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# PLANNING AND THE CITIZEN

From time to time it is necessary to assert the importance of the individual person in the face of the state. Recent statements by the Prime Minister the Hon R D Muldoon and the Minister of Works the Hon W L Young indicate that that time has come again.

In an earlier editorial (6 May: page 161) it was suggested that the magnitude of the work being carried out in respect of the Clutha Hydro Development was such as to pre-empt the planning decisions still to be made and that notwithstanding Mr Justice Somers' opinion that "expenditure made or to be made by the Crown could not reasonably be a factor in the Planning Tribunal's decision upon an appeal. . . ". That might be the judicial approach but it is not one that commends itself to the Government.

*There is no way investment made in the Upper Clutha power project will be thrown away the Prime Minister (Mr Muldoon) said in Clyde today, when reiterating the Government's intention to press ahead with the scheme. — Evening Post 21/5/80.*

The decision has been made and moneys invested. Work will proceed.

*The project is in both the national and local interests and some of the vast amount of money being spent will rub off to the benefit of local communities, Mr Muldoon said. — Evening Post 21/5/80*

The Prime Minister quite properly looks to national and local interests in justifying the scheme and indeed these are relevant planning considerations. However, there is another important interest, namely, that of the individual people who are affected by the scheme and who have sought to promote or protect their various interests by participating in the judicial proceedings at present in train. Where the Prime Minister's expression of determination to press ahead leaves them, and indeed, where it leaves the future hearings before the Planning Tribunal is open to speculation.

The judicial procedures associated with the planning process, whether at Planning Tribunal or Superior Court level, are looked on as a delaying process — and by that token, a bad process. That is a clear implication from the remarks, in particular, of Mr Young.

*"Ever since the Government made the decision to go ahead with this project four years ago it has never had a clear run at it. The Prime Minister is urging me to get on with the job as fast as possible, but within the law," said Mr Young.*

*He later said that he had "done his best" to speed up the outstanding hearings in relation to the Clyde dam. — EveningPost 21/5/80*

It is worth reviewing the good side of the judicial process.

First, and most importantly, it is one in which the individual citizen is important. Whatever may be asserted to the contrary, and while the greater good of all may well be the object, in planning people are dealt with en masse. Certainly submissions may often be made to the local authority or a Minister. But are they considered? Or do they simply form an insignificant statistic in a so-many-for, so-many-

against game? To those who contemplate the disposition of thousands the voice of a few must sound very faint indeed. Before the Planning Tribunal or the Courts though, a citizen is subservient to no other party and he may be secure in the knowledge that, win or lose, his own individual case will be heard and considered. In standing before the Courts, a person is asserting his own individual importance in one of the few forums available to him. He is reminding others that he too has rights.

Next, litigation provides an ordinary citizen with access to Government and local authority decision-making. Planning is a continuous process and, notwithstanding a measure of public involvement, it is essentially a bureaucratic process. Because it is continuous it is difficult to say when public participation should be sought with the result that it is usually invited at the very beginning, when there is little to discuss, or at the very end when a proposal is unveiled. By that time all the ordinary citizen can be assured of is that the interests and attitudes of the promoting agency will have been fully taken into account — particularly with regard to cost and convenience. There is a danger that these interests will be regarded by the promoters of a plan as being of over-riding importance.

*Protecting the environment is one thing but stopping development in its tracks is another matter altogether as far as Mr Muldoon is concerned. — Evening Post 21/5/80*

Through the planning process the ordinary citizen can ensure that hidden costs — losses of view, or a river, or a house — are also taken into account, and that these items are weighed, not by those with an interest in the matter, but by a judicial body with independent decision-making powers. Through this process he is able to assert that he is not a cypher to be pushed about at will.

And finally, by ensuring that projects go ahead only after adequate planning and full consideration of all the issues litigation may be seen as actively promoting intelligent planning.

All this is at risk, for in its obsessive preoccupation with avoiding delay the Government is side-stepping the judicial system. This is the effect of continuing with work at Clutha. It is the effect of National Development Act procedures that severely limit judicial intervention and reduce the Planning Tribunal to an advisory body only. And it is the effect of planning legislation that in practice places few constraints upon the Crown — a reality that gives a rather hollow ring to Mr Young's reference to proceeding "as fast as possible, but within the law." And the tragedy is that as the individual citizen becomes increasingly impotent, so may he be increasingly ignored.

In many ways people, individually, are inconvenient — the curse of democracy. But take away that inconvenience and you take away democracy. As we become increasingly ordered, as we are; as regard for the individual person diminishes, as it is, we will stop being a nation of farmers, and will become a nation of the farmed. This reminder is intended as a small counter to that unpleasant prospect.

Tony Black

## MARITIME LAW ASSOCIATION

The Maritime Law Association of Australia and New Zealand is holding its Annual Meeting and Conference at Surfers Paradise, Queensland on 3-5 July 1980. Topics for the Conference include International Shipping and National Aspirations: Private Salvage and Public Risk: Offshore Jurisdiction and Sovereignty: Recent Developments in Maritime Law: and a Panel Discussion on "Survey of Vessels". Further details may be obtained from the Association, 17th Level, MLC Centre, 239 George Street, Brisbane, Queensland 4000.

## INTERNATIONAL COMMISSION OF JURISTS

The New Zealand section of the International Commission of Jurists is interested in preparing a list of New Zealand lawyers who are fluent in foreign languages and who would be available to go on observer missions. Recently for example Mr D E Bisson (as he then was) attended a trial in the Philippines and there was also a request for provision of an observer to attend a trial in Tahiti. It should be mentioned that any trial to which the ICJ resolves to send an observer is likely to have some political overtone.

Interested and suitably qualified persons are invited to send details of their language abilities to:

The Secretary
New Zealand Section of the International Commission of Jurists
PO Box 993
WELLINGTON

**Landlord and Tenant**

# TENANT'S NEGLECT — CONTRACT OR TORT?

*By* J H MARSHALL, *Solicitor, Auckland.*

The judgment of Jefferies J in *Marlborough Properties Limited v Marlborough Fibreglass Limited* unreported, noted [1979] *Butterworths Current Law* 769 will be of interest to conveyancing practitioners. The Judge found in that case that the claim in tort could not succeed. The only action lay in contract and since there were no provisions in the contract dealing with the tenant's negligence the claim failed. The Judge expressed his dissatisfaction with the present state of New Zealand law which compelled him to find in favour of the tenant. He makes reference to authorities in both England and Canada where it is established law that there are concurrent liabilities in contract and tort, and comments in his judgment "I cannot see New Zealand law long maintaining a pocket of resistance to the direction the two great branches of the common law is now taking." With all respect to the learned Judge his criticism is misconceived in so far as the law of landlord and tenancy is concerned.

The fact situation in the *Marlborough Properties* case was that the tenant's negligent acts caused fire damage to the factory premises. The lease contained the usual clauses to be found in a commercial lease. The relevant clauses are not quoted in the judgment so one can only assume that there was a clause exempting the tenant from liability for fire damage to the premises, that exemption not being subject to a tenant's neglect qualification. If that was the case then the question must be asked whether the tenant's negligence was relevant where the lease expressly provided that the tenant was not liable to make good damage to the premises caused by fire.

It is submitted that most conveyancing practitioners and all laymen would consider that where a lease expressly provides that the tenant is exempt from making good damage to the premises caused by fire, then whether or not the fire was caused by the tenant's neglect is irrelevant. Moreover the chances are that the tenant would be paying the landlord's fire insurance premium, and should therefore receive the benefit of the insurance cover so purchased. To suggest that the tenant could be exempt from liability under his contract with the landlord, but still have a concurrent liability in tort, would, it is suggested appear to most persons as completely illogical. In the circumstances it is submitted that the judgment in the instant case is sound in so far as the law of landlord and tenancy is concerned.

In support of this submission regard can be had to the more recent Canadian cases where the Courts have found themselves in certain difficulties brought about by coexistent liabilities under contract and tort. It is settled law in Canada that the exception of fire in a repairing covenant does not exculpate a tenant from liability for a fire caused by its negligence or that of a person for whose negligence it is vicariously liable (*T Eaton & Co Limited v Smith* [1978] 2 SCR 749, — also refer to the *Cummer Yonge* case 55 DLR (3d) 76.) The illogic of the Canadian authorities in creating a situation where the words of the lease do not mean what they say, arises from the existence of concurrent liabilities in contract and tort so that in order to remove a tortious liability there must be an express removal of the liability in the contract, failing which any qualifications on the tenant's liability in the contract are merely regarded as contractual and not affecting the concurrent liability in tort.

The Canadian Courts having established the above principle have immediately had to turn round and qualify it. They have held that where the tenant is under a covenant to pay insurance premiums on the landlord's building, then the effect of this covenant is to entitle the tenant to protection against the risk of loss by fire caused by its negligence. Further, where the lease contains an express covenant by the landlord to keep the building insured it has been held that the tenant is entitled to the benefit of this covenant and is accordingly not liable for fire damage resulting from its negligence (*T Eaton & Co Limited v Smith).*

The logic of the fact situation in the landlord and tenancy cases can only lead to the conclusion that where matters are expressly covered by the contract then there is no room for any tortious liability. It is submitted that this would still leave in existence liability in tort arising

out of matters that are not expressly covered by the contract. The judgment in *McLaren Maycroft & Co v Fletcher Development Co Limited* [1973] 2 NZLR 101, which is the basis for excluding concurrent liabilties in New Zealand would not it is suggested appear to have the effect of excluding tortious liabilities in respect of matters which are not covered by the contractual terms, though the extent of the contractual coverage may be difficult to define.

Logic demands that the reasonable expectations of the parties, provided they are clearly expressed in the contract, should be fulfilled. The introduction of concurrent liabilities in contract and tort in so far as landlord and tenancy situations are concerned, would create a situation where the reasonable expectations of the parties would not be fulfilled. The principles enunciated in *McLaren Maycroft's* case have recently been reinforced in *Young v Tomlinson* unreported, noted CAV (1980) *Butterworths Current Law* 45.

In conclusion conveyancers can but applaud the judgment in the *Marlborough Properties* case and proceed to prepare leases which mean what they say.

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# CASE AND COMMENT

**Conversion of cheque marked "Account payee only" and "Not negotiable"**

In *Grantham Homes Pty Ltd v ANZ Banking Group Ltd* (1979) 26 ACTR 1 the plaintiff company sued the defendant bank for conversion of two cheques marked "Account payee only" and "Not negotiable". Although it was the practice of the defendant not to accept cheques so endorsed if lodged for deposit to the credit of an account other than that of the payee, on this occasion the bank accepted the cheques for $6,000 and $2,850 payable to the plaintiff and credited them to the account of an employee of the plaintiff, Anderson. The bank raised only two issues, the sufficiency of the plaintiff's title and the plaintiff's contributory negligence. It did not rely on any defence based on estoppel or the provisions of the Bills of Exchange Act 1980(Com).

The plaintiff succeeded. It had shown that it had a right to the immediate possession (as payee) of the cheques when they were accepted for credit to Anderson's account. Conversion of the cheques was treated as conversion of the money they represented.

Furthermore any negligence on the part of the plaintiff in trusting Anderson and permitting him to complete blank withdrawal forms resulting in the two cheques being prepared and signed by a building society in favour of the plaintiff was not the cause of the cheques being accepted by the defendant. The defendant had failed to explain why it accepted the cheques when lodged by Anderson to the credit of his account.

The decision is seen as merely reinforcing the existing law. Banks which credit an account other than that of the payee when the cheques are marked "Account payee only" and "Not negotiable" will inevitably be found to be negligent unless they can establish conduct on the part of the payee which releases them from the duty of care owed to the parties to the cheques.

JFN

**Family Law**

Domestic Proceedings Act 1968 — Maintenance — Short Marriage

*Warren v Aldrich,* Supreme Court, Wellington; Judgment 16 April 1980 (No M 42/80)

This was an appeal against the refusal of a Magistrate to make a maintenance order in favour of a wife and her child. The appellant wife and the respondent husband were married on 3 March 1979 and separated at the end of the following April. For two years or so before their marriage, the parties had lived together in a de facto relationship which had begun as a "boarder and landlady" arrangement. The marriage had not been the means of sealing a successful de facto association. Rather, it had been an attempt to improve by marriage a de facto relationship that had broken down, so it was small wonder the short-lived marriage foundered.

The appellant had been previously married, and there was a child of that union who, it was conceded, must be regarded as a child of the marriage between the parties. Since the breakdown of the marriage of the parties, the respondent had had no contact with the appellant or

this child. The evidence showed that there were maintenance orders in existence against the appellant's first husband in favour of the appellant and the child, but that the order was never honoured.

For reasons by no means clear, the child had been in the care of the appellant's brother since the separation of the parties. Even so, it was conceded that the appellant was able to take up suitable employment whether the child was with her or not. Be that as it may, the facts remain that the appellant had not been working and that, during the de facto association and during the parties' marriage, she was in receipt of a social welfare benefit. The respondent who, like the appellant, suffered no medical disability, had at all material times been employed.

The Magistrate concluded that the facts were similar to those in *McBreen v McBreen* 14 MCD 364. There had been a short marriage of six weeks' duration. The wife had been in receipt of a benefit prior to the marriage and she was to receive a benefit after the parties' separation. She applied for maintenance for herself and, as in the case under review, for her child of a previous union. The Magistrate had concluded that the short marriage must receive more weight than the other factors refered to in s 27 of the 1968 Act. He was satisfied that, but for the child, the wife could have worked and could not have successfully claimed for maintenance. He thought it would be both unreasonable and unjust to create a maintenance obligation solely because of the child's presence and refused the orders sought.

White J held that, regard being paid to the nature of the association, the shortness of the marriage and the appellant's ability to earn, he ought not to order maintenance for the appellant. There thus remained the question whether there should be an order for the child. There thus had to be determined the question whether the decision in *Park v Park* [1979] NZ Recent Law 246 was applicable. The question before Somers J in that case was whether the husband could be required to pay maintenance in respect of stepchildren under s 35(3) of the 1968 Act, they being members of the parties' family at the date of seperation. The natural father was paying $6 a week in respect of his children and this was, it was accepted on all hands, all he could afford. The parties there, and the children, had lived together in amity in the same household for nearly five years and the husband had taken some interest in the children and particularly in the boy. Having regard to the ages and prospects of these children and the natural father's limited ability to maintain them, the husband's means and his lack of responsibilities towards other persons and the wife's working, Somers J had concluded that it would not be reasonable to require either child to be maintained past the age of 16. The husband, it was observed, was not their father. ". . .[H]is relation with their mother and with them would not warrant that. Nor would it be proper", continued Somers J "to require him to contribute such sum as with that paid by the father who would wholly maintain. It is a case where along with the real parents of the children the husband has some, but a lesser obligation".

In the view of White J the circumstances in *Park's* case were distinguishable. The relationship between the present parties was never "satisfactory", and the marriage was "of very short duration". The present parties never lived together as married persons "in amity", and the husband's relationship with the child, while satisfactory, was no more than the relationship which of necessity came from the respondent's presence in the household."

"In *Park's* case", said White J., "Somers J found that 'along with the real parents of the children the husband has some, but a lesser obligation.' In my opinion, there was nothing which brings the present case into the category of which *Park's* case is an example. The conclusion I reach is that, on the particular facts of this case, the Magistrate's conclusion that the respondent had no obligation to maintain the child of another marriage was correct."

It was, incidentally, accepted by his Honour that there was nothing to suggest that the learned Magistrate had misdirected himself or allowed matters of matrimonial property to affect his decision on the issues before him.

His Honour dismissed the appeal without any order as to costs.

No-one would deny that this wife and her child are "victims". But victims of whom? Of an ill-advised marriage? Of society? We may well ask ourselves: should the husband or the taxpayer, subsidise this unhappy twosome? Is the ethos of the Accident Compensation legislation so to be extended to wife and child-of-the-family maintenance? And if so, where should the limits be?

P R H Webb

OFFICE MANAGEMENT

# A FRESH LOOK AT OFFICE PREMISES — I

*By* DAVID HARROWES MA MBIM.*

One of the most noticeable things about office work is that people almost always achieve less than they would like. The permanent gap between performance and intention is normally explained in one of two ways:

1 Subject as we are to the Protestant work-ethic, we castigate ourselves and our colleagues with a failure of will and commitment. The answer is to work harder, and preferably to punish ourselves by taking on extra work as well.

2 We become paranoid and accuse everyone else of making our situation impossible. It is their fault for coming into our offices and interrupting us, for sending us memoranda we don't want to read, for being out when we need to talk to them urgently or for telephoning to talk about one thing when we are in the middle of dealing with another.

These two points of view are very deeply ingrained: you can see them, and variations on them, in virtually every office the length and breadth of the Kingdom. But it is time for a fresh approach; neither a moral crusade not paranoia is a sound foundation for business efficiency. This article examines basic working needs, and its sequel next month will consider certain practical details.

Disillusioned clients often feel that their professional advisers are just technical hacks, taking a fat fee for filling in a few simple forms. However, the real task of the lawyer (or architect, or accountant) is to apply his mind to the problem he has been set. No doubt this may involve form-filling, but it is the quality, relevance and timing of thought which makes the difference between a good adviser and a bad one. On this analysis, it is a prime requirement that the office should be a place for thinking. This clearly means that there should be enough privacy for unsought visual and audible interruptions to be avoided or minimised, but it means far more than that. Like an industrial product, thought requires raw materials and processing in order to arrive at the finished result; so, for example, there is precious little use putting someone behind a desk in an empty, sound-proofed room and telling him to get on with thinking. For professional people, the raw materials will include not only client files and textbooks, but copies of magazine articles, diary entries, memoranda from colleagues, wall graphs and so on. The processing involves two elements: one is the creation of fresh material as thought develops and matures, and the other is contact with other people in order to obtain more information or test ideas against them. Where a team is concerned, its members will need to keep in touch in order to maintain the value of their individual contributions. It is at once clear that privacy in traditional terms can all too easily become isolation: as such it is not merely inadequate, but may be positively damaging.

It is one of the saving graces of humanity that no two people will approach a given problem in the same way. Similarly, no two people will have the same working methods, but nevertheless almost all office planning is based on the assumption that everyone of a given work status will have identical requirements. So executives are issued with a kit that consists of an office with a chair for themselves and one or two for visitors, a desk, a filing cabinet, a telephone, a dictating machine and (if the employer is particularly generous) a calculator. A new arrival will at once begin to impose his personality by distributing his own belongings round his territory and marking some of the firm's ones so that they become his: photos of his wife and children, rings round holiday dates on the calendar, theatre programmes and shopping lists on the window sill and so on.This will make the executive feel happier, but it will do nothing to improve his working performance. He needs two more things to help him. One is the equipment which he personally finds helpful in doing his work: may be it includes a pin-board where he can stick reminders, a rack where pending files can be left on display or a shelf where he can put the reference books he uses most often. The other is something which is almost totally neglected in office planning: it is a second working space.

As we all know only too well, a professional person cannot expect to tackle his work task by

*Reprinted from the *New Law Journal*.

task. Quite legitimate interruptions will involve temporary diversion to another subject, and some jobs are so long that other pressing work must be fitted in at the same time. Because it is so easy for papers to become confused and misfiled, we tend to put one file away or to one side before we start on another. This hinders progress on a big job, and can often impair thought; our papers have been arranged on our desk in a certain way, representing the current stage of our research and ideas on the subject, and if they can be left that way we can readily put ourselves back in the same state of mind. If they have all been put away, at best it will take a few minutes to get them out again, and at worst we will find our train of thought has been lost. Taking this into account, the value of a second working space becomes apparent at once. Vital though it is for filed papers and documents to be neat and orderly, this is not to say that material which is under study has to be neat and orderly as well. In fact, creative processes are seldom tidy, and if we try to make them so, we may well diminish their quality. So there are positive virtues in being able to leave papers out on a working space, in an order which may look a muddle to someone else, but which helps us deal effectively with the problem on hand.

Working conclusions are probably as often communicated orally as in writing, and most useful discussion within the office is also oral. It is therefore important to have the right environment for meetings of various kinds: the two minute, fact-finding talk on the threshold of someone's working area, the confidential discussion with a worried and nervous client or the formal meeting with half a dozen participants. How these needs can be met is a matter for the next article, but it is clear at this stage that some things simply will not do. You cannot interview a hysterical divorcee in a large, cold boardroom or hold an extraordinary general meeting around a desk piled high with the files of other clients. The meeting area must support the purpose of the meeting, not conflict with it.

This article has made three points: that the acknowledged gap between performance and intention is normally attributed to the shortcomings of ourselves, our colleagues or our clients, whether moral or otherwise; that our work is essentially thinking and creative; and that the creative process is different for each of us and ought to be supported by the working conditions which are most appropriate to the individual concerned. There is more to be gained by assisting us towards higher performance than by complaining about our inadequacies. A well planned working environment will provide this assistance, and next month we will consider some of the things that it should contain.

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# LEGAL LITERATURE

**The Brethren: Inside the Supreme Court** by R Woodward and S Armstrong, 1979 New York, Simon and Schuster. 467 pp (including index) $13.95 (US). Reviewed by Bill Hodge.

Any New Zealand lawyer or general reader interested in the human aspect of the U S Constitution or in the dynamics of a collegial court must read *The Brethren.* The authors, journalists with the *Washington Post* (Woodward is of Watergate reportage fame), have purported to write the impossible book: a behind-the-scenes, intimate, revealing demystification of the U S Supreme Court. Their object is to pierce the venerated inner sanctum of constitutional adjudication, to rip the veil of miracle, mystery and authority from the Delphic Oracle of American supreme law, and to reduce the temple of constitutional advocacy to political cockpit. Their method is verbatim reporting of judicial thoughts, luncheon meetings, and conferences, all of which reveal judges as human beings posturing for political purpose. Their thesis is the lateral and reactionary shift in the Court from the liberal progressive era of Chief Justice Earl Warren, 1953-1968, to the "Nixonburger" years, dominated by four Nixon appointees, and summarised by the final line of the book: "The center was in control".

The basic integrity of the book is suspect. The authors claim to have interviewed "several justices" and more than 170 former law clerks (three or four of the nation's brightest law graduates for each judge year). Either those judges and clerks sat down with Woodward or Armstrong and a tape-recorder, or the judges' chambers were bugged, or the authors have "recreated" judicial conferences and fabricated,

out of whole cloth, the entire book. Whether their claims regarding their sources are true or false, the authors may have well poisoned for the future the useful and confidential relationship between the judges and their clerks.

It is suggested here that the book's purported conversations (and thoughts?) have been constructed with a novelist's imagination, a poet's licence, a reporter's flair for readable scandal, and a journalist's hatred of former President Nixon. How else can a serious study pretend to tell a reader what a judge, alone in his study, was thinking as he "nearsightedly bent over his cup to peer at the coffee-stained brief"? It must be concluded that, even though certain substantive legal issues are considered in depth, it would be very foolish counsel indeed who would cite the book as "authority" to the Court. On the other hand, some of the quotes are so absolutely outrageous that there must be some truth in them.

A second objection to the book may be the little bits of human interest which have no relevance and which the reader may not really wish to know — that an elderly judge, after a stroke, had an incontinent bladder; that another judge, when tense, chewed rubber bands; that a retired judge tried pathetically to cling to a decision-making role in the Court; that another judge had failing eyesight; or that an energetic justice had cheated in basket ball games with the clerks in the gym upstairs ("the highest court in the land").

Scepticism and distaste aside, the book remains a marvellously good read as a blend of fact and fiction with a ring of truth to it. The essence of the book is a study of a handful of momentous appeals before the Court, in the years 1969-1976, and exposure of the alleged politicking, horsetrading, and consensus-seeking which surrounds the judicial conferences where the nine judges vote on cases and assign the writing of majority and minority opinions. Specific issues include the consitutionality of abortion, capital punishment, desegregation, the *Pentagon Papers* case, Mohammad Ali's conscientious objection to war, and presidential privilege — and how proud and learned men can sign their names to another judge's opinion on such issues.

A secondary, but persistent motif is the incessant character assassination of Chief Justice Warren E Burger, who is portrayed as a not-too-bright pro-Nixon, law-and-order hack, who only looks like a Chief Justice. As Mr Justice Stewart allegedly tells his clerks:

> "On ocean liners they used to have two captains. One for show, to take the women to dinner. The other to pilot the ship safely. The Chief is the show captain. All we need now is a real captain."

Mr Justice Stewart also allegedly thinks that the Court needs "a statesman able to inspire, cajole and compromise, a man of integrity, who commanded the respect of his colleagues. Warren Burger was none of these". When a friend is persuading Mr Justice Douglas to retire, on account of failing health, he asks: "You can't even read. How are you going to decide cases? I'll listen and see how the Chief votes and vote the other way' Douglas snapped".

Other judges are criticised as well. When Mr Justice Blackmun was assigned the majority opinion in *Flood v Kuhn* , a challenge to the non-applicability of the anti-trust laws to professional baseball, he waxed eloquently but harmlessly about the sport for several pages, citing the *Baseball Encyclopedia,* several poetic odes to the sport, and naming 88 individual baseball heroes: (1972) 407 US 258, 260-265. (As if Hardie Boys J had reviewed the 1905 Invincibles for several pages before dealing with the writ of ne exeat regno in *Parsons v Burk* [1971] NZLR 244). The authors report Mr Justice Brennan's reaction to the Blackmun opinion: "Brennan was suprised. He thought Blackmun had been in the library researching more important cases, not playing with baseball cards".

It must also be concluded that this book, because of the much stronger laws of contempt of court and defamation, could not have been written in New Zealand or the United Kingdom about the courts in those countries. The nearest comparable efforts might be Professor Heuston's essay on *Liversidge v Anderson* at (1970) 86 LQR 33, Griffiths' *The Politics of the Judiciary* (Manchester, 1977), and G.Rosenberg's article of the same title in (1971) 6 VUWLR 141.

Fact or fiction, Woodward and Armstrong have made it easier to belive that judges reason backward from a chosen result; that judicial decision-making is more dependant on what the judge had for breakfast than on a judicial discovery of "the law as a brooding omnipresence in the sky".

MATRIMONIAL PROPERTY

# DEBTS AND THE MATRIMONIAL PROPERTY ACT 1976 — PART III

*By* A J B McLEOD. *This is the final part. The earlier parts appeared at pp195 and 220.*

## I Section 20(5): deductible debts

*Two rules and two exceptions*

Once the debts are classified as either "personal" or "matrimonial", it is then possible to use s 20(5) to determine which debts are deductible. Unfortunately, s 20(5) is an extremely difficult subsection to understand. The draftsman has chosen economy of words as his goal. To this end he has sacrificed clarity, comprehension and any degree of coherence. The result is a frustrating subsection which is short on sense as well as on words. The question must be asked again — why did the draftsman not use a few extra words to make his sections read a little better?

Section 20(5) says:

> "(5) The value of the matrimonial property that may be divided between husband and wife pursuant to this Act shall be ascertained by deducting from the value of the matrimonial property owned by each spouse:
>
> (a) Any secured or unsecured debts (other than personal debts or debts secured wholly on separate property) owed by that spouse; and
>
> (b) The unsecured personal debts owed by that spouse to the extent that they exceed the value of any separate property of that spouse."

With patience and repeated readings however one can distill two simple rules from s 20(5) together with two exceptions which govern the deductibility of debts.

Rule: Matrimonial debts are deductible.

Rule 2: Personal debts are non-deductible.

The two exceptions are:

Exception 1: Matrimonial debts secured wholly on separate property are non-deductible.

Exception 2: Unsecured personal debts owed by one spouse to the extent that they exceed the value of any separate property of that spouse are deductible.

The question must now be asked: Are these exceptions really necessary?

*Exception 1: Matrimonial debts secured wholly on separate property are non-deductible* It is difficult to understand the reason behind exception one. If it is accepted that in principle matrimonial debts should be deductible, why should it make any difference if they are secured wholly on separate property? Surely the nature and purpose of the debt and the circumstances in which it was incurred should determine whether or not it is deductible, rather than the manner in which it was raised.

It is not hard to imagine the possible injustices and anomalies caused by this exception. Take, for example, a debt incurred to acquire a family chattel. This chattel will be shared as part of the domestic property, and as one might expect of a debt incurred to buy a family chattel, it will be classified as a matrimonial debt: s 20(7) (c). But if the debt is secured over the husband's separate property farm it will not be deductible, whereas if it is secured over the matrimonial home, it will be deductible. The result is nonsense but the message is clear — encumber the matrimonial property before your own.

In the writer's opinion, exception one:

(i) complicates an already complex subsection;
(ii) causes injustices;
(iii) serves no apparent purpose.

It should therefore be removed.

*Exception 2: Unsecured personal debts owed*

*by one spouse to the extent that they exceed the value of any separate property of that spouse are deductible* The reasoning behind this exception appears to be as follows. Unsecured creditors of personal debts can in the normal course of events claim against the debtor's separate property, but such a claim is clearly good only to the extent of the value of that separate property. If the debtor's unsecured personal debts exceed this sum, the creditors must then resort to the matrimonial property. But the value of the matrimonial property available to satisfy the creditors' claims is diminished by the other spouse's "protected interest". By virtue of s 20(2) this protected interest, which may be as high as $10,000, is not liable for the unsecured personal debts of the debtor spouse. And after the Court's order pursuant to an application under the Act, this pool of matrimonial property may be further diminished by:

(i) The deductible debts owed by the *other* spouse; and
(ii) The *other* spouse's share of the matrimonial property.

To protect these unsecured creditors, therefore, the debtor spouse is obliged to dedect the value of his/her unsecured personal debts to the extent that they exceed his/her separate property. Such a deduction has the practical effect of giving the debtor spouse a larger share of the matrimonial property and thus providing more property for the creditors to claim against. This of course is all done at the expense of the other spouse. Its fairness must be seriously questioned and in the opinion of the writer, exception two should suffer the same fate as exception one: unconditional removal.

The case of *Delbridge*[1] illustrates the inherent injustice in exception two. There the husband had no separate property. Ongley J held that the husband was able to deduct from the matrimonial property his unsecured personal debts totalling $1,135.94. The learned Judge said:

> "The respondent [wife] opposes the deduction of these amounts but I think the finding that there is no separate property puts their deductibility beyond question."

Fisher has ably highlighted two other difficulties caused by exception two: see para 342 of his work on the Act, R L Fisher, *The Matrimonial Property Act 1976.*

## II Mechanics of s 20(5)

Once the deductible debts have been ascertained the Court is able to proceed with the arithmetical calculation required by s 20(5). If s 20(5) is construed literally, the Court simply totals up the gross value of the husband's matrimonial property and subtracts his deductible debts to arrive at a net figure. A similar calculation is made with respect to the wife's matrimonial property and deductible debts. The two net figures thus arrived at are then pooled and divided pursuant to the Act.

However, such a literal construction ignores a key concept of the Act, viz matrimonial property is made up of domestic property and balance matrimonial property. These two classes of property must be kept separate, as they are divided at the end of the day on two completely different bases. This necessitates one total for the husband's domestic property and one for his balance matrimonial property. Similarly, the wife's property must be split into these two classes, making four subgroups in all:

(i) husband's domestic property;
(ii) husband's balance matrimonial property;
(iii) wife's domestic property;
(iv) wife's balance matrimonial property.

This subgrouping of property raises a problem: which debts are to be deducted from which subgroup? As Fisher points out[2] there is scope for manipulation by the parties in this area. To avoid any unfair advantage, the learned author advocates a set procedure to be observed by the Courts when appropriating the debts to the various sub-groups. However, such rules carry with them their own problems of formulation and interpretation. Further they fetter an invaluable discretion given to the Court. In the light of the Court of Appeal's observations on discretions in *Meikle*[3] it is submitted that the question of appropriation should be left to the unrestricted discretion of the Court. Thus the Judge should be free to appropriate the husband's deductible debts between

(i) the husband's domestic property, and
(ii) the husband's balance matrimonial property,

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[1] (1978) 1 MPC 57.
[2] Fisher, op cit, paras 346, 347.
[3] [1979] 1 NZLR 137, 154 per Cooke J, 159 per Richardson J. See also *Reid* [1979] 1 NZLR 572, 594 per Cooke J.

and the wife's deductible debts between

(i) the wife's domestic property, and
(ii) the wife's balance matrimonial property

in whatever proportions it deems desirable.

Once these appropriations have been made, the deductible debts may be subtracted to give the following:

(i) husband's net domestic property
(ii) husband's net balance matrimonial property
(iii) wife's net domestic property
(iv) wife's net balance matrimonial property.

It is then a simple matter of addition to arrive at values for:

(i) total net domestic property, and
(ii) total net balance matrimonial property.

It is these last two values which are used to give effect to the Court's awards under ss 11 and 15. Under these sections each spouse will be awarded a share in these two values. The Court will then allocate various items of property between the spouses to give effect to this sharing: ss 25 and 33.[4] In doing so, it will take into account that a spouse is liable for a deductible debt.

Take the following example. The domestic property owned by the husband consists of the matrimonial home ($50,000) and a car ($10,000). There is a deductible debt of $20,000 for which the husband is liable. The wife owns no matrimonial property. The total net domestic property is therefore $40,000 — $20,000 $20,000. However in allocating the property the Court will allow for the fact that it is the husband who will eventually have to repay the debt of $20,000. Thus a possible order might be to vest the house in the husband and the car in the wife.

It is not difficult to imagine the injustices that will arise when there is insufficient matrimonial property from which to subtract the deductible debts.[5] Take the above example again but imagine that the wife is liable for the deductible debt of $20,000, not the husband. The wife has no matrimonial property from which she can subtract this debt. The total net domestic property is therefore $40,000 of which the wife's share is $20,000. However all of this will go towards extinguishing the debt. The practical result is that the husband will get $20,000 and the wife nothing.

## III Date at which debts are to be assessed

There may emerge two schools of thought on this topic. The first would contend that only those debts owing at the date of hearing can be taken into account. The second school would accept the value of the debt at the date of hearing as the general rule but subject to the Court's discretion to decide otherwise.

Richardson J's judgment in *Meikle*,[6] provides the only appellate observations on ss 20(5) and (7). The learned Judge said at p 157:

> "In providing what debts owing by a spouse are eligible for deduction in arriving at 'the value of the matrimonial property that may be divided between husband and wife', s 20(5) allows for recognition of such post-separation factors in two situations. One is where subsequent to the separation one spouse borrows on the security of the matrimonial property for his or her own purpose. The amount involved is not deductible under s 20(5) from the value of the matrimonial property owned by that spouse. In the result the spouse bears the total burden of the diminution in the equity in the property consequent on the borrowing. The other is where debts, which are not personal debts within s 20(7) — a debt incurred by one spouse for the purpose of improving the matrimonial home is one example (s 20(7) (c) ) — are incurred subsequent to the date of separation. Such debts are deductible[7] in ascertaining the value of the matrimonial property to be divided between husband and wife. *But they must be debts owing as at the date of hearing. And s 20(5) does not extend to cases where the equity is increased through payment or reduction of secured indebtedness* or to cases where there is a change in the value of the property *subsequent to the date of separation*" (emphasis added).

The underlined sentences would appear to support the first school of thought, and be consistent with Richardson J's earlier pronounce-

[4] Alternatively of course it may order that the assets be sold and the spouses share in the cash proceeds that result.
[5] For a case where there was no matrimonial property at all from which to subtract debts, see *Bradley* (1978) 1 MPC 35.
[6] [1979] 1 NZLR 137.
[7] Unless of course they are secured wholly on separate property in which case they come within exception one outlined above.

ments on the limitation of the Court's jurisdiction to property that is in existence at the date of hearing.[8] The second school of thought finds an able advocate in Fisher.

> "It is submitted that subject to a discretion to decide otherwise, the Court is to have regard to the state of the spouses' debts as they stand at the date of hearing. This seems to flow from the fact that s 20(5) qualifies value in terms of s 2(2) as distinct from shares in terms of s 2(3). Section 2(2) stipulates that prima facie the value of property is to be taken as the value as at the date of hearing."[9]

As to the discretion to decide otherwise, Fisher says:

> "There remains, however, the Court's discretion under s 2(2) to determine value at a date other than date of the hearing. Normally changes in value which have been actively brought about by the actions of one of the spouses after separation warrant the exercise of this discretion (para 486). That principle does not seem appropriate where the cost of the improvement remains deductible at the date of the hearing under s 20(5). On the other hand the exercise of the discretion does seem appropriate where, for example, prior to the hearing a spouse has paid off a non-personal [ie matrimonial] debt with income earned since separation."[10]

In *Delbridge*,[11] Ongley J showed himself to be a member of the second school with the following passage:

> "While the respondent was depleting the cash reserves on her overseas trip the applicant was refurbishing the coffers to some extent by improving his current account balance with his employers from a debit of $1,112.36 to a credit of $501.63. It would be quite unjust in the circumstances to give the respondent a share of the credit balance rather than to deduct the earlier debit from the value of the divisible assets. The Act is not specific as to the date at which debts are to be ascertained. *Ordinarily I should think they would be ascertained at the time the property is valued but in the absence of any provision to the contrary, I think it is open to the Court to fix a different date if the circumstances of the case warrant that being done.* In my view it meets the justice of this case to deduct the debt as it stood at the time of separation." (emphasis added)

Only time will tell which view will prevail. The latter view does have the decided advantage of containing a discretion which, as *Delbridge* shows, makes it easier to achieve a just result. But it may well be that after *Meikle* the former view now has the inside running.

**Conclusion**

The approach in this article has largely been a negative one. The writer has sought to bring out some of the defects, anomalies and lacunae to be found in ss 20(5) and (7). These "rotten" parts have proved so numerous, that it may well be preferable to root out the whole tree, and plant again, rather than attempt any ad hoc grafting.

However, in case these two subsections are deemed salvageable, and in order to conclude on a more positive note, the writer suggests the following partial redraft:

> (5) The value of the matrimonial property that may be divided between husband and wife pursuant to this Act shall be ascertained by deducting from the value of the matrimonial property owned by each spouse any matrimonial debts owed by that spouse.
>
> (7) For the purposes of this section, "matrimonial debt" means a debt incurred —
>
> (a) By the husband and his wife jointly; or
> (b) By either spouse in the course of a common enterprise carried on by the husband and the wife, whether or not together with any other person; or
> (c) By either spouse for the purpose of acquiring or improving or repairing matrimonial property; or
> (d) By either spouse for the benefit of both the husband and the wife; or
> (e) By either spouse for the benefit of any child of the marriage in the course of bringing up any child of the marriage.

[8] See eg *Edwards* (1977) 1 MPC 67; *Winter* [1977] 1 MPC 230.
[9] Fisher, op cit, para 349.
[10] Ibid, para 351.
[11] (1978) 1 MPC 57.

EQUITY

# AVONDALE PRINTERS v HAGGIE: MR JUSTICE MAHON AND THE LAW OF RESTITUTION

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## Introduction

In his recent decision in *Avondale Printers and Stationers Ltd v Haggie*[1] Mahon J has taken the opportunity to expound his views on the place of the constructive trust and the doctrine of Unjust Enrichment in the law of New Zealand. Given the controversial character of these issues in this jurisdiction[2] and others[3] the decision is of importance for that alone. It is even more interesting however on account of the learned Judge's observations, forwarded in the course of the presentation of his thesis on those doctrines, on the nature of the judicial law-making process and the particular role of one of its greatest modern participants, Lord Denning. Many of the Judge's observations are illuminating. Some are provocative and controversial. All combine to form a scholarly, measured and significant contribution to both the Unjust Enrichment debate and the broader issue of the judicial role in law creation. The object of this note is to examine the main observations forwarded by the Judge on both these counts.

## The facts and decision summarised

The facts of the case were somewhat complicated. No more than an abbreviated summary of them is necessary however to provide a basis for the subsequent discussion.

The Fearon Estate owned a commercial property in Avondale. The plaintiff and defendant both leased parts of that property. Thomas, the plaintiff's governing director, saw redevelopment possibilities in the site. He offered to purchase it from Fearon. Fearon thought the offer was too low and refused. Haggie, a friend of Thomas, offered a higher sum. It was accepted. On 1 June 1976 a contract was signed with Fearon, the purchasers being designated as Haggie, his wife "or nominee". Settlement was fixed at 29 October. It was apparently contemplated that Thomas, with whom Haggie had discussed the possibility of joint development of the site, might be the nominee.

On 3 June 1976 Thomas and Haggie agreed that Thomas would be nominated as purchaser, and would immediately refund Haggie's deposit and take over Haggie's obligations under the contract with Fearon. For his part Haggie agreed to advance $45,000 to Thomas to assist in the purchase and any subsequent redevelopment. A "Deed of Nomination" to this effect was subsequently executed.

On 27 September Thomas's contractors began preliminary development work on the site. The plans proposed a development of approximately $75,000. Loan moneys for that purpose and for the purchase of the property itself were available to Thomas but at a high rate of interest. On October 28 Thomas, Haggie and Baillie, an adviser of Thomas's, met to discuss settlement, scheduled for the following day. The Judge found as a fact that Thomas and Haggie reached a new agreement at that meeting to the effect:

1. Thomas would "stand aside" and allow Haggie to take title;
2. Haggie was to refund Thomas's deposit;
3. Haggie would commit himself to "a top limit" of $100,000 to the total cost of the development;
4. Thomas would take responsibility for the development of the site within that limit;

[1] [1979] 2 NZLR 124.

[2] The Unjust Enrichment issue has given rise to conflicting expressions of viewpoint in the Supreme Court. *Carly v Farrelly* [1975] 1 NZLR 356 and *Gibson v Gibson* (unreported; Supreme Court, Christchurch, 21 May 1979) are explicitly or implicitly against its recognition; *Van den Berg v Giles* (unreported; Supreme Court, Wellington, 18 December 1978) is in favour.

[3] See the judicial discord and confusion prevailing in Australia summarised in Neave, "The Constructive Trust as a Remedial Device" (1978) 11 MULR 343 and Neave, "A postscript: Kardynal v Dodek" (1978) 11 MULR 580. Most of this confusion straddles the two issues identified in the text and arises from the judicial response to *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886, discussed infra, pp 250-251. The issue is also of course a live one in the United Kingdom; see the discussion of the opposing viewpoints, infra, pp 254-255.

5 Thomas was to have an option to purchase[4] the property within two years of settlement at a formula price;
6 Thomas would immediately make a $10,000 deposit "against his two-year purchase contract";
7 Haggie was to have a 15-year lease of part of the premises to carry on his trade as a butcher.

On 2 November settlement was effected by Haggie and the vendor. Immediately thereafter Haggie through his solicitor denied the existence of any agreement with Thomas, rejected the suggestion that Thomas continued to have an interest in the property, and called for an end to the "unauthorised" work being carried out on the site by Thomas' builders. Thomas stopped all work on the site on 1 December 1976. The cost to him of construction work to that point was $34,000.

In his Statement of Claim the plaintiff argued for conveyance of the land to it or, alternatively, for payment to it of the value of the works constructed on the land. In support an arsenal of causes of action were pleaded. Most are of no direct concern to the themes of this paper. The two that are of relevance were those that sought to impose liability on the bases of Unjust Enrichment and of constructive trust. The first was rejected by Mahon J. The second was accepted.

It is convenient to summarise the learned Judge's approach to the constructive trust issue first. After holding that an agreement incorporating points 1-7 above was arrived at between Thomas and Haggie on October 28 the Judge turned to the issue of whether Haggie's failure to honour that agreement constituted him a constructive trustee. Mahon J defined the legal principle applicable in the following terms:

> "Where property is conveyed or proprietary rights released in consideration of an oral promise by the transferee that the transferor will retain or later acquire a beneficial interest in the property in question, and where retraction of the promise amounts to a fraud on the transferor, then the transferee will be held a constructive trustee for the benefit of the transferor . . . ."[5]

And when will retraction of the promise amount to a fraud on the transferor? the view of Mahon J:

> "The key . . . lies in the question whether the transferor would have parted with his property but for the oral undertaking of the transferee. If that question is answered in the negative, then renunciation of the promise or disavowal of the common intention will operate in equity as a fraud on the transferor and entitle him to the appropriate remedy".[6]
>
> Applying these principles to the facts the Judge held a constructive trust to be imposed on the defendant who was as a result bound to transfer the property to the plaintiff.[7]
>
> Turning now to the Unjust Enrichment cause of action, it would appear from the judgment that counsel for the plaintiff argued first for the application of the "broad equity" invoked by Denning MR in *Hussey v Palmer*.[8] There a mother had moved in with her daughter and son-in-law, built on her own bedroom at her own expense, left shortly thereafter and unsuccessfully sought to recover from her son-in-law, the owner of the dwellinghouse, the cost of the extension. A majority of the Court of Appeal[9] held that a constructive trust was imposed on the son-in-law and that the cost could be recovered. Lord Denning reached that conclusion on the basis of the principle that:
>
> "[A constructive trust] is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone. . . ."[10]

Mahon J observed of the result in this case that "it seems impossible that such a conclu-

[4] The actual agreement used the term "first refusal". This was held by Mahon J to mean an option, having regard to the context of the agreement. See supra, note 1, p 158.
[5] Ibid, p 163.
[6] Ibid.
[7] Other terms of the constructive trust, of no great relevance here, rendered the plaintiff liable to reimburse the defendants' purchase money and to grant a registerable lease in terms of clause 7 of the facts as found. See p 2.
[8] [1972] 3 All ER 744.
[9] Denning MR and Phillimore LJ; Cairns LJ dissented not on the merits but on the basis that the transaction constituted a loan and could not therefore give rise to a resulting trust. See ibid, pp 748-9.
[10] Ibid, 747.
[11] Supra, note 1, p 145.

sion could have been valid"[11] in that it contravened the settled principle that a constructive trust could only be imposed in situations such as *Hussey v Palmer* upon proof of an express or implied agreement as to beneficial ownership,[12] neither of which existed in that case. From that conclusion Mahon J turned to other decisions of Lord Denning in which similarly broad expressions of the circumstances in which a constructive trust would be imposed were articulated.[13] In these cases, according to Mahon J, Lord Denning was attempting to introduce into English law a doctrine of Unjust Enrichment. He held that upon analysis:

> "[W]hereas lip service is consistently paid to the principle that unjust enrichment does not exist in English law . . . [these cases] clearly reveal the invocation of unjust enrichment as a principle of fairness applicable by reference to the assumed merits of each individual case. Such an approach is vindicated neither by principle nor authority . . . "[14]

And concluded of Lord Denning's endeavours:

> "The result is a formidable aggregation of appellate precedents which are juridically invalid . . . . The body of precedent stands, constructed by a process which is a simple violation of the principle of stare decisis".[15]

As earlier indicated these remarks were directed towards the specific argument that the recent decisions of Lord Denning provided a basis upon which the plaintiff could recover. It will be obvious from the foregoing that Mahon J saw the "juridical invalidity" of those decisions or "the violation of stare decisis" they involved as reasons in themselves to reject the argument. In the course of this analysis, however, the Judge also addressed the broader proposition of whether, these objections aside, the principle of Unjust Enrichment *should* be part of the law of New Zealand. His answer to that query was an emphatic negative. After referring to several earlier expressions of opposition to the doctrine[16] he cited with approval the view of Holdsworth[17], who described the consequence of the adoption of a doctrine of Unjust Enrichment as necessarily involving the conclusion:

> ". . . that the law has thrown up the sponge, and has abandoned the attempt to produce any workable rules on this question. It means in effect that a lawyer asked to advise on a doubtful case will be obliged to study, not so much the principles of the law, as the mentality of his judges".[18]

Mahon J cited too his own even more eloquent criticism in *Carly v Farrelly*[19] to the effect:

> "[Unjust Enrichment] is not only vague in its outline but . . . must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying notions of fairness and conscience shall be the legal determinant. No stable system of jurisprudence could permit a litigant's claim to be consigned to the formless void of individual moral opinion".[20]

As a result the Judge concluded that while there could be no objection to formally assembling "under one general title" the existing quasi-contractual and equitable restitutionary reliefs there were great objections to introducing the doctrine in any more substantive a manner. "All . . . objections to a general right of restitution have as their central point the elemental uncertainty of a doctrine afflicted by the possibility that 'justice' might degenerate into 'fairness' "[21] and would call for "subjective judicial opinion as to where the merits lie"[22] He concluded by illustrating the uncertainties inherent in the doctrine by reference to the difficulties of applying it to the facts of *Avondale Printers and Stationers Ltd v Haggie* itself and held in respect of them "I fail to see by

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[12] Ibid. The requirement arises from the decisions of the House of Lords in *Pettitt v Pettitt* supra, note 3 and *Gissing v Gissing* supra, note 3, and is discussed infra, pp 250-251.

[13] See eg *Heseltine v Heseltine* [1971] 1 All ER 952; *Cook v Head* [1972] 2 All ER 38; *Binions v Evans* [1972] Ch 359; *Eves v Eves* [1975] 3 All ER 768.

[14] Supra, note 1, p 149.

[15] Ibid, p 153.

[16] See *Baylis v Bishop of London* [1912] 1 Ch 127; *Sinclair v Brougham* [1914] AC 398; *Reading v Attorney-General* [1951] AC 507.

[17] (1939) 44 LQR 37.

[18] Ibid, p 154.

[19] [1975] 1 NZLR 356.

[20] Ibid, p 367. For an illuminating note on this decision see Sutton, (1975) 6 NZULR 367.

[21] Supra, note 1, p 152.

[22] Ibid, p 153.

what touchstone that delicate question might be resolved".[23]

**The judgment analysed**

(a) *Constructive Trust*

The actual decision to impose a constructive trust was beyond question correct. Mahon J totally persuades in his argument that such a result is both consistent with and demanded by existing authorities.[24] (It was also, one might add, demanded by the justice of the case).[25] One or two aspects of the Judge's reasoning do however call for comment.

The first relates to his view, expressed in the course of his analysis of the general principles upon which existing law recognises the imposition of a constructive trust, that there is indeed "one connecting link" joining all situations in which constructive trusts may presently be imposed. That link the Judge defined as a finding of actual or equitable fraud on the part of the defendant. Definitionally this must be correct, given that "equitable fraud" describes "any breach of a duty to which equity [has] attached its sanction".[26] The breadth of this definition does however serve to reduce any "connecting link" of which it is a component to the status of a Nothing. Redefining that link to accommodate its generality the "link" holds that a constructive trust will be imposed if the defendant has been guilty of fraud or has breached an equitable duty. That necessarily poses the question, "when will such a breach take place?". And that is in many contexts an extraordinarily complicated question the resolution of which is not assisted to the slightest degree by recourse to a "connecting link" which effectively answers it by the reply, "when it *has* taken place". While it cannot be denied that there are some areas of equity jurisprudence in which that determination is reasonably straightforward and in which the circumstances when a constructive trust will be ordered are clear-cut, there are manifestly many others in which the nature and extent of equitable obligations or their application to fact situations is the subject of great difficulty. Take for instance the question of the liability of a fiduciary for the use of information or opportunities that come to him in his fiduciary capacity. *Boardman v Phipps*,[27] the leading authority on the issue, is in itself contradictory. Subsequent cases, in a variety of jurisdictions, have compounded that difficulty by taking conflicting interpretations of *Boardman v Phipps* and of each other.[28] The result is that any determination of either the duties owed by a fiduciary in this context or whether a given fiduciary is in breach of them are matters of great uncertainty. The general principle advanced by Mahon J does no more than ask, rather than resolve, these questions.

Perhaps in recognition of that the Judge at a later point in his judgment substituted a rather more specific description of the "common link" in terms of a constructive trust being imposed "because it would be dishonest for the recipient to retain a benefit"[29] and, alternatively, of the imposition of constructive trusts on the ground of "want of probity".[30] Mahon J recognised that such descriptions had been criticised in the past[31] by reference to cases such as *Regal (Hastings) Ltd v Gulliver*[32] in which the fiduciaries were held liable notwithstanding the honesty of their intentions, yet justified it by reference to the rule in *Ex Parte James*.[33] That rule prohibited in absolute terms the purchase of trust property by trustees. Mahon J said of it and of related prohibitions:

> "In this situation . . . the Court of Chancery was inevitably dealing with a transaction which at first sight carried the imprint of a fraud and as a matter of policy declined to allow that presumption to be rebutted by one who was the sole repository of the truth".[34]

The inference is that a fiduciary who offends the prohibition by purchasing trust property has on that account alone been guilty of a "want of probity" or even "dishonesty" and that by extension and further inference those other situations — such as *Regal (Hastings) Ltd*

[23] Ibid, p 155.

[24] See particularly *Bannister v Bannister* and the learned Judge's discussion at pp 68-72.

[25] See the discussion infra, p 14.

[26] Per Lord Haldane LC in *Nocton v Lord Ashburton* [1914] AC 932 at p 953.

[27] [1967] 2 AC 46.

[28] For discussions of the case and subsequent developments from it see generally Goff and Jones, *The Law of Restitution* 2nd ed pp 505-507; Finn, *Fiduciary Obligations* pp 231-234, 240-246.

[29] Supra, note 1, p 160.

[30] The phrase is that of Edmund Davies LJ in *Carl Zeiss-Stiftung v Herbert Smith (No 2)* [1964] 2 Ch 276, 301.

[31] See eg Oakley, "Has the Constructive Trust Become a General Equitable Remedy?" (1973) 26 Current Legal Problems 17 at 18.

[32] [1942] All ER 378.

[33] (1803) 8 Ves 337; for an earlier expression of the same view see the decision of Lord Eldon in *Ex Parte Lacey* (1802) 6 Ves 621.

[34] Supra, note 1, p 160.

*v Gulliver* perhaps — in which supposedly "honest" fiduciaries have been subjected to constructive trusts may be similarly described.

With respect neither this reasoning nor its conclusion persuades. Even accepting the validity of the rule in *Ex parte James* and of the reasoning behind it,[35] it does not follow from the imposition of the constructive trust that the rule involves that the defendant is either in fact or in theory held or deemed to be "dishonest" or "wanting in probity". Not in fact, because it is explicitly stated by Lord Eldon in *Ex parte James* itself that the trust is to be imposed "however honest the circumstances"[36]; not in theory because the conceptual basis upon which liability rests involves no attribution of dishonesty to the purchaser himself but merely stresses the inability of the Court to double-check the trustee's assertion of his honesty. Further, any case there might be for viewing *Ex parte James* as attributing dishonesty to any fiduciary who acts contrary to one or other of the prohibitions is weakened by the erosion of the severity of its rule over the intervening decades. Even if Lord Eldon saw purchasing trustees as notionally dishonest — and if the analysis above is correct he did not — subsequent Courts have clearly not. They have permitted purchases with the consent of the Court.[37] They have held that such purchases are not void but only voidable.[38] One has even held that purchases should be permitted if the trustees can establish the bona fides of the transaction.[39] None of these developments makes it inconceivable that *Ex parte James* itself may implicitly support a form of notional blameworthiness on fiduciaries falling foul with its rule. They do however render it unquestionable that the only ground forwarded in that case which could support such a notional attribution — the inability of the Court to investigate the facts — is increasingly unacceptable to later Courts. All in all *Ex parte James* and the philosophy it articulates must, at the very least, represent an insecure basis for Mahon J to build his "dishonesty" and "want of probity" link upon.

There is in addition a broader objection to it than that. Even if it were supported by the older authorities its rarified and academic character would render it a source of confusion rather than assistance in the resolution of or even approach to constructive trust inquiries. In ordinary legal contemplation "want of probity" and "dishonesty" connote exactly that: evidence of improper dealing, abuse of position, preference of self to beneficiaries or the like. Any general principle which suggests these qualities as the focus of every constructive trust inquiry possesses an obvious capacity to mislead. So unusual and refined does the definition of "dishonesty" have to be made to encompass *Keech v Sandford*[40], the host of cases decided upon its basic principle and the myriad of fact situations to which it will in future lead to constructive trust liability, as to be an obstacle to understanding.

(b) *Unjust Enrichment*

(i) *Lord Denning's "Broad Equity"*. As earlier indicated[41] the starting point for the criticisms forwarded by Mahon J on the doctrine of Unjust Enrichment was an analysis of the "broad equity" articulated by Lord Denning in a series of recent Court of Appeal decisions. This doctrine, said by Mahon J to be "juridically invalid"[42] and in "violation of the principle of stare decisis",[43] provided the basis for his more general criticism of Unjust Enrichment itself. It will be subsequently suggested that there is no necessary or logical connection between the two. Assuming for the moment that there is some relationship, however, and that any criticism that can be sustained against Lord Denning can also be sustained against Unjust Enrichment, let us briefly examine the propriety of Lord Denning's innovations.

The thrust of the charge of "violation of stare decisis" seems to be directed at Lord Denning's treatment of the decisions of the house of Lords in *Pettitt v Pettitt*[44] and *Gissing v Gissing*.[45] The short point made by Mahon J in relation to that treatment is that Lord Denning has — by inference deliberately — ignored or misconstrued those authorities in order to enable him to reach decisions "on the merits" of the case before him. This specific charge is impossi-

[35] And others have not: see for instance the criticisms levelled against it by all members of the Court of Appeal in *Holder v Holder* [1968] Ch 353.

[36] Supra, note 33 at p 345.

[37] *Robertson v Robertson* [1924] NZLR 552; *Throp v Trustees Executors and Agency Co of NZ* [1945] NZLR 483.

[38] *Thompson v Eastwood* (1877) 2 App Cas 215; *Holder v Holder* supra, note 35.

[39] *Holder v Holder* ibid.

[40] (1726) 2 Eq Cas Abr 741.

[41] Supra, p 2,7.

[42] Supra, note 1, p 153.

[43] Ibid, p 153.

[44] Supra, note 3.

[45] Ibid.

ble to rebut. In *Gissing v Gissing* a majority of the House of Lords reaffirmed that no constructive trust could be imposed in respect of "family assets" on the basis of an "imputed" intention — namely, one which the parties did not make but which would have been made by reasonable persons in their position — as opposed to one imposed on the basis of an express or implied agreement.[46] Specifically rejected was the notion that, whether by the device of an "imputed" agreement or otherwise, a constructive trust could be imposed on the ground that it was "just and equitable" to do so.[47] Decisions of Lord Denning after *Gissing v Gissing* have ignored both of these limitations upon the remedial capacity of the constructive trust. In place of the *Gissing v Gissing* rules — and to add salt to the wound, in partial and selective reliance upon them[48] — the Master of the Rolls has developed a principle justifying judicial intervention in precisely the circumstances rejected by the House of Lords.

"In violation of stare decisis" this development must be. Whether it is "juridically invalid", however, or whether that violation is of a character such as to justify the wholesale dismissal of the development and any broader implications it may have is a more complex question.

We may start with the proposition that there is nothing unique in attempts by a lower Court to either undermine the authority of or circumvent the full force of a higher decision. On the contrary: it happens with great frequency, and not only at the hands of Lord Denning. We need not move outside the area of trusts to find examples. The highest authorities in the area of purpose trusts are at the House of Lords and Privy Council level.[49] They adopt a restrictive approach to the validity of such settlements. Recent High Court decisions,[50] while paying lipservice to them, have so relaxed the rigour of those rules that they are in substance largely ignored. So too in the realm of gifts to unincorporated associations. In strict higher-Court theory it is extraordinarily difficult to make an effective inter-vivos gift of this character.[51] In actual high Court practice it is becoming increasingly easier through the erosive influence of High Court Judges impatient with a rule which is sound in theory but destructive of reasonable expectations in practice.[52] So too again in the area of the requirement of certainty of objects in relation to trusts and powers where, at least prior to *McPhail v Doulton*,[53] the greater degree of certainty required by appellate Court decisions of discretionary trusts as opposed to mere powers lead to a High Court response of categorising trusts as powers.[54] It is indeed impossible to conceive of any area of equitable jurisprudence which to a greater or lesser degree does not evidence the same phenomenon. It is a fundamental feature of the judicial process that appellate decisons are subject to lower Court scrutiny and that if found wanting many Judges will do their best to avoid them. To criticise Lord Denning for in substance doing precisely that is to criticise a far broader aspect of human and judicial nature.

Of course, there are special features of the Denning decisions. On most occasions on which a lower Court Judge seeks to avoid the force of a higher decision he will endeavour to dress up his decision by "finding an exception" or in some other manner give the appearance of general compliance with it. He will "accept it as binding". He will "be anxious that his decision be not seen as doubting it". He will be merely "applying what he understands the law to be". He will in other words preserve the proper form. If he is seriously minded to go further and cast doubt upon the rule itself or to develop a contrary or competing doctrine he will do so gradually, from case to case, extending here, drawing back there in the light of the reception afforded his innovations in the intervening

[46] An approach adopted by Lords Dilhorne, Morris, Pearson and Diplock. For the fullest discussion of it see Lord Diplock at [1971] AC 886, 904-905. Lord Reid dissented, holding to the view he expressed in *Pettitt v Pettitt* to the effect that an agreement could be imputed: see [1971] AC 886, 896.

[47] See eg, Lord Diplock at 904.

[48] And in particular the judgment of Lord Diplock. See the discussion of this point by Mahon J at p 146. See too the discussion referred to by Mahon J in Neave supra, note 3.

[49] See eg *Bowman v Secular Society* [1917] AC 406 and *Leahy v Attorney-General for NSW* [1959] AC 457.

[50] Most notably *Re Denley* [1969] 1 Ch 373, approved and followed in *Re Lipinski* [1976] 3 WLR 522.

[51] See *Leahy v Attorney-General for NSW* supra, note 49 and *Bacon v Pianta* (1966) 114 CLR 634. See too the discussion of these authorities, substantiating the assertion in the text, in Hogg, "Testamentary Dispositions to Unincorporated Associations" (1971) 8 MULR 1.

[52] *Re Recher* [1972] 1 Ch 526; *Re Lipinski* supra, note 50.

[53] [1971] AC 424.

[54] As in *McPhail v Doulton* itself: see the influence of this consideration discussed by Lord Wilberforce at p 450.

period. He will, again, challenge the higher decision in the respectable and established traditions.

Lord Denning is a master of both devices. Their employment typified his approach in the cases prior to *Pettitt v Pettitt*, where, in the evolutionary and orthodox way in question the "just and equitable" rule (rejected in *Pettitt v Pettitt*) was built up. The special feature of his "broad equity" decisions since that case is that he has largely abandoned them in favour of a more forthright assertion of competing principle. This has not involved an outright or explicit rejection of the House of Lords decision; it has affinities with the more traditional approach in that it purports to gain support from, at least, the judgment of Lord Diplock in *Gissing v Gissing*; but the pretence of consistency seems hardly intended to be taken seriously. As earlier indicated the two-pronged thrust of *Pettitt v Pettitt* and of *Gissing v Gissing* is to the effect that "imputed" agreements (as opposed to "implied") are illegitimate, and that no basis for the division of family assets exists short of an express or implied intention. The "broad equity" rejects both rules. It is worth repeating it:

> "[A constructive trust] is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone".[55]

This is manifestly in flat defiance of the rules laid down in *Gissing*. Moreover, Lord Denning seems to have intended that it be seen as such by seemingly deliberately failing to launch his challenge to the authorities on more orthodox grounds. Such clearly existed. As earlier indicated *Gissing v Gissing* holds out the possibility that an agreement affecting the beneficial title to matrimonial assets may be implied from conduct. The nature of the implied agreement contemplated is extraordinarily difficult to fathom. The statements of those members of the House in *Gissing* who tried to define it are conflicting.[56] One Australian writer, observing the inconsistencies in attempts to apply the concept in that jurisdiction,[57] has described it as necessitating just as much a fiction-based analysis as the "imputed" agreement approach rejected in *Gissing*.[58] The vague and shadowy concept of the implied agreement would therefore clearly be that which most Judges minded to escape from *Gissing* would employ. It possesses the twin virtues of apparent recognition of the authority of the superior decision while enabling a decision to be reached more in accordance with the Judge's view of the merits.

If this is correct then the only meaningful distinctions between the process by which Lord Denning has developed his response to *Pettitt* and *Gissing* and that by which appellate decisions are typically modified by lower Courts are those of the form by which the process has been carried out. The objections of Mahon J are, in short, at the use of more explicit and less covert devices than the norm. That is, with respect, a somewhat narrow basis upon which to launch an accusation of juridical invalidity and one that could be sustained only by showing that the more orthodox process of notional adherence but actual departure possesses a markedly greater virtue than a frank acknowledgement of disagreement. On this issue reasonable minds may differ. Undoubtedly the orthodox process possesses whatever advantages there may be in preserving the appearance of compliance with stare decisis and, perhaps, of limiting the occasions on which appellate decisions are modified or implicitly challenged by requiring the Judge to find some device by which to manoeuvre around them and, usually, some escape route in the language of the decision itself which gives at least the appearance of legitimacy to his own judgment. To the extent that some Judges may be dissuaded from following their own view of the merits by the difficulties this dressing-up process involves the orthodox approach of which it is typically a component may be said to bring a degree of certainty to the law.

Yet it also brings the difficulties inevitably borne of artificial and forced distinguishing. It leads to situations illustrated in a not extravagant way by the present state of the authorities in the law of purpose trusts, in respect of which the only certainty is that the conceptually pure doctrines enunciated by higher Courts will in substance even if not in form be disregarded by lower Courts.[59] It may, as is evidenced by the present law of trusts for unincorporated associations, see the emergence of a series of fictions which cloud the real

[55] Supra, note 10.

[56] See the analysis in Neave supra, note 3 at 347-350, 581-84.

[57] See for example the conflicting approach taken in *Ogilvie v Ryan* [1976] 2 NSWLR 504 and *Kardynal v Dodek* (discussed by Neave, supra, note 3 at 580 et seq).

[58] Neave, ibid, at 584.

[59] See the discussion of these authorities by the present writer in 37 Conv (NS) 420 and 9 VUWLR 1.

issues presenting themselves for adjudication.[60] It will almost certainly breed the confusions and uncertainties typified by those evident in the Court of Appeal judgments other than those of Lord Denning following *Pettitt* and *Gissing*, wherein Judges equally unhappy with those appellate decisions, but more orthodox in their selection of devices to avoid them, have employed a conflicting array of contradictory mechanisms to that end while paying lip-service to them.[61]

None of this is to say that Mahon J should have chosen to follow the "broad equity" doctrine in preference to the approach of the House of Lords. The doctrine is clearly inconsistent with that of higher authority. Mahon J was perfectly entitled to refuse to follow it on that ground. Any decision, whether presentationally orthodox or not, which attempts to circumvent a higher authority is subject to similar treatment at the hands of later Courts. Such decisions are in the nature of a judicial gamble. Some Judges may, while aware of the inconsistency with higher authority, choose to follow and build upon the decision. Others, such as Mahon J in this instance, may call the bluff. In the last resort the question of whether the gamble succeeds depends in substantial part on whether those falling into the first category are sufficiently numerous and authoritative to force a formal change or modification of the higher Court doctrine should it go back to the higher Court itself. The real question raised by Lord Denning's doctrine is not whether it is "juridically invalid" but whether such support will be forthcoming.

(ii) *Unjust Enrichment generally.* As we have seen Mahon J turned from an analysis of the propriety of Lord Denning's "broad equity" to the more general question of whether Unjust Enrichment should be part of the law of New Zealand. To that query, as we have also seen, he returned an emphatic negative. It is worth quoting the kernel of his reasoning once more:

> "[Unjust Enrichment] must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying notions of fairness and conscience shall be the legal determinant. No stable system of jurisprudence could permit a litigant's claim to be consigned to the formless void of individual moral opinion".[62]

It will be obvious from this extract that Mahon J saw the doctrine of Unjust Enrichment as possessing essentially the same qualities as those of Lord Denning's "broad equity" — as involving, in other words, the conferral of a wide and general dispensatory or remedial power such as to enable each Judge to decide in accordance with his view of what was "just and equitable".[63] The main criticism of this view, developed below, is that recognition of the doctrine of Unjust Enrichment does not necessarily involve any such thing. It is worth noting however that even on the assumption that Mahon J is correct in his equation of the doctrine with Lord Denning's "broad equity" it by no means follows that the consequences of a doctrine so defined would be the palm-tree justice supposed. First, one is entitled to doubt whether individual views of "the merits" or of "fairness" would vary as much as is alleged. The reference point is, of course, individual *judicial* views rather than individual views per se. While that does not totally remove any capacity for disagreement it nevertheless ensures a large degree of correspondence in the selection of those elements of any given fact situation which are likely to be treated as of significance in the formation of the opinion as to where the merits lie. The plaintiff's politics, religiosity, social standing and conduct on unrelated issues may well influence an individual's view of what is "fair" or "equitable". They are unlikely to persuade a Supreme Court Judge. In their place the judgment on that issue will be moulded by a series of quasi-legal

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[60] See McKay "Re Lipinski and Gifts to Unincorporated Associations", ibid.

[61] Space forbids a detailed substantiation of this assertion. In the writer's opinion however it is a fair description of, inter alia, the judgments of Brightman LJ in *Eves v Eves* [1975] 3 All ER 768; Megaw LJ in *Hazell v Hazell* [1972] 1 All ER 923; Stephenson and Megaw LJJ in *Binion v Evans* [1972] Ch 359.

[62] Quoted from *Carly v Farrelly* [1975] 1 NZLR 356; see supra, note 1 at p 154.

[63] A view confirmed by his equation of it with some of the more general of Lord Mansfield's dicta on quasi-contract (see eg, his description of the action money had and received in *Towers v Barrett* (1786) 1 TR 133 as being "founded on principles of eternal justice"). It is relevant to note for the purposes of the subsequent analysis however that these broad definitions notwithstanding the action was applied by Mansfield with caution, circumspection and due regard for precedent. "I am a great friend of the action for money had and received, and therefore I am not for stretching, lest I should endanger it" — *Weston v Downes* (1778) 1 Doug 24. See generally Allen, 54 LQR 201 at p 205.

signposts. Did the plaintiff rely on the defendant's undertaking? Did the defendant intend it to be relied upon? Was there equality of bargaining positions? Did the defendant stand in a special relationship to the plaintiff? Did he abuse that position? The result is likely to be one of substantial judicial agreement "on the merits" of any given fact situation. Would not for instance most lawyers and Judges agree with the view of the merits formed by Lord Denning in *Hussey v Palmer*[64] and the other decisions in which the broad equity was applied? I suspect so, for the very reason that the application of that doctrine is quite clearly based upon signposts such as those above. Certainly: in virtually all of the Court of Appeal decisions in question all Judges *have* agreed on the merits, the few dissents being occasioned on legal issues alone.[65]

Mahon J would probably disagree with these assertions. It will be recalled that at the conclusion of his criticism of Unjust Enrichment he illustrated the difficulties its recognition would involve by outlining the uncertainties of its application to the facts of Haggie itself and concluded "I fail to see by what touchstone [this] delicate question might be resolved".[66] Yet with respect, this argument does not persuade. At the stage of his judgment when it was forwarded Mahon J had not resolved the issues of fact surrounding the crucial meeting of 28 October between Thomas and Haggie.[67] His inability to resolve the "merits" of the case or reach a view of "fairness" are hardly surprising if only for the reason that the facts as found to that point hardly gave rise to any legal issue upon which such a view could be formed. Can there be any doubt however that once those issues of fact were resolved in the manner earlier outlined most lawyers would see the "merits" as overwhelmingly in favour of Thomas? A promise was made to him. He relied upon it. The promisor went back on his undertaking and sought to retain benefits conferred upon him by the promisee. The void, it is suggested, is far from formless.

There is too a second consideration. However vague and uncertain a general remedial power might be on its inception it is highly unlikely that those qualities would remain for any appreciable period of time. It is in the nature of the judicial process to measure the Chancellor's foot[68] and to cut down the generality of wide principle by limitations and qualifications. Such would, it is suggested, inevitably take place in relation to the principle of Unjust Enrichment as defined by Mahon J.[69] The pattern is predictable. There would be an initial consensus that property rights were not to be overriden by recourse to it apart from "blatant" cases of injustice; "blatant" would grow to be typified by the presence of "unconscionable" conduct on the part of the defendant; "unconscionable" conduct would be defined as a case in which the defendant had made an undertaking relied upon by the plaintiff. And so on. The result would ultimately be, analgous to the existing law of quasi-contract and equitable restitution, a reasonably precisely defined catalogue of situations in which relief would be granted and an equally well-defined class of situations in which it would not. The details of those rules would presumably not be precisely the same as the existing substantive law.[70] It is scarcely conceivable however that it would be less certain or "formless".

The principal objection to the analysis of Mahon J rests however on a different ground. As we have seen, his assumption is that Unjust Enrichment necessarily confers wide powers to override ordinary property interests on a "just and equitable" ground. That may indeed be true of the Unjust Enrichment principle implicit in Lord Denning's "broad equity". It is not however even vaguely related to that form of the doctrine around which academic and judicial debate has centred in recent decades and which represents a far more likely candidate for adoption into the common law. Yet Mahon J sees the latter variety of the doctrine as being essentially the same as that forwarded by Lord Denning, as being subject to the same criticisms and as being no less unsuitable for adoption in any "stable system of jurisprudence". In doing so, it is suggested, he over-

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[64] Supra, note 8.

[65] As in *Hussey v Palmer* itself: see supra, note 9.

[66] Supra, note 1 at p 155.

[67] The facts as found are set out supra, p 246-247.

[68] The phrase is that of Bagnall J in the course of a vigorous and fluent High Court dissent from Lord Denning's "broad equity" in *Cowcher v Cowcher* [1972] 1 All ER 943.

[69] Goff and Jones, supra, note 28, p 63. One can say with certainty that the civilian doctrine of unjust enrichment, which possessed an equally vague and general beginning (see Gutteridge, "The Doctrine of Unjustified Enrichment" (1935) 5 Camb LJ 204) has evolved in this way: see Gutteridge, ibid, p 205 et seq. See too supra, note 63.

[70] Though if the view of some commentators that the existing rules of restitution are heavily based upon the element of aequum et bonum is correct then such differences may be reasonably minor. See generally Winfield 53 LQR 447 and Allen 54 LQR 201.

looks the fundamental distinctions between the two.

The principal contemporary proponents of the adoption of Unjust Enrichment into English law are Goff and Jones.[71] Their arguments in support of that reception are not new, having been advanced in earlier years by Winfield,[72] Gutteridge,[73] Allen,[74] Lord Wright,[75] and others. Their proposals are a far cry from the "just and equitable" doctrine. No such general power would be conferred. Rules and precedents would play the same role as in any other area of law. The majority of existing rules would remain unaltered by it. It would have a decidedly limited role. It would first enable the existing heads of common law and equitable liability to be brought under one general principle, thereby, inter alia, freeing quasi-contract from the "deplorable effect"[76] of its fictional basis in indebitatus assumpsit.[77] And secondly it would provide a generalised, conceptualised principle by which the propriety of existing rules and contemplated developments of them might be assessed. To reassert: neither role bears the faintest resemblance to the "broad equity" of Lord Denning. The first, in so far as it is intended to free the law of restitution from centuries of development characterised by the extension of the original forms of action by fiction heaped upon fiction, must obviously benefit exposition and understanding.[78] The second may on first blush seem to come closer to the fears expressed by Mahon J of the resolution of cases by "the formless void of individual moral opinion". On analysis, however, any disquiet in this respect is clearly groundless. To suggest that acceptance of the doctrine of Unjust Enrichment would provide a general reference point by which the propriety of existing restitutionary rules might be assessed is not to say that every Court at every time would be free to determine for itself whether to follow a particular rule, nor that once that assessment had been made and the question of propriety resolved the rules could be put to one side on a "just and equitable to do so" basis. Lord Wright, an earlier proponent of the reception of the doctrine into English law, did not think so.[79] Nor do Goff and Jones, who recognise:

> "Acceptance of the principle of unjust enrichment is not . . . inconsistent with recognition that, in restitution as in other fields, recourse must be had to the decided cases to determine the success or failure of any particular claim".[80]

Nor would the employment of the doctrine for this limited purpose create instability or uncertainty of anything like the order attributed to it by Mahon J. If the opinion of Winfield[81] and others is correct the overwhelming majority of existing rules of restitutionary liability have been fashioned on the basis of an implicit doctrine of Unjust Enrichment in any event[82] and would for that reason be unaffected by its explicit recognition. Even if it is not, the fact remains that Goff and Jones, Mahon J's principal protagonists, view the occasions on which the doctrine might force a reappraisal of existing law as limited in number and for the most part well-defined.[83] There is no reason at all to believe that a stable system of jurisprudence could not be preserved under the doctrine. There is some ground for believing that a more just and — there is no real need to shrink from the term — fair one could result.

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[71] *The Law of Restitution* 2nd ed (1978).

[72] Supra note 69. See too Winfield: *The Province of the Law of Tort* pp 128-129.

[73] (1935) 5 Camb LJ 204.

[74] Supra, note 70.

[75] See *Fibrosa Spolka Akeygna v Fairburn* [1943] AC 32 at 62. More recent expressions of judicial sympathy for this view — other than from Lord Denning — are summarised by Goff and Jones at 13-14.

[76] Friedmann, 53 LQR 449 at 450.

[77] See Winfield, supra, note 70 at 448; Allen, supra, note 70 at 205; Goff and Jones, supra, note 71 at p 9.

[78] Goff and Jones, ibid; Friedmann, ibid, at p 450.

[79] See (1938) 6 Cam LJ 305, 321.

[80] Supra, note 71 at 13. See too the description of the role of Unjust Enrichment as a basis for the reform of existing law in Sutton, supra note 20 at p 370.

[81] See 53 LQR 448: "I would urge that there has never been a time when this very idea of what is 'just and reasonable' has been absent from this branch of the law. It may at one time have passed current under other phrases such as 'natural justice', 'aequum et bonum', 'justice as between man and man'; it may have been conscious or unconscious in its application; but it was always there and it still is there".

[82] In 54 LQR 201 at 206 Allen observes: "[W]e cannot say . . . that the law will [imply a contract] whenever it is '. . . 'equitable' [to do so] . . . . But this much we can say: that in all the circumstances to which the remedy has . . . been applied, the element of aequum et bonum is not only present but essential".

[83] Constraints of space render it impossible to discuss the important question of the precise impact of the reception of the doctrine on substantive principles fully. Sufficient to say that there are a reasonably well catalogued list of situations in which an Unjust Enrichment inquiry might well resolve trouble-spots in existing law. In addition to those discussed by Goff and Jones, others are listed by Friedmann, supra, note 76 at p 452; others are discussed in the United Kingdom Law Commission Law of Contract Working Paper No 65 (Pecuniary Restitution Breach of Contract), 1975.

# CORRESPONDENCE

Dear Sir;

**Exemplary Damages and the Accident Compensation Act**
The Saga Continues

On 5 May 1978 at about 11.30pm a Mr D J G Hayward was, lawfully as he alleges, within the premises of the Mt Albert City Council library when he was confronted by, alone and in combination, traffic officers employed by that Council and by the Auckland City Council, a police constable and a police dog named "Wolf". As a result of what then happened Mr Hayward commenced proceedings against the various officers and their employers, claiming general and exemplary or aggravated damages for trespass to the person. Certain other causes of action including false imprisonment and other forms of interference with his freedom to come and go and use his motorcar, were also alleged but are not relevant to this note.

The Auckland City Council and its Traffic Officer moved to strike out such portion of the statement of claim as related to them on the ground that the plaintiff's action was barred by s 5 (1) Accident Compensation Act 1972. On 30 August 1979 the (then) Supreme Court made an order pursuant to s 64 (b) Judicature Act 1908 removing that motion to the Court of Appeal; the motion was argued in the Court of Appeal on 23 April 1980 and that Court's judgment was deliver by Richmond P on 1 May.

The Court of Appeal, basing itself upon its earlier decision in *L v M* held that the question whether the plaintiff had cover under the Accident Compensation Act 1972 in respect of personal injury by accident suffered by him in the course of the alleged incident and, in respect of what category or categories of personal injury should be referred to the Accident Compensation Commission for decision.

In so doing the Court recognised that the questions raised in the present case differed from those arising in L v M [1978] Butterworths Current Law 176; it said:

> "It will be seen that the question whether or not a claim is barred by section 5 (1) does not depend simply on the question whether or not the plaintiff is a person who has suffered personal injury by accident. It also depends on whether the claim is for damages arising directly or indirectly out of the injury. Those words, of course, refer back to the words 'personal injury by accident' as defined in s 2 of the Act as including the physical and mental consequences of any such injury or of the accident. In our view the effect of *L v M* is that the Commission has exclusive jurisdiction to decide whether the plaintiff is a person who suffered personal injury by accident in the course of the alleged incident on 5 May 1978 and also to decide what categories of personal injury by accident he suffered. It is important that the Commission in the present case should determine the categories, if any, of personal injury suffered by the plaintiff because it will be necessary for the High Court to decide whether or not the damages claimed by him are wholly or in part damages arising directly or indirectly out of the injury. In particular we have in mind that there may be personal injury in the sense of mental consequences of the kind referred to in the definition of personal injury by accident. There is also likely to be an argument that punitive damages claimed in the action cannot fairly be brought within the description of damages arising direcctly or indirectly out of the injury' ".

This decision leaves unanswered a number of questions, including the rights any of the parties might have to be heard by the Commission or to appeal from any determination by the Commission. It also leaves unanswered the central question of the nature of a claim for exemplary damages and whether s 5 (1) Accident Compensation Act 1972 bars such a claim. In *Lucas v A R A* Prichard J seemed to be under no doubt that exemplary damages did not necessarily relate to any element, physical, mental or emotional, of personal injury; it will be of interest to see whether the Accident Compensation Commission follows his reasoning.

Yours faithfully,

K I Bullock

Sir,

**Grey Lynn Neighbourhood Law Office**

Thank you for sending me a copy of the letter of the Minister of Justice for comment.

The "agreement" referred to by the Minister in the penultimate paragraph of his letter was a tentative arrangement arrived at for the Government of the Neighbourhood Law Office between Departmental representatives, members of the New Zealand Law Society Legal Aid Committee and myself. It was quite clear to the Departmental representatives that the arrangement would need to be ratified by the Council of the New Zealand Law Society. The Council in fact did not ratify the arrangement but decided to set up an advisory body along much the same lines as the one that exists at present.

The advisory body is well representative of community interests. It seemed to the Council of the Society at the commencement of the pilot scheme that it was reasonable for the Auckland District Law Society to administer the scheme directly on behalf of the New Zealand Society. The Council's view was that inasmuch as the NLO is a law office, the solicitors who work there are subject to the same ethical requirements as to solicitor/client confidentiality and other aspects of practice as would be the case in a private independent practice.

It seemed further to the Council that the only effective controlling body could be the Law Society itself assisted by

the advisory committee. It also seemed reasonable that inasmuch as the Law Society was rendering an important public service in the Grey Lynn area, public funds should be allocated for it.

An arrangement of this type between the Department and the Society would not have been unique. The Law Society operates the Duty Solicitor Scheme with Government funding. The Civil and Criminal Legal Aid Schemes are also fully funded by the Government, albeit with a heavy contribution in service from the profession — but still borne by the independent practising profession.

There were in fact real difficulties about the approach of the Departmental representatives to the proposed survey. These should not be dwelt upon now as the difficulties have been largely cleared away. They have, however, had the effect of delaying the survey required by the Minister and this, in turn, has had the disastrous effect of putting the continuation of the NLO in jeopardy.

The Society believes it is not possible to provide the type of service envisaged for the Neighbourhood Law Office by traditional private practice means. There may be a long-term answer other than the Neighbourhood Law Office concept but in the foreseeable future such an Office is the only remedy seen by the Society to cope with the unmet need, at least in the Grey Lynn area.

Yours faithfully,

W M Rodgers
Secretary-General

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# RECENT ADMISSIONS

**Barristers and Solicitors**

| | | |
|---|---|---|
| Ali, C M C | Wellington | 29 February 1980 |
| Allardice, M B | Wellington | 29 February 1980 |
| Averill, M H | Wellington | 29 February 1980 |
| Barzoukas, A | Wellington | 29 February 1980 |
| Brabyn, J M | Wellington | 29 February 1980 |
| Bryson, J E | Wellington | 29 February 1980 |
| Calhoun, D C | Wellington | 29 February 1980 |
| Callaghan, A E A | Wellington | 29 February 1980 |
| Carruthers, G R | Wellington | 29 February 1980 |
| Castle, P R | Wellington | 29 February 1980 |
| Cheng, P W F | Wellington | 29 February 1980 |
| Clarke, E D | Wellington | 29 February 1980 |
| Clifford, D K | Wellington | 29 February 1980 |
| Cotorceanu, P A | Wellington | 29 February 1980 |
| Creasy, R G | Welllington | 29 February 1980 |
| Cunliffe, R J | Wellington | 29 February 1980 |
| Diver, P F | Wellington | 29 February 1980 |
| Doone, P E C | Wellington | 29 February 1980 |
| Dunphy, R M P | Wellington | 29 February 1980 |
| Elliott, B E | Wellington | 29 February 1980 |
| Evans, E A | Wellington | 29 February 1980 |
| Flaus, V R | Wellington | 29 February 1980 |
| Gallagher, C M | Wellington | 29 February 1980 |
| Gatenby, J K | Auckland | 29 February 1980 |
| Gifford, S E | Wellington | 29 February 1980 |
| Goodwin, G J | Wellington | 29 February 1980 |
| Gowland, G H | Wellington | 29 February 1980 |
| Grant, K V | Wellington | 29 February 1980 |
| Gray, R J | Wellington | 29 February 1980 |
| Hale, R J | Wellington | 29 February 1980 |
| Harden, M G | Wellington | 29 February 1980 |
| Hardy-Jones, M | Wellington | 29 February 1980 |
| Hayes, J N | Wellington | 29 February 1980 |
| Highfield, C G | Wellington | 29 February 1980 |
| Johnston, K B | Wellington | 29 February 1980 |
| Kincaid, A T | Wellington | 29 February 1980 |
| Lawn, G O | Wellington | 29 February 1980 |
| Lee, L M | Wellington | 29 February 1980 |
| Lee, M | Wellington | 29 February 1980 |
| Lines, A J | Wellington | 29 February 1980 |
| McGrath, G M | Wellington | 29 February 1980 |
| MacPherson, A R | Wellington | 29 February 1980 |
| Mazengarb, A S | Wellington | 29 February 1980 |
| Mazengarb, S R | Wellington | 29 February 1980 |
| Middleton, R M | Wellington | 29 February 1980 |
| Miles, L M L | Wellington | 29 February 1980 |
| Mills, J G | Wellington | 29 February 1980 |
| Nauta, H C | Wellington | 29 February 1980 |
| O'Brien, M D | Wellington | 29 February 1980 |
| O'Byrne, M J | Wellington | 29 February 1980 |
| Paino, P V C | Wellington | 29 February 1980 |
| Papageorgiou, A B | Wellington | 29 February 1980 |
| Parker, J R | Wellington | 29 February 1980 |
| Patel, H K | Auckland | 29 February 1980 |
| Peter, L L P | Wellington | 29 February 1980 |
| Reeves, G L | Wellington | 29 February 1980 |
| Ross, W S | Wellington | 29 February 1980 |
| Sharrock, G E | Wellington | 29 February 1980 |
| Skinner, M J | Wellington | 29 February 1980 |
| Smith, K R | Wellington | 29 February 1980 |
| Southall, A T | Wellington | 29 February 1980 |
| Stewart, I G | Wellington | 29 February 1980 |
| Stone, G N | Wellington | 29 February 1980 |
| Tait-Jamieson, P J | Wellington | 29 February 1980 |
| Thackery, T C | Wellington | 29 February 1980 |
| Toon, M S E | Wellington | 29 February 1980 |
| Van Bohemen, G J | Wellington | 29 February 1980 |
| Walker, G T | Wellington | 29 February 1980 |
| Waymouth, J A K | Wellington | 29 February 1980 |
| Winter, P J B | Wellington | 29 February 1980 |