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PROFESSIONAL ORGANISATION: LAW PRACTITIONERS

> In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. As the ultimate source of those rights, the legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests.
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> Report of the Professional Organisations Committee p 25.

It is remotely possible that the Law Practitioners Bill may be introduced during the current Parliamentary Session. For this reason the recently published "Report of the Professional Organisations Committee", a Ministerial Committee appointed by the Attorney-General of Ontario will prove of more than passing interest. Under its terms of reference the Committee was required to review the Statutes governing the main professions "with a view to making recommendations to the Government for comprehensive legislation setting the legal framework within which these professions are to operate".

As a guide to the formulation of a regulatory policy the Committee identified four principles:

- The protection of vulnerable interests.
- Fairness of regulation.
- Feasibility of implementation.
- Public accountability.

Protection of vulnerable interests:

Three categories of interest were identified:

- The providers of professional services (including law clerks, para-professionals etc).
- Clients.
- Third parties liable to be affected.

In the case of the legal profession client and third party interests were seen as being more vulnerable than with other professions because "a substantial proportion of its clientele is drawn from the less affluent and more uninformed members of the household sector . . ." (p 8). In the first category reference is made to "a case for regulation to promote smooth relations among the members of the professional team whose interests are potentially vulnerable to exploitation or to ill-defined lines of responsibility." (p 11).

As far as third party interests are concerned an alleged lack of concern for children (in par-

ticular) in Family Proceedings has been the subject of a petition to Parliament already this session and last year saw litigation in which a wife claimed to be affected by the negligent way her husband's affairs were being conducted. Third party interests are a real issue.

While the vulnerability of client and third party interests is often seen as constituting the entire case for professional regulation the interests of the providers of services (and it is implicit that their interests include the "valuable rights" referred to above) are seen to be equally significant "if professionalism in the best sense of the term is to prevail."

> "In the words of Professor Michael Spence, 'society has a long term interest in attracting high quality people to the professions, especially to the segments where quality is imperfectly perceived by consumers.' (p 9).

Quality is the point where all interests coincide.

Fairness of regulation:

Here mention is made of the need for fairness in respect of "existing providers of professional services and those of aspiring professionals" (ie, discipline and entry) and in respect of clients with particular reference to complaints procedure.

Public accountability of administrative bodies:

Skipping feasibility ("no mousetrap is better if it fails to catch mice") and passing to public accountability we enter a section dealing with the relationship between the profession and the legislature and Government.

> "Given a setting where the legislature has bestowed valuable rights on professional regulatory bodies the principle of Public accountability acquires great importance. It is a fundamental principle of our system that those who make policy decisions ought to be held accountable to those who are affected by their decisions." (p 16).

The proposals for securing public accountability include Ministerial approval of Rules, annual reports, lay observers in disciplinary matters and, more controversially in New Zealand, the appointment of lay representatives to the governing body of a profession. It was stressed however, that the independence of the legal profession should not be undermined. Independence of the Judiciary and the Bar, and the supremacy of the legislature were recognised as equally fundamental constitutional values.

Other matters:

The Report went on to consider more specific matters including disciplinary procedure (must embrace incompetence as well as misconduct), continuing competence (extensive treatment given — disciplinary process most important — civil litigation an expensive and cumbersome way of enforcing competence — implementation of practice inspection powers recommended — general periodic re-examination and mandatory education not favoured), citizenship (lawyers should be citizens), professional fees, employee professionals (their concerns should be noted when formulating regulations) and speciality certification (not favoured) but unfortunately does not deal with entry to the profession this having been dealt with in an earlier report.

Three other topics deserve special mention because they are of particular interest in New Zealand. These are:

- The appropriate subject-matter of statutory prescriptions, regulations and by-laws.
- Professional advertising.
- Incorporation.

Appropriate subject-matter of statutes:

A detailed statute is not favoured.

> ". . . there is an advantage in making professional statutes as 'lean' as possible". (p 47).

Of the matters to be dealt with by statute the Committee was firm. ". . . that matters relating to the regulation of entry into, exit from, and conduct within professions must be considered matters of public policy. . . ." More difficult however is judging which matters bearing on the constitution, internal government and administration should be dealt with by statute and which by regulation or by-law. Here three points could be noted:

- "The State must respect the ability of a profession to organise itself for the purpose of governing its members, and to determine the most effective means of administering its own affairs" (p 54).
- "Feasibility of implementation. . . speaks eloquently for a regulatory framework in which all the principle actors, be they the legislature, Cabinet,

public servants, professional governing bodies, or committees, will retain ample scope within which to act flexibly and with a sense of their own responsibility".

- Economy is promoted if changes in detail can be made without "a gearing-up of the full legislative apparatus" (p 47).

So while the statute may establish general criteria for entry into the profession, the Committee considers the specific requirements (academic, experience etc), to be appropriate subject-matter for regulation. (For those interested, the Report recommendations go into some detail on this topic).

Advertising:

One of the difficulties faced by a person with a legal problem is identifying a person to assist. The particular point made in the section on advertising is that a prohibition on advertising denies prospective clients knowledge from which to make an informed choice of a particular professional. Those singled out as facing the greatest information problem are individuals and small businesses located in large towns or urban settings — these lacking "the benefit of the informal community networks operating in small towns and the sophistication and experience possessed by large business clients." (p 192).

The Report recommends permitting both price and non-price advertising in print and it is worth setting out the recommendation in detail for it goes beyond specialised fields and includes personal matters that may assist in the choice.

> "Every member of the Law Society [shall] be entitled to advertise such information as office hours, languages spoken, educational qualifications, professional affiliations, preferred areas of practice, representative clients (with consent), references, publications, and fees charged for initial consultations, hourly rates, or fixed fees for services;" (p 201).

Apparently in jurisdictions where advertising has been permitted limited use only has so far been made of the opportunity.

Incorporation:

On incorporation it suffices to say that it is favoured with opportunity being provided for minority ownership by non-professional employees but subject to unlimited liability for claims arising out of professional services and preservation of the fiduciary, confidential and ethical relationship that presently exists between solicitor and client.

Conclusion:

Whether one agrees or disagrees with its recommendations this report may be read with profit for its analysis of the principles underlying the self-regulation of professions and for the approach it has adopted towards formulating the legal framework within which a profession is to operate. In particular it recognises the wide range of interests bearing on professional regulation. By contrast, we lawyers in New Zealand are tending to look on the framing of our governing legislation as a domestic matter and while client and third party interests are recognised are they being taken into account in the right way and at the right time? There are already indications that when the Bill is introduced it will bring out the student/lawyer and public/lawyer tensions over conditions of entry, fees, discipline, competence and so on. The debate will take place before a Select Committee and it is open to question whether that is an appropriate forum. There is certainly a danger that a sop to the public interest may be legislation that regulates the profession more closely than is in anyone's interest. It is hard to avoid the feeling that were a similar inquiry to that in Ontario, at which all these matters could be aired and resolved to precede legislation, that legislation would likely be better than may otherwise be the case.

TONY BLACK

TORTS

THE NEGLIGENT ADVOCATE

By ANTHONY GRANT, *an Auckland practitioner.*

That the incompetent should be allowed to practise their incompetence on the innocent and the innocent have no redress is a strange thing.

That it should be lawyers who allow this state of affairs to exist and that lawyers should be the lucky beneficiaries of the rule is both remarkable and yet understandable. Remarkable because lawyers are trained in the principles of justice and know that such a proposition is unjust. Understandable because it is the lawyers themselves who receive the benefit of the rule.

The rule

Yet that is the effect of the present rule in both the United Kingdom and New Zealand which gives advocates an immunity from actions in negligence in respect of their work in Court or in respect of preliminary decisions which affect the way the case is conducted in Court.[1]

In *Rondel v Worsley*[2] Lord Pearce said that "On a quick superficial view, one may well say that a client ought to have a right to sue his counsel for damages due to his negligence. But the matter is worthy of more than a superficial consideration. For the present independence of counsel is a carefully considered part of a great legal system which has commanded admiration from various parts of the world."[3] And when this century they have considered the implications of the removal of this immunity, the England and New Zealand Courts have concluded that the "superficial" attraction of such a move is outweighed by other factors.

This article is concerned with the question whether the time may now have come for the rule to be changed; whether even on a considered (and not just superficial) view it is now time to say that the wrong need not lack its remedy and society can cope with the consequences of the change.

The recent cases

It is in the nature of law which is based on the results of litigation that the facts of the leading cases can have a disproportionate effect on the outcome and such has been the case in this branch of the law.

The accusation by one of the Maltese criminals from Soho, Fred Rondel,[4] that his barrister, Michael Worsley, was negligent was bound to lead to failure. The latter was distinguished enough then and his reputation has only grown so that he is today one of the most respected and competent criminal advocates in England.[5]

It was similarly improbable that Mr Hawea Rees should have been able to establish that Mr J B Sinclair, a former President of the Auckland District Law Society and shortly thereafter to become Mr Justice Sinclair, had been negligent.[6]

But the hopeless facts of those cases may have shielded the Courts from giving sufficient consideration to the full effect of the rule which was propounded in them.

The rather different facts of two recent cases have, however, brought a new thinking.

In England there has been the decision of *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033 and in Canada there has been *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

In *Saif Ali* the Court was concerned for the first time in recent cases with a barrister whose advice was clearly questionable.[7] The unfortunate Mr Saif Ali had been a passenger in a car which was struck by a vehicle driven by a Mrs Sugden. There was no doubt Mrs Sugden was to blame and yet during the limitation period no proceedings were ever brought

[1] See *Rees v Sinclair* [1971] 1 NZLR 180 at 187 and *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033 (HL).

[2] [1967] 3 All ER 993 (HL).

[3] Ibid, at p 1024.

[4] Believed to be the same Fred Rondel who achieved notoriety for his involvement in the famous "Spaghetti House Siege" in Knightsbridge about 10 years later.

[5] *Rondel v Worsley* [1967] 3 All ER 993 (HL).

[6] *Rees v Sinclair* [1973] 1 NZLR 236 (Mahon J) and [1974] 1 NZLR 180 (CA).

[7] So much so that the reports do not name him. The most that is given is the first letter of his surname.

against her. It would obviously have been a disgrace if Mr Saif Ali should have been left without a remedy against his barrister and it was held by the House of Lords that in so far as Mr Saif Ali had suffered loss by reason of any negligent advice or the negligent drafting of pleadings, he could sue his barrister.

That case was not concerned with the immunity of an advocate for his conduct in Court. As a result, the House was not required to consider whether advocates in those circumstances should still be immune from actions brought against them in negligence. That the House of Lords might have made further inroads into the immunity of counsel is illustrated by the statement of Lord Diplock when he said:

> "I find it an unsatisfactory feature of the instant appeal . . . that (the Court) has not had the benefit of any argument from Counsel in support of a more radical submission that the immunity of the advocate, whether barrister or solicitor, for liability for negligence even for what he says or does in Court ought no longer to be upheld. Counsel cannot be blamed for this. The parties whom they represent are solicitors and a barrister respectively. It is not in their interest as members of either branch of the legal profession to argue that this immunity no longer exists."[8]

Lord Diplock then went on to say that notwithstanding the lack of argument on this point there were various reasons which justified the Court "in accepting as a premise for the purpose of deciding the instant appeal that . . . such immunity is still good law".[8] The obvious qualifications in this statement make it clear that Lord Diplock is one Judge who considers that the time may have come to reconsider whether advocates should still enjoy immunity from action in negligence.

It did not take long before a Court was asked to consider whether the immunity should still remain. It happened in the Ontario High Court in *Demarco v Ungaro*.[9] And the great step has been taken. It was held that an advocate can be sued in negligence for his conduct in Court.

Demarco v Ungaro

The facts of this case are of a type that New Zealand lawyers will easily be able to recognise. The defendants were barristers and solicitors practising in partnership. Guy Ungaro of the firm was retained to act for the plaintiff in a claim against her for $6,000. Her defence failed and judgment was awarded against her. She then sued the defendants and pleaded four specific matters against them. She said that they:

> "(a) Failed to adequately counsel, assist or confer with the plaintiff in preparation for the Examinations for Discovery or the trial of the action;
>
> "(b) Failed to proceed expeditiously with the defence of the action and arranged for adjournments of Examinations for Discovery from time to time without advising or conferring with the plaintiff with the result that the plaintiff attended at the Courthouse unnecessarily on three occasions and incurred unnecessary expenses as a result thereof;
>
> "(c) The defendant, Guy Ungaro, failed to attend and act as Counsel at the trial of the action, sending (his partner), in his place, who was totally unprepared;
>
> "(d) (The partner) failed to lead evidence which he knew was available and which would have supported the plaintiff's position."

The defendants moved to strike out paragraphs (a) — (d) although at the hearing of the motion they conceded that the allegations contained in (a) — (c) could, on the existing authorities, be allowed to remain. The Court was therefore asked to determine whether the allegation in (d) could stand. In a lucid judgment Krever J considered in detail the public policy considerations which were said to justify the retention of immunity for advocates. It is not proposed in this article to deal in detail with the judgment in this case (it runs to 24 pages and an article of this length could not do it justice) but a summary of the public policy considerations will indicate why the Judge came to his decision. Public policy considerations only are considered because it now appears to be the case that the immunity of Counsel is based solely on the "unruly horse"[10] of public policy.[11] In deciding that advocates can be sued in Ontario for their negligence in civil (and not criminal) proceedings the Judge considered these factors:

[8] [1978] 3 All ER at 1045.
[9] (1979) 95 DLR (3d) 385.
[10] Per Hobart CJ, cited by Lord Denning in *Enderby Town Football Club v The FA* [1971] 1 All ER 215 at 219.
[11] That is the effect of *Rondel v Worsley* and later cases.

1
The proliferation of lawyers

As in Canada, so in New Zealand. The universities have been producing large numbers of lawyers each year and "it is widely recognised that (the large numbers) place such an enormous strain on the resources of the profession that the articling experience of students-at-law is extremely variable. Only a small percentage of lawyers newly called to the Bar can be expected to have had the advantage of working with or observing experienced and competent counsel. Yet very many of these recently qualified lawyers will be appearing in Court on behalf of clients. To deprive these clients of recourse if their cases are negligently dealt with will not, to most residents of this Province, appear to be consistent with the public interest."[12]

2
Cases will be prolonged

To the argument that counsel will be tempted to prefer the interest of the client to the duty of the Court and will thereby prolong trials (feeling obliged to ask every question so as to forestall a claim in negligence for not having asked a necessary question), Krever J said "it is my respectful view that there is no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless . . . a very similar argument is advanced in many discussions of the law of professional negligence as it applies to surgeons. Surgeons, it is claimed, are deterred from using their best judgment out of fear that the consequence will be an action by the patient in the event of an unfavourable result. This claim has not given rise to an immunity for surgeons."[13]

3
Cases will need to be re-tried

To succeed in a claim against his lawyer for damages, a client will have to prove that had the lawyer been compentent he (the litigant) would have succeeded. This effectively requires the re-litigating of an issue which has already been tried, a course which is said to be most undesirable. The Judge dealt with this argument by concluding that it was better to have the issue re-litigated "than that the client should be without recourse."[14]

4
The "cab-rank" principle

In England (and in theory although possibly not in fact in New Zealand) a barrister is not allowed to pick and choose between clients. This may result in the barrister being obliged to accept instructions from clients who are obstinate and cantankerous and who are more likely to sue him for negligence. It is said to be unfair that the barrister should be exposed to the greater risk of an action in negligence by having to take such clients. Lord Diplock in *Saif Ali* was not persuaded that the existence of this risk justified a barrister in being immune from an action in negligence [15] and Krever J adopted Lord Diplock's reasoning.[16]

5
Absolute Privilege

It has been argued that it is inconsistent for a barrister to be liable to an action in negligence and yet at the same time to enjoy absolute privilege in respect of what he says in Court. The tenuous link between these two matters scarcely warrants the retention of the rule and Krever J said of it that "I confess that I am unable to appreciate why it should follow from the existence of that privilege that a lawyer may not be sued by his or her client for the negligent performance of the conduct of the client's case in Court . . ."[17]

6
Other reasons

For these main reasons, it was held that an advocate could be sued in civil proceedings

[12] 95 DLR (3d) at 405, 406.

[13] Ibid, p 406. This brings to mind Bernard Levin's comment in *The Times* (13.4.72) on the claim by a Doctor Taylor of the Medical Protection Society that high damages awards would cause doctors to practice "defensive medicine". Levin: "This strikes me as the best news I have heard for years; there has been far too much aggressive medicine practised for some time now . . ."

[14] Ibid, p 406.

[15] [1978] *3 All ER at 1033 and 1044.*

[16] 95 DLR (3d) at 407.

[17] Ibid, at 407.

in Ontario. There were other reasons: for instance, in Canada counsel can sue for their fees [18] unlike barristers in England; their fees as counsel are subject to taxation; and the cab-rank principle does not apply to Canadian barristers. These seem to have been secondary reasons.

The Position in New Zealand

The New Zealand Court of Appeal in *Biggar v McLeod* [1978] 2 NZLR 9 has recently reaffirmed the immunity of counsel in respect of work related to the conduct of litigation but that decision followed hard on the English Court of Appeal's decision in *Saif Ali* where a similarly restrictive view was unanimously taken by that Court. The judgments given by the House of Lords which overturned the Court of Appeal had not been given when *Biggar v McLeod* was decided and one wonders whether the Judges of the New Zealand Court of Appeal would have given different judgments had they known what was to come.

The decision seems to reflect (what nowadays is an unusually) uncritical acceptance of high English authority. The judgments were, however, given extemporaneously after only a few hours argument.

And it is unlikely that the decison will stem the tide which continues to reach further and further into the community washing away the immunities from actions in negligence from those of its members both corporate and individual who are still possessed of them.

The tide has almost reached the arbitrators [19] and when the day comes that it does, not only will the immunity of advocates seem anomalous but so may the position of Judges.

The rule which was justified until 1967 on the basis that as counsel could not sue for their fees so they should not be exposed to claims in negligence is now based quite openly on public policy only. This is quite exceptional. There are very few doctrines in law which are based on such ephemeral grounds. What is good policy this year may be bad the next.

One is bound to wonder whether the factor which has prompted the Ontario High Court to decide that public policy now favours the removal of an advocate's immunity is the proliferation of poorly qualified lawyers — a factor given some prominence in the discussion on the relevant public policy considerations. If so, it is a factor that may have some relevance here.

How much negligence is there?

A recent survey of American Judges indicated that they considered that 10 percent of advocates were incompetent[20] (which in a way is surprising since in America advocates can be sued for negligence). There can be no doubt but that the proliferation of lawyers in recent years has led to declining standards. This is likely to be the same the world over. The training of advocates is not achieved in universities and to a large extent an adequate training can only come from some years of experience. Lord Hailsham, the present English Lord Chancellor, has said [21] that "it takes about four years from call to make a competent, and about seven to make a really mature advocate able to cope with every emergency within his field . . ." and that was said of the English Bar most of whose members are likely during their first four years to be in Court on most working days of the year. Even as skilled a lawyer as Lord Denning admits that as a young barrister practising at the Hampshire Quarter Sessions he made his "first mistakes".[22] A survey of New Zealand Judges might well show a consensus that there is now a large body of such untrained or undertrained advocates here. The fact that new members in other professions take time to become competent does not give them an immunity from claims in negligence

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[18] Solicitor/barristers in New Zealand can also do so, according to Perry J in *Robinson & Morgan-Coakle v Behan* [1964] NZLR 650, although Macarthur J suggested in *Rees v Sinclair* [1974] 1 NZLR 180 at 187 that the decision might be open to question. There is some recent authority for saying that a solicitor cannot sue his client for counsel's fees: see *Monk & Montague v Harlen* (1979) 14 MCD 346.

[19] In *Arenson v Casson Beckman* [1975] 3 All ER 901 (HL) two of the five Judges saw no reason in principle why arbitrators should be immune from actions in negligence.

[20] See "Dealing With Incompetent Counsel — the Judge's Role" (1980) *Harvard Law Review* Vol 93, p 633. If Judges consider many advocates to be incompetent it is only fair to state that the converse is also the case. Melvin Belli, the celebrated trial attorney is recorded as having said not so long ago (in *Supertalk* by Digby Diehl) "Now, the law is good but some of these judges just don't know how to handle it in Court. They simply don't have the experience. There are an awful lot of 'C' law students practising law and sitting on the Bench." Other topical criticisms of American Judges can be found in *Time* Magazine 20.8.79 at p 47 in the article "Judging the Judges". A more erudite criticism can be found in Spry's *Equitable Remedies*; p 2.

[21] *The Door Wherein I Went*, Collins, 1975, p 266.

[22] *The Due Process of Law* 1980, p 248.

and their exposure to such claims does not in practice prevent them from becoming competent.

Conclusions

Thirteen years ago the House of Lords decided to support an advocate's right in England to immunity for claims in negligence on the shifting sands of public policy. The Court could only speak for England since it was not aware of the public policy considerations applying elsewhere and thus the House did not determine whether other jurisdictions should similarly adopt such a rule.[23]

Times have changed quite significantly since then. The House has whittled the doctrine down in *Saif Ali*; Lord Diplock has intimated that the time may have come to see whether public policy still justifies the retention of the doctrine in England; and in Ontario it has been decided that public policy does not justify the retention of the doctrine there.

What were relevant public policy considerations in England in 1967 are not necessarily relevant considerations for New Zealand in 1980. For instance, Lord Pearce gave as one factor "The constant difficulty of inducing men and women to undertake the profession of the Bar, with its strain, hazard and rather austere self discipline (and these factors) are not wholly without significance when one is considering whether the advocate is unduly favoured as things stand at present."[24] Events have changed sustantially in England since that statement was made. Rather than there being a lack of recruits for the Bar, the problem has been one of burgeoning numbers. These have been so great that Bar Council has had to resort to publicity materials which paint a gloomy picture of life at the Bar in an attempt to deter would-be recruits! There can be no doubt that such a factor is completely irrelevant to New Zealand in 1980.

In considering whether the immunity should remain, it should not be overlooked that it is inherently difficult to succeed in most claims for negligence against an advocate for his conduct in Court because so many hurdles have to be surmounted before a claim can succeed. The two major hurdles are proving that in the exercise of reasonable professional skill and care the advocate should have done or refrained from doing something, and that moreover had he taken the proper step, the Court's decision would have been different. It would be rare for an action to succeed.

When our Courts are next asked to investigate this question it is to be hoped that the public policy issues will be argued at length and that some empirical evidence may be available so that the Judges are not forced into the realms of speculation.

Whatever the evidence may be, one thing is clear: Courts exist to solve in a civilised manner the disputes which one citizen has against another. To provide a satisfactory and successful alternative to self-help and revenge in the community, it is fundamental that the Courts should give remedies to those who deserve them. To deprive an innocent litigant of a remedy against his negligent advocate is to inflict a great deprivation on him. So great is it, that it should not be done without the strongest justification.

Self-Defence — Widely as social and legal systems may vary in the extent to which they allow some forms of power (eg, economic power, industrial power, the powers of persuasion) to be exercised, they unite in prohibiting the exercise of physical power by one citizen against another. . . .

Occasionally cases arise in which the maintenance of an individual's right to life conflicts with his duty to abstain from violence. Legal systems generally resolve this conflict by permitting the individual's right to life to override the social duty not to use force. Where the attack or threat is sudden, the protection of society and its laws is no longer effective, and the individual alone may be left to protect his right to life and physical security. Indeed, on practical grounds a liberty to use force in self-defence is essential if members of society are not to be put at the mercy of the strong and unscrupulous. Take away this liberty, Bentham wrote, "and you become, in so doing, the accomplice of all bad men." If a legal system is to uphold the right to life, there must be a liberty to use force for the purpose of self-defence. Ashworth, "Self Defence and the Right to Life" (1975) 34 Camb L J 282.

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[23] See for example Lord Reid [1967] 3 All ER at 998.

[24] Ibid, at 1029.

OFFICE MANAGEMENT

A FRESH LOOK AT OFFICE PREMISES — II

By DAVID HARROWES MA MBIM.*

There are times when people should work in private offices — but not many. Privacy is deliberate isolation, and in a professional business the work of the firm will suffer if its executives are isolated from what happens outside their office doors. There are also times when people should work in a completely open-plan environment; but these are few and far between too. It is not easy to give a subject creative thought when you can see a person twenty five yards away who is filing his nails.

Neither the traditional concept of cellular offices, nor the modern one of open-plan, will suit the professional firm. The right answer lies in a balance between privacy and involvement, not in a complete surrender to the one or the other. Most people are subconsciously aware of this, and if they have their own room they will leave its door open most of the time, so that they can hear what is happening outside; they may also position their desk so that they can see into the corridor. These moves, however, are less than satisfactory, because the result is often over-involvement.

Once the need to balancce privacy and involvement has been accepted, the next step is recognition that the proper balance will vary between one office function and another; for example, privacy would be out of place in the reception area. Many office layouts are of a geometric formality, with various sized rooms leading off a central corridor, the rooms being allocated according to status; partners will have rooms of one size, managers rooms of another, secretaries rooms of a third. This arrangement allows no variation in the privacy/involvement ratio between one worker and another, irrespective of their real needs, and is plainly wrong. Each person's actual requirements ought to be considered, and his privacy/involvement ratio fixed accordingly. In terms of physical appearance, the result will look more like a beehive than the battery hen house of current practice.

One of the most important rules in office planning is that you should not be able to hear someone you cannot see, and that you should not be able to see someone you cannot hear. In other words, your auditory and spatial areas should coincide. Cellular offices are often bad acoustically, because noise is transmitted from the adjacent room through the false ceiling or via the heating pipes. In open-plan offices, someone moving in a far corner can cause a distraction that is every bit as bad as a raised voice in the next room. If the mix between privacy and involvement is correct, visual distraction ought not to be a problem, and it only remains to conquer the acoustic problem.

The best acoustic surrounding is a productive buzz at between 45-55 decibels. Anything exceeding this level is intrusive and tiring, and anything below it will create pockets of noise, when every single tap of a typewriter will jar on the consciousness like the early morning alarm bell. In this situation, people hearing their colleagues will be uncomfortably aware that their colleagues can also hear them; this creates insecurity. Here are some suggestions for dealing with the problem of noise.

1 Keep the numbers up. Although a large space with a low head count can look attractive, it creates acoustic difficulties. Think of a cocktail party: when the first few guests have arrived, it is possible to hear and understand several conversations at once. People are a bit embarrassed, and the talk can be spasmodic and stilted. When the room has filled up, individual conversations merge with each other to produce a general buzz, and people speak more freely.

2 Use surfaces to absorb sound. A sound-absorbent ceiling is vital, and nowadays common; in its absence, extra effort needs to be put into the other surfaces. A carpeted floor is also extremely valuable, and the thicker the carpet, the better. If the office is in a modern block with large areas of window, net curtains may be needed. Glass reflects noise as a mirror reflects light. It is possible, however, to go for overkill, and to absorb the productive buzz as well as the excess noise from individual sources. In this case, the atmosphere of the office becomes dull and lifeless, and the working performance of the staff will suffer.

3 Sound absorbent panels should be close to the source of noise. The further sound travels before it meets a noise-absorbent surface, the more likely it is to disturb other people. Office systems are now available which have panel-

*Reprinted from the *New Law Journal*.

hung working surfaces, so that the noise generted by a typewriter or a telephone conversation is partly absorbed close to its source. In desk-based systems, sound can escape far more readily, and intrude into someone else's working area.

4 Keep speaking distances short. A meeting around a small circular table will make less noise than one round the oval table in the firm's boardroom. The best speaking distance is five-six feet.

5 Use induced noise systems in places where natural noise levels are below 45 decibels, either permanently or from time to time due to a fluctuating office population. Induced noise is created artificially, as the name implies, and is disseminated by speakers which are placed behind the tiles of a suspended ceiling, or sometimes on top of the panels in a panel-based office system. Its main characteristic is that you only notice it when it stops: it is not to be confused with background music, which nevertheless can serve a similar purpose in restaurants, airport lounges and other public places. Induced noise systems should be carefully tailored to room size and natural noise levels. It is a generalisation to say that it sounds like an air conditioning system, but this gives the reader a broad idea of the noise it makes. Its purpose is to make good the absence of productive buzz, and its cost roughly speaking, is the same per square foot as that of carpeting.

Robert Propst is one of the leading innovators in office design. As he puts it, "Face to face involvement is the premier communication tool. Unmatched for subtlety and efficiency it is also a wasteland of mysterious inhibitions and limitation". Professional people do so much of their work at desks that they automatically assume that interviews and meetings should happen in the same way. Desks, however, have two serious defects for the purpose: one is that they are normally covered with papers which are not relevant to the matter in hand; the other is that they are a physical and psychological barrier, and often a major one, between the executive and the people he is seeing. There will be a few cases in which a barrier is useful, but not many. For the most part, the executive will be giving or receiving not only information, but also feelings about that information. He may, for example, want to convince a client that he should follow a certain course of action for his own good or safety; he can put his conviction across to the other person far more effectively if he comes out from behind his desk.

Many people who have recognised the limitations of the desk as a meeting place have chosen either or both a separate lounging area for informal discussions and a boardroom for large or formal gatherings. The use of a boardroom for formal occasions cannot be faulted, but the room is often also used for interviews which ought to take place in less intimidating surroundings. It is a mistake to hold a small meeting in a space that is intended for a large one; the executive will not notice the strain because he is familiar with his surroundings, but the client certainly will. A lounging area can also be very helpful, when people know each other well. But most easy chairs are low, and those who sit in them can feel very insecure psychologically when they are not absolutely at ease; furthermore, it is impossible to deploy paperwork conveniently from an easy chair.

There are two keys to the successful small meeting: flexibility and control. The executive must be able to choose one of a number of options for the location of the discussion, so that he can control the proceedings effectively. The best two involve use of the working surface itself and use of a round table, on castors, at working height, in the executive's office or work area; two or three visitor's chairs will be needed as well. In the first case, the discussion will relate to some job actually in progress, and it will be with a colleague or subordinate. So it will be a question of looking at papers, reference books and such like as they are actually displayed on the desk. This means that it should be possible to roll or pull a second chair up to the working surface, side by side with the executive's own chair.

The table will need to be reasonably close to the working surface, so that the executive can use his own chair for a meeting around it. This is important, because his chair will be on castors, and the distance at which he sits from his visitors will set the tone of the proceedings. He can sit opposite and well back from a stranger, close to someone who needs reassurance, beside someone who is going through a set of papers with him, and so on. At the same time, the table itself, which has no irrelevant material on it, prevents the visitor from being distracted from the purpose in hand.

These suggestions, of course, will not save a meeting from failure, because success or failure depends as much on the people as the place. They will, however, make certain that the efforts the people make are not nullified by the wrong surroundings.

CASE AND COMMENT

Matrimonial property
Matrimonial Property Act 1976 — Matrimonial Proceedings Act 1963 — Section 79 — Setting aside separation agreement as to matrimonial home.

In *Smith v Smith* (High Court of New Zealand, Wellington Registry; 17 April 1980 (A No 364/78); Quilliam J) the applicant wife began two proceedings which, by consent, were heard together. The first was an application to set aside a separation agreement so far as it related to the matrimonial home and the second was an application under the 1976 Act together with one under s 79 of the 1963 Act.

The parties were married in 1960 and there were five children of the marriage. At the time of the marriage the parties were fledgings of 19, and the wife was pregnant. The wife's grandparents, who had in fact brought her up, were naturally concerned. Her grandfather gifted her a section which then cost L750. The parties erected thereon a house with a State Advances Loan, a small balance of cash being found by the wife's stepfather. The house was settled as a joint family home. It was sold in 1965 for L4,000 when the husband was transferred. Another property was then jointly purchased for L5,200, the net proceeds of the first property being applied thereto. The husband was transferred again. The property just mentioned was sold for $19,000 and another purchased jointly for $27,750. This last property, the subject of the present dispute, was financed by a first mortgage to the AMP and a second mortgage to the applicant wife's mother. The balance came from the proceeds of the previous home. Unhappy differences arose and the wife formed a temporary attachment to a fellow-employee. A reconciliation followed, but the marriage deteriorated sharply, and a separation agreement was signed. The net effect thereof was that the wife conceded sole ownership of the home subject to the payment by her of outgoings, other than mortgage payments, and to reimbursement to her for the cost of improvements carried out by her. It was this agreement that the wife now challenged.

Her first claim was one of undue, or unfair, influence in that she had been under emotional stress at the time and that she was dominated by the husband "to the point where she felt she had to do what he demanded and that she was ignorant of the implications of what she was agreeing to." This allegation, his Honour found, was simply not established on the facts, she never having been "overborne by him to the point of doing something she would not otherwise have done." His Honour further adverted to the fact that *it was the wife* who had taken legal advice early in 1976 as to a separation. He further traversed the facts and found that there could be no suggestion that she had been "bustled into making" any concession of this kind. It was further found that she had been legally represented throughout, and that the written agreement was not signed until late in March 1976, and that it was not until nearly two years later that she first suggested that the agreement might not be valid. Quilliam J could find no support for the wife's allegations in this regard and turned to her other applications.

Her first arose out of s 57 (5) of the 1976 Act, and Quilliam J said that there was really no dispute over the proposition that the agreement was of the sort contemplated by that provision. Accordingly, he turned to the second argument, namely, that the agreement should be reviewed and varied pursuant to s 79 of the 1963 Act. As to this, he remarked that:

(a) The question whether s 79 was any longer able to be applied to agreements to which s 57 (5) of the 1976 Act applied was already decided by *Grant v Grant* [1979] 1 NZLR 66 (CA). In sum, the Court of Appeal held that the addition of subs (5) to s 79 of the 1963 Act by the 1976 Act was a clear recognition of the existence of a power to vary agreements relating to matrimonial property.

(b) It had not been necessary for the Court of Appeal to indicate what were the principles to be applied in considering when it would be proper to vary an agreement.

(c) Section 79 (2) referred to the fact that conduct *must* be taken into account and other matters, such as change of circumstances, *may* be taken into account.

(d) Section 79 did not give guidance as to when it would be appropriate to vary an agree-

ment and was "undoubtedly expressed in very wide terms."

(e) Having regard to the relationship between s 79 and the provisions of the 1976 Act, this matter was a preliminary one of some importance.

(f) In *Hammond v Hammond* [1974] 1 NZLR 135, at p 138, Henry J had said that he could find no reason why a carefully drawn settlement, in which both parties apparently had solicitors, should be reviewed and altered by the Supreme Court — particularly so since no new matter had arisen and that no new injustice or unfairness had been proved in respect of the making of the settlement and that no new matter had arisen which had not then been fairly in the parties' contemplation. This statement had received the approval of Cooke J in *Roome v Roome* [1976] 1 NZLR 391, at p 396 and should be adopted here.

(g) The separation agreement in the present case was carefully drawn and was one in which both sides had been legally represented. It was thus not likely that the Court would interfere with it, particularly if there had been no injustice or unfairness in the making of the agreement. His Honour referred to the statement of Holland J in *Silvester v Silvester* [1979] 2 MPC 171, at p 172: "There is . . . a very distinct difference between an agreement that has been negotiated unfairly and an agreement that has been negotiated fairly but has led to an unfair result," and concurred with it, adding that the fact that a person had been wrongly, or badly, advised with the result that there had been a disadvantageous bargain was not a reason for interfering with the agreement. In the view of Quilliam J, where the parties had negotiated on an equal footing, it would "be wrong to deprive one of them of the advantages of what was agreed to simply because the other may have been badly advised. The latter will . . . still have his or her remedy in respect of the advice that was given."

(h) In the present case, at the time of marrying, neither side had any assets. There could be no doubt that it was very much to their advantage that the wife's grandfather "came to the rescue" by providing the Palmerston North section, no cash contribution being made by either party. Their present home was worth $41,000, and the various increases in the values of their homes had been due not only to inflation but also to the husband's work thereon in improving them, his meeting the cost of maintenance, rates, insurances and mortgage instalments down to the date of the separation — including repayment to the wife's mother of $3,000, which she had advanced towards the price of the last home.

(i) The wife conceded that she confined her activities to housework and child-care. (She did not claim to have contributed to gardening or any of the outside work done by the husband). Quilliam J regarded this contribution as obviously not a trifling one. Emphasis was placed on the wife's behalf on the fact that, but for her grandfather's contribution, the establishment of the parties own home would have been delayed considerably — indeed the husband put it that the absence of the gift would have put them back about five years.

(j) As to conduct of the parties, his Honour noted that each party had had suspicions as to the fidelity of the other at different times but there was "very little proof to support these suspicions." In so far as each spouse had become involved with others, it had occurred after the marriage was, to all intents and purposes, over. What had broken the marriage was, in fine, "sheer incompatibility", but it was the wife who resolved on a final break-up and pursued the matter of separation.

(k) It had always been agreed that the wife should have custody of the children and occupancy of the former matrimonial home, but the husband had never, at any stage, agreed that she should have any right of ownership of the home and it was this that provided the only real matter for negotiation. Indeed, he had made it clear that he would not vacate the house until there was a signed separation agreement, and he required it as a term of the agreement that he should be sole owner of it. Further, Quilliam J was in no doubt that the wife was prepared to make concessions to get a separation and had conceded as much. "In particular", continued his Honour, "she was fully aware that she was giving up her right to the home (except as to occupancy) in order to be assured of having a separation. She was also giving up her right to share in any other matrimonial property except the household chattels. In the result she received most of those chattels and she also received the husband's agreement to pay her $350 as her share in the motorcar owned at the time of separation. That sum has not yet been paid but the husband has confirmed his liability to pay it. The remainder of the matrimonial property was not . . . very substantial . . . I have no doubt, however, that the wife deliberately made her bargain to give up her rights to matrimonial property in exchange for

what she regarded as the advantage of separation including, as it did, the right for some 15 years to occupancy of the house."

Quilliam J concluded that the bargain was not an unfair or unconscionable one even if it might have been the case that an application under the 1976 Act, at the time of the bargain, could have yielded the wife a better result. He therefore declined the wife's application under s 79 and made no order as to costs. This seems to be a case of drastic concessions to achieve a desired end.

P R H Webb

Real estate agency — Commission where sale goes off

Burrett & Veitch Ltd v Glengarry Developments Ltd, and Eide (Supreme Court, Auckland, 15 February, 1980 (A No 695/78), Speight J) was a claim for commission by the plaintiff firm of real estate agents in relation to an agreement for sale and purchase that was never followed through to completion because of the defendant vendors' default. On the complicated facts which need not detain us, it was clear that the contract was (i) an unconditional one; and (ii) binding on, and capable of being enforced by, the vendor.

In finding for the plaintiff firm, Speight J neatly summed up the law as follows for cases such as this one:

> "(1) The agent must show that he acted with authority.
> (2) That the person procured as a purchaser must have been acceptable to the vendor, that is to say, a person able to purchase not a man of straw, and therefore one who in default is worth suing for his default.
> (3) That conditional agreements do not of themselves justify a claim for commission, for the conditions, eg one relating to finance, may be incapable of being fulfilled so that the vendor is left with an unenforceable contract. In such a case the vendor has not been given a viable purchaser.
>
> However, if in the case of an otherwise binding contract the vendor who has appointed the agent himself defaults, then he is not justified in refusing to pay the agent on the grounds of non-completion of the contract. Conversely, if the purchaser, who is a man whom the vendor has accepted as trustworthy, has defaulted, then the agent is entitled to his commission for he has procured a contract which the vendor could sue upon."

There was also an interesting side issue in the agency aspect of the case. The first defendant owned the relevant land as tenant in common with the second defendant, a Mr Eide. Speight J found that while it was clear that Mr Eide had authorised the plaintiff firm to act as agent, there was no evidence that the defendant company had also appointed the plaintiffs as their agent. It would seem that his Honour was about to non-suit the plaintiff when his attention was drawn to the pleadings. The allegation of agency on behalf of both the defendants had been admitted in the statement of defence. The moral is clear: a plaintiff agent should ideally be ready to prove his agency.

Further, as an alternative defence counsel for both defendants pleaded on behalf of the defendants that the claim against the first defendant had merged because the contracting parties were only jointly and not severally liable. It was acknowledged that the plaintiff had already obtained judgment under these proceedings against the second defendant and the matter was only brought to hearing in relation to the first defendant. Counsel's submission was that the plaintiff's cause of action has merged in the judgment against the second defendant and that he was debarred from making a claim against the first defendant. This proposition would undoubtedly have been sustainable under the common law, but the matter appears to be comprehensively dealt with by s 94 of the Judicature Act 1908:

> "A judgment against one or more of several persons jointly liable shall not operate as a bar or defence to an action or other proceeding against any of such persons against whom judgment has not been recovered, except to the extent to which the judgment had been satisfied, any rule of law notwithstanding."

Speight J concluded on this point as follows:

> "Despite what might be described as a delicate argument by [counsel], I cannot see that there is any answer to the plain wording of this section, and his plea based on merger is not accepted."

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COURTS PRACTICE AND PROCEDURE

THE MAREVA INJUNCTION AND ITS APPLICATION IN NEW ZEALAND

By C B CATO, *Barrister.*

The development of the *Mareva* injunction,[1] which germinated in the decision of the English Court of Appeal in *Nippon Yuson Kaisha v Karageorgis,*[2] has been nothing short of spectacular in England. In essence, the injunction may issue to restrain a foreign debtor from disposing of his assets outside the jurisdiction of the Court in which the plaintiff creditor has a claim. One condition is that the plaintiff can establish that he has a "strong prima facie"[3] case or a good arguable case[4] and another is that there is a prima facie danger that the assets may be removed from the jurisdiction so as to frustrate eventual satisfaction of the judgment.[5]

In order for the plaintiff to have standing to apply for the injunction it must be established that he may proceed to a final judgment in the Court out of which the injunction has been sought. Thus in *the Siskina,*[6] an injunction was rescinded on the basis that there was no jurisdiction in the English Court to determine the matter in issue between the parties. Further, the injunction operates simply in personam not in rem. As Buckley L J has said in *Cretanor Maritime Co Ltd v Irish Marine Management Ltd;*[7] "it is consequently, in my judgment, not strictly accurate to refer to a *Mareva* injunction as a pre-trial attachment."

It is clear from the reported decisions that English Courts will more readily issue the injuction against foreign debtors where the creditor has had difficulty in locating the debtor or in establishing the financial standing of the debtor. For example, in *Nippon Yusen Kaisha v Karageorgis,*[8] the Court of Appeal issued an injunction where the debtors, who had defaulted on a charter-party could not be located, and there was evidence that their offices in Piraeus had closed; and in *Third Chandris Shipping Corporation v Unimarine SA,*[9] the Court of Appeal indicated its concern at the creditors' inability to obtain evidence of financial standing. Lord Denning M R said:[10]

> "Inc & Co made inquiries of their correspondent lawyers in Panama. It showed that Unimarine SA was engaged only in off shore operations and had no property in Panama. It had no obligation to file statements, returns, or other financial information with the local authorities in Panama; nor to keep its books in the Republic of Panama. Certainly it was not possible to determine its financial status."

Given, however, that the injunction is a great favourite in England in the Commercial List, is it likely to play an important role in this country? It would appear that there is certainly jurisdiction to issue the injunction in New Zealand. Quilliam J in *Mosen v Donselaar*[11] asserted that a New Zealand Court did have inherent jurisdiction to issue the injunction in appropriate circumstances, though he declined to do so for reasons which will be discussed. More recently,

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[1] An abbreviation for the injunction issued in *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyds Rep 509.

[2] [1975] 2 Lloyds Rep 137 [1975] 3 All 282.

[3] *Nippon Yusen Kaisha v Karageorgis* [1975] 2 Lloyds Rep 137 [1975] 3 All ER 282.

[4] *Rasu Maritima v Pertamina* [1977] 2 Lloyds Rep 397 [1977] 3 All ER 324.

[5] *Third Chandris Shipping Corporation v Unimarine* [1979] 3 WLR 122. And see also *Montecchi v Shimco Ltd* [1979] 1 WLR 1180 at 1184 per Bridge L J.

"Certainly no case has been cited to us to in which such an injunction was granted where there was not every reason to apprehend — that without such injunction the plaintiff creditor would be defeated."

[6] [1978] 1 Lloyds Rep 1.

[7] [1978] 1 Lloyds Rep 1. And see further, *The Angel Bell* [1980] 1 All ER 480, at 485 per Robert Goff J.

[8] Supra, at 138; 283.

[9] Supra, at 138 Lord Denning M R described the defendant as "nothing more than a name grasped from the air, as elusive as The Cheshire Cat".

[10] Ibid, at 134.

[11] *Mosen v Donselaar* A325/75, A311/78 13 October 1978, Wellington Registry, [1978] *Butterworths Current Law* 1012; [1979] Recent Law 52. The issue of jurisdiction was not considered in *Systems and Programs v PRC* (1978) Recent Law 264.

in a lengthy, and with respect, a valuable review of the appropriate authorities, Barker J in *Hunt v BP Exploration Company (Libya) Limited*[12] came to the conclusion also that a New Zealand Court had jurisdiction to issue a *Mareva* injunction.

It is, however, important for any consideration of the applicability of *Mareva* in this country, to consider its relationship with the pre-judgment charging order provisions contained in Rule 314 of the Code of Civil Procedure. Pursuant to R 314, a creditor may obtain a charging order prior to judgment if he can identify the assests of the debtor and if he can show that the debtor is "absent from New Zealand or about to quit New Zealand with intent to defeat his creditors". Since both conditions are often extremely difficult to establish it is not surprising that creditors rarely have resort to this procedure. The principal advantage of the *Mareva* procedure is that it does not depend upon the assets of the debtor being identified, and indeed proof of availability of assets may be quite insubstantial. The importance of this aspect of *Mareva* was perhaps with respect not apparent at the earlier stage of its development to Quilliam J who in *Mosen v Donselaar*[13] declined to issue a *Mareva* injunction because it was "not possible . . . to make an order which can be enforced against a specific asset."[14] By contrast, however, in the *Third Chandris Shipping Corporation* Case[15] decided after *Mosen v Donselaar*, Mustill J, whose reasoning was described by Lord Denning M R in the Court of Appeal as invaluable,[16] stressed:[17]

> "Since the defendant is ex hypothesis a somewhat elusive character, it will usually be impracticable to establish exactly what assets he has available. All that can reasonably be asked, where moneys are the subject matter of the attachment is that a prima facie case is made out inferring that such moneys exist and where they may be found. For this purpose, the plaintiff need in my view do no more than point to the evidence of a bank account"

A further advantage of *Mareva* is that it may be very difficult for a creditor to establish under R 314 that the debtor is absent from or is about to quit with intent to defeat his creditors.[18] This is not the test with *Mareva* where the criterion would appear to be merely "a risk that the judgment . . . may go unsatisfied."[19]

But it is suggested even given these advantages, it is unlikely that *Mareva* will flourish in this country, though the fact that it is available may be invaluable to creditors in certain probably rather exceptional situations. Of the reported decisions involving *Mareva* injunctions many involve disputes about charterparties where, by reason of the customary English forum disputes clause, foreign creditors have been able to sue foreign debtors in England. This is, of course, not to suggest that *Mareva* is limited to such activity and indeed the decision of *Chartered Bank v Daklouche*[20] is to the contrary, but it is submitted that unless there is a good deal more commercial activity in New Zealand involving foreign parties the application of *Mareva*, at least in so far as it has developed to date, is unlikely to be substantial. This may, of course, alter in the future should New Zealand seek to encourage greater foreign participation and investment in development projects but even if this is to occur, it is probable that the participants will be of considerable financial standing or have substantial assets in jurisdictions where New Zealand judgments may be reciprocably enforced.[21] Having said this, however, it is appropriate to refer to one perhaps rather exceptional situation involving a foreign creditor and a foreign debtor where a *Mareva* injunction was issued in this country to preserve the debtor's New Zealand assets for possible satisfaction of judgment.

In *Hunt v BP Exploration Company (Libya) Limited*[22] Barker J had granted an ex parte application by the respondent BP Exploration

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[12] A1418/79 21 March 1980, Auckland Registry, [1980] *Butterworths Current Law* 363.

[13] Supra.

[14] Ibid.

[15] Supra.

[16] Ibid at 134.

[17] Ibid at 127.

[18] Reasonable Proof is required. *Butler v Green* [1908] 11 GLR 100 and *Pond v Glover* [1933] GLR 358. More recently stressed by Barker J in *A W Bryant Limited v McDonald* 1860/79, 4 March 1980, Auckland Registry.

[19] *Third Chandris Shipping Corporation v Unimarine*, supra at 138. Lawton L J described the test as "a danger of default" at 140. And see *Chartered Bank v Daklouche* [1980] 1 All ER 205, at 207 per Denning M R.

[20] [1980] All ER 205. And see also for an unsuccessful application in relation to an action involving a bill of exchange *Montecchi v Shimco (UK) Ltd* (1979) 1 WLR 1180.

[21] And this may bar the issue of a *Mareva* injunction. *Third Chandris Shipping Corporation v Unimarine* SA supra, at 138 per Denning M R; at 141 per Lawton L J.

[22] Barker J A1418/79 21 March 1980, Auckland Registry, [1980] *Butterworths Current Law* 363.

Company (Libya) Limited, for an English judgment to be registered in this country pursuant to the provisions of the Reciprocal Enforcement of Judgments Act 1934 and had also issued a *Mareva* injunction to preserve the the judgment debtor's assets, consisting of a stud farm in the Waikato, expensive bloodstock, farm equipment and bank accounts, here. On an application inter alia to set aside the injunction, Barker J ruled that in view of the paucity of evidence before him as to the financial standing of the applicant, Mr Bunker Hunt, the injunction should continue. In the opinion of his Honour:

> "All in all I infer that there is a danger that the assets will be taken out of New Zealand. The situation is different from the usual Mareva type of case where there is not even a judgment but merely the issue of proceedings. Hence there is a judgment, albeit one subject to an appeal; a judgment obtained after a lengthy defended hearing and one subject to being set aside under the provisions of the Act."

Of more relevance perhaps to New Zealand than the foreign debtor is the possible application of *Mareva* to a resident debtor. It would appear entirely possible that *Mareva* will be extended to cover resident debtors and thereby abrogate the long established principle in *Lister v Stubbs*[23] that interim injunctions of this kind should not issue against the property of resident debtors prior to judgment. Indeed, in *the Siskina,*[24] Lord Hailsham anticipated this development thus:[25]

> "I believe the truth to be that sooner or later the courts or the legislature will have to choose between two alternatives. Either the position of a plaintiff making a claim against an English based defendant will have to be altered or the principle of Mareva cases will have to be modified. In any event, it is clear that Mareva injunctions cannot be allowed to flourish independently in the Arcadia of the commercial list without being applied in the High Court generally in all cases where plaintiffs and defendants are comparatively placed."

The issue was foreshadowed although not argued expressly in *Mosen v Donselaar.*[26] In this case, the plaintiff was owed a considerable sum of money by the defendant for panel beating work. Although the defendant was a New Zealand resident he was a Dutch national and there was evidence before the Court that his daughter and son in law had already moved to Australia from New Zealand. A property had been transferred into his ownership in Brisbane some months before. He had further sold two homes at the time of an earlier application to rescind an order made pursuant to s 55 of the Judicature Act 1908, whereupon he had been arrested, and released, a condition of his bail being that he surrender his passport. He denied an intention at that time to sell the third property or to transfer funds to Australia but his Honour, Quilliam J perceived that in the interim he had probably done so. By the time the application for the *Mareva* injunction had come to be determined he had disposed of the third property but there was no evidence before the Court as to where the proceeds had gone. On these facts, his Honour declined to grant a *Mareva* injunction to restrain the defendant from transferring the proceeds from New Zealand.

His Honour ruled that a *Mareva* injunction could not issue because there were no specific assets over which the injunction could lie. For reasons given above it is respectfully submitted that English authority would suggest that this is not a bar to a *Mareva* injunction. Further, however, it is submitted in situations where the debtor is ordinarily resident and has owned property or has carried on some kind of business in the country in which the creditor is proceeding to judgment, it is a legitimate inference that he will have somewhere funds available which may be ultimately available for satisfaction of judgment. Thus it is suggested that the creditor should not have to establish in the case of the resident debtor evidence even of such an insubstantial kind as an overdrawn bank account. He should, it is submitted, be entitled to the injunction to preserve the residential debtor's assets in the jurisdiction simply on proof that he has a good arguable case and there is a

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[23] [1890] 45 Ch D 1. Discussed by Lord Denning M R in *Mareva Compania Naviera SA v International Bulk Carriers SA* supra, at 510. And for a commentary advocating an extension of *Mareva* see Journal of Business Law (Jan 1980) 59 at pp 63-65. And also Lloyds Maritime and Commercial Law Quarterly, February 1980, 38 at pp 45-47.

[24] [1978] 1 Lloyds Rep 1.

[25] Ibid at 9.

[26] Supra. Note in *Adler Commetica v Minnahurst* (referred to in [1979] 2 Lloyds Rep 119 and in *The Agrabelle* [1979] 2 Lloyds Rep 117). Lloyd J concluded that *Mareva* was not available against an English based defendant. However, Megarry J in *Barclay-Johnson v Yuill* (L R Times 23 April 1980) ruled that the *Mareva* injunction was not confined to foreign debtors. A *Mareva* injunction accordingly was issued against a residential debtor.

danger that any available assets will be transferred out of New Zealand, leaving judgment unsatisfied. This should not greatly inconvenience the debtor. Such an injunction will not prevent him utilising his assets in New Zealand and, on the occasions where the debtor may wish to legitimately export some assets or funds from this country, security acceptable to the creditor could be arranged as is the practice with *Mareva* in England.[27] If there are objections to this practice on the basis that it is unfair to the debtor to have to organise his affairs so as to accommodate his creditors prior to judgment, then in argument for the creditors, it must be pointed out that they will in most cases have to provide a suitable undertaking as to damages should the action fail,[28] thereby eliminating too precipitate a use of the injunction. If it is successful then the creditor has the advantage of knowing that the debtor has not been able to cheat satisfaction by transferring his assets out of New Zealand between commencement of the action and judgment. Of course this does not guarantee to the creditor that he will be able to effectively attach the assets or funds, if any, after judgment, but it does at least preserve some kind of possible opportunity to him for satisfaction. In principle, therefore, it is submitted that there is no reason to distinguish the foreign debtor from the residential debtor. What is crucial is that the evidence establish that the debtor is likely to remove, or there is a danger that his assets if any, will be removed from this country. It is submitted that in *Mosen v Donselaar*[29] such an inference could have been acceptably drawn.

But there is one further limitation on *Mareva*, which in practice may be likely to considerably affect its application in this country. Where it can be shown that the debtor has substantial assets in the jurisdiction where the judgment could be enforced then it would appear unlikely that the Courts will readily entertain the injunction.[30] Similarly, if the assets are able to be transferred in specie to a jurisdiction where there are available procedures for the creditor to attach them, an injunction is likely to be declined. For example, in *Rasu Maritima SA v Pertamina*,[31] Lord Denning M R declined to issue a *Mareva* injunction because the asset, the subject of the application, could be seized as readily by the creditor in Hamburg as it could in England. Therefore, it is arguable that in *Mosen v Donselaar*, the injunction could have been further resisted on the basis that the judgment debt could have been enforced in Queensland. It is however, submitted, that this limitation should not be too readily applied to restrict *Mareva* because the protection of available assets in this country for satisfaction of the judgment debt does mean that the judgment creditor is not put to the additional, and often not inconsiderable expense of enforcing the judgment elsewhere. In this regard, it is further submitted that it is reasonable in circumstances where the requirements of *Mareva* are satisfied, that a creditor should be spared this additional expense and inconvenience in obtaining satisfaction.

In conclusion, therefore, it would appear that the application of *Mareva* in this country will be rare, certainly far less common than in England. However, it is nevertheless a useful weapon available for a creditor who cannot identify particular assets but can establish that there is a danger or a real risk that the debtor's assets will be transferred out of New Zealand. In this regard, it is a useful adjunct to the provisions of R 314 of the Code of Civil Procedure, and s 55 of the Judicature Act 1908, which already give some protection for a creditor prior to judgment. It is hoped that in an appropriate case our Courts will see fit to issue a *Mareva* injunction where the debtor is ordinarily a New Zealand resident and not restrict its application to the foreign resident, only. Indeed, if *Mareva* is to have anything other than only an occasional application in this country, it is likely to be in cases involving residential debtors anxious to preserve their assets and enjoy them in what they may regard as sunnier climates.

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[27] See English practice discussed in *Third Chandris Shipping Corporation v Unimarine SA* supra, at 129-130 per Mustill L J.

[28] *Third Chandris Shipping Corporation v Unimarine SA* supra, at 131. NB undertaking required by Barker J in *Hund v BP Exploration Company* supra. And see further *EE.IA v Central Bank of Nigeria* [1979] 1 Lloyd Rep 445, (security to the value of $40,000 required).

[29] Supra.

[30] *Third Chandris Shipping Corporation v Unimarine SA* supra, at 138 per Denning M R: at 141 per Lawton L J. This may of course, be simply evidence that the debtor is of substance and therefore likely to honour the judgment.

[31] [1977] 3 WLR 818; [1978] 1 Lloyds Rep 1.

TOWN PLANNING

THE FORM AND EXPRESSION OF DISTRICT PLANNING SCHEMES

By J N Matson, *a Christchurch Practitioner.*

Oliver Cromwell, it is said, once apostrophised English law as "that tortuous ungodly jumble", and one gets a fellow feeling for the Lord Protector on reading the way in which some district planning schemes are expressed, particularly their ordinances.[1]

The Town and Country Planning Act 1977 lays down in general terms the form or structure of planning schemes but as one would expect says nothing of their mode of expression. The form of regional schemes is to be significantly different from such schemes under the 1953 Act, because there is now no reference to regional schemes having to include ordinances. In practice under the 1953 Act any binding legislative effect on regional ordinances had tended to be overshadowed by the reference in s 3 to regional schemes being designed as a guide to councils (sometimes argued as meaning only a guide), by the reference in s 4 to local authorities adhering to regional schemes only "in respect of matters of regional significance", and by "every provision" of district schemes, but not of regional schemes, having under s 33 the force of regulations. The binding effect of regional schemes under the new Act may be more extensive, but so far as form is concerned it seems they will not be expressed in mandatory or prohibitive language but in statements of what should be done, either expressly or in the form of ends and means to which local authorities will be obliged to adhere.

Structure of district schemes

So far as district schemes are concerned the two Acts contain very much the same requirements. Section 36 of the new Act perhaps allows a little more elbow room than s 21 of the old Act, in that the scheme is to "include" the specified matters and not to "consist of" them.

These specified matters are of three kinds.

First there is to be a statement of the objectives and purposes of the scheme, and of the policies for achieving them, and an indication of the means by which these are to be implemented and achieved. There is also to be included whatever else the Council thinks is necessary to explain the scheme. There is little guidance in the Act as to the distinction between purposes and objectives and between policies and means. Section 4 does state however that the general objectives shall be to achieve the general purposes specified in that section.

Second, the scheme must include a code of ordinances "for its administration and implementation"; and third, a map or maps.

The maps are to "illustrate the proposals for the development of the area", the same expression as occurred in s 21 (2) of the 1953 Act. There is an echo here of British legislation. The Town and Country Planning Act 1947 of the United Kingdom required local planning authorities to submit to the Minister for approval a plan "indicating the manner in which they propose that land in that area should be used", and the plan was to include maps "to illustrate the proposals"[2]. The description of a plan as "proposals" was appropriate in English circumstances; it is not appropriate in the circumstances obtaining in New Zealand, where no such approval is required and the scheme is more than a general guide. Maps in current district schemes go much further than being mere illustrations, whether of "proposals" or of objectives and purposes, though they may illustrate these also. They may for instance show intended road widening and motorway corridors, and the planned direction of urban expansion in the form of urban and deferred urban zones. But they also define the limits within which certain activities, specified in the ordinances, are permitted or prohibited, and thus complement or complete the legislative part of the scheme. They are therefore hybrid in nature,

[1] Some writers quote Cromwell as saying "jungle", not "jumble"; but "jungle" is first recorded in written English in 1776, more than a century after Cromwell's death: G Subba Rao, *Indian Words in English* (Oxford, 1954).

[2] Town and Country Planning Act 1947, s 5, substantially repeated in the consolidating Act of 1962, but repealed in 1968. Cf A E Tilling, *Planning Law and Procedure*, (5th ed London, 1977), pp 58-62.

partaking of the nature of both the other parts of the scheme, expository and explanatory (the scheme statement) and legislative (the ordinances).

But the cardinal distinction is that between these two parts, the scheme statement and the ordinances. The clearer this distinction is kept the more easily will the ordinary man find out what he can and cannot do. Furthermore the mode of expression of the two kinds of provision may, even should, be different. A certain vagueness or generality, and a leaving of things to be inferred, are appropriate to an essay on what should be achieved and why and when and perhaps how; but in legislation depriving a man of the right to do as he wills with his own, precision is the first requirement. What Wilson J said of the 1953 Act applies to ordinances: "In construing its terms, the Courts, in accordance with established principles, will not adopt a meaning which takes away existing rights of property owners further than the plain language of the statute, or the attainment of its object according to its true intent, meaning and spirit, requires." *(Clifford v Ashburton Borough* [1969] NZLR 446, 448.) On appeal, McCarthy J quoted this passage and went on to say: "I believe it very important to keep this in mind. One frequently hears it asked whether some particular use is permitted under the Town Planning legislation, but the true question is, is it prohibited?"[3]

The Form of Ordinances

This does not mean there should never be any non-legislative matter combined with legislation; it merely means the distinction should be clear. Explanatory matter may be interpolated, to explain to people affected the reasons for the provision, with or without also assisting in the interpretation of doubtful provisions, or to make the total position clearer by cross-reference to other provisions. The preamble and the long title of an Act of Parliament may have this function. In some of the tax avoidance provisions of the Income and Corporate Taxes Act 1970 of the United Kingdom there is an initial statement of the purpose of the provision. Thus s 478 begins "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets [abroad] . . . it is hereby enacted as follows . . ." When Macaulay and the other Law Commissioners set about drafting the great series of Indian codes in the 1830s some of them contained examples of what was meant, inserted after the appropriate section; and the same device appeared in the ordinances of East African colonies which adopted so much Indian statute law.[4] The operative Christchurch district scheme (recently reviewed) contains at the head of the several zoning ordinances a "zone statement" explaining the purpose of the zone, and this has been favourably commented on by the Appeal Board.[5] This style of drafting may be welcomed as making for clearer communication, but even so the purist or the expert may deprecate it. The United Kingdom taxation provision just quoted was criticised in *Lord Chetwode v IRC*; [1977] 1 All ER 538, 643-4 and in similar vein the (American) Handbook of the National Conference of Commissioners on Uniform State Laws lays down, as rule 17 of the Drafting Rules for Writing Uniform or Model Acts, "Purpose clauses: do not include language stating the purpose of an Act or a recital of facts upon which the Act is predicated".[6] In Britain the Renton Committee, which reported in 1975 on the Preparation of Legislation (Cmnd 6053), had this to say:

> "11.6 A number of witnesses have suggested to us that express statements of purpose would help to explain and clarify both complex legislative provisions which provide in detail for specific instances and legislation framed in terms of general principles. Statements of this kind can take various forms, such as a general preamble to an Act, a general statement of its pur-

[3] *Ashburton Borough v Clifford* [1969] NZLR 927, 943.

[4] Macaulay himself is chiefly famous for the Indian criminal code, of which Sir James Steven said "The Indian penal code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made. It is to the French code penal, and to the German code of 1871, what a finished picture is to a sketch. It is simpler and better expressed than Livingston's code for Louisiana; and its practical success has been complete."

[5] The reviewed scheme also includes zone statements, which are expressly said not to form part of the ordinances (or rather not to form part of the Code), but are for some reason in the same numbered series as the ordinances and, except that they are printed in italics, are in form indistinguishable from sections of the ordinances.

[6] Quoted in Horace E Read, *Materials on Legislation* (3rd ed New York, 1973) p 294. But cf clause 2 of the Canadian Human Rights Bill, "an Act to extend the present laws in Canada that prescribe discrimination and that protect the privacy of individuals" — "2. Purpose. The purpose of this Act is to extend the present laws in Canada to give effect . . . to the following principles: (a) every individual should have an equal opportunity . . . (b) the privacy of individuals should be protected . . ." (Quoted in Sir William Dale, Legislative Drafting, a New Approach, (London, 1977) p 325.)

> pose in one of the opening sections of an Act, or specific statements of purpose and preambles prefacing particular sections or groups of sections or Parts of an Act.
> 11.7 Among the advocates of statements of purpose are those whose task it is to pronounce or advise on the effects of legislation: members of the Judiciary, practising lawyers, and teachers of law. The draftsmen themselves are less enthusiastic . . . New Zealand's Chief Parliamentary Counsel told us that preambles are rare in public Acts in New Zealand; purpose clauses, forming part of the text of the Act, were sometimes used, but were not thought to aid comprehension. Professor Reed Dickerson thinks that 'Most purpose clauses are quite unnecessary'; that general purpose clauses tend to 'degenerate into pious incantations . . . such as . . . the one in a recent ecology Bill, which in substance said "Hurray for Nature!" '; but that 'in prefatory language in individual sentences such as "For the purpose of this", or "For the purpose of that", or "In order to do this", you may have an economic, focussed purpose statement that is of some use' . . . "

These remarks refer to purpose clauses as an aid to understanding, but the same considerations apply to a wider field, as already mentioned. In district schemes also the separate scheme statement provides a proper place for defining the planner's (and the legislative draftsman's) purpose. What is more relevant to the form of ordinances is the explanatory notes and cross-references (which should be clearly distinguished from the legislation) which may be inserted in the interstices of the legislation and are designed to make clearer to the citizen the extent of his rights and duties. The Malvern district scheme ordinances for instance contain notes in several places drawing the reader's attention to dispensing provisions which appear later in the ordinances. The ordinances in the "second review" of the Christchurch scheme, published in December 1979, contain a number of footnotes and a provision to the effect that "The footnotes set out in italics in this Code are included for information only and are not part of the Code". The footnotes and this clear statement are commendable. The ordinances as a whole however are "a dark jungle full of surprises and mysteries",[7] containing as they do a large amount of factual and explanatory matter, jumbled up in the same numerical sequence with legislative matter and inaccurate paraphrases of the Local Government Act 1974, apparently intended to have legislative effect. In Part II for instance what appear to be Ordinances 8, 10 and 11 are purely cautionary factual statements. They and the footnote to 0:11 itself all begin with the words "Attention is drawn to . . ." The ordinances are also arranged in a curious way. Each ordinance does not have a unique name or number. As is usual they are not named at all; the numbering begins afresh in each "Part" into which the Code is divided, so there may be 11 anonymous ordinances each numbered the same. There is no great harm in this provided the legislation is clear and easy to use, but it is cumbrous because it does mean citing the Part each time. Commonly however in other fields the legislative units gathered in a code are uniquely numbered or named, just as the section numbers in an Act run right through and do not start afresh in each Part. It might be of advantage if each ordinance started with a section something like "1. This is the Commercial 1 Zone Ordinance and applies to the Commercial 1 Zone as shown on the planning maps."

On the other hand a legislative provision should not be buried in the scheme statement. Under the rubric General Information the Malvern scheme statement contains provisions apparently intended to make law. "Any use not expressly mentioned in this district scheme that falls naturally within a general class of uses authorised in respect of any zone shall be deemed to be included in that class . . . but in respect of any other zone . . . the Council shall determine in which zone or zones it shall be permitted, and . . . whether it shall be a predominant use or a conditional use . . ." (Cf "clause" 1 (4) (b) of Ordinance II of the skeleton code in the Fourth Schedule to the 1960 Regulations.) Further, "every public utility not provided for under s 21 (9) of the Act shall be deemed to be a conditional use in every zone in the district". This is much more than General Information. The provisions are certainly out of place, and since they do not form part of the code of ordinances are of doubtful validity. Similarly the Kaiapoi Borough scheme lays down in Appendix IIA to the Scheme Statement what the Council "shall" and "may" do in the matter of limited access roads, provisions which appear to be intended to have legislative effect. The Riccarton Borough scheme also has provisions in the

[7] Kitto J's description of the (Queensland) Succession and Probate Duties Acts 1892-1955, in *CSD v Livingston*, (1960) 107 CLR 411 at 446.

Scheme Statement about what developers "must" do, and what the Council "shall" do in the SDA 5 zone.

The legislative part of the scheme is to take the form of ordinances, gathered in a code. It is not clear from the Acts why the rather high-sounding title "ordinance" was chosen for these laws; they are much life by-laws, though they do deal with matters of great financial and social importance, are subject to procedures of publicity objection and appeal to which by-laws are not subject, and have the force of regulations;[8] so perhaps they merit that higher status.

Ordinances are enactments of a subordinate legislature, usually a legislature of a status of some importance, above that of a local authority. Thus on the severance of New Zealand from New South Wales in 1839 the Legislative Council of the new colony was empowered to pass ordinances, and began by passing an ordinance declaring that New South Wales law applied in the Colony of New Zealand. Ordinances were (and are) the standard form of legislation by colonial Legislative Councils. In the 1850s the Provincial Councils of New Zealand also legislated by way of ordinances. However, in Australia the term is today applied to some local authority legislation. In New South Wales for instance a local planning scheme must begin in the form of a draft ordinance.[9] Ordinances follow very closely the structure of Acts, and more recent colonial ordinances are indistinguishable from Acts of Parliament, apart from the title and enacting clause. In particular they follow the same conventions about division and subdivision, and the numbering and naming of different pieces: Part I, section 1, subsection (1), paragraph (a), subparagraph (i) and so on. There is no particular virtue about such conventions; any other accepted system would do; the point is that in the New Zealand planning context no other comprehensive system is generally accepted. Accepted conventions have the advantages of habit and (especially) of immediate understanding. They make clear at once what sort of provision, at what level in the hierarchy, the speaker is referring to. There is no need to consider afresh every time "what should this piece be called? clause, paragraph, section?"; nor to wonder "when he said subclause two, which bit numbered two did he mean?"

The naming conventions used by New Zealand Parliamentary Law Draftsmen are very similar to those used in other parts of the Commonwealth, though we do have one or two odd practices of our own.[10] The Fourth Schedule to the Town and Country Planning Regulations 1960 set out a skeleton code of ordinances. If convention had been followed the pieces of an ordinance corresponding to sections in an Act would also have been called sections; but they were called clauses. (The usual words for bits and lesser bits of a schedule are paragraph and subparagraph;[11] but here we are not dealing with bits of a schedule but with bits of ordinances which are set out in a schedule.) The reason for using the word "clause" remains unexplained, though the schedule looks like the work of a planner adopted without thought by a legal draftsman. Whatever its origin, the word was adopted in the earlier schemes and remains in general, perhaps invariable, use today. Apart from being a unique and irritating departure from convention it has caused no little inconvenience, because there is no established way of referring to the bits into which these "clauses" are divided and subdivided. The more recent "quasi-decimal" system of notation, used of example in the Tauranga and Picton schemes, removes some of the difficulty by reducing the need to have any names for the bits at all, but this does not wholly meet the problem and the system can become cumbersome. In "clause" 3 of Ordinance III of the Picton scheme for instance one gets down to a piece distinguished as 3.2.2.2 (b) (iii) with further unnumbered pieces within that.

Defects of existing ordinances

The first requirement of town planning ordinances is certainty; and the next, ease of understanding. But it is not hard to find existing ordinances which fail to meet these and less important criteria. They may be vague or uncertain, or say things the draftsman did not really mean, or omit things he did mean. Change No 81 of the Christchurch district scheme of 1972 (one of the better schemes) was introduced because of such factors; and

[8] 1953 Act, s 33; 1977 Act, s 62. They are therefore not open to challenge as being unreasonable.

[9] A S Fogg, *Australian Town Planning Law*, (University of Queensland Press, 1974), p 123.

[10] One would expect each piece of the primary division of a regulation to be a sub-regulation; or at worst a clause or paragraph; but as Thornton says "New Zealand practice is remarkable for the mystifying use of the term subclause for a subsection equivalent." (G C Thornton, *Legislative Drafting* (2nd ed London, 1978), p 334 n 7). See eg, reg 49 (6) of the Town and Country Planning Regulations 1978.

[11] Thornton, in the work cited, p 308. Cf the (United Kingdom) Town and Country Planning Act 1962, Sch 3 Part II.

when the Tribunal was asked, in connection with loosely worded other parts of that scheme, when is a restaurant not a restaurant? the answer (when it is licensed) was not what the planning staff expected or wanted.[12] Again, ordinances may be certain, but may be as impenetrable and difficult to understand as a nineteenth century deed. And they may be certain and easy to understand but offend against the cannons of grammar and logic.

As to grammar and logic, it is quite common to find the draftsman beginning a long sentence, particularly one with a series of similar clauses and split verbs ("shall (a) do this . . . (b) do that"), and before he gets to the end of it forgetting how he started and beginning another sentence, with fullstops scattered about like hundreds and thousands. In the 1972 Christchurch scheme Ordinance I "clause" 4 division (subclause? section? paragraph?) (2), subdivision (b), subsubdivision (i) is an example. On a single page of the Ashburton County scheme may be found ordinances numbered in the series (i), (ii), (iii), others in the series 3.1.2, 3.1.3, and sections and paragraphs both lettered (a), (b), (c). Another scheme provides the Council may forbid the erection of hoardings without saying in what manner they may do so, and goes on to say the Council may "in like manner" cause existing hoardings to be removed. In a manner like what other manner? The Kaiapoi Borough scheme provides in ordinance 5 "clause" 4 that "the Council may dispense with the observance or performance of any of the requirements of this Code subject to the following procedure". No procedure follows. A notified change of another scheme (altered on objection) provided that proposals for certain uses should be conditional uses (not, be it noted, the uses themselves but the proposals), and also that damage to or destruction of "vegetation" should be a conditional use; this in an area where there were trees and shrubs and where lawns were habitually mown, gardens weeded and hedges trimmed. A number of schemes provide in the same zone for conditional uses, and also for predominant uses (now, uses as of right) subject to certain conditions. In view of the sharp distinction the Act makes between uses as of right and conditional uses it seems a particularly unfortunate turn of phrase, and one easily avoided, to specify conditional uses and uses which are not conditional uses but are subject to conditions. (But it must be admitted that both Acts seem to contemplate this with equanimity; 1953 Act s 21, 1977 Act s 36.)

Reasons for defects

The poor standard of drafting of district scheme ordinances stems from their being drafted by planners and not by solicitors. This does not mean that solicitors are the only people who can write precise, comprehensive and intelligible English, or that all solicitors can do so; but since much of his time is spent in trying to write thus a solicitor is likely to achieve a better result than one whose time is spent in exercising other skills.[13] It is of course open to anyone to acquire legislative drafting skill, if not by experience then by study. There have been texts on legislative and other drafting available at least since 1845. George Coode's classic on Legislative Expression was published in that year. It still retains value and his principles are indeed adopted or referred to in modern Australian, Canadian and English books.[14]

There seem to be two main reasons for planners not ensuring that ordinances are drafted by someone skilled in that work. The first is that most of them do not recognise that any skill is involved; the second is that they think lawyers' drafting is too "legalistic". The first is mistaken; the second contains a grain of truth.

Planners who criticise legal drafting as being too legalistic appeasr to have in mind two things; the use of legal jargon — "all those whereases" — and the very involved language of many enactments and private legal documents which makes them so difficult to understand. There is no doubt that many twentieth century solicitors go on using eighteenth century vocabulary and prolixity in their documents, and though this is not likely in itself to

[12] *Losco v Christchurch City Council*, appeal 450/78.

[13] This applies of course not only to expressing, but to advising on the legal effect of, the planner's ideas. Ordinances in several district schemes have been held to be ultra vires, and in *Attorney-General v Mount Roskill Borough*, [1971] NZLR 1030, 1036, a dispensing ordinance "of a type in wide use in town planning schemes in New Zealand" was declared to be ultra vires.

[14] Coode's work is printed as an appendix in Stanley Robinson, *Drafting* (London, 1973) and E A Driedger, *The Composition of Legislation* (Ottawa, 1976). See also E L Piesse, *The Elements of Drafting* (5th ed Sydney, 1976) and Thornton, the work cited in note 10. (Thornton qualified in New Zealand, has had experience in African and other countries, writes in Hong Kong and publishes in England).

have much effect on legislation, if they turn their hands to drafting ordinances they are not likely to use a simpler, clearer style. We still have "last will and testament", "give, devise and bequeath", "my said wife", as if there was still some distinction between the Anglo Saxon will and the Norman testament, and as if New Zealand men were usually polygamous; in short, as if those expressions meant anything more than "will", "give" and "my wife". Very frequently also a deed "witnesseth" as if one's clients still used the language of the King James Bible. Indeed, so little do some of those who use these creaking antiquities understand what they are saying that one even finds "these presents witnesseth". There is only one thing to be said in favour of such language, and that only of some of it: some of it is what the Americans call "boiler plate" — expressions whose meaning has been hardened in the fires of litigation.[15]

The very involved language of some modern statutes is however a more relevant criticism of lawyers' drafting. They could undoubtedly be made easier to understand without losing certainty of meaning. As Thornton says, intelligibility is the product of simplicity and precision, and simplicity involves economy and directness, familiarity of language and orderliness. "The trouble", Lord Denning has said, "lies with our method of drafting. The principal object of the draftsman is to achieve certainty —a laudable object in itself. But in pursuit of it, he loses sight of the equally important object — clarity. The draftsman — or draftswoman — has conceived certainty: but he has brought forth obscurity; sometimes even absurdity." (The Discipline of Law, p 9.) The attainment of these two desirables is not always easy but is feasible.

One reason for statutes being drafted in a manner which attempts to dot every i and cross every t is the "strict construction" approach to determining the meaning of an enactment which has prevailed in the Courts in the past. Of recent years there has been a retreat from strict construction towards what Lord Diplock has called a "purposive approach" (*Kammins v Zenith Investments Ltd*, (1971) AC 850, 881). In Britain this has been helped by closer contact with continental methods; a continental code is to an English statute "what a sketch is to a finished picture",[16] and meaning is determined on broad principles rather than niceties of wording. In New Zealand a greater emphasis than in earlier years on s 5 (j) of the Acts Interpretation Act 1924 seems to suggest a more liberal approach to construing statutes. There also seems to be, for whatever reason, more of a "sketch" than a "finished picture" approach to the drafting of statutes, though this may only be on account of the subject-matter of certain statutes.

The more liberal approach of the Courts is likely to be followed by the Planning Tribunal; indeed the Boards and the Tribunal appear already to be at least as willing as the Courts to follow this approach in construing both statutes and ordinances. This in turn may make for simpler drafting of ordinances.

The inherent nature of the subject-matter of planning legislation tends also towards a "sketch" approach. It is when a rule involves matters of degree or proportion or value judgments in particular that the "sketch" approach becomes easier, perhaps inevitable. Such matters very often arise in town and country planning and therefore may well affect the form in which ordinances are drawn. Clear examples of such matters affecting legislation in another field may be seen in the Matrimonial Property Act 1976, though the manner of expression in that Act goes further than is made necessary merely by the factors just mentioned, and can be criticised as needlessly introducing the uncertainties of colloquial speech. Thus s 15 refers to one spouse's contribution being "clearly greater" than the other's. As Somers J pointed out in *Barron v Barron* [1977] 1 NZLR 454, at 460, if one contribution is $1 more than the other its greater size is completely clear, but the section appears not to be primarily concerned with clarity at all but with the substantial nature of the margin: an unfortunately colloquial use of the word "clearly". Expressions such as "extraordinary circumstances", "repugnant to justice", "significantly" affect the value, and import matters of degree and value judgments; and so do those such as "amenities", "enhancement of the social environment" and "unnecessary expansion of urban areas", which occur in planning enactments. It is all the more necessary that ordinances be as clear and precise as possible.

The tendency just mentioned to draft legislation in colloquial speech seems to be one which should be regarded with some caution. One can use clear modern language without

[15] Cf the treatment of two very similar ineptly drafted leases in *Bocardo S A v S & M Hotels Ltd*, [1979] 3 All ER 737, and in the Australian case there cited.

[16] Cf Steven's remarks quoted in note 4.

being imprecise or difficult to understand, but much everyday speech is uncertain in meaning. The Renton Committee welcomed "a discernible trend towards a more colloquial style in current statutes", but went on to say "Ordinary language relies upon the good offices of the reader to fill in omissions and give the sense intended to words or expressions capable of more than one meaning. It can afford to do this. In legal writing on the other hand, not least in statutory writing, a primary objective is certainty of legal effect . . ." Many existing ordinances are expressed in a colloquial or informal, even casual, manner and the imperfections of this have already been referred to.

Good legislative drafting is not something that can be achieved as easily as writing one's name; and this gets back to the first of the reasons stated earlier for planners not seeking the help of solicitors, even though the number of solicitors who have experience in, or who have studied, that particular branch of drafting is limited: planners often do not think drafting is a matter of skill. Over the years the planning embodied in district schemes has become much more sophisticated, and with that sophistication has come the need for more complicated legislation. We have been gradually getting away from a too-close adherence to the skeleton ordinances in the 1960 Regulations, but the refinement of the legislation actually enacted has not kept pace with the refinement of planning. The latter would benefit if more attention were paid to the former. So would the citizen. And it might even be such as to mollify the Lord Protector if he were here to see it.

LEGAL LITERATURE

Davis' Introduction to Real Property, B H Davis Butterworths, 1979, xxvii, 281 pp (incl index), $32.80 Reviewed by J A B O'Keefe.

Dr Davis' book is virtually a compendium of land law in New Zealand. He has successfully reduced the statute and case law to fundamental and readily assimilated principles with a view to teaching and practical application. Although this text does not aim to be a substitute for the larger works by the same publisher, it is prophesied that it will readily find its special and indispensable niche on the bookshelves of lawyers, accountants, valuers, real estate agents, central and local Government officers and members of professional and practical bodies and individuals associated with law, especially students.

Davis' *Law of Real Property* constitutes a new line of approach and is engagingly readable whilst being subtly informative. Practically all of the cases updating the land law have been cited. The book contains clear summaries of essential facts where necessary. Because of the considerable work and achievement in the careful reduction to fundamental principles, this book constitutes an outstanding contribution to the practical illustration of the law.

The text has the ring of true scholarship together with a ground-level appreciation of what readers will want and need. It can never be a waste of time to see what Davis has to say on any aspect of this complex subject. Davis has not been afraid of putting forward some of his own views of the current and future state of law eg, his comments on *Domb v Owler* at p 181, or his doubts as to the creation of restrictive covenants, p 225. Moreover, Davis encourages readers to glance across the fence, because real property law is emeshed with many other branches of the law — tax, tort, contract and family aspects related to law. He has a brief but useful chapter on Maori Land law, and is to be congratulated on putting together a worthwhile conspectus of the whole of the laws of New Zealand as they impinge upon and affect land.

This reviewer predicts that it will not be long before Davis goes into a second impression. The index and tables of cases and Acts are adequate, and the ready reference index is a feature of this well set-up book.