The New Zealand
LAW JOURNAL

7 October | No 18 | 1980

ACCIDENT COMPENSATION AND THE CRIMINAL

Should a person who is injured while committing a crime receive Accident Compensation benefits? According to a Commitee chaired by the Associate Minister of Finance (the Hon Mr Quigley) he should not. Persons injured while committing crimes such as murder, rape, aggravated robbery, resisting arrest, burglary and drunken driving should be excluded from the scheme. As though to underline the desirability of this approach, shortly after the announcement was made a person was seriously injured when leaping from an upper floor of a building in an attempt to avoid arrest.

At first sight the proposal has a certain superficial attraction but on closer examination it may be seen to be fraught with so many pitfalls and disadvantages as to be not worth pursuing.

In the first place, at what point is it to be decided whether a person falls into the excluded category of criminal. Is it on conviction? In that case what happens to benefits paid between accident and conviction. If it is not to be on conviction then who is to make the decision, and on what evidence and following what procedures, that a person falls into this criminal category — a category that is to be denied the very valuable benefits of the Accident Compensation Scheme.

Secondly denial of cover is an arbitrary and very substantial added penalty. Justice and mercy should walk hand in hand. A person who is seriously injured through criminal stupidity may well warrant a reduction rather than an increase in sentence on the basis that he has suffered enough. Under this proposal he must suffer more.

Thirdly both the criminal justice system and the Accident Compensation Scheme have one theme in common — rehabilitation. In a caring, as opposed to a retributive society, the opportunity for rehabilitation should simply not be withheld from anyone.

Fourthly, the criminal is not the only person with an interest in the Accident Compensation Scheme. Criminals do occasionally have families. As the matter is not entirely free from emotion attention could perhaps be drawn to the problems likely to be faced by a good solid middle-income family including several young children with a father whose isolated bout of drunken driving has resulted in a permanent disability that will markedly reduce his income. It could also be that the family of a criminal who is killed by accident (and therefore cannot be prosecuted) may find itself in a much better position than that of the criminal who is merely permanently injured.

Finally the proposal cuts across the basic underlying principle of the Accident Compensation Scheme, namely that it provides universally applicable no-fault insurance.

Against this, what really is the magnitude of the problem? Suspicions are that, if the drunken driver is excluded, there will be very few cases of criminals injured in the course of a crime. The payout involved is not likely to be great, particularly if their period of healing coincides with their term of imprisonment.

Including the drunken driver in the criminal exclusions is a questionable step. That the drunken driver is involved in a considerable number of serious accidents cannot be denied and it is that very reason that makes the exclu-

sion questionable. Although widely condemned, driving while over the limit is a prevalent practice within all sectors of the community. More than anything, the inclusion of the drunken driver in this category cuts squarely across the no-fault concept of accident compensation. It also leads on to the awkward question of whether exclusion from cover is a matter of status so that a drunken driver will be excluded even though the accident was not his fault, or whether we are back to cover being excluded only where he was to some extent blameworthy.

It may be said that the drunken driver voluntarily assumes a higher risk of injury. If this is to be used to justify withholding Accident Compensation then it is but a short (and logical if undesirable) step to excluding sports injuries from cover.

In addition, though, drunken driving is reprehensible in that it threatens others with a risk of injury. But undesirable activity is discouraged by the penalties of our criminal law. Were our criminal law to be changed to provide that the injured drunken driver, or indeed any criminal who suffered injury in the course of offending, was, in addition to other penalties, to be deprived of rehabilitative assistance and deprived of financial assistance for which (especially in the case of the self-employed) he may very well have paid, then that provision would rightly be branded as cruel and inhuman. That the same result is achieved by other means changes the situation not one bit.

If the criminal is to be excluded from the scheme of the Accident Compensation Act 1972 he may console himself with one little thought. If he is assaulted by a policeman he may well find himself in a position to claim exemplary damages against his assailants — a benefit denied to the law abiding citizenry.

DISSOLUTION OF MARRIAGE

Under the Family Proceedings (No 2) Bill living apart for two years will no longer be a ground for dissolving a marriage. It will be necessary to prove in addition that the marriage has broken down irretrievably. A separation agreement is reduced to the status of no more than evidence that the parties have lived apart for the required period.

For the past 12 years it has been sufficient to prove that a separation agreement has been in force for not less than two years. Common sense dictates that in those circumstances the marriage has broken down. It will be interesting to see what justification is given for complicating what was regarded as a simple and certain procedure for dissolving a marriage.

It has been widely said that irretrievable breakdown of a marriage will be the sole ground for dissolution. That is not so either. Irretrievable breakdown plus two years living apart will be the sole ground of dissolving a marriage. Why should this be so? If a marriage has irretrievably broken down then it has irretrievably broken down. Why make the parties wait two years if they can establish their case sooner?

The proposed ground confuses two separate matters. Irretrievable breakdown is the logical ground for permitting dissolution of a marriage but it is a very uncertain ground. Two years living apart is a certain and realistic ground but lacks the logic of irretrievable break down. By mixing the two concepts together, as they have been, the logic of one is diluted and the certainty of the other destroyed. It smacks of a timid compromise.

Would it not be better to have irretrievable breakdown as the sole ground for dissolving a marriage and make two years living apart prima facie evidence that the marriage has irretrievably broken down?

TONY BLACK

CONSTITUTIONAL LAW

ROYAL COMMISSIONS IN THE HIGH COURT

By DR WILLIAM C HODGE

A discussion, in general, of the power of the High Court to review the activities of a Royal Commission with particular reference to the declaration made in New Zealand Police Association Inc v Taylor in respect of the Royal Commission inquiry into the conviction of A A Thomas.

IN GENERAL

Royal Commissions in the High Court

The first modern Royal Commission may have been the Domesday Inquest of William 1, gazetted, as it were, in 1086. Since that date, the classic function of a Royal Commission has been to "inquire into and report upon" — and presumably to deliberate before reporting and after inquiring — natural disasters, blunders and corruption in high places, and law reform. There is no adversarial contest. A Commission does not acquit, adjudicate, arbitrate, conciliate, convict, determine, mediate, rule, settle, try, or award damages to or against any person. A Royal Commission does not label participants as plaintiffs, defendants, applicants, appellants, or respondents. As the Royal Commission on State Services (1961) said of itself, "No one is charged before this Commission. This is not a law-suit. We decide no rights. We merely make recommendations." Why, then, should the High Court open its doors to those displeased with such an information-gathering, surveying, law reforming function?

The answer must be that, in practice, persons can be "adversely affected" or "aggrieved" by a Commission to a degree far beyond any hypothetical injury suffered in common by the public at large. The Commissions of Inquiry Act 1908, indeed, refers to "parties" in s 11, and even makes provision for the "whole . . . of the costs of the inquiry" to be borne by any party. (Consider the costs of the Mt Erebus inquest or the Thomas Inquiry being inflicted upon one of the witnesses! A bookkeeper's mentality might provide for compensation to be paid minus such costs). The 1980 Amendment to that Act expressly recognises, in substituting a new s 4A, that there may be "parties to the inquiry [with] an interest in the inquiry . . . [who] may be adversely affected." When Government malfeasance, departmental misfeasance, or loss-of-life disaster is subject to compulsory inquiry, it would be fatuous to pretend that professional reputations and political futures are not at risk. With a broad statutory power to access computers, inspect records, require production of documents, and compel evidence generally, common sense alone demands that a Royal Commission be subject to High Court review.

Constitutional decencies, and the equilibrium of 1688, also require that the High Court remain open. A Commission may, by statute, be a legislative auxiliary, and it may, by appearance, don the cloak of judicial procedure, but it remains, in essence, an aspect of the Executive and a creature of the prerogative. Royal Commissioners, by Warrant and by Letters Patent, are Kings's Men. The Governor-General, acting under Clause VII of the 1917 Letters Patent and with the advice of the Cabinet, constitutes a commission, appoints its members, defines its term or terms of reference, and receives its report. Potential for a Star Chamber-like inquisition, or the contrary whitewashing-cover up, albeit unlikely, undeniably exist. Three examples illustrate the potential (if not the actuality) for abuse.

In 1909, the Court of Appeal prohibited a Commission of Inquiry (Mr Justice Sim) from pursuing allegations of bribery made against five elected members of the Ohinemuri Licensing Committee. The Court found that the Inquiry could not supplant — by prerogative or otherwise — the ordinary Courts of justice, citing 42 Edw III, c 3 (1297) (confirmation of

Magna Charta; no man to answer for crime except by law of the land) and 16 Car I, c 10 (1640) (abolition of Star Chamber). *Cock v A-G* (1909) 28 NZLR 405.

In 1953 a one-man Commission of Inquiry (Sir Robert Kennedy) was appointed to answer certain questions regarding "the conduct of the Police Force", including bribery by bookmakers, irregular enforcement of licensing laws, wire-tapping by Commissioner Compton, carpentry work done at the Commissioner's private home by members of the force, and the nature of any constabular criminal records. Skirting the edges of criminal allegations, Sir Robert conducted the inquiry on judicial lines and eventually gave the police a clean bill of health. Compton himself resigned prematurely, after some wire-tapping and private use of police labour was admitted. Compton was ordered to pay £7.18s as compensation (presumably by the Minister) but received £6,000 as a condition of early retirement: 1954 AJHR H-16 A and B; 1955 AJHR H-16 C and D. (No imputations of impropriety on the part of Sir Robert are intended; the case is cited for its constitutional significance and precedential value)

A more recent example — which also led to a premature retirement — was the one-man inquiry conducted by Sir Alfred North in November-December 1976 into the so-called Moyle Affair. (The origins lay in Parliament debate of 4 and 5 November 1976: (1976) 407 NZPD 3677-3681. The North report was widely published in the press on 17 April 1978, but was not incorporated into the Journals of the House.) Sir Alfred rigorously cross-examined the opposition front-bench MP, expressly rejecting his request to be allowed counsel, and rhetorically asking Moyle, "Do you expect me to believe you?" It is submitted that such an inquiry cuts across Article 9 of the Bill of Rights of 1688, which protects Parliamentary speech from being questioned in any place outside Parliament. Indeed, compulsory Royal cross-examination of a Member of the Opposition would seem to be the mischief at which the statute was aimed in the first place. It was ironic that a "party" in that affair, Mr Muldoon, defined the terms of reference. Suffice it to say that Sir Alfred concluded that Moyle's statements to the House, in part, could not be justified and could not be made with propriety.Parliamentary statements made by Messrs Muldoon, Rowling, McCready and Connelly were also examined and compared by Sir Alfred. These issues are discussed in more detail at [1978] NZLJ 259 and at [1978] 94 LQR 276.

Commissions of inquiry carry an increasingly heavy load. In the New Zealand constitution, Parliamentary committees enjoy no independence from Government. There are no grand juries. Both the Parliamentary Commissioner (Ombudsman) and the Human Rights Commission have narrow statutory briefs, and neither has the resources to conduct even one major inquiry. (Compare the multi-faceted Watergate Inquiry in the United States — a Federal grand jury, a New York grand jury, a Senate select committee, and a House standing committee, in addition to a Special Prosecutor).

The machinery of Royal Commissions is, therefore, essential, but, as war is too important to be left to the generals, Royal Commissions are too critical and too potent to be left exclusively to the King or his Cabinet manifestation. The recent High Court consideration of the Thomas Inquiry is an example of the Rule of Law in action.

IN PARTICULAR

The Thomas Inquiry

A declaration, under the Judicature Amendment Act 1972, concerning the legal effect of the pardon to A A Thomas and the reception of evidence by the Royal Commission inquiring into the convictions of Thomas, has been given by a three-Judge High Court in Auckland; *New Zealand Police Association Inc v Taylor*, 29 August 1980 (A 778/80; A 796/80); Moller, Holland and Thorp, JJ.

The Court traversed two threshold questions before reaching the substantive applications. There was little hesitation in clearing the initial hurdle, the standing of the four applicants, as the third and fourth applicants (Hutton and Jefferies) were respectively in charge of and "actively involved in" the original murder investigation. They were obviously parties capable of being aggrieved, while the first and second applicants, the non-commissioned officers Police Association and the commissioned Officers Guild, were "trade unions" of persons capable of being aggrieved. Unlike environmental plaintiffs, these associations, like

the Liverpool Taxi Fleet Operators' Association, had an interest far greater than that of members of the public: [1972] 2 QB 299. The Court also rejected a submission by respondents that only the Commission could determine a party, referring to the judgments of North and Cleary JJ at [1962] NZLR 96 (*In re the Royal Commission*). It might be noted that the respondents were quadripartite as well: the three Commissioners, A A Thomas, the Department of Scientific and Industrial Research, and the New Zealand Police. The third and fourth respondents withdrew; presumably the respondents will be reported as "*Taylor*", simpliciter, thereby further confusing law students who now mistake N Taylor (the Magistrate) [1975] 1 NZLR 728 for A Taylor (the publisher) [1975] 2 NZLR 138; 675.

The second threshold issue - the jurisdiction of the High Court to "interfere" with a Royal Commission — was dealt with briefly. Noting that such a Commission is a sort of hybrid, partaking of both the genus prerogative and a 1908 statute, the Court concluded that

> "the Crown clearly cannot appoint a Commission, or anybody else, to act contrary to the law. If the Crown is subject to the law — as it is — then a fortiori, a delegate body of the Crown must likewise be subject to it."

Reference was also made to the *Laker Airways* case, [1977] 2 All ER 182 at 193.

With respect to the nature of possible relief and the availability of particular remedies, the Court fuond that the writs of prohibition and certiorari would lie against inquisitorial and investigative inspectors and commissioners:

> "We are satisfied that dicta in earlier cases to the effect that a Commission of Inquiry is immune from certiorari or prohibition because it is doing no more than inquiring and reporting are now out of date, and are not in accord with the Court's reponsibility to ensure that all tribunals carrying out functions (either investigative or decisive, or both) which are likely to affect individuals in relation to their personal civil rights, or to expose them to prosecution under the criminal law, act fairly to those concerned."

The Court referred to the *Pergamon Press* case, [1971] 1 Ch 388 and the recent House of Lords decision in *Bushell b Secretary of State for the Environment* [1980] 2 All ER 608, and was influenced by Australian and Canadian practice. It was an easy leap, then, to hold the Judicature Amendment Act 1972, s 4(1) applicable. The 1977 amendments to that Act, especially the definitional changes, established jurisdiction beyond all doubt. That jurisdiction was threefold:

(1) to ensure that the Commission acts fairly;
(2) to prohibit the commission from exceeding its jurisdiction by committing errors of law; and
(3) to exercise the powers of review set out in the Judicature Amendment Acts.

The Court then dealt with four causes of action, the sequence of which will here be somewhat rearranged. The first, and central, cause will be dealt with lattermost.

The second cause of action sought prohibition against the Commission on the ground of bias. The Court found that the hypothetical reasonably informed observer would have expected an informal inquisitorial procedure, wherein the Commission is the master of its own house. That inquisition may have been rigorous but the witnesses "were generally much more experienced in giving evidence than the average citizen." Whatever unfortunate television interviews had been given by the Chairman, the Commission's collective mind was not closed, and no irreversible errors of law had been committed. Bias by predetermination was not established.

The third cause of action sought a declaration that the police ought not be restricted in any way from pursuing inquiries into the Crewe murders whether or not those inquiries might implicate A A Thomas. While the Commission had referred to the "harassment of Thomas" and made strong suggesions, any purported directives to the police were subsequently purged by the Commissioners themselves. It is, of course, beyond the scope of any Court or tribunal to instruct the police not to fulfil their oath, or indeed to supervise the pursuit of their statutory duty. To the extent that the police have on their files an uncleared double murder, it would be criminal obstruction of justice to instruct the police otherwise than to pursue the wrongdoer. See *R v Commissioner of Police ex p Blackburn* [1968] 2 QB 118, 136. Such a declaration, therefore, would be gratuitously unnecessary.

The fourth cause of action sought declaration that the Commissioner should not consider when shell case 350 was ejected because the terms of reference expressly excluded any inquiry into "the actual conduct of the trials."

The Court rejected this claim by noting that Term of Reference 1.(a) expressly referred to that cartridge and that any mention of the trial by the Commission in connecton with the cartridge case was purely incidental: See Terms of Reference, "To Inquire Into and Report Upon the Circumstances of the Convictions of A A Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe:"*New Zealand Gazette*1265, 24 April 1980.

The first cause of action, referred to by the Court as the "principal complaint" and "the main cause of action", claimed that the Commissionhad misconstrued the meaning and effect of the Royal pardon, and by reason of this initial error, had misconceived the scope of its inquiries and its acceptance of evidence. The Court traversed matters discussed at length in this journal at [1980] NZLJ 163-168, and found that a prerogative pardon did not have the effect of altering the facts, as distinct from the legal consequences of those facts:

> "... the result of the pardon was not so much to restore the person's former character as to give him a new one; that a pardon was not the equivalent of an acquittal; and that it 'contains no notion that the man to whom the pardon is extended never did in fact commit the crime.' "

Section 407 of the Crimes Act (a deeming clause) reaffirms the effects of the prerogative pardon and minimises residual legal disabilities or attainders. Unlike the Restoration Act of Oblivion of 1660 (12 Car 11 C XI), which was intended to bury Civil War discords, no aspect of the pardon, prerogative or statutory, has the effect of altering the facts as distinct from the legal consequences.

The learned Chairman of the Commission , therefore, mis-stated those consequences (somewhat irrelevantly) when, on television "News at Ten" on 24 July 1980, he declared that the pardon "... to me ... means in law and in fact that he did not do it; he is innocent." More seriously, the Chairman erred in excluding police evidence which allegedly showed the whereabouts of Thomas on the day of the murders because that evidence might show that Thomas could have deposited the cartridge case and therefore might have committed the murders. This error was "of major significance".

The Court then gave a declaration that:

(1) the pardon itself in no way limits the ambit of the Commissioner's inquiries; and
(2) it is wrong in law to exclude evidence solely upon the ground that it might tend to implicate Thomas in the murders or upon the ground that that evidence was circumstantial or indirect only.

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BERTIE, THE FIRST ELECTRONIC BARRISTER: COMPUTER INFORMATION RETRIEVAL ACCEPTED AS CONSTITUTING "PUBLICATION"

By DR STEPHEN CASTELL*, JOHN SCANNELL** and SHEILA RICHARDSON**

A specially-designed portable microcomputer and telecommunications system, described by its makers, Luddite Legal Systems Ltd, as "the world's first ultra-intelligent-machine lawyer" and given the acronym BERTIE (for Barristers' Equipment for the Retrieval of Teleological Information Electronically) yesterday (31 June) became the first non-human advocate to be given the right of audience in an English Court. BERTIE successfully defended Mr Steen C T Pellash in a prosecution for a contravention of the Prevention of Depositors Act 1934.

There were scenes of uproar in Court No 7 at the Old Bailey, when Mr Jack Lennax, counsel for the Crown, rose to introduce the case with the words ". . . and my learned friend BERTIE appears for the defendant . . .". At this point the presiding Judge, his Honour Judge Theeshurt enquired sharply "Who is BERTIE?" following which there came a five-minute highly-technical monologue delivered in a grating, synthetic voice from the cabinet of the retrieval equipment, whilst everyone in Court reacted with increasing clamour. Order was restored only when Mr Mike Reauchipe, of Reauchipe & Co, BERTIE's instructing solicitors, pulled BERTIE's electric plug out.

"The Judge's question caused BERTIE to get into a potentially ongoing non-viable recursion situation", explained Mr Reauchipe after the hearing. "The only thing I could do was to pull the plug and re-boot."

After this inauspicious start, there was clearly some doubt as to whether BERTIE would be allowed to continue to appear and it was only after a further ten minutes intense questioning from the Bench on the basis of English law and advocacy, and sight of BERTIE's Bar examinations certificate that the case resumed, with Judge Theeshurt being ". . . happy to accord BERTIE full status as counsel for the defence, despite the fact that he . . . er . . . it . . . could not possibly have eaten any dinners before qualifying . . .".

After the ripple of amusement which this caused had subsided, the case continued on a more or less uneventful course. The Crown's case rested on the clear evidence of the absence of proper company records kept by the defendant's Guernsey bank, Pellash Hapibank (Holdings) Ltd. The classic precedents, eg *R v Smith* and *R v Orkin*, and the well-tested provisions of the Companies Acts and the Prevention of Depositors Act seemed to make the Crown's case unchallengeable and the outcome of the case almost a foregone conclusion.

BERTIE's submissions for the defence, however, quickly changed this. He simply cited one precedent — *R v Byam-Ury* [1980] *The Times*, 1 July, in which it was held that, inter alia, a Guernsey bank constituted under company law in a fashion essentially the same as Pellash's had no obligation to keep the type of detailed records which the Crown was alleging was necessary to prevent fraudulent trading under the Prevention of Depositors Act.

His Honour Judge Theeshurt then echoed what was evidently the puzzlement of the whole Court in saying that he found himself perplexed on two counts: (i) How could BERTIE claim as a "precedent" a case report not to be published until the following day?; and (ii) How could BERTIE possibly know that it was to be published?

BERTIE replied that he would answer the second point first, and explained that he had naturally searched all existing published legal material of relevance to his client's interests including ". . . new computer-assisted retrieval databases available in the United Kingdom

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such as INFOLEX, RETRIEVE-A-LAW, LEXIS, INTELLEG, EUROLEX, LEXTEL, PRECECOMP . . .". It appears that one of these systems (he neglected to explain which) had direct telecommunications access to the electronic phototypesetting system now being used in the printing of *The Times* newspaper. The case report to appear in the following day's printed *Times*, *R v Byam-Ury*, was, BERTIE alleged, in fact already "published" within this computerised phototypesetting system, although of course it would not be generally available in newsagents and elsewhere in the "old-fashioned" printed form until later that evening. BERTIE ended by saying that this also answered the first of the Judge's questions — the case had in fact already been "published".

At this, the Court was once more in uproar. When order had been restored, Judge Theeshurt said that, on reflection, he was bound to accept such a case report as "published", if it did indeed exist as BERTIE alleged (quoting as authority recent High Court judgments involving for example the Post Office's Prestel viewdata system). He asked BERTIE if he could immediately produce for the Court a printed, or otherwise human-readable, copy of the alleged *Times* report, for he was not sure he could "pervert the normal — some may say haphazard — course of justice by ordering an adjournment until tomorrow to see if the report *did* appear printed in *The Times*".

BERTIE said that this would not be a problem provided the Court would accept any liability for infringement of copyright which *The Times* might subsequently claim, "since production of such an advance copy for others to read was contrary to the terms of the contract under which I have access to this particular database . . .". The Judge assured BERTIE that production of such a document would without a doubt be covered by the usual open Court immunities, whereupon there was a three-second whirring noise from BERTIE and a piece of print-out dropped on to the desk in front of him.

Judge Theeshurt then ordered a ten-minute adjournment so that he and Mr Lennax, counsel for the prosecution, could study it.

When the Court sat again, Mr Lennax rose and asked for a one-week adjournment, so that the prosecution could more adequately study the full details of the *Byam-Ury* case when they became available. Judge Theeshurt was about to grant such an adjournment when BERTIE interrupted to say that he had not finished presenting his case and that he felt sure that if allowed to continue, the case could be successfully concluded there and then without further delay and burden on the Court's time.

This BERTIE was allowed, with the proviso that further argument would not rest for the time being on *R v Byam-Ury*. BERTIE assured the Court that this would be so and then asked, "Would your lordship and my programmed friend accept my submission that my client has no case to answer if the records it is alleged his company Pellash Hapibank (Holdings) Ltd did not properly keep were in fact produced here and now in Court?" After a moment's hesitation, Mr Lennax conferred with his instructing solicitors and then replied, "Subject to a satisfactory audit of such records, I can say that the Crown will be bound to consider such a possibility. But," he added, "I am instructed to say that if such records do exist, then the defendant has been deliberately wasting public time and money, since he himself when challenged has never been able to produce such records and, indeed, I have already read to the Court his own signed statement agreeing that there were no such records kept."

In reply, BERTIE said that he accepted that the records *as such* had never hitherto been kept but, if the Court would allow him "four microseconds to think" he was confident that he could regenerate the complete set of books of accounts which the Crown sought, assembled from the counter-entries in the computer files of all the relevant parties who dealt with Pellash Hapibank (Holdings) Ltd.

The Judge once again accepted that the Court must see this new evidence if it could indeed be immediately adduced in this manner, suggesting, therefore, that he would not follow the recent decision in *R v Pettigrew* in which it was held that computer print-out was not admissible as evidence in criminal proceedings. BERTIE whirred and clattered for ten minutes to produce a stack of print-out three and a half feet high on the desk in front of him, to the visible incredulity of all in Court and none more so than Mr Pellash himself.

After a further brief adjournment for the Crown to study this "new" evidence, Mr Lennax once again asked for the one-week adjournment. "However," said Mr Lennax, "it now seems almost certain that, following a satisfactory audit of the books of accounts now produced, I am instructed that the necessary steps for discontinuing the prosecution against Mr Pellash will be taken and am further instructed to ask that Mr Pellash be released from custody forthwith!"

The Court rose at 11.45am.

Rossbinders, the accountants appointed, were, according to the partner in charge of the audit, "very quickly able to do the checks necessary because of the clarity and accuracy of the BERTIE records". By the end of the afternoon of 31 June it was clear that the case could not proceed, effectively acquitting Mr Pellash.

Mr Jack Lennax, prosecuting counsel, said afterwards: "This case raises a number of important issues, not the least of which is the doubt now cast on *Pettigrew*. The outcome could have a profound effect on all those at the criminal Bar. I shall personally be taking action to see that the Bar Council is fully aware of these matters and responds accordingly."

Later it was announced that Mr Lennax was to launch a Barristers' Action Group on Information Technology (BAGIT), but at the time of going to press no details of its proposed aims and objectives were available.

CORRESPONDENCE

Dear Sir,

Your May 20 issue contains a lengthy review of *King-Ansell v Police* [1979] 2 NZLR 531 by Dr Wm C Hodge, and a long letter from Dr C Macpherson, the Crown expert. I feel obliged to answer.

I certainly have no quarrel with Dr Macpherson. Although his evidence was that Jews have ethnic origins, he also said Jews are not a race, and that there is "much confusion surrounding the use of ethnic". That is what the defence case was really all about.

The prosecution charged that Jews were a protected group by reason of their ethnic origins. The defence said Jewry has no "ethnic" origins, or alternatively, that the Court should not ascribe ethnic origins to Jews because there was public uncertainty on the point.

Lord Diplock said in *Black-Clawson* [1975] 1 All ER 810, 836 — "the Court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates".

Those "ordinary citizens" would be uncertain as to whether Jewishness was a matter of race or religion. Jews, excluded under the primary "gentile" meaning of ethnic, would also be excluded under the secondary meaning ("pertaining to race") if they were not a race. Without some further well-understood meaning embracing Jewry, ordinary citizens could reasonably suppose that "ethnic" did not apply to Jewry.

It was claimed that Parliament intended to protect Jewry on the ground of "ethnic origins". But, seemingly, Parliament used a word not applicable to Jewry. The Court should refuse to give effect to any such intention. Parliament had failed to express its intention in clear and unequivocal language.

After all (so the defence argument went) the primary "gentile" or "non-Jewish" meaning still appeared without the archaic label in the *Oxford* and other British dictionaries available here when Parliament was passing this statute in 1971. Ordinary citizens could have regarded it as a current meaning. Also produced were nine "popular" handy-sized British dictionaries published since 1971 (five by Oxford) showing virtually only one meaning for ethnic — "pertaining to race".

If Jews were not a race, ordinary citizens here consulting these particular dictionaries might well regard the notion of "Jewish ethnic origins" as strange indeed. Of course, other sources of information and dictionaries (especially American) suggested otherwise but they would probably do no more than create confusion or uncertainty in the public mind. The Court should therefore decline to give to "ethnic" a new or disputed meaning that would convict the defendant.

However, on evidence and for reasons appearing in the judgments, the Court of Appeal impliedly gave its view of what the public thinks. It said that Jews are a race in the "popular" sense of the word (as opposed to the scientific sense used by Dr Macpherson) and Richardson J gave a definition which will probably determine any future questions on "ethnic origins" or "ethnic group" here:

> ". . . a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock."

One submission of mine is referred to by Dr Hodge as rather incredible and "unworthy".

In the Supreme Court, I had said that a new meaning of ethnic, favouring Jewry, first appeared in British dictionaries after race relations laws were passed in Britain and here. I suggested this could be due to pro-Jewish influence among lexicographers and editors of dictionaries, with a view to removing the doubt as to whether Jewry comes within the protective grounds of "colour, race, or ethnic or national origins". No Court in Britain has yet been asked to rule on that question. Even the *Jewish Chronicle* in London expressed doubts on the point in 1977.

My "unworthy" submission was not entirely without foundation. *Schloimovitz v Clarendon Press* (*The Times* 6/7/73) was an injunction action against *Oxford Dictionary* publishers over meanings of "Jew". That Jewish plaintiff said he had persuaded eight other publishers to "revise their definitions" (*Daily Telegraph* 6/7/73).

Encyclopaedia Judaica (Jerusalem 1971) probably the most authoritative on Jewry, speaks of "many attempts" to

have "dictionary definitions revised" in the United States, England and Europe.

Jewry thus shows a concern about definitions and a disposition to have derogatory or discriminatory meanings revised. The "gentile" meaning of ethnic, and "pertaining to race" (if "race" bears the scientific meaning) are discriminatory against Jews. One would hardly be astounded to learn of Jewish efforts to promote a new meaning of ethnic that embraces Jewry and renders obsolete the discriminatory meanings.

Indeed, a hotly-disputed meaning of ethnic that appeared for the first time in a British dictionary in 1972 was almost a carbon copy of one that appeared about three years earlier in the dictionary put out by Random House — a well-known Jewish publishing house in America.

Judges may consult dictionaries to assist in ascertaining the ordinary or "popular" meaning of words in a statute. Makers of dictionaries record what they regard as current and common usage. In so doing they may become persuaders of public opinion and thought. They may even influence Courts. Popular dictionaries are a likely source for ascertaining popular meanings.

Clearly some meanings have stronger claims to being popular or common usage than others. A lexicographer might accord that status to an Americanism in British countries even though it is very much a matter of opinion as to whether the usage is wide enough to warrant the entry. But once into a few dictionaries, the alleged common usage is hard to refute in Court, and criticism of it will almost always be speculative and sometimes even "unworthy".

An adverse meaning in the nature of a Johnny-come-lately from New York was not one to be meekly accepted by anyone facing three months' gaol on this particular charge — least of all by a defendant steeped in Nazi philosophy.

Brian Nordgren

LOCAL GOVERNMENT

REGIONAL AUTHORITY MEMBERSHIP REVIEW A TRIENNIAL CIRCUS

By Dr K A PALMER

When considering the membership of a Regional Council the Local Government Commission is not guided by any statutory criteria.

Prior to every triennial election, a Regional Council is bound under s 43 of the Local Government Act 1974 to review the existing distribution of membership. For this purpose the Council must have regard to the adjusted net capital values of the several districts, the respective areas and populations, and such additional factors as considered relevant.

Back in 1977, the Auckland Regional Authority, acting under the former provisions, affirmed its existing membership at 34 without change of districts or members. Five Councils objected to the distribution and the matter was referred to the Local Government Commission. The Commission then came to Auckland, and acting with great zeal and determination, after hearing submissions that the membership should be increased in number, gave short notice that in fact it was proposing to decrease the membership to 29 following a reorganisation of districts, and that decision was in fact made. The outcome was a case in the Supreme Court under the name *Northcote Borough v Auckland Regional Authority* [1977] Butterworths Current Law 727; [1977] NZ Recent Law 321. Chilwell J ruled that the power of the Commission was revising only and it had no jurisdiction to reorganise the district, or alter the membership but was limited to a redistribution within the existing localities. Also the Commission had given inadequate notice for further submissions before making its surprise decision, and on all grounds the decision was quashed.Consequently, due to a lack of time before the election, the Commission meekly affirmed the existing membership at 34 without change.

Subsequently, the Local Government Amendment (No 2) and (No 3) Acts of 1977 were passed, which rewrote the review and objection procedures to indicate that the Commission could "alter the distribution of membership" but whether this would have allowed an increase or decrease of membership was still uncertain. Under the (No 2) Act, the then Local Government Commission was disbanded and replaced in due course by the present Commission. Finally, the Local Govern-

ment Amendment Act 1979 repealed and substituted subss 2 and 5 of s 44, presumably with the intent of making it clear that following referral of objections to the Local Government Commission, the Commission could stand in the shoes of the Regional Authority and exercise the same power and discretion to ensure that the electoral areas of the Authority, and the membership, reflected the criteria specified; namely the adjusted net capital values of the respective districts, the areas concerned, the populations, and such additional factors as the Commission thought relevant.

Bearing these changes in mind, in 1979 under s 43 of the Act, the Auckland Regional Authority reviewed the existing membership of 34 and finally determined, notwithstanding objections, to increase the membership to 36. At the time, the Authority resolved that no other matters were relevant beyond the criteria of capital values, population and respective area. Following objections and reconsideration of the existing decision, certain of the larger Councils referred the decision to the Local Government Commission under s 44, claiming overall that the five major authorities comprised at least 60 percent of the capital values, the areas, and the population, yet were accorded only 44.5 percent of the members. The Commission, after travelling to Auckland and interviewing each authority in separate private sessions, issued a decision declining to alter the membership and as a result the major authorities filed applications for review, or cases stated under s 37A of the Act. Speight J delivered the decision in *Auckland City Council v Local Government Commission* (164-602/80) on 28 July 1980. In short, the judgment indicates a fundamental defect in the Act, and continuing confusion over the appropriate type of procedure to be followed by the Local Government Commission when considering objections of this type.

Firstly, his Honour was obliged to consider the interpretation of s 44, as to the obligations if any, it imposed on the Local Government Commission when considering the Regional Council membership, and in particular as to whether the Commission was bound to consider the existing membership in the light of the criteria to be applied by the Regional Council in making its preliminary review. To the surprise of the Judge, and no doubt the applicants, but not the Commission, his Honour found that s 44(5) as substituted in 1979 did not require the Commission to have regard to any particular criteria in considering the initial decision whether to make an alteration to the membership or not. It was only *after* that initial decision was made, that the criteria of net capital value, area and population, and other relevant factors became applicable. His Honour stated in respect of the applicants' argument that the Commission was bound to examine initially the three matters:

> "Regrettably I conclude that that is not the way in which Section 44 has been worded, though it may have been the intention of the Legislature. For the reasons I have given I conclude that there is no statutory requirement or restriction as to matters which the Commission shall or shall not take into account . . . . I think it relevant to say that the dismissal of the objections on the basis given in the memorandum, namely, that the majority of the members of the Authority seem to prefer the status quo, was a very strange result in the face of what appear to have been most meritorious grounds advanced. It also needs to be said that if my interpretation of Section 44 is correct, the right of objection to a Commission which is not bound to follow any guidelines, and may reject the same peremptorily, is a most unsatisfactory if not worthless right."

Accordingly on the legal interpretation of s 44 the actual decision of the Commission in refusing to alter the Authority's determination could not be said to be wrong.

The other aspect, namely the procedures adopted by the Commission in interviewing the various Councils separately, produced greater success, as with respect, any lawyer with a basic grounding in the concepts of natural justice would expect. It was quite apparent that certain damaging comments and opinions had been advanced to the Commission at these private sessions and no opportunity had been given to the persons or bodies identified to reply. In particular one Council chairman is reported as having been told "what you say won't be taken down and used against you".

His Honour noted that the Commission was not a judicial body as such, and, having the powers of a Commission of Inquiry under s 13 of the Act, could thereby regulate its own procedure, but he observed "nevertheless this broad discretion must be regulated according to the nature of the task upon which it is embarking and with all the latitude in the world I cannot see this most objectionable procedure which was followed here can be saved in this way". It was noted that the previous Commis-

sion in 1977 had called an open meeting for the submissions by all parties together. There was some suggestion of bias but this was not accepted. Accordingly for the breach of natural justice in failing to conduct a proper hearing and allow comment on matters arising, the determination of the Commission was quashed. His Honour stated "It might be thought that this has been a vain exercise and that the applicants' victory is a hollow one". However his Honour expressed total confidence in the Commission to rehear the matter in a fair and impartial way.

Whether in the short time available before the October local body elections the Local Government Commission will be able to rehear the objections and issue a redetermination remains to be seen. Assuming that it does, the vital question is whether, notwithstanding the interpretation of s 43 of the Local Government Act, the Commission will be prepared to make the initial decision to alter the existing distribution of membership upon the patently clear evidence that an imbalance exists on the basis of the criteria of net capital values, areas and population. On the other hand, if the Commission sticks to its expressed view that it has an absolute discretion whether to intervene following objections, and declines to do so because the majority of constituent authorities and members are satisfied with the status quo, then it would appear to be virtually impossible ever to reorganise the areas and distribution. The present balance of membership means that the smaller Councils with an overweighted representation are able to retain the status quo indefinitely. This being the case, if Parliament believes that the stated criteria are relevant (and not some other criteria such as population alone), then the Act will require amendment to rectify the present unsatisfactory position. By way of comparison, the equal protection mandate of the United States Constitution has led the Supreme Court of that country to rule that the only valid principle for all national and local elections is that of one person one vote apportionment. In New Zealand there is at least the benefit of some flexibility in introducing other principles considered to be of guidance. The identification of land area and capital value as also being important and allowing the Council or the Commission to consider other identified relevant matters, does seem appropriate for the conditions in this country and can be worked out in practice: see *Waikouaiti County Ratepayers and Householders Association Inc v Waikouaiti County* [1975] 1 NZLR 600. At the present time, the weighting of individual votes in the Auckland Regional Area is completely unjustifiable in relation to benefits received and contributions made by the separate electors. The fact that one may possibly facilitate the election of more experienced or better qualified members through retaining pocket borough areas is not a provable justification.

With reference to the business-like rather than legal procedure adopted by the Local Government Commission, one cannot help but wonder whether the Commission was confused by its more flexible powers for the preparation of Regional schemes and reorganisation schemes for local authorities. These procedures do contemplate separate consultation, the use of a conciliator, and a discretion to select representations as considered relevant. For example s 21(2) of the Act purports to give a general discretion as to the consideration of objections. But even in this area it is clear that the principles of natural justice must be observed in broad terms. One may refer to *Waitemata County v Local Government Commission* [1964] NZLR 689, 698 and *Lowe v Local Government Commission* [1977] Butterworths Current Law 800; [1978] NZ Recent Law 152. From the comments made before the Commission as disclosed in the judgment of Speight J, it is quite obvious that although the private interview procedure with all Councils had the benefit of confidentiality and facilitated the obtaining of a "feel" for the local political situation, a real likelihood of prejudice and unfairness could have arisen in absentia, against those bodies or persons whose views or positions were being discussed. A case of this nature provides a salutary reminder of the safeguards of an open hearing, of the desirability of a record of matters raised, and of the opportunity to dispute unfounded comments. If Regional Government is to have any chance of influencing the development of the regional areas, it is essential that the foundation for election of members is soundly based.

CASE AND COMMENT

Matrimonial property

Widow seeking chattels — Estate duty — Delayed design by Inland Revenue Department necessitating extension of time.

J v J (High Court, Wellington; judgment 4 July 1980, No M684/79; Savage J) involved an application for leave, to extend the time for making an application under the Matrimonial Property Act 1963, and, if leave were given, for a further order vesting in the applicant widow in common with her late husband's estate the chattels in their matrimonial home in such shares as the Court might think fit.

The husband and the applicant were married in the early 1950s. They started out with modest finances. The husband was most successful in the sporting field and in time became an equally successful man of business. The spouses were able to buy a home, each putting up $600 for the deposit and the husband's father loaning $800. The remainder of the price was borrowed on mortgage. Both spouses worked until 1959, when their first child was born. For several of those years the wife's earnings matched those of the husband. She maintained the home when he went abroad to pursue his sporting interests. The wife was an able lady with artistic and other qualities which enabled her to contribute both in a personal sense and in a financial sense apart from her direct earnings. In 1963 a more valuable home was purchased. The husband's professional and business interests prospered and a good many valuable chattels were also purchased. These were kept in the new home and the wife's artistic bent and experience were considerable factors in the choosing and the buying of them. The chattels increased substantially in value. The wife was also responsible for the upbringing of the two children of the marriage. She also undertook considerable business entertaining for her husband.

The husband died in *mid-February 1977*, a wealthy man. As late as *November 1978*, the Department of Inland Revenue intimated that it refused to accept that the wife had a half-share in the chattels in the home and indicated that it proposed to include the whole value thereof in the deceased husband's estate. The chattels were valued at $52,000. Hence the need to obtain an order vesting in the wife the title to the chattels either in whole or in part, but in any event not less than a half-share.

The Matrimonial Property Act 1976 came into force on 1 February 1977, just over two weeks before the husband's untimely death. The present application was made, however, not under the 1976 Act but under the 1963 Act and because s 5(1) of the 1976 Act provides that an application under the 1976 Act can be made only when both spouses are alive. Under the earlier Act, by virtue of s 5(7), one spouse could apply after the death of the other spouse.

The making of the wife's application was attributable in the main to death duty considerations. Whatever happened, the wife's position was that she would get the chattels under the terms of the will of her late husband. If the chattels were included wholly in his estate, the amount of duty payable would consequently be greater. Those who would suffer would be the children of the marriage as the residuary legatees. At best, all that the wife would gain would be the extra income on the amount of duty saved—in her position as tenant for life under the will.

Savage J had to deal first with the matter of the application to extend the time. Section 5A (2) of the 1963 Act provides that applications are to be made before the expiration of a period of 12 months after the date of the grant in New Zealand of administration in the estate of the party against whose estate the application is made. Probate of the husband's estate was swiftly sought and, evidently, swiftly granted *— at the end of the first week of March 1977 — that is to say three weeks after the death.*

Section 5A (3) provides that a Judge, after hearing the applicant and such other persons having an interest in the property that would be affected, may extend the time as he thinks necessary. Assuming that the bereaved wife could apply under the 1963 Act even though her husband had died so shortly after its repeal, Savage J considered that he should extend the time in accordance with the generally accepted principles laid down in cases such as *Butler v Martin* (1978) I MPC 33. His Honour considered, rightly it is submitted, that, in a case such as this, brought as it was against the execu-

tors, it was relevant to consider the question whether the relevant property was still in their hands. Here, the delay was, it is true, only short, being about seven or eight months. But it was, apparently, attributable to the — unexpected — decision of the Inland Revenue Department to treat all the chattels in the home as forming part of the deceased's estate. There was no prejudice to any of the parties. The Department might, certainly, obtain a lesser sum in duty, but it was not a party to the proceedings. Moreover, as Savage J was at pains to say, it had been given the chance to be heard. Being satisfied that there was a really substantial issue before him, and that the property concerned was still under the executors' control, his Honour turned to the question whether it was possible for the surviving wife to apply at all under the 1963 Act, in view of the date of the husband's death. The Court noted the delicate position of the executors — and the wife was one of them — and the facts that not only had the Department been given an opportunity to be heard pursuant to s 7(1) of the 1963 Act but also it had indicated that it did not wish to be heard. Fortunately, there was a line of cases indicating that the wife could apply under the 1963 Act, viz *Davidson v Perpetual Trustees* (1979) 2 MPC 45; *Frost v Frost* (1979) 2 MPC 63 and *Willis v Willis* (1979) 2 MPC 198. At the same time, there was a faint suggestion going in the opposite direction, viz that of O'Regan J in *Huszak v Huszak* (1978) 2 MPC 111. Savage J felt able to accept that the application could be entertained by him and that he would not adopt the obiter view of O'Regan J. In the light of *Haldane v Haldane* [1976] 2 NZLR 715 (PC), Savage J held that he was quite satisfied that the surviving wife was entitled to an order because of the considerable contribution she undoubtedly made to the chattels in question. It had been suggested to his Honour that all the chattels should be vested in the wife alone. It was also put that she could have applied under the 1963 Act in respect of many other assets of her husband's but she had not done so and, for that reason, it would be just to vest all the chattels in her. Savage J refused to accept that approach but continued: "I accept that one should not proceed on an asset by asset basis but she chose to apply in respect of one class of asset only and I have not forgotten the main reason for the making of this application." Section 5(3), it was said, empowered the Court to make such order as appeared just — just, that is, as between the parties and not what may be most advantageous from an estate duty point of view. In the light of the lady's contributions, Savage J held that the chattels should be vested in her and her husband's estate equally.

P R H Webb

Matrimonial Property

Business assets — Fund to pay tax.

Anderson v Anderson (High Court, Auckland; judgment 28 May 1980, No M550/79; Prichard J) was a claim under the Matrimonial Property Act 1976 and it had been transferred from the Magistrate's Court. The parties were married on 28 January 1972 and the applicant wife was then 25 and on the defendant husband was 33. They had one son who was born on 31 December 1972. Before the marriage the husband owned a property at Drury. After marriage the parties lived there until the end of 1977, when the property was sold for $32,000 and the present matrimonial home at Runciman bought for $62,000. This consisted of a house and 10 acres of land. The husband claimed he made this move only because his wife was "much involved in hunt club affairs and wished to keep two horses." To make the move the husband said he had to sell the Drury property and his boat and raise a $14,000 mortgage. He also said he would preferably have stayed at Drury and that he only bought the Runciman property "to enable his wife to pursue her interest in horses." The wife said the Runciman property was bought "without reference to her". Prichard J accepted the submission of counsel for the husband that the new place was bought by his client "in an endeavour to prop up an already failing marriage".

Before the marriage the husband possessed a half share in a company known as Premier Joinery Ltd. This company had been incorporated in 1964 with a capital of $2000 divided into shares of $1 each and had been set up to carry on a joinery business carried on by Mr Anderson and a Mr Miller. It originally carried on business in rented accommodation in Drury. The partners wanted to acquire better premises and restricted their drawings to $20 weekly so that they could "accumulate loan accounts with the company sufficient to enable them to purchase the site for a new factory". By the end of March 1972 they had in their joint loan account over $12,000 for the acquisition of a new factory site in Drury. A site was purchased in the two partners' joint names after the date of the marriage. Thus the interest of Mr Anderson had to be regarded as matrimonial property pursuant to s 8(e) of the 1976 Act. Two factories were erected, one being finished in 1973

and the other in 1977. The second factory was let by the partners as an investment. The two partners were capable of doing much of the factory building themselves. The first they constructed by working in the week outside the normal business hours and at the week-ends, the second they also erected substantially by themselves though with more outside labour than the first. The wife did not contribute labour or capital to these projects, but she averred that she cooked lunches regularly and delivered them to the sites, that she was often called in to collect goods required for the factories in a truck "and that she provided and hung the curtains for the factory lunch room". The first factory cost some $11,300 and the second some $37,200, *excluding* allowance for the partners' labour. Both factories were professionally valued as at August 1978 at $160,000. The company shares were professionally valued as at the same date at $5.65 each. After the marriage Mr Anderson gave 100 shares to his wife. At the date of the hearing, the husband's holding was worth $5,085 and the wife's $565. As the husband's holding was acquired in 1964, his shares were separate property. As at 31 March 1978, there was a loan account owing to the shareholders amounting to $17,239.35 and this was taken into account in valuing the shares.

The Court found that the assets falling to be divided between the spouses were:

(1) Matrimonial home situated at Runciman Road, Runciman valued by Mr A L Knott as at 9.7.79 at:	$60,500.00	
Less Mortgage to ANZ Bank	13,079.00	$47,421.00
(2) *Matrimonial Chattels:*		
Furniture, estimated value at:		4,000.00
1972 Mini motorcar:		2,000.00
(3) *Other Matrimonial Assets:*		
(a) *Husband's Assets:*		
Half share in factories		$80,000.00
Bank Accounts (as at 18.8.78)		
ANZ bank account — (rental a/c)		712.00
ANZ Investment a/c (being half interest in Miller & Anderson partnership account):		2,000.00
ANZ current account		1,751.15
POSB account		168.44
Life Insurance policy (Govt Life) — surrender value not established savings account		1,144.35
16 steers valued at $60 each		960.00
(b) *Assets owned by the wife:*		
100 shares in Premier Joinery Ltd		565.00
Loan account — Premier Joinery Ltd		20,298.69

In the assessment of the assets of the husband, his Honour left out of account an "investment account of $4,000 held by the husband specifically to provide for income tax." The accountant showed that, at the time of the parties' separation, there was an impending liability of $1,572.81 for terminal tax to 31 March 1978 plus $5,371 provisional tax for the year ending 31 March 1979. His Honour considered that, even allowing for the fact that a proportion of the provisional tax would be attributable to income derived after 18 August 1978 (the date the wife left the home) the amount set aside in the investment account mentioned above "was clearly all earmarked to meet the payment in respect of income derived prior to the separation". It had, said Prichard J, been so applied and should not be brought to account on a division of matrimonial property. Counsel, he said, had been unable to refer him to any case in which provision to meet liability for tax had been specifically considered in terms of s 20(5)-(7) of the 1976 Act. (It may be mentioned parenthetically that *Dorreen v Dorreen* [1978] NZ Recent Law 374, which also involved matters of tax, does not assist). In the absence of authority, Prichard J considered that, where income tax attached to income used for a family's support, it was a liability to be treated as a debt incurred for the benefit of both parties in the course of managing the household affairs and so within s 20(7) (d).

However, to achieve a fair result it was felt that this fund, accumulated specifically, as it had been, to meet an impending fiscal liability — and applied to that end before the date of the hearing — ought to be left out of account. "It is," said his Honour, "property which exists at the date of the hearing which is to be divided". Also left out of account was an item of $3,235 said to represent "a credit in account current with Premier Joinery Ltd." This the Court could not relate to the accountant's evidence to the effect that the husband was $13,819.53 overdrawn in his account with the company as at the end of March 1978. Prichard J took it that the husband had been mistaken and that he could do no more than assess the position as best he could on the evidence.

Passing to the 100 shares held by the wife in the company, his Honour said these were a gift from the husband and were separate property unless used for the benefit of both parties. He referred to s 10(2) of the Act, to *Taylor v Taylor* (1978) 1 MPC 206, and *Jorna v Jorna* (1979) 2 MPC 104 and said he could "see no justification for finding that the shares were not for the benefit of both the husband and wife and accordingly are matrimonial property".

Prichard J then turned to the wife's horses, horsefloat, saddles and riding gear. These, he found, were either owned by her before marriage or, in the case of one of the horses and the float, gifts from the husband. All, in his view, were the wife's separate property.

Also in dispute was the Morris Mini car which, according to the husband, was purchased in 1974 by him "as a brand new car for my wife". He himself usually drove a company car, but, as it was clear that the Morris was used for family purposes, it was held to be a family chattel. This seems to be correct in the light of *Robertson v Robertson* (1977) 1 MPC 184.

The Court then observed that the assets for division fell into two categories, viz: (a) the matrimonial home and chattels and (b) the "business" assets, the most substantial of which comprised the husband's half share in the factories valued at $80,000 and the wife's loan account with the company of $20,298.69.

It was argued on the husband's behalf, as regards the category (a) property, that this was a case for unequal division. It was put that the Runciman house was purchased as a matrimonial home only nine months before the spouses parted, that it was almost double the value of the previous home and bought "to try to consolidate a shaky marriage". It was submitted that the fact that the 10-acre place "was purchased in a spirit of reconciliation in the hope of re-establishing the marriage" must bring the case within s 14. It was also pointed out that, the mortgage apart, the balance of the purchase price obviously came from the re-ordering of matrimonial assets which otherwise would have been subject to ss 15-18, that is to say "other matrimonial property". It was further submitted that, though the marriage did not come within s 13, it was nevertheless a marriage of a comparatively short duration — less than seven years — and that there had been "a gross inequality of contributions made by the parties to the marriage partnership". Prichard J stated that he did not overlook the fact that the husband's interest in the two factories valued, as we have seen, at $80,000 fell within s 8(e) and so was matrimonial property — and this notwithstanding that the original purchase price of the land on which they were built was derived by the husband from his pre-marriage business interests and that the husband had contributed substantially by his own labour to the erection of them both, working on the project outside ordinary business hours. His Honour said: "As was pointed out in *Reid v Reid* [1979] 1 NZLR 572 (CA), the provisions of the Act as to matrimonial property and those as to contributions are complementary. As Cooke J said at p 598 of the Report: "The matrimonial net is far-reaching, especially because of s 8(e), but as a corollary whatever is caught ranks as a contribution to the marriage partnership under s 18(1) (d)".

Even so, his Honour was not — correctly it is submitted — persuaded that the category (a) property came within s 14. He referred to the now well-known dictum of Quilliam J, in *Castle v Castle* [1977] 2 NZLR 102, approved by the Court of Appeal in *Martin v Martin* [1979] 1 NZLR 97 and cited, even more recently, with approval in *Castle v Castle* (CA, unreported; judgment 2 April 1980; No CA 101/77). Thus his Honour recognised once more the clarity of the precept that the "extraordinary circumstances" contemplated by the section must be such as "to force the Court to say that the particular case is so out of the ordinary that an equal division is something the Court feels it simply cannot countenance."

Prichard J then passed to the category (b) property. It was argued for the wife that the husband's only real contribution thereto was a financial one and that the Court was not to be blinded by financial imbalance. Reference was made to the *Jorna* case, supra, where some 400 shares in a private company were acquired after

the marriage, 300 being transferred to the wife and 100 to the husband. Speight J held the 400 shares were matrimonial property and divisible equally between the spouses, while 800 shares owned by the husband prior to the marriage were to be treated as his or as his separate property. That case had, in the view of Prichard J a superficial resemblance to the present case in that the home was substantial and valuable; the husband owned an industrial property valued at $70,000; there was a family company in which the bulk of the shares were owned by the husband before marriage, and a small proportion acquired post-martitally was owned by the wife. It was held, as Prichard J observed, that all these assets other than the shares acquired by the husband pre-maritally were to be divided equally. The present case was distinguishable in the eyes of Prichard J by the fact that the factories were substantially created by the expenditure of pre-marriage assets of the husband coupled with his own physical labour and his expertise. His Honour then referred to what Richardson J had said with reference to the *Reid* case, supra, in *Castle v Castle* on appeal, viz:

> "The acquisition of Matrimonial property including the payment of money for that purpose, is a contribution to the marriage partnership (s 18(1) (d)) and a contribution to the marriage partnership by one spouse of previously separate property is properly to be treated as an additional contribution by that spouse for the reason that the separate property did not itself result from the operations of the marriage partnership."

Prichard J considered, regard being had to the origin of the "factory asset" in especial, that he was not being "blinded by the finanicial imbalance" when he gave "considerable weight to the circumstances in which this matrimonial asset was created". Counsel for the wife had evidently asked his Honour to apply the principles enunciated in the *Reid* case, where a husband "unusually gifted in mechanical matters" was able to create assets worth $500,000 over 17 years. In the present case, Prichard J pertinently noted, he was "dealing with an asset worth $80,000 which was created over a much shorter period of time by the application of the husband's own capital and labour". He also pointed to the fact that, in this case, Mrs Anderson's non-monetary contributions were spread over a period of less than seven years whereas Mrs Reid's were spread over 21 years.

The Court then considered Mrs Anderson's position. It was not disputed that she carried out normal household duties "and in a general way cared for the one child of the marriage". On the other hand, the husband had complained that she devoted "a great deal of her time to her own interest in horses and hunt club activities and that she left the child in the care of her mother" more than he approved of. The wife claimed she lent some support in the building works, but this was not borne out by Mr Miller's evidence to the effect that she brought cooked meals to the site on no more than a dozen occasions and only made one delivery to the site in the truck — which she borrowed on several occasions to get hay for her horses.

The final impression that the Court gained was that of a husband doing his best to keep his wife happy and to cater for her interests as shown by "a number of quite expensive presents which he gave her during the marriage including a horse, and a horsefloat valued at $1,100 and by the purchase of a 10-acre property, where her horses could be kept, as a matrimonial home". By way of contrast, the wife "probably made rather less than the normal non-monetary contributions to the [marriage] partnership during the comparatively short period of the marriage.

Prichard J then had to deal with the husband's liabilities. As regards the tax liability he held that he would offset it against the sum the husband had accumulated to meet it. That left him to deal with the husband's debt to the company which amounted to $13,819.53. His Honour agreed with the opinion expressed by Mr A J B McLeod in an article entitled "Debts and the Matrimonial Property Act 1976 — Part I" in [1980] NZLJ 195, ibid, to the effect that s 20, and particularly subss (5) and (7) were "deplorably drafted". In the absence of any other evidence, the learned Judge held that he must treat this debt as a personal one. But he drew the inference that at least a substantial portion of that debt could be traced to expenditure on the factory buildings. To this extent, this was, in the opinion of the Court, another contribution made by the husband to those buildings and so should be taken into account in assessing the share of the s 15 property he should receive. This totalled $107,599.63. In view of all the circumstances of the marriage and the circumstances whereby the factory properties in particular became matrimonial property, his Honour awarded the wife one-fifth of the total and the husband four-fifths. The wife's share could, in the Court's view, be satisfied substantially by her retaining the debt

owed to her by the company and the car without any allowance in the husband's favour for his half interest in it. On that basis, the wife should transfer to the husband or his nominee the shares currently held by her in the company without payment.

Ultimately, therefore, the wife was entitled to a half share in the equity in the matrimonial home and its furniture. She was further entitled to retain the sum owing to her by the company and to be paid half the surrender value of the husband's life policy — a sum yet to be established. The husband was to receive a half share in the home and furniture, to retain his interest in the factories, his bank accounts and the 16 steers or the proceeds of sale thereof. Lastly, he was entitled to have transferred to him the 300 shares in the company standing in the name of his wife. As he had been in occupation of the home since the separation, however, it was held that he should not receive credit for any interest under the mortgage which he might have paid since then. On the other hand, it was decided that he should be credited with the amount of any repayments of capital made.

In accordance with settled practice no order was made as to costs.

P R H Webb

REAL PROPERTY

UNIT TITLES AMENDMENT ACT 1979

By E K PHILLIPS*

Both composite titles and unit titles still have their place. Unit titles are suitable for the large multi-storey development but the administration is still too complex while the "development by stages" procedure contains threats to the certainty of title early owners should be able to expect.

Introduction

The year 1961 saw the first successful attempt to adapt the somewhat arbitrary and restrictive provisions of the Torrens System of conveyancing to the concept of issuing individual titles for flats or units as part of a residential development. Titles had previously been issued infrequently for strips or strata of air space or minerals below the surface of the soil but it was not considered possible to issue title to buildings or structures in their material form. The titles under this system could be described as ones of bricks and mortar. The difficulty had been overcome in some South American countries and states of the USA by the system known as condominium. This presented no difficulty in what amounted to a deeds registration system. The English Real Property system was also able to cope with the situation without difficulty as the State guarantee did not extend to the survey definition of metes and bounds.

Australian Position

The New South Wales Government attracted world-wide attention when it passed the Strata Titles Act 1961. The Act extended the provisions of the Torrens System in New South Wales to allow for the issue of separate titles for principal and accessory units and the common property in a residential development. Messrs Rath, Grimes and Moore, the co-authors of the legislation, have written an excellent book entitled "Strata Titles" dealing with the new concepts involved. The various states of Australia followed the New South Wales lead over a period of years with the Victorian Government passing their Act "the Strata Titles Act" in 1967. This Act had considerable significance for New Zealand as it was adopted in a large degree by our Government when the Unit Titles Act was passed in 1974. A great number of the strata title develop-

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ments in Melbourne were of the single storey courtyard, villa or semi-detached nature and as similar developments were in the preponderance in this country it was a naturnal consequence that we should be attracted to their legislation. This was in direct contrast to the inner-suburb areas of Sydney where multi-storey developments have always dominated. The Victorian legislation spelt out in detail the legislative provisions required to make the system work, in contrast to the original New South Wales Act which concentrated on the broad general principles of the system. It has been a matter of some regret to the writer that our legislature should have chosen to follow the Victorian legislation so closely to the exclusion of the very successful New South Wales legislation. Such regret may, however, be tempered by the provisions of the amending acts in New South Wales in 1973 and 1974 which tended to depart from the original concept and deal in detail with the various operative provisions required particularly those relating to the operation of the body corporate.

New Zealand position

The Unit Titles Act 1972 saw the light of day in New Zealand after lengthy deliberations by a special committee assisted by submissions from interested bodies. The alarming spread of suburbia about our principal cities and the consequent demand for an extension of services made it increasingly obvious that some statutory solution must be provided to the problem of obtaining title to units in a semi-detached development either of the villa or multi-storey type. The 1972 Act had an unfortunate beginning in that its appearance coincided with a ruling in the English High Court case *Dutton v Bognor Regis United Building Coy Ltd* [1971] 2 All ER 1003 (affirmed [1972] 1 All ER 462 (CA)) which held that a local authority could be held responsible for defects appearing in a building to which they had given approval under their building regulations. This had a two-fold effect on local authorities in New Zealand. Firstly it proved almost impossible to obtain approval from them and secondly they used their authority to impose all sorts of conditions which were akin to building permit requirements. In this atmosphere the new unit title system made a very slow start. Only the fact that titles issued under it were an acceptable security under the Trustee Act 1956 saved it from ignominy. An amendment, the Unit Titles Amendment Act 1973, was hurriedly passed in 1973 and this modified the terms of consent under s 5(1) (g) of the principal Act by setting out more precisely the terms of the Council consent and absolving the Council, or its officers from liability, civil or criminal, unless it or they had acted negligently or in bad faith. Despite the amendment councils continued to use their certifying powers as a means of ensuring compliance with their building codes or permits, and this, to some degree anyway, stifled the success of the system.

In the period 1973-79 the system enjoyed a fair measure of success as is evidenced by the table set out below for the Auckland Land District:

1976/77	Unit Plans	605	Flat Plans	918
1977/78	Unit Plans	535	Flat Plans	954
1979/80	Unit Plans	179	Flat Plans	529

The number of flat plans (composite title) lodged for the same period is added as a matter of interest. The two sets of figures give some idea of the comparative popularity of the two systems but it must be remembered that generally the composite title system is popular for two or three unit residential developments whereas the unit title system is favoured for the large complex multi-storey developments to which it is ideally suited. The Act provided in Part IV (Conversion of Existing Schemes) arrangements whereby existing developments held under the Companies Amendment Act 1964 or the composite share in the fee simple, perpetual leasehold scheme could be converted to the new unit title system. Little advantage has been taken of this part of the Act partly because the arrangements set up in Part IV are difficult to put into operation. In particular the difference in concept of unit titles, and composite share in the fee simple leasehold titles, makes the provisions of s 63 of the Unit Titles Act 1972 almost impracticable. In any case there are a number of situations such as the two or three single-storey unit residential developments where the composite title relying on the terms of the leases has been considered preferable to the complex statutory provisions of the Unit Titles Act 1972 as is clearly shown by the table set out above.

Ministerial Committee

The 1979 Amendment was the result of the deliberations of a special Ministerial committee. The committee consisted of representatives of the appropriate departments, the Institute of Surveyors, the Institute of Valuers, Real Estate Institute, Insurance Council, Counties and Municipal Associations and the New Zealand Law Society. I understand the committee saw as main areas of concern:

- Development by stages
- Consents by Local Authorities under section 5(1) (g)
- Insurance provisions
- Fixed Unit Entitlement
- Practical difficulties of setting up a body corporate as a working administrative entity
- Problems caused by using the Act to evade subdivisional requirements
- Problems contained in the conversion provisions of the Act

Staged Development

The existence of a strong lobby favouring the introduction of "Staged Development" is witnessed by the form in which the 1979 Amendment Act emerged. The whole of Part I, nine sections in all, is devoted to this new procedure. The other matters which were represented to the committee as of importance are lumped into Part II under the heading "Miscellaneous Amendments of Principal Act". Some of these receive cursory treatment indeed as I will attempt to show as this article develops.

The possibility of allowing for development by stages thus allowing the promoters to spread their financial burden attracted attention from a very early stage of the operation of the 1972 Act. Those who had seen the bitter experience of unit owners in *Jenkins v Harbour View Courts Ltd* [1966] NZLR 1 under the company form of title were doubtful that procedures could be evolved that would equally benefit prospective unit purchasers and the promoters.

The need for development by stages seems to have sprung from the desire to escape from reserve contributions for a subdivision for otherwise there seems to be no reason why a number of unit plans could not be used, each one representing a stage of the complete development. Such an arrangement would give each group of unit owners certainty of tenure from the outset, something which is lacking where there remain the possibly conflicting rights of owners and promoters in the one development. The decision in *Perry & Ors v Henderson Borough Council* (unreported 604/75) throws some doubt on the assumption that unit title developments are wholly exempt from reserve fund contribution requirements.

In Victoria there was general dissatisfaction with the operation of the strata titles system chiefly on the grounds that it could not be used for development by stages. The writer has correspondence from the Law Institute's Strata Titles Sub-committee in which the view was strongly expressed that the development by stages procedure could not be used under existing strata title legislation. To meet the situation the Cluster Titles Act 1974 was passed. A cluster subdivision subdivides land into lots and common property. The common property provision is the major difference and is considered to be of considerable advantage when it comes to the planning of open space. The lots need not be contiguous with one another nor need they have a conventional street frontage. The view has been expressed that eventually it will be possible to permit a strata title development on a lot in a cluster title subdivision.

The fact that Australian authorities consider it was not possible to provide development by stages under strata title procedures does not necessarily preclude New Zealand ingenuity from coming up with a workable scheme. The writer has no doubt that the arrangements provided in Part I of the 1979 Amendment Act offer a procedure that will work satisfactorily.

Staged development — Caution

There is room for doubt, though, as to whether the rights of both unit owners and developers are safeguarded to a satisfactory degree. The rights of the promoters appear to be adequately safeguarded by the provision of a future development unit in s 8. Section 9(2) absolves the owner of the development unit from any responsibilities in regard to the body corporate or the liability to contribute to any fund established by the body corporate to meet its responsibilities as laid down by s 15 of the principal Act. On the other hand s 9(4), (5) and (6) of the Amendment gives the promoters as owners of the future development unit the aggregate unit entitlement of all the units into which it is proposed to subdivide the future development unit as shown on the proposed unit plan, in taking any action which affects the future of the development. In the early stages of the development the promoters as owners of the future development unit would have an overwhelming preponderance of voting power.

The unit owner does not appear to be in nearly as strong a position. The basis of the Torrens System is certainty of title. The procedures laid down for development by stages certainly provide that the proposed unit development plan which is deposited at the outset shows the whole development with unit entitlement established and also prohibits departure from the plan except under the provisions of s 5(5) of the Amending Act. There is

no way, however, to ensure that the staged development will be proceeded with in a stated time. The provisions of s 8 of the Amending Act give future development units the status of a principal unit and they may therefore be mortgaged or otherwise dealt with or be the subject of a debenture. In such circumstances the promoters may lose effective control over the future development unit. The owners of units in the early staged development, having acquired title on the basis of the complete development, could find themselves indefinitely situated on a partially completed development or one which, through the voting strength available, had changed its character. It could be possible also that the financial commitments provided in s 15 for the whole area could fall on the few existing unit owners. In the event of redevelopment under s 44, cancellation of the plan under s 45, or application to the Court for cancellation under s 46, being contemplated a unit owner could find himself heavily outweighed in voting power by those exercising control over the unit entitlement arising from the future development unit. Fortunately the principal Act contains in s 43 "Relief for the minority"; a power for a unit owner to apply to the Court where a resolution or decision is inequitable to the minority.

Local Authority Consents

The committee's second point of reference, that of consents by local authorities, is dealt with in Part II of the amending Act at s 13. Section 5(1) (a) of the principal Act was amended in 1973 within one year of the Act coming into operation as the wording of the consent by the local authority was the cause of some anxiety to local authorities in view of the English High Court decision *Dutton v Bognor Regis United Building Co Ltd* supra mentioned earlier in this article. The new ss 13 and 14 clarify the situation in a most commendable way. Section 13 allows the principal officer of the territorial authority (a designation arising from the Local Government Act 1974) to give a certificate at an earlier stage when the boundaries of every unit and the common property on the plan can be physically measured. Section 14 provides that the certificate cannot be refused except on the grounds

- That buildings have not been erected or development work carried out to the extent necessary for the boundaries of every unit and the common property to be physically measured.
- That any building has been erected or that any development work requiring a permit has been carried out without the authority of all necessary permits.
- That any building on the land has been erected in such a place in relation to the boundary or to such a height as to contravene the territorial authorities bylaws or any of the requirements of the Town and Country Planning Act 1977.
- That any building or any other part of the whole development contravenes any such bylaws or requirements in any other manner to such an extent that alterations are required that may affect the location or the boundaries of any unit or of any part of the common property shown on the plan.

Section 14(2) provides that once a certificate has been given under s 5(1) (g) and the unit plan deposited the territorial authority, notwithstanding any enactment or rule of law to the contrary, shall have no power to require any alteration to any building or any other part of the whole development that may affect the location or the boundaries of any unit or of any part of the common property. The territorial authority may however pursue any remedy it may have (including the prosecution of any person) in respect of any non-compliance with its bylaws or the requirements of the Town and Country Planning Act 1977. This saving clause preserves the validity of the titles issued in the face of changing conditions under the various Town and Country planning requirements.

Finally s 14(3) absolves the officers of any territorial authority or the authority itself from any civil or criminal liability in respect of giving a certificate under the section unless they or it has acted in bad faith.

The provisions outlined above seem to rationalise the consent provisions of the Act most satisfactorily and should have the effect of speeding up the issue of certificates. In this latter respect there is one drawback in that para 2 of Form 1 in the First Schedule remains unaltered. This paragraph, which does not otherwise have authority arising from the Act, requires an application for deposit of a unit plan to state a date on which, in terms of s 20(2) of the Wages Protection and Contractors' Liens Act 1930, all work on the unit and common property into which it is proposed to subdivide the land is deemed to have been completed under any contract, or sub-contract, the completion of which was necessary to make the units suitable for occupation for the pur-

pose for which they are intended.

Insurance

The third matter to be considered was the important one of insurance and here again what had been a very confused situation seems to be satisfactorily cleared up. Most of the insurance difficulties arose from it being necessary in the case of destruction of or damage to a multi-storey unit title development by fire or other means to ensure that a situation did not arise whereby a mortgagee using his right of election in such circumstances did not take the insurance money rather than rebuild. The 1972 Act provided for fire insurance under s 15, at the option of the body corporate or the registered proprietor, mortgage insurance for destruction or damage by fire under s 38, and proprietors insurance under s 39. This situation meant that in some cases a unit owner was required to take out three insurance policies. There was no requirement for an "all risks" policy.

Sections 16, 21 and 22 of the amending Act deal comprehensively with the insurance provisions. Section 16 repeals s 15(1) of the principal Act and makes it a duty of the body corporate "To insure and keep insured all buildings and other improvements on the land to the replacement value thereof (including demolition costs and architects fees) against fire, flood, explosion, wind, storm, hail, snow, aircraft and other aerial devices dropped therefrom, impact, riot and civil commotion, malicious damage caused by burglars, and earthquake in excess of indemnity value". The new section 38(1) provided by s 21 of the amending Act defines "Principal Insurance Policy" in relation to the units and common property shown on a unit plan as that taken out by the body corporate under the provisions of s 15(1) (b). Section 38(3) provides that every unit proprietor and every person entitled as mortgagee by virtue of a registrable mortgage in respect of a unit has an insurable interest in the property covered by the principal insurance policy. The body corporate has a responsibility to inform the insurer of the name and address of every proprietor and mortgagee.

Insurance — Lapse or Cancellation

Section 38(5) provides that no principal insurance policy shall lapse or be cancelled but shall remain in full force and effect until

- The insurer has served on every unit proprietor and every mortgagee of which he has had notice, a notice to the effect that the policy shall lapse or be cancelled on the date specified in the notice being not earlier than 30 days after the date on which the notice is served and
- The date specified in the notice has arrived. The use of registered post is held to be sufficient service.

The insurer shall specify in his notice the default complained of, whether in respect of the payment of premiums or otherwise, and shall state that lapsing or cancellation is conditional on the default not being remedied before the date specified in s 5(a).

Insurance — Application of Moneys Received

Section 38(8) then provides that, unless by unanimous resolution all the proprietors otherwise resolve, all money paid by the insurer pursuant to the principal insurance policy shall be applied in or towards reinstatement and where it is to be so applied no mortgagee shall be entitled to demand that any part of any such money be applied to or towards repayment of the mortgage debt.

Mortgage redemption insurance

Section 22 repeals the existing s 39 and substitutes a new s 39 which provides that nothing in the new ss 15(1) and 38 shall limit the right

- of a proprietor to effect a policy of insurance in respect of the destruction of or damage to his unit
- of a mortgagee as a condition of a loan to require the proprietor to effect a policy of insurance (referred to as a mortgage redemption policy) to indemnify the proprietor against liability to repay the whole or any part of the sum secured to the mortgagee in the event of the destruction or damage of the unit.

Payments made under a mortgage redemption policy will be made to the mortgagees in the order of their respective priorities. No mortgage redemption policy will be liable to be brought into contribution with any other policy of insurance except another mortgage redemption policy. Section 29 of the amending Act provides that in order for a loan on a unit title to qualify as a trustee investment under the Trustee Act 1956 a mortgage redemption policy in terms of s 39 must be taken out. The special legislative procedures dealt with in detail above

have the effect of reducing the number of policies required in some cases to the principal insurance policy only and in most cases to a principal insurance policy and a mortgage redemption policy.

Title — in whose name?

At this juncture although not specifically mentioned by the committee, s 15 of the amending Act is worthy of notice. Land registry offices had a differing interpretation of s 8 of the principal Act. Some offices considered that unit titles should be issued in the name of the registered proprietor of the development while some considered they should be issued in the name of the body corporate. Some considered that existing encumbrances could be brought forward while others felt there was no authority for this practice. Section 15 clarified the position so that titles will now be issued in the name of the developer and the Land Transfer Act procedures will operate to allow existing encumbrances to be brought forward.

Administration — Scant attention

The committee listed as one head of reference "Practical difficulties of setting up the body corporate as a working administrative entity". They appear to have done scant justice to this topic in s 27 which provides for amendment to rule 30 so that a registered proprietor may now be the secretary. Further to this they place the responsibility on the secretary to prepare a balance sheet showing the body corporate's financial dealings during the year and to supply a copy within six months to every proprietor.

This seems an inadequate reaction to a situation where it is generally considered that the responsibilities of the body corporate are more honoured in the breach than in the observance. The New South Wales Strata Titles Act commenced in 1961 with comparatively simple rules and administrative arrangements in the First and Second Schedule. In the early 1970s their Premier acknowledged that the problems which had arisen under this Act were not in the legalities of the Act or the system of registration but rather in the human problems of groups of people living together in unaccustomed propinquity. It must be recognised that the New South Wales scene is greatly different to ours in that large numbers of multi-storey units were erected in Sydney under their Strata Titles Act. In this sort of situation behaviour problems are liable to be more troublesome than in the villa or semi-detached scene.

The Strata Titles Amendment Act 1973 made some sweeping changes in New South Wales and in 1974 a further substantial Amendment was passed. The fairly basic schedule designating the rights of unit owners was enlarged to deal specifically with such questions as behaviour of children and invitees in the development, and damage to common property. Part IV of the 1973 Amendment under the heading "Management" provided, in the case of developments of over three units, for a Council which should have a Chairman, Secretary and Treasurer. In addition there is provision for a Managing Agent whose responsibility is to carry out the day-to-day duties of running the development. Provision was made for the appointment of a Strata Titles Commissioner who has the role of settling disputes between unit proprietors. Managing agents are required to lodge a bond with the Commissioner in a prescribed form with an insurer approved by him. In addition there is provision for a Strata Titles Board which can be the Fair Rents Board under the Landlord and Tenant Amendment Act 1948. So we have the situation of Managing Agents responsible to the Commissioner of Strata Titles who may summarily settle certain types of disputes arising amongst strata title proprietors. He may refer certain types of dispute to the Strata Titles Board for settlement. There is a right of appeal against their decision to the Courts.

This may seem something of an unnecessarily bureaucratic reaction in the light of the New Zealand experience; but it does serve to emphasise how inadequate our provisions are. Admittedly New South Wales has had a much longer experience of the system than is the case here and generally the developments are multi-storey and in a confined space, but surely there are lessons to be learned from their experience.

As far as the writer is aware no similar arrangements were made in Victoria at least up till the mid 1970s. At that stage the Cluster Titles Act 1974 intervened to steer development away from the Strata Titles system. At that stage however the Victorian authorities had the following publications available at law stationers in Melbourne

- Guidance notes on plans of strata subdivision in Victoria. These are intended to explain the general workings of their Strata Titles Act to prospective purchasers.
- Notes on the organisation of the body corporate. These are intended to be of

assistance to "non-professional" persons or accountants responsible for the administration of a body corporate.

- There have also been published in the Law Institute Journal "Requisitions and Enquiries" and an article regarding Contracts of Sale as a guide to members of the profession. We have nothing of this nature to offer in New Zealand.

It is fairly evident that in a great many cases people embark on the purchase of a unit in a unit titles development without any attempt being made to acquaint them with the responsibilities they are assuming as a member of the body corporate. I would suggest the very minimum we should contemplate in New Zealand is

- An obligation to supply prospective purchasers with a pamphlet setting out in layman's terms the manner in which a development is organised and the unit proprietor's responsibilities as a member of the body corporate.
- A set form preferably available in a printed form on which the balance sheet required by s 27 of the Amending Act is prepared. A provision to file a copy annually against the Supplementary Record Sheet would not appear to be unduly onerous. A prospective purchaser would then know immediately if the Secretary was carrying out his obligations.
- Alternative forms of rules for large and small developments.

It is a ridiculous situation when one set of rules is considered adequate for all types of developments. Section 10 of the Amending Act extends the definition of principal unit "as a place of business or residence" by adding the words "or otherwise". This means that there are no restrictions whatsoever on the type of undertaking which may seek registration under the Unit Titles Act 1972. There is obviously a great need for alternative sets of rules. A ready answer to this proposition is that s 37 of the Principal Act contains provisions enabling alteration of the Rules in Schedules 2 and 3. The writer does not have any figures available for New Zealand but in Victoria in 1973 out of 3,600 registered developments only 80 had changes of rules. One of the reasons given for this situation was that adherence to the Act's Second Schedule provided less difficulty to purchasers seeking finance.

Conversion of title

The Committee took as one of its heads of reference "Problems Contained in the Conversion Provisions of the Act". There does not seem to have been any great eagerness to take advantage of Part IV of the Principal Act which deals with "Conversion of Existing Schemes". The fundamental differences between the concepts of the share title, perpetual lease and the unit title organisation make it virtually impossible under s 63, where mortgages and charges exist, and they usually do, to successfully undertake the conversion process.

On the contrary the wind seems set the other way and the figures quoted earlier in this article for unit and flat plans deposited in the Auckland office show an increasing preponderance in favour of the composite title system.

Conclusion

The writer believes that there is a place for both systems in New Zealand. The composite title system should be further encouraged and reorganised by including in the Land Transfer Act 1952, the three or four additional sections needed to legalise its operation. There is no doubt that the system is an ideal one for the small three or four unit residential suburban development. It could even be worth considering a separate piece of legislation to provide for accessory units and common property instead of the somewhat clumsy device of restrictive covenants.

The unit titles development is eminently suitable for the large multi-storey complex which involves considerable administration. It only remains to evolve some workable compromise which will allow the system to operate efficiently without the trammels of bureaucracy.

The writer feels that while the Unit Titles Amendment Act 1979 has achieved some worthwhile advances on the original Act it has failed in the major premise of making the administrative machinery of the body corporate effective.

The "Development by Stages" procedure is also open to criticism in that it offers a unit owner less than the certainty of title which we have come to take for granted under the Torrens System. The purchaser of a unit should be entitled to expect to take title in a predictable expectation of his rights and responsibilities for the future. The existence of future development units and individual unit owners in the one title situation appears to negate this goal.