and indirect benefits and the welfare and honour of the family) is more than "a condition precedent": it *is* the sole jurisdictional matter because unless the Supreme Court is satisfied that the arrangement, weighing one thing with another, is not to the detriment of the applicant, then it has no discretion.

In both the New Zealand section and in the English statute (and indeed in all the other imitative enactments other than those of Alberta and Queensland) there is latent in the generality of the drafting the pervasive fear of beneficiaries biting and hand that feeds — and certainly that fear is manifest in the wealth of

obiter dicta that have often been elevated to the force and effect of statutory provisions. See for example the words (at 420, 421) of Lord Evershed MR, in the English Court of Appeal decision *Re Stead* [1960] 1 Ch 407.

None of the legislation necessarily produces results that are acceptable to all beneficiaries and some New Zealand decisions have curiously disadvantaged adults and minors and unborn grandchildren.

The Hutter decision

Welfare and honour of the family of two spinster sisters aged 62 and 60 was given little weight by Moller J in *Re Hutter* [1965] NZLR 1008 when they applied for the capital of the estate. They already received the income during their joint lives with the whole of the income to the survivor and the capital to be disposed of under the general power of appointment by will given to that survivor. Each of them deposed inter alia that she was past childbearing age and that neither had adopted any child or given birth to any ex-nuptial child. Moller J alluded briefly to counsel's submission that nothing could be found in the wills to deprive the daughters of the capital; certainly nothing sufficiently clear to cause the Court to refuse approval of the proposed variation. But then he added that a potential object of a general testamentary power of appointment was in fact within the description of "any . . . unknown person" (in s 64A (1) (c)).

The circumstances of the two spinster sisters had been indicated to the Court but there was no chance that they would alter or vary any rule or principle bearing on the exercise of judicial discretion once his Honour had fastened his mind to the misconception (at 1012) that ". . . those who will ultimately benefit through the exercise of the power of appointment are 'unknown persons' within the meaning of s 64A . . .".

Clearly, that was a strict (and unnecessary) interpretation that made no mention of *Re Courtauld* [1965] 1 WLR 1385 (in which Plowman J (at 1389) concluded that the fact that the donee of the power is propounding the arrangement was ample evidence of conduct inconsistent with the continued exercise of the power after approval) nor of *Re Suffert* [1961] 1 Ch 1 (where Buckley J assumed that the general testamentary power must be held to have been released, so that he was prepared to make an order that would bind anyone else who was unascertained and who might become interested).

The Lyell family decision

No recognition of availability of the paterfamilial duty characterised the approach of Beattie J in

R Lyell

[1977] 1 NZLR 713. There, largely on procedural grounds the application to vary the beneficial interests under the family trust pursuant to s 64 (1) foundered, even though Beattie J (orally) did acknowledge that under s 64A the Court is empowered to act as a statutory agent to vary beneficial interests. Counsel (for children and unborn issue of the plaintiff and for those taking on an intestacy) did not rely additionally and or alternatively on s 64A and this apparently precluded the Court from examining the merits of the case, especially on the intended rearrangement of the annual income (with capitalisation of one-third) that would have helped the plaintiff, a father of two young teenage children. At the time of the application he received a modest income and had a wife with a very disabling illness. Procedural difficulties prevented the exercise of any fractionally wider discretion and the tangible displayof the paterfamilial duty that is so inherent in the empowering s 64A.

Melville-Smith family trust: variation refused of discretionary settlement

More than mere welfare and honour of the family was immediately at stake in *Re G D Melville-Smith Family Trust* (Auckland, 11 July 1979: 480/79: Holland J) because not only was there no detriment to grandchildren in their intended inclusion in the substitutionary gift-over but there was potentially direct or indirect benefit to the children as well as the removal of any cause for complaint through a disinheritance claim otherwise being made under the Family Protection Act 1955. Nevertheless Holland J refused the application. There was no corresponding financial benefit to the children. He held there was no question of family honour involved and the statute clearly forbade the granting of the application.

Potentially, this is an important case because it directly raised the question of a variation that would have added new beneficiaries and yet implicit in *Stead* is that such power should not be circumscribed by the requirement that it be exercised only for the benefit of existing beneficiaries, and "welfare and honour of the family" does demand a much broader base for the Court's consideration.

The settlor deposed that he created the trust

because he wished to make finaicial arrangements for the welfasre of his wife and family: he had married once and had two infant children. The deed of trust appointed his mother and brother trustees and directed that they hold the trust property upon trust and inter alia apply the trust income for the benefit of the wife or children in such proportions as the trustees should think fit. The deed provided that the date of distribution or vesting of capital should be fixed by the trustees and be within 40 years of the date of the deed (15 October 1976). Upon the date of distribution the trustees were directed to hold the trust fund capital for such of the settlor's children then living, absolutely.

The settlor told the Court that when he consulted his solicitors about the creation of the trust he had in mind a provision whereby children of any deceased child of his should be entitled to take their parent's share. He said that when he instructed solicitors his intention was to provide for such grandchildren, and that when he executed the deed he did not notice that no provision had been made for the children of a deceased child.

The application sought the approval of the Court on behalf of the infant beneficiaries and unborn children of the settlor of the deed so as to provide that on the date of distribution the capital of the trust fund should be held by the trustees for such of the settlor's children then living with a proviso for the substitution of children of a deceased child who attains the age of 20 years.

The judgment does not indicate the wording of the existing recitals in the deed of trust nor the intended gift-over substitutionary clause but conceivably the latter could take this form:

> PROVIDED HOWEVER that should any child of mine die before the Date of Distribution leaving a child or children living at the Date of Distribution then and in every such case such grandchild or grandchildren who shall survive the Date of Distribution and attain the age of twenty (20) years shall take and if more than one in equal shares all that the estate share and interest that his her or their parent would have taken . . .

Inequitable denial; and expedient solution?

Any Equity practitioner can formulate a comparable provision and as easy as that exercise is the obviousness of two questions that arise as a consequence of the Court having refused approval of the arrangement:

(1) The grandchildren are potentially denied the use and availability of the extended provisions for advancement of capital to infant and contingent beneficiaries (pursuant to s 4 of the Trustee Amendment Act 1977) for their maintenance and advancement and the seeds of discontent are sown if such grandchildren are disinherited for then the Court has done nothing to avoid Family Protection Act 1955 litigation. The denial of Trustee Act access and the indirect promotion of Family Protection proceedings both appear inequitable.

(2) The execution of a deed supplementing the deed of trust and executed by the settlor specifically to make gift-over provision for grandchildren (should any child die leaving a child or children) and the recital that the supplemental deed is to be read as and form part of the deed of trust for all purposes of construction and disposition in the same way that a codicil adds or alters a dispositive clause in a will, would now seem expedient.

Holland J said that it had been acknowledged by counsel that there would be a substantial detriment to any of the infants or unborn children (on whose behalf approval was sought) if they survived to take a vested interest and one of their siblings died beforehand, "leaving a child or children who took their deceased parent's share".

He said that the result would be that the surviving child or children would obtain a lesser share in the trust fund. "There was no corresponding financial benefit to such children but it was submitted to me that the welfare and honour of the family justified a variation at the expense of such children, for the benefit of their nephews or nieces whose parent had died prior to obtaining a vested interest. Although these words require liberal interpretation where appropriate the welfare and honour of the family must be a benefit to those on whose behalf the Court is to give approval", Holland J added.

The Court said that it had been referred to *Re Bryant*; *Re Tinker* [1960] 3 All ER 85 and *Re Stead* and that it had considered those authorities and the provisions of s 64A of the Trustee Act 1956. Holland J concluded (without more) that none of "the foregoing authorities would authorise approval of this nature, and that there is no question of family honour involved here so as to justify approval." He added that in his opinion the statute itself

clearly forbade approval and accordingly the application was refused.

None of the cases is modern. *Bryant* is usefullyillustrative. *Tinker* is no longer acceptable authority on the meaning and ambit of "benefit". And *Stead* contains enough obiter to convince any Judge that it is the arrangement that must be approved and not just the limited interest of the person on whose behalf the Court's duty is to consider it. The Court must regard the proposal as a whole and consider what was really the intention of the benefactor. The Court must regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself and of any other relevant evidence available. That paraphrase is of the words ([1960] 1 All ER 487 at 493) of Lord Evershed MR, and their applicability to the facts in *Melville-Smith* is self-evident.

No other cases are referred to in the judgment so that it is impossible to know whether any others were heard by the Court and what part or parts of *Bryant, Tinker* and *Stead* the Court was referred to and what part or parts the Court found relevant in the consideration of those authorities.

Factually, *Bryant* has a superficial resemblance because in effect the Court had to solve the question of whether it was proper to sanction the proposed arrangement on behalf of unborn children whereas in *Melville-Smith* it had to decide whether contingent interests for unborn grandchildren could be inserted by substitutional gift-over. There was no question of resettlement and the creation of new vested beneficial interests, but essentially the insertion of a second contingency.

In *Bryant* the testator's will gave the widow a life interest in the residuary estate (of which a farm appears to have formed the substantial part) and after her death or earlier remarriage his two children (an unmarried son aged 25 and a married daughter aged 23) shared equally as tenants in common with substitution of grandchildren living at the date of distribution. TA Gresson J assumed that there were sound practical reasons to the advantage of both the widow and the two children for the son to be allowed to buy the farm at proper valuation and on proper conditions. The application sought authorisation and was supported by the execution of suitable deeds of covenant and the effecting of insurance policies protecting the unborn grandchildren's contingent interests. There were no grandchildren living at the time of the application.

Prima facie, the scheme involved possible detriment to unborn grandchildren because it deprived them of the chance, however remote, of succeeding to the whole estate if the son predeceased his mother childless and the daughter also predeceased her mother and left issue. Additionally the proposed arrangement could deprive the grandchildren of possibly eventually sharing in any prospective increase in the value of the farm as well as gaining the benefit of the trustee's protective role in the management of the farm.

The Court in *Bryant* agreed to the variation after applying a test of business realism that necessitated a practical business-like consideration of the whole arrangement includig the total amount of the advantages that the various parties would obtain and their bargaining strength. Moreover the Court held that if the infants and unborn persons had the capacities of a reasonable person, sui juris, then each would enter into the arrangement at that moment as it then stood. In any event, the unborn grandchildren merely had contingent interests that could only arise "after the birth of such grandchildren, followed by two untimely and premature deaths . . ." The grandchildren would receive the benefit of their respective parents' augmented circumstances "and one would expect that they would participate in their parents' estates on their respective deaths."

In *Tinker* the proposed arrangement did not gain the Court's approval. In effect, it appeared intended to take from unborn grandchildren an absolutely vested interest. Russell J refused approval of a variation on behalf of the unborn grandchildren under which they would forfeit an interest in the trust on the ground that the variation would not be for their benefit even though it might prevent dissatisfaction and conflict in the family. Russell J largely suggested that financial gain must be demonstrated to satisfy the requirement of benefit but that equation today scarcely appears acceptable and for that reason *Tinker* was not cited in *Re Weston* [1968] 3 All ER 338 (CA) and in *Re Remnant* [1970] 2 WLR 1103. Benefit does encompass purely moral benefit and/or purely social benefit: see *Re T's Settlement* [1964] Ch 158 (Wilberforce J at 162) and *Re Holt's Settlement* [1969] 1 Ch 100 (Megarry J at 121).

Discretionary trust equated with testamentary trust

Melville-Smith was a family discretionary trust. *Bryant* was a testamentary trust with no element of discretion. The judgment of Holland J does not make that necessary differentia-

tion. The essence of a modern discretionary trust is that a group of family members, individually, have no more than a hope or expectation of a decision by the trustees to give them some income and or capital. In *Melville-Smith* the settlor's wife and or children had some hope of the trustees applying the income towards their support, benefit and maintenance as and in such proportion as the trustees should determine. The settlor's children were contingently vested in the corpus because the deed provided that the date of distribution or vesting of capital should be the date fixed by the trustees (but to be within 40 years of the date of the deed: 15 October 1976) when the trust fund was to be divided among such of the settlor's children then living. Vesting of the corpus, then, appears to be solely conditional upon each child being alive at the date of distribution. The intended inclusion of grandchildren would create a double contingency.

In *Bryant* both the testator's son and daughter had absolutely vested interests because each of them had fulfilled the sole condition of vesting in interest: the attainment of 21 years of age. Vesting in possession and enjoyment was postponed till the period of distribution (the death or earlier remarriage of their mother). The testator's future unborn grandchildren had but contingent interests in the residuary estate, a contingency that depended on their respective parent dying before the period of distribution.

In *Bryant*, the son acquired a farm of his own and the daughter an immediate capital sum and therefore it was an obvious assumption that the unborn grandchildren could in the normal course of events be expected to benefit directly from the advantages gained by their parents — whereas in *Melville-Smith* none of the children had either a vested or contingent share in the income of the trust fund for all they had was the mere hope or expectation of receiving "the income at the discretion of the trustees" with a contingent interest in the trust fund should they be living at the date of distribution.

It seems regrettable, therefore, that the inflexible view of the Court (that is at variance with the intentions of the settlor) should ruin the reasonable expectations of an entire class of potential beneficiaries (the grandchildren) and as a result create dependency and possible family disunity, and perhaps penury to some degree.

Rectification available remedy from comparable trust decision

Holland J said that he was satisfied that the only grounds for the application were that the deed of trust did not correctly record the settlor's wishes — and "[I]n the ordinary course of events one would expect that to be remedied by an action for rectification of the deed." Rectification in fact was permitted (by the insertion of a new clause to give better effect to the settlor's intentions) in *Morse v Holland* (Supreme Court, Christchurch: 22 August 1977: A75/77: Roper J), an unreported judgment apparently neither drawn to the attention of nor mentioned by Holland J in *Melville-Smith*.

In *Morse v Holland* the settlor executed a deed of trust in 1955 designed to benefit both her daughters equally but through a drafting error it had the effect that if one daughter died the surviving daughter and her family were then entirely excluded from the operation of the trust.

There was no evidence of what instructions had been given to the solicitors who had prepared the deed.

The settlor brought the present action for rectification and by oral testimony satisfied the Court that her real intentions had not been contained in the deed.

The Court followed *Butlin's Settlement Trust* [1976] 2 All ER 483 to hold that it had jurisdiction to rectify the trust deed even though the error was one of interpretation of words used in the deed itself. It was held that the deed sufficiently evidenced the settlor's intentions but the Court then added that even in some circumstances it could rectify the deed where there was no extraneous evidence at all on the intentions of the maker of the deed. However (Roper J added) here there was a combination of the settlor's own evidence and the inferences as to intention that might be drawn from the deed and those elements were sufficient to justify the Court's intervention. A new clause was ordered to give better effect to the settlor's intentions.

Restrictive meaning given to "benefit"

Benefit is now expected to be given a broad meaning and is not restricted only to financial, social and educational benefit but includes benefits of almost any other kind. The Courts can approve an arrangement for a variation of a trust that defeats the intention of the testator provided that it is for the benefit of the beneficiaries and it is a fair and proper one to make: see Pennycuick J in *Remnant*.

It seems regrettable that Holland J should have simply referred to *Tinker* and construed benefit as being purely financial benefit for

benefit today includes social, moral, filial, fiscal, financial, educational elements that help the individual and promote or protect his family.

Real or illusory detriment manifestly offset by benefit

The settlor in *Melville-Smith* had wished to create equality between his children in the eventual distribution of the capital of the trust fund (they would take it absolutely) and he also wished (then or later) to ensure equality between his grandchildren so that if one of his children died leaving grandchildren, those grandchildren would eventually take the share that their parent would have received. Potentially, then, of course, the surviving child or children must obtain a lesser share but otherwise that possible benefit to them is far outweighed by the possibilities of detriment to their children born or unborn. Children (and grandchildren) can be deprived of their patrimony. And in any event, the determination whether such benefit is offset by possibilities of detriment to children of another generation must necessarily be, especially where contingent interests are involved, an imprecise operation.

Nevertheless the possibilities are none too remote and legitimately fall within the ambit of those words used in the first proviso: ". . . the welfare and honour of the family . . ." Advantages accruing to the children of the settlor will in the ordinary course of events benefit their children but other forms of family patrimony may be lost when families break up or are hit by disaster or when death occurs before the date of distribution so that grandchildren may be left dependent and perhaps disinherited; and it is those thoughts on the Family Protection Act 1955 that motivated Hardie Boys J in *Parker* [1964] NZLR 573 to conclude his judgment (at 575) with reference to "some possible ground to support a claim for better provision at his or her parent's hand" that could be invoked by a disadvantaged grandchild.

The Court in *Melville-Smith* had to consider whether it would approve on behalf of the infant and unborn beneficiaries. Indisputably, the financial benefit would be certain and positive for the surviving child or children if it did not have to be diminished through being shared by the living nieces and nephews if one or more of the settlor's children should die. Conversely the financial detriment for the surviving nieces and nephews would be equally sure and tangible if they had no expectations from the trust fund on the death of their parent. *Bryant* indicates that the Court can ask itself whether the infants and unborn persons, if they had the capacities of a reasonable person, sui juris, would enter into the arrangement at that moment as it then stood: see *Re Van Gruisen* [1964] 1 All ER 843; [1964] 1 WLR 449.

The Supreme Court is a Court of Equity and in protecting the rights of infants and unborn persons it must act within the law as parens patriae as far as can be done consistent with the rules of law and of equity and fairness to all concerned. *Melville-Smith* is a deviation from that standard.

A N Sutherland's Will

The arrangement in *Sutherland* (for which the Court refused approval) would have meant in effect the elimination of the life interest in the residue given to the plaintiff, its conversion into a lump sum payment of $45,000 to her from the residuary estate in lieu of and in full satisfaction of such life interest and the creation of a new trust compounding the income for the plaintiff's children when the balance of the residuary estate (as thereby transformed) would pass to her children living at her death and if more than one in equal shares with gift over to grandchildren if any child of the plaintiff should predecease leaving issue. The plaintiff also sought an order that out of the moneys payable to her the sum of $4,000 should be payable to each of her three children. Sinclair J said he was satisfied by affidavit that "the Plaintiff will not have any further children". At the time of the hearing she had according to the First Schedule of the Estate and Gift Duties Act 1978, a life expectancy of 24 years.

The plaintiff contended that the capital sum that she sought would enable her to invest otherwise than on mortgage at a higher rate of interest and so enable her to maintain her income and at the same time retain the capital. Her three children supported the application and "had the utmost confidence in their mother" that she would "eventually leave to them by will the net capital sum" of $45,000. (Sinclair J said there "could be serious problems to be considered" because of the Matrimonial Property Act 1976. If the proposal were approved by the Court then consideration might have to be given requesting the plaintiff's husband to enter into an arrangement whereby the moneys that would be received by the plaintiff would always be regarded as her own separate property. The situation could alter dramatically on the death of plaintiff's husband and her subsequent remarriage. Sinclair J added: "It may be difficult to propound a formula

to cover such an eventuality". (Section 10 (1) of the Matrimonial Property Act 1976 provides for consent in such transaction before intermingling results in conversion to matrimonial property. Without such consent, the Court may have to unravel the intermingled separate and matrimonial properties even where it may be "unreasonable or impracticable" so to do).

However it was not on such Matrimonial Property Act grounds that Sinclair J refused approval but because the authorities (and he cited *Re Towler* [1964] 1 Ch 158, *Re Ball* [1968] 1 WLR 899; [1968] 2 All ER 438 and *Re Harris* (1974) 47 DLR 142) showed quite definitely that if the proposed arrangement cannot be truly described as a variation or revocation, then there is no jurisdiction to make the order and none to create an entirely new trust or disposition. Moreover there had been no provision in the will for the payment of a lump sum to the grandchildren of the nature that the plaintiff sought them to receive before her death. The primary, predominant intention of the testator had been to provide income for the plaintiff and not to give her a capital sum. The capital was to be distributed to the testator's grandchildren and if one of them should have died before distribution, then the great grandchildren. None of the disadvantages that would result from the scheme outweighed the advantages, "if any, and I think at best they are minimal which would accrue from its implementation". He did not think that the infants and unborn persons if sui juris would enter into such arrangement.

Sinclair J, then, ostensibly found a variety of grounds to refuse approval but what was both persuasive and pervasive was his finding that the disadvantages far outweighed the advantages and that therefore he was not satisfied on the essential jurisdictional element of absence of detriment. Once that point is reached there is no question of discretion. But he had already "satisfied" himself that the Court had no power to dismantle the testator's trust and create a new one in its place.

The generality of the words in s 64A, and its legislative predecessor s 64 (2) of the Trustee Act 1956, as well as the Parliamentary history of the Variation of Trusts Act 1958 (Eng) do not substantiate that finding for all cases nor indeed do the judgments when lip service is paid to the words of the English enactment. *Ball* created the substratum test but nevertheless the result of the approval meant in effect the abandonment of the settlor's original life interest by the substitution of a new moiety of that trust fund for each of his sons and certain of each son's issue. *Harris* would have given equality to all children to the financial detriment of one child. Neither *Ball* nor the substratum test was mentioned in that judgment that refused approval. *Towler* stands for the proposition that there is no jurisdiction to resettle an infant's property. In reality these decisions are explicable by the Courts' construction of "benefit", an examinable quality whereas few judicial minds concur on what is a substratum in trustee law.

The result in *Ball* was in effect at variance with the substratum test that attempts to introduce a new concept into modern trustee law with little conspicuous justification. The Court is in effect supplying the binding consent of minors, incapable, unborn, unascertained and unknown persons when it gives its approval once it is satisfied that there is no detriment in the arrangement. Nothing is to be achieved by the imposition of restrictions on jurisdiction that are advanced to prevent the addition of new beneficiaries and the creation of contingent beneficial interests (at least in such cirumstances as *Melville-Smith*). If the section does not clearly contain such restrictions, then the Court has no justification for erecting them. The needs of the beneficiaries should be paramount. No arrangement can be approved that is detrimental to those for whom approval is to be given (apart from beneficiaries under protective trusts) and the Court has an absolute discretion to refuse to approve arrangements that are in any way improper. Availability of the paterfamilial duty should proceed on that basis. Equity in this context should be remedial, palliative and creative.

Lesson in trusts for New Zealand

The general balance of power may be clearer in recent English decisions so that there it is now the interests (largely) of the beneficiaries and not the intent of the settlor that controls whereas in New Zealand *Hutter, Lyell* and *Melville-Smith* the beneficiaries were not accorded any measure of paterfamilial benefit. *Sutherland* is useful on the measurement of detriment and the potential counter-balance of benefit.

New Zealand may have to learn that if the trust is to be allowed to continue to be a useful method of disposing property (as well as in estate planning) then it must be permitted to keep pace with the social, filial and economic climate of the day,. *Hutter, Lyell* and *Melville-Smith* make no contribution to the paterfamilial duty inherent in the judicial variation of trusts whereas *Sutherland* contains useful workings on benefit/detriment that are worthy of

development by later Courts that may yet be able to give equality to all beneficiaries not sui juris (of whatsoever kind) with adult beneficiaries. Admittedly, the distinctions between beneficiaries sui juris and those not sui juris have already been partially removed but the result of that removal still disadvantages both the beneficiary not sui juris and the adult beneficiary.

The remedy is in the Court's hands.

CRIMINAL LAW

CONTRACEPTION FOR THE YOUNG

By PENELOPE MUIR, *Senior Tutor in Law, University of Otago.*

The present law controlling the circumstances under which contraceptives and information relating to contraception may be supplied to persons under 16 years of age is contained in the Contraception Sterilisation and Abortion Act 1977. In order to understand this legislation it is necessary to examine briefly the historical background and previous law on the subject.

Until the passing of the Police Offences Amendment Act 1954, there was no legal restriction placed on the distribution of contraceptives. There was however a provision in the Indecent Publications Act 1910 which declared written material dealing with contraception indecent except in certain restricted circumstances which the Court could take into account, when called upon to adjudicate on the matter. This provision however was rep ealed by the Indecent Publications Act of 1963.

It seems that the Police Offences Amendment Act was drafted to give effect to the recommendations made in a Report to Parliament of the Special Committee on Moral Delinquency in Children and Adults (The Mazengarb Committee), and was intended to completely proscribe any access to contraception by persons under 16 years of age.

Section 3 of the Contraception, Sterilisation and Abortion Act repealed and replaced s 2 of the Police Offences Amendment Act. It is important I think to set out the terms of the repealed s 3 of the Contraception, Sterilisation and Abortion Act. Since no prosecutions have yet been brought under the current law, the Courts have not yet had the opportunity to provide an interpretation of it. Thus it is impossible to do more than suggest the possible scope and meaning the Court might give the terms of the section.

Section 2 of the 1954 Act reads:

> (1) Every person commits an offence who —
>
> "(a) sells or gives or otherwise disposes of any contraceptive to any child under the age of sixteen years, or offers to sell or give or otherwise dispose of any contraceptive to any child under that age; or
>
> "(b) Instructs or persuades or attempts to instruct or persuade any child under sixteen years to use any contraceptive."

Section 2 (2) sets out the penalties for offences against subs (1).

Section 2 (3) says: "Every child under the age of sixteen years who procures or attempts to procure any contraceptive knowing its purpose, commits an offence . . ." and the penalties are then set out. It is interesting to note that the police brought only five prosecutions under this legislation in the ten-year period between 1964-1974.

The word "instructs" in s 2 (1) (b) is ambiguous in that it could be given the broad meaning of "instruction in the use of", or the narrower meaning of "instruction *to* use". In practice the Police Department opted for the narrower interpretation, and decided that the giving of information on contraception was not an offence under the Act, but "instruction" in the sense of an order or command to use contraception did constitute an offence. This was felt to be justified because there was no specific reference to the mere giving of information in the Act, and the word "instruct" was closely associated with the word "persuade".

The 1977 Report of the Royal Commission of Inquiry into Contraception, Sterilisation and Abortion sets out fully the historical background and the interpretation of the Police Offences Amendment Act, which I have just summarised. The current law on contraception in the Contraception, Sterilisation and Abortion Act is based on the recommendations made in that Report, and so a brief look at the views expressed there might provide some gui-

dance as to the intended effects of the law. The Report notes that the Statutes Revision Committee which in 1973 began a review of the Police Offences Act 1927 and its amendments, after hearing many submissions on the contraception provisions under discussion, agreed with the police interpretation that these provisions did not and also should not prohibit the dissemination of contraceptive information. The Statutes Revision Committee in fact recommended the total repeal of the Police Offences Amendment Act 1954, thus demonstrating agreement with the majority of the submissions made to it. The effect of these submissions was that this law was outmoded in a changing social climate where young people are increasingly engaged in sexual activity in spite of legal prohibitions.

The recommendations of the Statutes Revision Committee were not acted on by Parliament. Those of the Royal Commission were. A great many submissions were made to the Royal Commission on similar lines to those presented to the Statutes Revision Committee, but a different conclusion was reached. The Commission rejected the idea of total repeal of these Police Offences Amendment Act provisions but agreed that they were too restrictive. It therefore proposed that certain amendments be made to allow specified persons such as doctors and parents to be exempted from the restrictions and allowed to supply contraceptives or advise on the use of them to persons under 16 years of age, where "responsible persons are convinced that the young people with whom they are dealing will not be dissuaded from sexual activity."

The Commission also suggested that the interpretation placed by the police on s 2 (1) (b) as to the meaning of the word "instruct" should be approved by the Legislature and that an amendment should be drafted to make this clear. The word "direct" was suggested in place of the word "instruct", and certain exceptions to the prohibition were also suggested. In the Act in its final form, the word "direct" is used, with the exceptions suggested, and the relevant provision in s 3 now reads:

> "(2) Every person commits an offence who directs or persuades or attempts to direct or persuade any child under the age of sixteen years to use any contraceptive unless that person is —
>
> "(a) The parent or guardian of that child or is acting in the place of a parent of that child; or
>
> "(b) A registered medical practitioner or is a person acting under his supervision or with his authority; or
>
> "(c) An authorised representative of any family planning clinic, or of any agency or association from time to time approved by the Minister of Justice by notice in the *Gazette*."

In addition, the Police Offences Amendment Act offence of actually selling, or giving contraception to a child was re-drafted in s 3 of the Contraception, Sterilisation and Abortion Act as follows:

> (1) Every person commits an offence who sells or gives or otherwise disposes of any contraceptive to any child under the age of sixteen years, or offers to sell or give or otherwise dispose of any contraceptive to any child under that age, unless that person is —
>
> (a) [as s 3 (2) (a) above]
>
> (b) [as s 3 (2) (b) above]
>
> (c) [as s 3 (2) (c) above]
>
> (d) A registered pharmacist, or a person acting under his supervision and with his authority and he sells or gives or otherwise disposes of, or offers to sell or give or otherwise dispose of, the contraceptive in accordance with —
>
> (i) The written prescription of a medical practitioner; or
>
> (ii) what he believes to be the written authority of any person referred to in paragraph (a) or paragraph (c) of this subsection.

If the Royal Commission had simply been content to endorse the liberal view taken by the police to the previous law, then we should at least have been no worse off than before, and perhaps even slightly better with the addition to the Act of persons such as doctors, pharmacists and so forth who are exempt from the prohibition.

However, the Royal Commission also chose to make specific that which had been in doubt before, ie they recommended that the mere giving of information to children on the use of contraception should be an offence, except under certain circumstances such as where the information forms part of an approved course on human relationships. This recommendation has been retained in spirit in the present Act although the detail of it is somewhat different as it now stands. The interesting thing is that when the Contraception, Sterilisation and Abortion Act went before the House

in its Bill form, the words "any information about, or instruction in the use of" were contained in s 3 (3). But in the course of its passage through the House, the words "any information about" were deleted, while the words "instruction in the use of" were retained and are now part of the current law. This still leaves a possible ambiguity, because it seems that there is a distinction, albeit fine, between "information about" and "instruction in the use of". Until the Courts are given the opportunity to adjudicate on this matter the doubt cannot be resolved. Unfortunately the spirit of the Act is so clearly against the free distribution of information that the Courts may not think it appropriate to give a liberal interpretation.

The provision for such information to be given as part of a human relationships or developments course has also been removed from the Act in its final form, while some other exceptions, not suggested by the Royal Commission, have been added. The relevant part of the Act, s 3, now reads:

> (3) Every person commits an offence who sells or gives or otherwise supplies instruction in the use of any contraceptive to any child under the age of sixteen years, or offers to sell or give or otherwise supply any such instruction to any child under that age, unless that person —
>
> (a) Is the parent or guardian of that child, or is acting in the place of a parent of that child; or
>
> (b) Is a registered medical practitioner or a person acting under his supervision and with his authority; or,
>
> (c) Is an authorised representative of any family planning clinic, or of any agency (including any agency of the Crown), or association from time to time approved for the purpose by the Minister of Justice by notice in the *Gazette*; or,
>
> (d) Is a registered pharmacist, or a person acting under his supervision and with his authority; or
>
> (e) A social worker, pastoral worker, or other counsellor professionally concerned with the child; or
>
> (f) Does so to any pupils of a school with the prior approval of the principal or head teacher of that school given after agreement with the School Committee or Board of Governors or (in the case of an integrated school) the School Committee or Board of Governors and the Proprietor.

A rather extraordinary further restriction is included in the Act even though it was not suggested by the Royal Commission, and was not contained in the original draft of the Bill. This is contained in subs (4) of s 3 and reads:

> (4) Notwithstanding anything in subsection (2) of this section, every person referred to in paragraph (a) or paragraph (b) or paragraph (c) of that subsection commits an offence who, *in any school*, directs or persuades or attempts to direct or persuade any child under the age of sixteen years to use any contraceptive.

This means that those persons, such as doctors and family planning clinic representatives who are allowed to advise children to use contraceptives, are not allowed to do so within the perimeters of a school. The point of this provision can only be guessed at.

Section 3 (5) outlines the penalties for offences under the previous subsections and s 3 (6) retains the offence that the child committed under s 2 (3) of the Police Offences Amendment Act by procuring or attempting to procure contraceptives, except that under the new Act, the child does not commit an offence if he or she procures them from someone authorised under the Act to supply them.

The word "contraceptive" under the Act is defined to mean "a substance or device or technique intended to prevent conception or implantation" and correspondingly abortion is defined to mean "a medical or surgical procedure carried out or to be carried out for the purpose of procuring the premature expulsion from the mother of an embryo or foetus after implantation". Thus, the legal status of an IUD, depending on whether it works before or after implantation may still be unclear.

It can be seen from this analysis that although the Royal Commission claimed to effect in its recommendations an easing of the restrictions in the law under the Police Offences Act, the legislation as passed, probably achieved the opposite result. Because the new law prohibiting access to contraception by children, subject to limited exceptions, is set out in such painstaking detail, there is little room left for police or judicial discretion in its interpretation.

Should one wish to further dampen hope that the Act might be interpreted liberally one might point to the additional offences of "supplying instruction in the use of any contraceptive" and, "directing or persuading any child to

use any contraceptive within a school", even if you happen to be the parent or doctor of that child.

The effect of this can already be seen in the attitude taken by the Indecent Publications Tribunal in its recent decision to classify the book *Make it Happy* by Jane Cousins as indecent in the hands of under sixteen year-olds, despite the fact that the tribunal found the book's "treatment of the subject-matter unobjectionable, and may indeed be useful and helpful to younger people and to adults." The major reason for restricting the book was the tribunal's view that it dealt with "some topics which are illegal in New Zealand. This is particularly the case in the section on contraceptives which gives instruction and implicit encouragement to their use. To the extent that this is made available to a person under sixteen years, it may be an offence under the Contraception, Sterilisation and Abortion Act 1977, and is certainly contrary to the spirit of that legislation." The latter statement is probably depressingly accurate, but nevertheless the decision seems to be unnecessarily timid. Its justification presumably must be an attempt to protect the bookseller from possible legal consequences if he or she sells the book to an under sixteen-year-old. But the tribunal in acting in this way on its own restrictive interpretation of the Contraception, Sterilisation and Abortion Act has made any proper testing of its ambit in Court even less likely. It would surely have been better for all booksellers to be issued with a general warning of the possible but by no means certain, legal results of supplying books relating to contraception to children, leaving it up to the individual bookseller to exercise his or her discretion. After all, there might be brave souls among them prepared to risk police prosecution in order to have a test case brought.

It is extraordinary that the Tribunal which needs only to interpret and act under its own empowering Act, ie the Indecent Publications Act, chose to go outside it, and base its decision on the Contraception, Sterilisation and Abortion Act instead. The result of this attitude taken to its logical conclusion could mean that any bookshop, library or even private home that makes, for example, an encyclopedia with a small section on contraception, accessible to children, might be liable to criminal prosecution.

Another ill-effect that this legislation has undoubtedly produced is a great deal of confusion and fear amongst school teachers as to their precise role in dealing with their pupils. The notorious "Gandar circular", which the then Minister of Education sent round to all schools in April 1978, offered an extremely cautious legal opinion on s 3 as it affects teachers. Among other things it suggested that the distinction between "instruction in the use" and "directing or persuading to use" is so fine, that the utmost caution should be used if a school chooses to take up its discretionary powers under the Act. Clearly, teachers need protection against possible prosecution and to err on the side of caution is understandable, but it is to be hoped that any Court would take a rather more robust view of the distinction between " instruction" and "direction" or "persuasion".

The Post Primary Teachers Association responded to the "Gandar circular" with a circular of its own, which stressed again the need for extreme caution on the part of any teacher, and warned specifically against any counselling of pupils under 16 years of age regarding the use of contraceptives on a confidential one-to-one basis. Many teachers have spoken to me of the distress they feel when they dare not answer direct questions on the subject as they occur in their classrooms, and they cannot do anything at all to help pupils whom they know to be at risk of pregnancy and urgently in need of counselling or information. The PPTA circular itself grimly notes that its warnings to teachers are "related to the harsh realities of defective legislation and do not represent a change in established policy . . ." The PPTA believes that the provisions of s 3 of the Act "do not enable the schools to meet the real needs of children at risk as intended by the Royal Commission. . . " The PPTA is but one voice among many to have called for the defects in the legislation to be remedied.

UnKind, Unkind — It has been announced that District Court Judges will wear robes but not wigs. This has prompted one lawyer to ask whether that means they will only be Judges from the neck down.