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TAX — WHAT HAPPENED TO PROGRESSIVE TAXATION?

Recently a spate of books on tax saving have appeared — indeed they have not only appeared but topped the bestseller lists. Their existence in such variety, and their popularity, evidences an upsurge in opposition to the current system of taxation.

In this issue is published an analysis by Professor Lindsay McKay of our present income tax structure. He argues that it has reached the stage where it can hardly be called progressive any more.

He estimates that about twenty percent of taxpayers are paying tax at the top marginal rate of 60 percent ($22,000 plus) or are within five percent of it ($16,000 plus in 1980/81). Others suggest the proportion could be higher. Many of these taxpayers — indeed most of them — will have moved on to a higher marginal tax rate through cost-of-living (as opposed to promotional) adjustments alone. At the same time, those paying into Superannuation Schemes will find their contributions now exceed the allowable exemption of $800. For a person contributing 6 percent of income this will happen at about $13,500 and for those contributing 5 percent at about $16,000.

To put numbers to this, at 31 March 1981 19,785 out of 65,844 public servants, that is 30 percent, were being paid more than $16,000. Most would be contributing more than $800 per annum to superannuation. Most would for the preceding tax year be paying 32 percent or more of their income in tax. Approximately 4,500, or 6-7 percent of the 65,844, were earning more than $22,000 and were therefore on the top marginal tax rate and paying in the order of 38 percent or more of their income in tax.

Between $16,000 (1980/81) or $17,600 (1981/82) and $22,000 there is but one tax step — one step for roughly 30 percent of public servants. This contrasts, as Professor McKay points out, with the seven tax steps for the top 6 percent of taxpayers in 1970.

With so many in this coarsely graded 55-60 percent tax bracket the only progressive element seen by many is a progressive loss of whatever exemptions they may have had. For this group the reality of taxation is that they pay a flat rate of tax of 32-38 percent.

Those at the lower end of the scale have anomalies all of their own. Professor McKay makes a number of observations on the low income family and young family rebates. These rebates diminish by 12 cents for every dollar earned over a specified amount. In the case of the low income family rebate this amount is $8,200. The diminution in rebate has the effect of increasing the marginal tax rate of every dollar earned over $8,200 with the result that a person earning say $9,000 with a diminishing rebate will be netting, for each additional dollar earned over $8,200, about the same amount as a person on double that income — a strange inversion of progressivity.

It has been said that New Zealand's per capita tax take (both direct and indirect) is among the lowest of the OECD countries. That may be so and certainly few would deny that tax revenue must come from somewhere. What is objected to is the high level of direct personal taxation in the mix and what many see as unfairness in its imposition. The person earning $22,000 is taxed at the same marginal rate as the person earning $60,000 or $100,000. High personal taxation is seen as reducing disposable income and so limiting choice. High marginal tax rates cutting in at a low level (and acompanied by rebate anomalies) reduce the incentive to earn that extra dollar while giving impetus to essentially non-productive tax avoidance schemes (as witness the sale of the books mentioned earlier).

While the personal tax rates of different countries cannot be directly compared, nonetheless the man in the street sees the Australian taxpayer, who ends up with a markedly higher disposable income, as being in a much better position. The erosion of the life insurance and superannuation exemptions especially rankles. Those who were encouraged by this exemption into what amounts to a long-term savings commitment now find themselves passed over and feel justifiably let down.

For all this, the greatest source of real dissatisfaction lies in the callous way in which fiscal drag is being used as an economic tool. Once taxation policies had an expressed social objective. Today, with a person's marginal tax liability being left to the vagaries of inflation (taxation by inertia rather Parliament?), it is increasingly difficult to see what, if any, social objectives are being promoted by the tax policies imposed.

There is no simple answer. But if a prediction may be made it is that if the forthcoming budget does not grapple with what so many see as structural defects in our tax system, and if taxation is not seen to have a purpose apart from collecting revenue, dissatisfaction will grow to unhealthy proportions.

THE COMMITTEE ON GANGS

On the cover of the Report of the Committee on Gangs is an Eric Heath cartoon showing Mr Ken Comber MP looking bemusedly at two pairs of gloves — one pair boxing; one pair "best kid". The choice is not so simple.

The Committee was established under the chairmanship of Mr Comber to study the gang situation in New Zealand. At the outset it stated that it had no objection to young people meeting together as a gang — what it did reject was gang behaviour that results in violence, territorial disputes and intimidation. Were only violence and criminal offending involved it would be hard not to side totally with the boxing gloves — with hard-line law and order. Unsocial, unlawful behaviour should be neither sanctioned nor condoned.

But are these aspects only a symptom? Gangs involve members of ethnic minority groups; people who may be regarded, at least by majority standards, as having come from socially, economically, educationally and culturally deprived backgrounds. This may not excuse offending, but some — the kid gloves? — recognising that these conditions are a by-product of social and economic policies, ask whether the community can in conscience so readily ignore a situation it has, in large part, created. Those holding this opinion do not deny the need for law and order but ask also for a positive plan to counter socially inflicted disadvantage.

The Committee had 30 days in which to bring down a comprehensive report on everything to do with gangs. Given the impossible time restriction it was understandable and inevitable that it should direct its attention to the topic giving rise to its establishment, namely "preventive actions which might be taken, to avoid an escalation of the social disruption, criminal behaviour and publicly perceived menace of some gangs." Its recommendations have been widely publicised. In essence, it left sentencing to the Penal Policy Review Committee — with a preference expressed for finding alternatives to custodial sentences, for use of non-association conditions in probation terms, and for making motor vehicle confiscation an effective penalty. The main changes recommended were that an extension of the law of consorting, to encompass consorting with persons convicted of crimes of violence, be sympathetically considered and that the laws and penalties on unlawful assembly and riot be reviewed. In what respect the existing unlawful assembly provisions are unsatisfactory was not stated but presumably identification-of-offenders difficulties feature.

Any legislation resulting from these proposals will warrant select committee study. It is not sufficient that the proposals have emerged from a public inquiry. Limitations on consorting and assembly should not lightly be imposed and the specific proposals should be open to public scrutiny and comment.

The Committee did not have time to undertake "a detailed consideration of the philosophy behind current housing, employment, education and social welfare policies" nor could it consider the effect its recommendations might have on social policy as a whole. Nevertheless the bulk of the Report deals with these matters, and if the Committee was unable to make many firm and definite recommendations it at least outlined what is being done and identified topics for further study.

After recognising "that in the present economic climate, it is unrealistic to talk of extending or increasing programmes at ever increasing cost" the Committee recommended what look to be a number of very costly preventive programmes, involving increased provision of work-related courses at secondary schools, pre-employment in vocational skills courses in community centres, additional support services for teachers, subsidised work programmes, employment of work advisors, making capital available to employer enterprises even though of limited commercial viability, direction of funds to community groups, provision of family support services, funding of recreational programmes and personnel and providing organisers of recreational programmes for young people. These are but a selection.

All this seems rather a lot for just 2,300 gang members out of over half a million 15-24 year olds, until one realises that the benefits recommended are not needed by gangs alone — they are needed by all young people who face the prospect of no job and no skills.

The difficulties and deprivations that encourage gang formation are not the exclusive preserve of gang members. And the extent to which the recommendations of the Committee for dealing with these deprivations are pursued will indicate whether the Government is interested in dealing with the underlying social problem, or whether it is prepared to do little more than engage in law and order cosmetics.

TONY BLACK

AWARDS OF COSTS BY THE PLANNING TRIBUNAL

By KEITH BERMAN LLB, DipTP, MNZPI

The Planning Tribunal has shown a recent willingness to award costs against unsuccessful appellants. The Number 3 Division has set the pace in the quantum of the award. In *Remarkables Protection Committee v Lake County Council* it awarded a total of $8,500 against the unsuccessful Protection Society.

As the Society is unincorporated the committee members were named as those being jointly and severally liable to pay the award. The Tribunal's powers were examined by the No 3 Division in *Woolworths v Dunedin City Council*. It noted a number of things. The power to award costs "as it deems just" (1973 Act) and "as it considers reasonable" (1977 Act) means the same thing. There is a hardening of attitude in respect of unsuccessful appeals arising from applications — the 1977 practice note, in 6 NZTPA 244 stated the Board would "decide each application for costs on its merits" whereas the 1979 practice note stated "the Tribunal will as a general practice order an appellant who has failed to obtain the relief sought by his appeal or any substantial modification of the decision appealed against, to pay the costs to the other parties to the appeal". The latter practice note did not go so far as to say that costs will normally follow the event. The Tribunal had no jurisdiction to award costs in respect of the hearing before the Council (cf Water and Soil Conservation Act).

In the *Woolworths* case the appellant had been unsuccessful on its application before the Council and was again unsuccessful on appeal. The objectors who were retailers were refused costs against the appellant, because none would be so affected by the grant of the application as to warrant refusal of the application on that ground alone. The respondent Council was awarded $1,000. The Tribunal noted that if an appellant had obtained a substantial modification of the decision appealed against or if an appellant was unsuccessful but on grounds significantly different from those found by the respondent at first instance, then those circumstances may provide good reason for refusing an application for costs against the unsuccessful appellant. In this case those circumstances did not exist and hence the award.

The *Remarkables* case gives cause for concern. It is a strange set of circumstances for the Tribunal to choose to create the high water mark for costs awards. The appellant was a conservation group which appealed unsuccessfully against the granting of consent to the development of skifields on the Remarkables. These points can be made for the ap-

pellant: the Council granted only a conditional use consent whereas the Tribunal considered a specified departure consent was also necessary (because the scheme was either unclear or deficient); it amended the conditions of approval; the Tribunal considered that "there is no doubt that the appellant's case had merit"; the Tribunal's decision was not unanimous; the issues were of national, regional and local interest. On the other hand the Tribunal was impressed by the conscientious way the Council adjudicated on the application in the first instance, was annoyed by the appellant's failure to prepare and present much of its evidence until after the Council hearing, and felt that the conduct of the appeal was extended (the hearing days totalled 12 spread over 5 months) by the appellant's failure to exchange briefs of evidence, advise the applicant of uncontested facts, and properly organise the conduct of its case. The Council was awarded $3,500 and the applicant $5,000 towards their costs.

The decision can be contrasted with *Dixon and Lonergan v Wanganui City Council* (No 1 Division) where no award of costs was made because the appellants were not seeking to promote matters of private interest, but were pursuing a matter of public moment, and *Auckland Regional Authority and Others v Rodney County Council* (No 1 Division) where on a public interest issue no award was made against the unsuccessful appellants (the reasons were not stated).

One is left uneasy about the present approach to the award of costs. It appears loaded against unsuccessful appellants to the extent that it could intimidate potential appellants. The writer is unaware of any award in favour of a successful appellant (whether objector or applicant) except where the Council has been seriously at fault in the administration of its planning responsibilities. Councils, while getting the benefit of awards of costs, rarely have awards against them. The circumstances in which costs will be awarded remain undefined. The practitioner is unable to advise his client with any real certainty as to the likely financial consequences of a proposed appeal. Community committees, environmental groups, ratepayers groups, will continue to have a role to play in advancing legitimate planning arguments. At the same time applicants will continue to suffer unreasonable delays and costs at the hands of vexatious objectors. To deter the latter without stifling the former is not easy. Caution must be exercised in bringing closer the principles as to the award of costs in civil litigation (where the resolution of disputes over private rights dominates) and in planning hearings (where the public interest is a dominant influence). The Tribunal has been at pains to emphasise that it has not adopted the approach of costs following the event, but the present approach has an uncomfortable air of unpredictability. One would not wish to preclude the award of costs. But before the present trend develops further there must be careful debate on whether it is better in the public interest to permit appellants with genuine and meritorious arguments to pursue them without fear of heavy financial penalty, than to compensate successful parties at the expense of such appellants.

THE INCOME TAX AMENDMENT ACTS 1980 AND THE DECLINE OF PROGRESSIVITY

By LINDSAY McKAY*

Introduction

The Income Tax Amendment Acts 1980 introduced three amendments to the existing income tax structure of vital significance to the general body of taxpayers. The first, brought about by the Income Tax Amendment Act 1980, removed the Single Income Family rebate and in its place created a Low Income Family rebate of quite different structure and criteria for eligibility. The Single Income Family rebate of a value of $260 had been available to any taxpayer whose spouse derived less than $1,300 in the income year, reducing in value by 20 cents for each dollar by which the spouse's income exceeded that level. The Low Income Family rebate put in its place is of a value of $468 and is available to the principal income earner in families where the aggregate of the spouse's income does not exceed $8,200, after which it reduces by 12 cents for every additional dollar derived by the spouse. In addition to introducing this rebate the amendment altered the abatement rates and levels of the Young Family rebate. Prior to the Amendment the rebate of $468 reduced by 10 cents for every dollar of income over $9,360. As a result of the Amendment it is to abate by 12 cents for every dollar in excess of $12,100 a year.

The third important alteration in question, brought about by the Income Tax Amendment Act 1980 (No 2), was of even greater and more widespread significance. It introduced changes to the rates of personal income tax to take effect early in 1981 and to apply to the full 1981/82 tax year. The rates laid down for 1981/82, with those of the preceding tax year for comparison, are:

1980/81		1981/82	
Taxable Income	Marginal Rates	Taxable Income	Marginal Rate
1-4,900	14.5%	1-5,500	14.5%
4,901-11,500	35%	5,501-12,600	35%
11,501-16,000	48%	12,601-17,600	48%
16,001-22,000	55%	17,601-22,000	55%
22,001-	60%	22,001-	60%

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Central to the Government's explanation for the rate changes and the amendments to the terms of the Young Family rebate was the need to make adjustments to the tax structure to take into account the effect of inflation in raising nominal incomes into higher marginal tax brackets.[1] The replacement of the Single Income Family rebate by the Low Income Family rebate was occasioned by a somewhat different range of considerations, principally that of a desire to direct the benefit of the rebate to lower income groups.[2] Beyond question, however, the impact of inflation upon low income families was a contributing factor in this redirection in the sense that the need for tax relief to such families was in substantial measure the product of their nominal incomes having been pushed into higher tax brackets by inflationary forces.

Few would quibble with the Government's desire to counter the effects of inflation in these ways. In the absence of indexing, periodic adjustments of this character are both necessary and proper. Few would disagree either with the decision to afford additional relief to those on low incomes by redirecting the revenue forgone by the Single Income Family rebate away from those on high incomes — to whom it was an unexpected and illogical windfall — and its rechannelling to lower income groups. The 1980 changes do, nevertheless, raise significant tax policy issues in terms of their impact on both the progressivity and in some respects the rationality of the personal income tax structure. These issues arise principally from the consideration that both in isolation and as steps in a series of alterations to the rate and rebate structures they have led to a lessening in that progressivity and the imposition of what is effectively a proportionate and in some instances a regressive tax structure across a broad band of incomes covering a very significant proportion of taxpayers. These phenomena would give rise to policy issues at whatever level of

[1] See *Financial Statement to House of Representatives* (3 July, 1980) 27-28; *New Zealand Parliamentary Debates*, 1980 (Part 27) pp 3308-3310, 1980 (Part 43) p 5553.

[2] *Financial Statement* ibid, p 28; *Parliamentary Debates* (Part 27) ibid.

incomes they appeared. They do so even more emphatically in present circumstances since they are to be found across income levels where in orthodox theory the rates should be at their most progressive. The object of this note is to describe and substantiate the existence of these phenomena and argue that the position they describe is one of manifest error and illogicality.

Decline in Progressivity, Growth of Proportionality

The general effect attributed above to the 1980 Amendments and their forerunners over the last (say) five years arises from a combination of successive changes to both rate scales and rebate entitlements. It is helpful at the outset to afford them separate treatment.

(a) Rate changes

A comparison of the rates introduced in 1980 with those operating in the preceding year (see the table set out in the introduction above) is highlighted by two obvious features. The first is that those laid down in the 1980 Amendment give a measure of tax relief to those on incomes of $4,900 or over by increasing for incomes above that level the amount of income taxed at at least the first four steps in the rate scale. The second, and one of most concern to the themes of this paper, is that they leave the marginal rates for those taxpayers with incomes over $17,600 unaltered (though of course the average rate for all taxpayers deriving more than $4,900, even those with incomes over $17,600, is lower due to the reductions at earlier steps of the scale).

In and of itself the decision to leave unaltered the rates applicable to incomes over $17,600 must necessarily lead to a decline in progressivity, for the obvious reason that while the top-end rates and the levels at which they operate are static, the effect of inflation on nominal incomes is not; thereby forcing a greater number of taxpayers into the top tax bracket. This inevitably brings within the same step on the scale taxpayers formerly facing different marginal rates. The difficulties noted below that this gives rise to are exacerbated by the further consideration that the phenomenon described has been a trend in the tax structure over a number of years. Over the last three years the income levels at which the top marginal rates of tax apply have been reasonably static, notwithstanding high inflation and the resulting upward surge in nominal income. The 1978/79 rate table imposed a rate of 52 cents at $16,000 and one of 58% on incomes over $22,000. Those in respect of 1979/80 and 1980/81 imposed rates of 55% percent at $16,000 and 60% at $22,000. The only relevant change for 1981/82 is in the threshold at which the 55% rate applies which has been raised up to $17,600 from $16,000.That is a very minor change. It involves no real exaggeration to say that essentially the same rate structure as was seen as appropriate in 1978 for those on $16,000 or more is seen as appropriate in 1981 for those within that same income range. This consideration necessarily compounds the difficulties attributed to the 1980 Amendment in isolation, namely, that of bringing into the top rates of tax a considerably higher proportion of taxpayers than was formerly the case. Over the four tax years during which the rates and the income thresholds have been virtually unaltered, inflation has, or is likely to produce, a 50-60% increase in income levels.[3] So in the 55-60% steps of the 1981/82 tax rates are not only those who were there in 1978 but those who have been or will be put there by inflation in the intervening three years. The same marginal rates and income thresholds are being forced to accommodate those who in real income terms were formerly deemed the subject of separate and in many cases quite noticeably distinct treatment.[4]

It is impossible to set out with any precision the numbers of taxpayers who are presently, or who will be by the end of this tax year, facing the highest marginal rate. The most recent published statistics of any reliability showing the breakdown of the taxpaying population into income groups are in respect of 1976/77. That is regrettable. Informed comment and criticism of policy issues become very difficult in such circumstances.[5] This notwithstanding, it is possible to attempt an estimation of the degree of concentration which has occurred as the result of the considerations described, even though any conclusions which are drawn from them must necessarily be tentative. One basis for such calculation is to estimate the range of marginal rates faced by various classes of taxpayers in 1976/77 (for which year, as noted above, statistics are available),

[3] See 1980 Year Book, pp 802-803 and the Tables there set out. The calculation in the text assumes rises for the full 1980 year, and for 1981, consistent with those for the previous years in question.

[4] See the calculations infra, p 1.

[5] One might believe too that the informed statement of new policy becomes impossible, at least if the writer's lack of success in obtaining more up-to-date information from those charged with its formulation is occasioned by genuine inability to provide it.

assume a rise in income levels in the intervening years of the same proportion as the rise in wages and salaries (statistics in respect of which are available for all but the last of the years in question)[6] and finally to estimate the marginal rates the 1976/77 taxpaying population would face during the 1981/82 tax year. Conducting such an investigation in respect of those taxpayers enjoying the highest 10% of incomes in 1976/77 reveals that the marginal rates faced by those taxpayers in that year (on incomes commencing at around $9,800) ranged between 48% and 60%. Estimates for later years are:

1977/78	49 - 60
1978/79	48 - 60
1979/80	55 - 60
1980/81	60
1981/82	60

So: whereas in 1977/78 the top 10% of incomes were subject to a variation of 12% in marginal rates — a spread fairly representative of earlier years, in which the variation was reasonably consistently between 10% and 14% — there was by 1979/80 a mere 5% spread and there will be for 1981/82 no difference in marginal rates at all. The calculation in respect of the top 20% of incomes is at least equally dramatic. In the 1960s and early 1970s the marginal rates faced by taxpayers within the highest 20% typically varied by 25%, with the result that the most wealthy taxpayer faced a marginal rate up to twice that of the least wealthy within this class. In the late 1970s that range was reduced to around a 12% spread and, in respect of 1981/82, under the impact of the new rates, will probably be as low as 5%. Both this and the preceding calculation offer some substantiation of the phenomenon earlier alleged in that they show a decline in progressivity at the upper income levels directly attributable to the leaving of the rates and the dollar thresholds of their application more or less static.

There is also a second basis upon which this decline in progressivity can tentatively be measured, namely, by comparing the approximate numbers of taxpayers facing the higher marginal rates now as compared to 1976/77. If we take the breakdown of incomes into various income classes provided by the Year Book in respect of 1976/77, assume that the increase in all incomes in all classes between 1976/77 and 1981/82 corresponds with the increase in wage movements over that period, and then examine the numbers in each of those years facing the highest marginal rates, some sense of the dimension of the movement described may be obtained. The results are as follows:

1976/77

Income	No in Class	Marginal Rate
12,000 - 13,999	49,000	50
14,000 - 15,999	25,500	50
16,000 - 17,999	18,400	51
18,000 - 19,999	13,800	53
20,000 - 21,999	10,000	55
22,000 plus	20,000	57

1981/82

Income	No in Class	Marginal Rate
12,000 - 13,999	180,000	35 - 48
14,000 - 15,999	140,000	48
16,000 - 17,999	120,000	48 - 55
18,000 - 19,999	91,000	55
20,000 - 21,999	85,000	55
22,000 plus	185,000	60

It should be acknowledged once again that these projections for 1981/82 are far from totally reliable. Even assuming a considerable margin for error, however, what clearly emerges from them is an unquestionable increase of significant proportions in the number of taxpayers who find themselves in the highest and the next to highest of the steps of the rate scale. A mere five years ago (1976/77) the highest step on the scale was met by about 20,000, or 1.2% of all taxpayers. As the above table shows, for 1981 that could well be of the order of 185,000, or approximately 10% of the total taxpaying public. In the 1976/77 year the penultimate step on the scale was faced by a mere 10,000, or .6% of taxpayers. For 1981 it is likely that over 180,000, a further 10% of total taxpayers, will be subject to that step on the scale.

[6] Supra, note 3.

(b) Consequences of Rate Changes

If the calculations set out above are broadly correct then a number of criticisms may fairly be levelled. The first is that they reflect a disturbing phenomenon of regrettably increasingly frequent occurrence in our tax law, namely, the bringing about of quite fundamental changes in the tax structure and its impact not by deliberate, considered and openly debated policy but as seemingly unforeseen — though hardly unforeseeable — consequences of ad hoc tinkerings with isolated parts of that structure. Certainly in the instance at hand, the quite fundamental restructuring of the burden of taxation the changes in issue involved has received virtually no parliamentary attention. What debate on tax rates there has been has almost without exception been confined to describing the effect of inflation in pushing taxpayers into "higher and higher" tax brackets and then proposing measures to arrest or reverse that tendency.[7] The assumption in parliamentary and most other debate has usually been that the rate structure does in fact contain "higher and higher" steps, to match rises in nominal incomes with increases in marginal rates. That is true enough in relation to those on low and low-middle incomes. For what seems however to be a very large and, one imagines, rapidly increasing body of taxpayers it is not true: there will by the end of the current tax year be approximately a fifth of all taxpayers who either have nowhere "higher" to go or are within 5% of the top marginal rate. This position is not one of Government policy, we may assume. It has certainly never been announced as such.[8] The fact that it has nonetheless resulted can do nothing to inspire confidence in those entrusted with the administration and formulation of tax policy or in those charged with the obligation to scrutinise legislation which implements it.

This observation leads in turn to the most serious criticism arising from the trends described. Our income tax structure is said to be progressive. It looks so on its face. It was described as such in the last major revision of the rate scales, namely that which led to the adoption of the five step scale in 1978. The trend in question, however, casts serious doubts upon whether that description is even substantially accurate. As we have seen, the present structure is at present not in the slightest progressive for the top 10% and hardly meaningfully so for the top 20%. It is rather, at best proportionate (the amount of tax paid on the last dollar being no higher than the dollar carrying the taxpayer to the step threshold) across a very wide income band; at worst, it may even be regressive (the amount of tax paid on the last dollar being lower than that on the dollar which carries the taxpayer to the step threshold) at levels above the $22,000 threshold if, as one assumes to be a reasonable assumption, propensity to avoid taxation increases as a function of both income and average rates.

"Progressivity" is not a quality which, once determined to be an appropriate feature of a tax structure, automatically throws up a desirable or "proper" rate scale for adoption. On the contrary: within the context of tax structures which are unquestionably "progressive" a wide variety of rates and thresholds are possible. At the level of theory, therefore, the movement of a large percentage of taxpayers into the top marginal brackets would not of itself prevent the use of this description in relation to our tax structure: after all, the kernel of progressivity is a rise in marginal rates to match a rise in income, and that is in a general way still manifest in our rate scale. This acknowledgement made, however, the pattern of taxpayer distribution within the top levels of the rate scale described above nevertheless represents a highly unusual and questionable method of operating a progressive tax structure. The general pattern in other progressive systems is to hold that the — say — 10% highest earners, while united by an ability to pay significantly more than taxpayers on other income levels, do between themselves possess considerably different abilities to pay, and are accordingly subject to a considerable range of marginal rates. The present New Zealand structure, as we have seen, manifests agreement with the first of these assumptions — a collective ability to pay in excess of poorer taxpayers — but not the second. Rather, as we have also seen, it lumps the top 10% together in the same marginal category. It assumes that a taxpayer's capacity to pay tax on his 22,000th dollar is the same as his capacity on his 100,000th. It says of the taxpayer on $22,000 that *his* last dollar is no greater or more proper a subject of taxation than the last dollar of the taxpayer earning $30,000 or $50,000 or $500,000. In doing so it draws no distinction at the marginal level between an income which is by present standards decidedly middle-

[7] See eg *New Zealand Parliamentary Debates* ibid note 1 at pp 3309, 3314-3315, 3319-3320, 5553-5554, 5557; see too *Financial Statement*, supra note 1 at p 27.

[8] Whether this conclusion may not fairly, or necessarily, be drawn from it is however another question: see the observations, infra.

order and one whose recipient is — by any standards — decidedly wealthy. Can it be defended in not doing so? Is not the reason that most other jurisdictions subject the class of "higher level" taxpayers to a range of marginal rates a collective view that "fairness" or "propriety" or "equity" demands the recognition of the dramatic differences in capacity to pay which unquestionably exist within the group in question? Do not similar notions of equity demand analogous treatment here? Our inability to articulate more precisely the basis upon which this judgment rests need not be an obstacle to making the judgment itself: progressivity itself rests on no firmer basis than a collective sense of fairness and propriety. The claim that our present taxation of higher incomes is unbalanced and illogical can fairly and cogently be rested on precisely that basis.

Yet it can additionally be supported on at least two other grounds as well, one of logic, the other of history.

The rate scale introduced in 1980 subjects the range of incomes from $1 to $22,000 to five separate marginal rates, each of which in terms of the traditional rationalisation for progressivity indicates a different taxpaying capacity in the taxpayers subject to it. The rise from one step to another, from one level of capacity to another, typically occurs in 5,000 dollar intervals. It is at the very least anomalous to see an increase in taxpaying capacity on movements from $5,500 to $5,501, from $12,600 to $12,601, from $17,600 to $17,601 and from $22,000 to $22,001 yet to find no increases whatsoever in any movement beyond that point be it $29,999 to $30,000 or $99,999 to $100,000. By what basis in logic or common sense can a 60% spread in marginal rates be necessary to accommodate a $22,000 spread in income in the $0-22,000 range yet no spread in rates be required to accommodate increases in income beyond that point?

Clearly, earlier New Zealand Parliaments would agree with this criticism. An analysis of the tax rates and the distribution of the taxpaying population within them for virtually any of the forty years before 1978 illustrates far greater progressivity in the rates applicable to the wealthiest taxpayers. The rates for 1970 for example possessed 17 steps imposing rates ranging from 7.8% to 67%. No less than the highest 7 of those steps, imposing marginal rates from 45% to 67%, recognised the different taxpaying capacities of a mere 6% of taxpayers.[9] That fairly represents a pattern and a practice prevailing both before that time and up to the mid 1970s, namely, the top of the rate scale being characterised by a large number of steps to differentiate between the taxpaying capacities of a small number of people. As earlier noted, it also reflects what historically has been and still to a large extent is the practice in most overseas jurisdictions operating a progessively based income tax. From either reference point our present tax scale bunches far too large a proportion of taxpayers together in the top bracket and in doing so fails to recognise the different burdens appropriately to be borne by different members of that class.

(c) Rebate changes

The nature of the 1980 amendments to the rebate structure has already been noted. Noted too has been the suggestion that some desirable features and effects notwithstanding these amendments have either introduced or exacerbated complications in relation to the progressivity and logicality of the tax structure. To elaborate upon the nature of these complications it is helpful to subject the two rebates in question to separate analysis.

(i) *Low Income Family Rebate*

The Low Income Family rebate is available to a taxpayer with a "qualifying child" (a child in respect of whom a Family Benefit is payable) living as a member of his or her family. Its value is $468. It abates by 12 cents for each dollar of joint-spousal income in excess of $8,200. The effect of this abatement must realistically be regarded as an increase in the marginal rates faced by the taxpayer eligible for the rebate by the same percentage as the level of abatement, namely 12% — "realistically" because for every dollar in excess of $8,200 the taxpayer is liable to tax at the ordinary rate (35 cents in 1981/82) and to a further reduction (12 cents) in the value of the rebate with the result that 47 cents in tax is taken from the first dollar above the $8,200 level.

To point out that rebates structured in the manner of the Low Income Family rebate bring about an increase in the marginal rate of their recipients above the abatement threshold involves no novel revelation. Rebates structured in this way always have had, and have long been recognised as having, such a consequence.[10] Nor is it to imply that we are

[9] Calculated from the 1970 income distribution statistics provided in the 1974 Year Book pp 758-759.

[10] For a valuable discussion, see Kay and King *The British Tax System*, (1978) p 118 et seq.

in error in employing this form of rebate device — it has in fact many equity advantages over the deduction and exemption mechanisms formerly used to, at least ostensibly, grant relief at the lower end of the income spectrum. Nor, finally, is it to suggest that the combined effect of the abatement and the marginal rate as such necessarily imposes an undue burden on those in receipt of the rebate. We have in fact done far better than some overseas jurisdictions in avoiding the so-called "poverty trap" created by the combined effect of tax rates, rebate abatement and abatement of social welfare or analogous benefits, which in other jurisdictions has sometimes led to effective marginal rates of over 100% on lower incomes.[11] These acknowledgements notwithstanding, however, the combined effect of the 12% abatement of the Low Income Family rebate and the tax rate additionally applicable has a significant effect on the progressivity of the tax structure. The overwhelming majority of those taxpayers entitled to the rebate fall almost certainly within the 35% marginal bracket (for 1981/82 applicable to incomes between $5,500 and $12,600). For those within this group whose income is over $8,200 (the income level at which abatement commences) the marginal rate is not of course 35% but 47%. This is virtually the same as the rate faced by taxpayers on $17,600, only 8% below those deriving incomes between $17,600 and $20,000 and a modest 13% below those whose incomes range from $22,000 to $220,000 and beyond. One is entitled to seriously question whether the last dollar of a taxpayer earning $8,201 can be justifiably taxed at the same marginal rate as the last dollar of a taxpayer deriving $17,599 and at a rate which is only a little below that of a taxpayer deriving $21,999. Is it not in fact unarguable that in terms of the criterion of ability to pay — the foundation stone of progressivity — there are very significant distinctions between these groups of taxpayers?

It is no answer to this query to argue that the Low Income Family rebate is in the nature of a special concession and that the imposition of a 47% marginal rate is on that account necessary or defensible in that it removes the preference; nor to argue along the lines that if a taxpayer has taken the benefit of the rebate at lower income levels he can hardly complain if it is taken away. These arguments simply misconceive the basic objection taken. That objection is not that the rebate abates, nor that that abatement increases the marginal tax rate, nor even that the total marginal tax rate produced by the scale and abatement in combination is too high in some absolute criterion: rather, the objection is that the marginal tax rate is far too close to that imposed upon higher income taxpayers whose capacity to pay can by no conceivable argument be even loosely equated with that of the lower income groups in question. Nor can the description of the rebate as a "concession" be used as a basis for excusing or rationalising this result. The rebate can no more be properly viewed as a concession than the rate structure itself. Its presence is essential to recognise the different taxpaying capacities of taxpayers on similar gross incomes but with dissimilar family commitments. Its inclusion in the tax structure is a prerequisite to both horizontal and vertical equity rather than an unjustified, concessional distortion of them.

The effect of the abatement of the Low Income Family rebate in sandwiching together taxpayers possessing quite disparate abilities to pay is in many cases exacerbated by the consideration that the rebate does, as we have seen, commence to abate at 12 cents for every dollar of *joint* earnings over and above $8,200. Take the case of a husband earning $8,200 who is entitled to the rebate and whose spouse decides to take up part-time employment. That spouse faces a marginal tax rate of 14.5% on income up to $5,500. But that is not of course the only effect her taking up of employment has on marginal rates. By leading to an abatement of the rebate at 12 cents for every dollar earned it must additionally be viewed as either increasing her own rate by 12% or increasing that of her husband by the same amount. On either view, a dollar of part-time earnings by the spouse is effectively subject to at least[12] a 26.5% marginal rate. Now take the case of a family where the husband earns $13,000 and is

[11] For the discussion of the United Kingdom position, under which tens of thousands of taxpayers face marginal rates in excess of 100% through the combination described, see Kay and King, ibid, pp 118-120. The suggestions in the text should not be taken to indicate that the interaction between tax and social welfare structure is, however, as satisfactory as it might be: in some, thankfully fairly isolated, cases that interaction may lead to marginal rates in excess of 75%. An instance is cited in *New Zealand Parliamentary Debates*, 1980, Part 27, p 3314.

[12] It would be 20% higher if the wife's earnings reached the threshold of abatement of the "rebate for married men" under s 51 Income Tax Act 1976. Since that would also be true of the spouse of the taxpayer deriving $13,000 discussed later in the example, however, it may be put to one side for present purposes.

therefore beyond the range of the Low Income Family rebate. Should his spouse elect to take up part-time employment she too, like the spouse in the previous example, will face a marginal rate of 14.5% on her earnings up to $5,500; but unlike that other spouse her earnings will have no effect on the marginal rates faced by her husband.[13] So: whereas in the case of the $8,200 family the first dollar of the wife's earnings faces a 26.5% rate, in the case of a $13,000 (or $14,000, or $16,000, or $17,500) family the first dollar of the wife's earnings faces a 14.5% rate. The implications of this comparison on the progressivity of the tax structure are obvious. From the standpoint of the two part-time earners the tax structure is not progressive at all: it is rather, regressive, in that the tax cost of an additional dollar is higher to the spouse in a low income family situation than to the spouse who is a member of a higher income family group. To that extent the disincentives to effort and enterprise high marginal rates are frequently said to bring about may, quite perversely, operate more significantly in the former case than in the latter. It is perhaps worth noting that the phenomena described can hardly be dismissed as theroretically valid but of no real significance: close to 200,000 family units are likely to be entitled to the Low Income Family rebate in 1981/82[14] and the consequences described may reasonably be expected to operate in a very high percentage of those cases.

(ii) *Young Family Rebate*

The distortions and lessening of progressivity attributed above to the Low Income Family rebate are in many respects compounded by the Young Family rebate. The general features of this rebate, and the changes introduced to it in 1980, have already been noted. The rebate has a value of $468 and is available to any taxpayer who has or jointly has the care of a child under the age of 5 years in respect of whom the family benefit is payable. It abates at the rate of 12 cents for each dollar derived by the taxpayer in excess of $12,100 a year with the result that no rebate is available on incomes in excess of $16,000. As in the case of the Low Income Family rebate, this 12% abatement rate must be regarded as equivalent to an additional 12% marginal rate of tax across the income range in which abatement occurs. It necessarily, and obviously, follows that the effect of that abatement is to impose higher marginal rates in that income range than the scale itself suggests on its face. That obvious consequence has a number of implications in terms of the progressivity and logicality of the tax structure.

The first is that in respect of taxpayers deriving in excess of $12,600 a year and entitled to the rebate the combined effect of the rate scale (48%) and abatement (12%) is to exact a 60% marginal rate of tax. That is of course equivalent to the highest possible marginal rate provided for by the rate scale itself. In the earlier part of this paper it was suggested that the very substantial number (and variety) of taxpayers who face that rate by virtue of their gross incomes throws doubt upon the sense and equity of the tax structure. When one adds to that number those taxpayers in the range of $12,600-$16,000 who face that same rate by the combination of rate scale and abatement in question those doubts cannot help but be compounded. If it is a prima facie breach of basic notions of equity to subject incomes as disparate as $22,000 and $220,000 to the same marginal rate — as earlier suggested — the imposition of the top marginal rate on those earning as little as $12,600 becomes virtually indefensible. The same marginal rate cannot be exacted of those in the area of the average wage as of those twice, or ten times, above it in any structure with any claims to genuine progressivity. A tax regime which holds that 60% is the appropriate burden for the first dollar over $12,600 and also for the first dollar over $126,000 is proportional in character, not progressive. It is no more legitimate a response in this context than in the case of the Low Income Family rebate (discussed above) to see the imposition of the marginal rate in question as a necessary consequence of the phasing out of "concessional" or "preferential" treatment. There is not the slightest element of preference in recognising the additional burden — and the lower taxpaying capacity — in the family situation to which the Young Family rebate relates. But even if the position were otherwise it could not take away the apparent absurdity and certain anomaly of subjecting what is a decidedly middle-order income to what in orthodox theory should be an upper-income rate.

The second, related, consequence of the Young Family rebate and its operation within the rate scale is that it forces a very steep rise in marginal rates across a very narrow band of incomes. A tax-

[13] Other than in the situation noted in fn 12 ibid, common to both examples. In both cases it is probably realistic to regard abatement as a cost to the wife attributable to her decision to take up employment.

[14] See *New Zealand Parliamentary Debates*, 1980, (Part 27) p 3356.

payer on $12,000 and entitled to the Young Family rebate suffers no abatement in that rebate and therefore faces a marginal rate of 35 cents. A movement to $12,101 increases that rate to 47% by the commencement of 12% abatement. A movement to $12,601 sees that 47% rise to 60% by the movement across a step in the rate scale. This is a very significant rise in marginal rates indeed. It is not a fanciful possibility, but one faced by what are likely to be tens of thousands of middle-income taxpayers.[15] It provides a strange contrast with the operation of the tax scale in other areas. A rise in income from $12,000 to $12,601 is seen as necessitating a 25% jump in marginal rates to (presumably) accommodate the increase in taxpaying capacity involved. Yet a rise from $17,600 to $22,000 requires but a 5% rise and increases beyond that point none at all.

The principal cause of the 25% jump across the $600 spread in question is the movement within it of the taxpayer from one step on the scale (35%) to the next (48%). In earlier years, and in relation to earlier rate scales, either such movements did not take place — the range of abatement being confined to one step on the rate scale — or, in the case of the pre-1979 scales, characterised by a large number of steps, the step increase was of the order of 2-4%, which brought about only a small increase in the marginal rate. This however is explanation, not justification. It is indeed almost impossible to justify an upward movement of the dimension and pace in question in terms of traditional notions of progressivity.

The third, and again related, consequence of the rebate and its operation within the rate scale is the element of regressivity which it introduces. As noted above, a taxpayer deriving $12,700 and entitled to the Young Family rebate faces a marginal tax rate of 60% (48% under the rate scale, 12% through abatement). A taxpayer on $16,500 in a similar family position (a by no means unlikely comparison, given that the point of similarity need only be the care of a "qualifying child"), and in defiance of elementary notions of what should be the position under a progressive tax structure, would face a marginal rate of only 48%. This comparison necessarily renders the tax a regressive one across a very considerable area of its operation, which will significantly affect tens and perhaps hundreds of thousands of taxpayers.[16] Nor is the criticism limited to incomes within the range noted in the example above. Regressivity in fact operates in respect of all income levels up to $22,000. At every point from that of total abatement ($16,000) onwards a taxpayer charged with the care of a "qualifying child" faces a lower marginal rate of tax than that imposed on a (family-wise) comparable taxpayer in the range of $12,601-$16,000.

Conclusion

In the light of the foregoing analysis it is difficult to avoid the conclusion that both independently and in combination our rate and rebate structures lead to substantial departures from ordinary notions of progressivity. That is particularly, and most dramatically, so in respect of the large proportion of taxpayers subjected to the highest marginal rates in defiance of those elementary equity considerations requiring significant differentiation in the upper quartile of incomes. Beyond doubt, the ongoing impact of inflation makes it difficult to ensure that adequate differentiation occurs; beyond doubt too, reasonable minds may differ on the issue of what are the appropriate distinctions to be drawn among that group of taxpayers. But what would seem to be beyond controversy is the proposition that if our tax structure is to be paraded — as our legislators do in fact parade it — as "progressive" in character, then significantly greater differentiation than at present must be recognised.

The foregoing analysis also suggests other significant anomalies inconsistent with the ordinary concepts of a progressive tax structure. The combination of rate and rebate structures imposes marginal rates equivalent to the highest possible upon very significant numbers of decidedly average-income taxpayers. That same combination renders the income tax regressive across an income range including tens, possibly hundreds, of thousands of taxpayers; imposes steep increases in marginal rates in an area of low to middle incomes quite inconsistent with the absence of progressivity at upper income levels; and, through the Low Income Family rebate's emphasis upon joint earnings, imposes higher marginal rates on secondary earners in low income families than on those in high income families. No progressive form of taxa-

[15] 160,000 taxpayers were entitled to the Young Family Rebate on its introduction in 1977: see *New Zealand Parliamentary Debates*, Vol 413 at p 3039. Given that the income levels attending the rebate have not totally kept pace with inflation the number is likely to be somewhat higher in 1981/82.

[16] Ibid.

tion can be quirk-free. It will always be possible to detail certain exceptional situations (particularly when both spouses are employed) in which injustices and anomalies are occasioned. But the consequences in issue, given the numbers of taxpayers directly affected by them, cannot shelter under such a description. Like the phenomenon summarised in the preceding paragraph, then, they do in fact constitute the very negation of progressivity in each of the important aspects of the structure to which they apply. And if those areas of application are excluded what is left in the structure upon which to peg the label "progressive"? Very little, other than a shift in marginal rates from 14.5% to 35% at the $5,500 level, a harsh and unsophisticated step increase more appropriately described not as progressivity but as proportionality with an extended exemption for part-time earners.

What then is to be done? The most obvious solutions are, first, to raise the income thresholds at which the top marginal rates apply, secondly to provide for slower abatement of rebates and thirdly, and equally significantly, to revert to the pre-1978 practice of a tax scale containing considerably more increases in marginal rates than that presently applying. The case in favour of the first and second of these proposals emerges explicitly in the body of this paper and needs no restatement here. The third however warrants a degree of re-emphasis. The principal charge levelled against the existing structure in the foregoing analysis is that it fails to differentiate between disparate taxpaying capacities to the extent required to justify the label "progressive". Of itself an upwards revision in the top marginal rates (the first proposal above) would do little to counter that charge, in that its principal consequence would be to crowd an even larger percentage of taxpayers and an even wider range of incomes within the middle ranges of the scale, thereby paying for greater progressivity in the top quartile by reducing it in the third. Similarly, adoption of the second of the proposals noted above would, without the adoption of the third, do little more than create a series of dramatic increases in marginal rates across narrow income bands and in that sense exacerbate rather than ameliorate the existing difficulties. Both of these considerations require that any implementation of the proposals in question be accompanied by the restoration of a considerably greater number of step increases across the overall range of rates. The abandonment of the existing five step scale this would involve would be small loss. Apart altogether from its contribution to those inequitable and unsatisfactory features of our structure described above it is in more general terms an exceptionally primitive basis for differentiation of taxpaying capacities.

In introducing these solutions I described them as "obvious" devices to remedy the problems in issue. They indeed are *so* obvious that it is difficult to imagine that they have not been considered and, since they have not been adopted, in fact rejected by the Government. One wonders what that rejection might indicate or foreshadow. If, as has been suggested above, the features of our tax structure in issue are the antithesis of progressivity, one might have expected them to have been remedied by the Government were it in fact committed to that notion. It is for that reason difficult to avoid the suspicion that there presently exists no real commitment to orthodox progressivity at least and that the phenomena in question are but the first stages in a deliberate retreat from it. If this conclusion is valid, would it not be more conducive to the promotion of informed and rational tax policy to acknowlege that explicitly?

INSURANCE

THE DUTY OF DISCLOSURE IN INSURANCE CONTRACTS

*By A A TARR**

Utmost good faith (or *uberrima fides*) is required of parties to an insurance contract. Consequently parties are not only subject to the contractual obligation to avoid material misrepresentations but are also obliged to disclose all material facts relating to the insurance. The reason for the duty of disclosure can be found in Lord Mansfield's speech in *Carter v Boehm* (1766) 3 Burr 1905, 1909, where he stated:

> "The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist."

Although the duty of disclosure is a mutual one, required of both insurer and insured, in practice the obligation rarely touches the insurer, who is usually in a position of ignorance as to the material facts. (See *Re Bradley and Essex & Suffolk Accident Indemnity Society* [1912] 1 KB 415, 430; *Deaves v CML Fire and General Insurance Co Ltd* (1979) 53 ALJR 382). While the reason for the duty of full and accurate disclosure is clear, the legal basis for the duty has occasioned considerable debate. One view is that the duty of disclosure arises from an implied term in the contract of insurance (eg *Blackburn Low & Co v Vigors* (1887) 12 AC 531, 539; *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863). But this explanation has been severely criticised. See (*Merchants & Manufacturers Insurance Co Ltd v Hunt* [1941] 1 KB 295, 313; *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Assn Ltd* (1939) 39 (NSW) 174, 187; *Claude R Ogden and Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd* (1973) 2 NSWLR 7). As Roberts J explained in *Iscor Pension Fund v Marine & Trade Insurance Co Ltd* (1961) 1 SA 178, 185:

> "In some contracts parties are required to place their cards on the table to a greater extent than others, but the determination of the extent of the disclosure does not depend on the *label* we choose to stick on the contract."

Thus the accepted view today is that the duty of disclosure is not based on an implied term in the contract, nor is it limited to insurance contracts. The duty to disclose is a common law duty arising outside of contract and applicable to all contracts *uberrimae fidei* (see for example, *March Cabaret Club and Casino Ltd v London Assurance* [1975] 1 Lloyd's Rep, 169 175).

The test of materiality

The duty is to disclose all material facts and the test of materiality in New Zealand is the so-called "prudent insurer" test. In providing that a misstatement must be material in order to avoid the contract under ss 4 and 5 of the Insurance Law Reform Act 1977, the New Zealand legislature has stated, in s 6 of that Act, that:

> ". . . a statement is material only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms."

Similarly in *Avon House Ltd v Cornhill Insurance Co Ltd* High Court, Christchurch, 11 December 1980, A 248/71, where an insured had failed to disclose a fire during the currency of an earlier insurance, Somers J stated (at p 3) that:

> ". . . a particular is material when it would affect the mind of a prudent insurer either in deciding whether to take the risk on the terms of the policy or in fixing the premium."

(See also the Marine Insurance Act 1908, s 18(2); *Willcocks v NZ Insurance Co Ltd* [1926] NZLR 805, 813; *Wimbush v Rothwell & Tinker* [1933] NZLR 1167; *Mutual Life Insurance Co of New York v Ontario Metal Products Co Ltd* [1925] AC 344 PC). The term "prudent insurer" is not defined in either the

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Insurance Law Reform Act 1977 or in the Marine Insurance Act 1908, but was considered in *Associated Oil Carriers Ltd v Union Insurance Society of Canton Ltd* [1917] 2 KB 184. The insurer argued that it was material on July 31 1914 for charterers of a vessel to disclose that they were of German nationality. Atkin LJ pointed out that this fact had been held material in *British and Foreign Marine Insurance Co Ltd v Samuel Sanday & Co* [1916] 1 AC 650, but rejected the insurer's contention that a prudent insurer must be taken to know the law as it was subsequently laid down in *Sanday's* case. He stated at p 192):

> "I think that this standard of prudence indicates an insurer much too bright and good for human nature's daily food. There seems no reason to impute to the insurer a higher degree of knowledge and foresight than that reasonably possessed by the more experienced and intelligent insurers carrying on business in that market at that time."

Thus the "prudent insurer" corresponds closely to the "reasonable insurer" and the terms may well be interchangeable (see Ivamy *General Principles of Insurance Law* (3rd ed 1975) 112; *Mutual Life Insurance Co New York v Ontario Metal Products Co Ltd* op cit).

This test of materiality imposes a heavy, and often unjustifiable, burden upon the proponent or insured, who must often possess clairvoyant powers to discover what a reasonable or prudent insurer would regard as material. For example, in *Horne v Poland* [1922] 2 KB 364 the failure of a proponent seeking burglary insurance to disclose that he was a Rumanian national was held to be material, notwithstanding the fact that he had been living in Britain for 22 years since he was 12 years old. Similarly in *Woolcott v Sun Alliance and London Insurance Ltd* [1978] 1 All ER 1253 failure by an insured to disclose a robbery conviction entitled the insurer to repudiate a fire insurance policy effected in respect of the insured's house. Other illustrations abound (see for example *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485; *Schoolman v Hall* [1951] 1 Lloyd's Rep 139; *Locker and Woolf v Western Australian Insurance* [1936] 1 KB 408).

Furthermore the proponent is not safe if he discloses all the information required of him by the proposal form, since the duty of disclosure is not confined to answering questions outlined in the proposal form. While there is a presumption that matters dealt with in the proposal form are material, there is no corresponding presumption that matters not listed there are *not* material. (*Schoolman v Hall* op cit; *Joel v Law Union and Crown Insurance Co* op cit; *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] VR 297, 313; *Lee v British Law Insurance Co Ltd* (1972) 2 Lloyd's Rep 49). For example, in *Schoolman's* case, the insured suffered a burglary loss which the insurer admitted was genuine, but the insured had failed to disclose a criminal record. One argument raised by the insured was that since he had been asked fifteen questions and had been required to guarantee the truth and accuracy of his responses, the information given in answer to the enquiries represented all the information that the insurance company wished to have; that is, the insurance company must be taken to have waived all other information. This argument was rejected by the Court of Appeal who affirmed the generality of the duty of disclosure even where a proposal form is employed. However, the Courts occasionally have come to the assistance of the insured in this type of situation by holding that questions in the proposal form restrict the ambit of the duty of disclosure. Thus, where a question in a proposal form for motor vehicle insurance asks whether the insured has had his licence cancelled or suspended within the last 3 years, the inference may be that the insurer regards any cancellation or suspension outside this period as immaterial (see, for example *Jester-Barnes v Licenses & General Insurance Co ltd* (1934) 49 Lloyd's List Rep 231 237; *Schoolman v Hall* op cit at 143).

The adoption of the prudent insurer test as to materiality means that neither the opinion of the particular insured nor the opinion of the particular insurer is relevant in deciding the issue of materiality. Therefore, even if a particular insurer does not regard the fact undisclosed as material (in the sense that it would not have influenced him in fixing the premium or deciding whether to take the risk), if a prudent insurer would have regarded it as material, that particular insurer is not precluded from avoiding the contract for non-disclosure.

In *Avon House Ltd v Cornhill Insurance Co Ltd* (op cit) Somers J disagreed with the test of materiality enunciated by Kerr J in *Berger and Light Diffusers Pty Ltd v Pollock* (1973) 2 Lloyd's Rep 442, 463, who had introduced an element of subjectivity into the test in the following terms:

> "It seems to me, as a matter of principle, that the Court's task in deciding whether or not the defendant insurer can avoid the policy for non-disclosure must be to determine as a question of fact whether, by applying the standard of the

> judgment of a prudent insurer, the insurer in question would have been influenced in fixing the premium or determining whether to take the risk if he had been informed of the undisclosed circumstances before entering into the contract."

Kerr J was endeavouring to curtail the possibility of a particular insurer avoiding a contract for non-disclosure even though he would not himself have been influenced had he been aware of the fact concealed.

Somers J (at p 4) considered this importation of subjectivity to be contrary to long established authority, and also to involve a difficult ex post facto judgment as to the attitude of the particular insurer. In any event, the Insurance Law Reform Act 1977 (not applicable to the policy in question in the *Avon House* case which had been entered into prior to its commencement) adopts a purely objective test as to materiality. While the law remains committed to the present test of materiality a negligent insurer may call evidence to show that a prudent insurer would have been influenced by the non-disclosure, and thus avoid the contract on the basis of a non-disclosure he himself did not consider material (see *Ionides v Pender* (1874) LR 9 QB 531; *Tate v Hyslop* (1885) 15 QBD 368; *Rivaz v Gerussi* (1880) 6 QBD 222).

The decision as to whether the given fact is material depends upon the judge's own appraisal of its relevance to the subject-matter of the insurance; it is not something which is settled automatically by reference to the current practice of insurers. As Somers J stated in the *Avon House* case (op cit, at 5):

> "Whether a fact is capable of being material is a matter of law; whether it is indeed material is a matter of fact".

Thus materiality is a question of fact to be determined by reference to the date at which the circumstance should, if at all, have been communicated to the insurer (see Ivamy, op cit, 116; Sutton, *Insurance Law in Australia and New Zealand* (1980), 110).

The ambit of the duty of disclosure

It is frequently stated that the insured is under a duty to disclose all material facts which he in fact knows. This view was put most forcibly by Fletcher Moulton LJ in the leading case of *Joel v Law & Crown Insurance Co* (op cit, at 885):

> "The disclosure must be of all you ought to have realised to be material, not of that only which you did in fact realise to be so. But in my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess . . . [The] question always is, was the knowledge you possessed such that you ought to have disclosed?"

(See also *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72; *Colonial Industries Ltd v Provincial Insurance Co Ltd* [1922] AD 33).

Nevertheless it would seem to be settled law that the insured is also under a duty to disclose material facts which he *ought* to know. This is clearly the case where, although the fact in question was never within his actual knowledge, his ignorance was due to his intentional failure to make such inquiries as he might reasonably have been expected to make in the circumstances (*Blackburn, Low & Co v Vigors* op cit). Similarly where the insured's failure to make inquiries is unintentional the policy is equally to be avoided where the insured should have made the inquiries in the ordinary course of business (see *London General Insurance Co v General Marine Underwriters' Association* [1921] 1 KB 104; *Australia and New Zealand Bank Ltd v Colonial and Eagle Wharves Ltd (Boag, Third Party)* [1960] 2 Lloyd's Rep 241; *Avon House Ltd v Cornhill Insurance Co Ltd* op cit).

Therefore the duty to disclose extends to all facts actually known and to all facts which the insured ought in the ordinary course of business to have known and which a reasonable man would have thought material.

As stated above, the question of materiality is a question of fact to be decided in each individual case, but certain broad categories of material circumstance are generally accepted. First, all facts that suggest that the subject matter of the insurance is exposed to more than ordinary danger from the perils insured against, that is, facts affecting the physical hazard (see, for example, *Dawsons Ltd v Bonnin* [1922] 2 AC 413). Second, those factors referable to the integrity of the insured such as character, qualities and reputation, that is, facts affecting the moral hazard. Under this head an insured is under an obligation to disclose, inter alia, previous convictions (*Lambert v Co-operative Insurance* [1975] 2 Lloyd's Rep 485); previous losses and claims (*Rozanes v Bowen* [1928] 32 Lloyd's List Rep 98); and whether insurance has ever before been declined or cancelled (*Willcocks v New Zealand In-*

surance Co Ltd op cit). Third, the insured must disclose all facts which to the knowledge of the insured are regarded by the insurers as material, such as, over-insurance (*Ionides v Pender*, supra), and any fact affecting subrogation rights (*Tate v Hyslop* (1885) 15 QBD 368). Conversely, the insured need not disclose facts which diminish the risk (Marine Insurance Act 1908, s 18(3)(a); *Carter v Boehm* (1766) 3 Burr 1905, 1910); nor facts within the knowlege of the insurers (Marine Insurance Act 1908, s 18(3)(b); *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 10 Com Cas 1); nor facts which it is superfluous to disclose by reason of any express or implied warranty (Marine Insurance Act 1908, s 18(3)(d); *de Maurier v Bastion Insurance* [1967] 2 Lloyd's Rep 550); nor facts as to which they waive information (Marine Insurance Act, s 18(3)(c) *Becker v Marshall* (1922) 12 WLR 413, 414).

The duty of disclosure exists up to the date of the conclusion of the agreement, and whether the duty is broken or not depends on the circumstances existing at the time the contract is made. With most types of insurance there is a new policy each year, as opposed to a continuing one (as with life insurance) and this reimposes a duty to disclose. The insured must with each renewal correct earlier representations that have become incorrect and disclose fresh material facts (see *Dalgety & Co Ltd v AMP Society* [1908] VLR 481, 506; *Re Wilson and Scottish Insurance Corpn* [1920] 2 Ch 28).

The onus of establishing that there has been a breach of the duty of disclosure rests upon the insurer. The insurer must prove, on a balance of probabilities, that the insured knew, or ought reasonably in the ordinary course of business to have known, of the fact in question; that he failed to disclose it; and that it would have been material to a prudent insurer if disclosed (*London Assurance v Mansel* op cit; *Babatsikos v Car Owners Mutual Insurance Co Ltd* op cit). Expert evidence of persons engaged in the insurance business may be led but such evidence must be directed to the general practice of insurers as a class (*Horne v Poland*, op cit; *Babatsikos'* case op cit). Frequently, however, the materiality of an uncommunicated fact may be so obvious that it is unnecessary to call any expert evidence to establish this point (*Glicksman v Lancashire and General Assurance Co* [1925] 2 KB 593, 609).

Proposals for reform

The prudent insurer test of materiality imposes a heavy and often unjustifiable burden on the insured or proponent. As the English Law Reform Committee in their Fifth Report, *Conditions and Exceptions in Insurance Policies* (1957) Cmnd (2) observed, many facts which are material to insurers would not appear to even an honest and careful proponent to be facts which he ought to disclose. The Committee therefore recommended "that for the purpose of any contract of insurance no fact should be deemed material unless it would be considered material by a reasonable insured" (para 14). Unfortunately this recommendation has not yet been implemented in the United Kingdom. For example in *Lambert v Co-operative Insurance Society Ltd* (op cit) the insurer refused to indemnify Mrs Lambert who had insured her husband's and her own jewellery against all risks, on the ground that she had not disclosed: (i) that some years before entering into the policy her husband was convicted and fined for stealing cigarettes, and (ii) that eight years after entering into the policy her husband was imprisoned for further offences involving dishonesty — a fact which Mrs Lambert did not disclose when renewing the policy. Although it was found that Mrs Lambert had acted in good faith throughout, the Court of Appeal unanimously gave judgment for the insurers, holding that both convictions would be considered material by prudent insurers. Mackenna J in delivering the leading judgment said (at 491):

> "I would only add to this long judgment the expression of my personal regret that the committee's recommendation has not been implemented. The present case shows the unsatisfactory state of the law."

Illustrations abound of the unfortuante conjoint effect of the doctrine of disclosure with the "prudent insurer" test of materiality (see above). Therefore an insured or proponent may exercise both care and complete good faith in entering into a contract of insurance, believing that security has been effected, and yet much later find that this protection is in fact worthless because he failed to mention a fact which a prudent insurer might consider material to the risk. It is suggested that the doctrine of disclosure as it presently exists goes beyond the scope of the principle of *uberrima fides* on which it is supposed to depend.

The adoption of a "reasonable insured" or "reasonable proponent" test of materiality in relation to the duty of disclosure would largely redress the imbalance that currently exists. Sutton (op cit, 104) argues that the test of the reasonable insured might be difficult to apply in practice because it "could be an extremely nebulous one". The short

answer to this is that this test is no more nebulous than the test of materiality currently applied. While it may be argued that under the present test the Court has ready reference to the yardstick of the prudent insurer, the identification of this person is not an easy task. Is he, for example, Mr Archer, an expert witness for Lloyds underwriters, who gave evidence to the effect that a man who has stolen apples when he was seventeen, after which time he had lived a blameless life for 50 years, was too big a risk to insure against the risk of loss of valuables (see *Roselodge Ltd v Castle* [1966] 2 Lloyd's Rep 112, 132)? Therefore a danger with the "prudent insurer" test, aside from the heavy obligation as to disclosure on the insured or proponent, is that idiosyncrasies of individual insurers may replace the objective standard of the reasonable insurer.

While it is recognised that the acceptance of a reasonable insured test may lead to similar problems in relation to the identification of the reasonable insured, the Courts are well acquainted with the notion of a "reasonable man" test. This test has already been applied in a number of (insurance) cases. In *Joel v Law Union and Crown Insurance Co* (op cit, 864) Fletcher Moulton LJ expressed the test in the following terms

> "If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so."

And in *Horne v Poland* [1922] 2 KB 364, 367 Lush J said:

> "If a reasonable person would know that underwriters would naturally be influenced in deciding whether to accept the risk and what premiums to charge, [by] the circumstances [if disclosed] the fact that they were kept in ignorance of them and indeed were misled, is fatal to the plaintiff's claim. The plaintiff was making a contract of insurance, and if he failed to disclose what a reasonable man would disclose, he must suffer the same consequences as any other person who makes a similar contract."

(See also *Roselodge Ltd v Castle* op cit; *Anglo African Merchants v Bayley* [1970] 1 QB 311; *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Assn Ltd* op cit; *Roome NO v Southern Life Association of Africa* (1959) 3 SA 638.)

A second area of the law relating to disclosure that merits some attention is the right of insurance companies to require the disclosure of the insured's past (especially where the insured is apparently rehabilitated from a minor offence), and the right of insurance companies to avoid the contract for non-disclosure of such facts, even where the non-disclosure is totally unrelated to the claim in question (see Regina Fur Co v Bossom (1951) 2 Lloyd's Rep 466; Schoolman v Hall op cit; Roselodge v Castle op cit). The strict requirement that previous convictions must be disclosed has been relaxed in the United Kingdom by the Rehabilitation of Offenders Act 1974 which provides, in ss 4 and 5, that anyone convicted of a criminal offence and receiving a sentence of less than $2^1/_2$ years imprisonment may "lose" the conviction after a specified period. Therefore, provided the required period has elapsed, the insured will not have to disclose the original convictions to the insurer. Similar provision could well be made by the New Zealand legislature. Non-disclosure of nationality and racial origin (Horne v Poland op cit 367, Becker v Marshall (1922) 22 Lloyd's Rep 114) no longer entitles an insurer to avoid an insurance contract (Race Relations Act 1971, s 4). The New Zealand legislature has already provided in s 11 of the Insurance Law Reform Act 1977 that if the terms of an insurance contract limit or exclude the liability of the insurer in certain circumstances, and in the view of the Court or arbitrator determining the claim such limitation or exclusion was inserted because the existence of the circumstances was in the view of the insurer likely to increase the risk of the loss, the terms of the contract will not prevent the insured from being indemnified if he proves on a balance of probability that the loss was not caused or contributed to by the circumstances. The underlying rationale for this provision is to be found in the Report of the Contracts and Commercial Law Reform Committee, Aspects of Insurance Law (1975) where it is stated (at para 29) that:

> ". . . it is unreasonable for insurers to avoid liability on the grounds that the risk is increased where the loss results from some cause other than the circumstances relied on as increasing the risk."

Thus if the insured proves that the breach of the exclusionary clause was not causative of the loss, indemnity shall not be denied (see *Sampson v Gold Star Insurance Co Ltd* [High Court Auckland, 6 March 1980, M 1332/79] for a discussion of the Insurance Law Reform Act, s 11).

However, where an insurer is seeking to bar recovery because of non-disclosure of a material fact, the actual cause of the loss is not relevant in deciding whether the uncommunicated fact is

material. It is submitted that this is totally inequitable, and illogical given the approach adopted with exclusionary clauses. If the insured can prove on a balance of probabilities that the uncommunicated fact has no bearing on the loss sustained, then nondisclosure of that fact should not preclude recovery. To adapt an illustration given by Borrie and Diamond, *The Consumer, Society and the Law* (3rd ed 1974), at 244, if a house is insured against fire and flood, the fact that it is situated on low-lying land by the bank of a river and has often been flooded is clearly material. If, however, the house is destroyed by fire and a claim is lodged, it is submitted that the insurer should not escape liability because the insured failed to disclose its low-lying position and flooding danger.

Third, where a proposal form is used the insurer should not be allowed to claim later that a fact outside the scope of the proposal form is material, and to avoid the policy because of nondisclosure of that fact. Failure to ask a question on a particular matter in the proposal should be conclusive in deciding that the insurer regarded the matter as immaterial and should absolve the proponent from the duty of full disclosure. Alternatively, if the duty of disclosure is not confined to answering questions set out in the proposal form it is suggested that the proposal form should contain a clear notice to the proponent to this effect.

Finally, it is submitted that the insured should receive notification that the duty of disclosure is reimposed each time a policy is renewed. It is at least arguable that it is unreasonable for the duty of disclosure to extend to periodic renewals *in the absence of notice*, as it appears questionable whether a reasonable insured would realise that the duty of disclosure arose on each renewal.

LAND

THE LAND TRANSFER ACT 1952

By E K PHILLIPS

In this article the author, a former Registrar-General of Land, takes a general and critical look at the current proposals for amending the Land Transfer legislation, and puts forward some positive alternative suggestions.

1. The present review

When the Government undertook its consolidation of the statutes in 1952 the Land Transfer Act 1915 naturally came within the ambit of this work. The 1915 Act had efficiently served the needs of recording dealings with land for almost half a century. The sole major development in this period was the Land Transfer (Compulsory Registraton of Titles) Act 1924, by which the Land and Deeds Department undertook the conversion of land held under the Deeds system to the Land Transfer system. The 1952 consolidation was prepared under the guidance and authority of that outstanding property lawyer Mr E C Adams. Other than incorporating the 1924 Compulsory Act in the main Act as Part XII little change was made to the Act. There was little appreciation at this time of the inevitable changes which were to occur in the form of the Registers and the methods of processing dealings with land.

The Justice Department has recently used the availability of one of its former District Land Registrars to draft major amendments to the Land Transfer Act 1952 with a view to introducing a new Act. The considerable volume of work produced by the Department has been made available to the New Zealand Law Society for consideration and consultation. The Society has divided the proposed amendments amongst its District Societies with a view to studying the new provisions and reporting on them.

The writer has considerable reservations about such wholesale and major amendments to an Act which in the final analysis operates so successfully. I understand now, however, that the newly-appointed Registrar-General of Land was given the task this year of carrying out a further review of the Land Transfer Act. It may well be that he will adopt a fresh approach to the problem, and it is the writer's hope that the views put forward in this article will be given some weight by the new Registrar-General.

The work which has been done may be laudable legal research, but in my opinion it represents an incorrect approach to the task of setting up the conveyancing procedures which will be adequate to enter the new century with. What is the objective for which the changes are being sought? There are principles of real property law dealt with in the Act but its predominant purpose is to establish a satisfactory and efficient system of recording dealings with the ownership of land.

What has been done to date is indeed to put the cart before the horse. To go through the Act section by section tinkering with the wording, making minor alterations here and deletions there, is in my opinion an exercise in frustration. The two most important decisions to be taken are, first, what form the registers should assume in the future and, secondly, how the system of registration shall operate. Once these decisions have been taken the Land Transfer Act and its Regulations can be amended and redrawn in a form to implement those decisions.

2. The form of the register

To take the form of the Register first, it is very evident that a decision will soon have to be taken whether it should be computerised or not. It seems scarcely possible to ignore such a development at this time. Dare I suggest that along with such a development there would be the possibility of reducing the number of Registry Offices at present operating in New Zealand to, say, two in the North Island and one in the South? There seems no reason why terminals could not be operated in the present Registry towns, and indeed in others such as Palmerston North and Whangarei which have to rely on agency facilities at present and have been disadvantaged by the heavy administrative task of transferring records under the existing system. One of the administrative problems the New Zealand Lands and Deeds Division has to grapple with is, under the decentralised system, the vast differences in the sizes of office,

from the major intake in Auckland of up to 1,000 documents a day to the very minor intakes of such small offices as Blenheim and Hokitika with a 10, 20 or 30 daily intake. Systems which are viable in the larger offices are an embarrassment to the smaller establishments.

Alternatively, once the register is computerised there would be no great difficulty in regionalising Land Transfer offices so that Christchurch controlled the South Island and Wellington and Auckland controlled the southern and northern halves of the North Island respectively. The present difficulty of establishing records in a new office no longer appears the bogey it once did.

The Department has for some years operated with a system of District Land Registrars controlling a number of offices. Regionalising the offices and reducing the smaller offices to terminal points would not present any great difficulty.

New South Wales has taken the lead in Australia for computer conversion, and after conducting a pilot operation for some years within its existing organisation is preparing to convert its whole operation to the computer. This does not by any means represent the push-button conveyancing of popular fancy. While the information is fed into the computer in traditional fashion the use of the outstanding copy of the title, indispensable to conveyancing as we know it, is preserved. The only difference is that instead of the use of the one outstanding copy of the title over a long period until it becomes subdivided or full of entries, a new outstanding copy is issued automatically by the computer each time title information is fed into it. This is done immediately the information is fed into the computer. The outstanding copy shows not only the encumbrances which are recorded against the register but also those which are in the office in the course of being processed.

3. Registration procedures

The second issue is that of the procedures for registration. Good as the current New Zealand system is there is still a hiatus between the time of settlement lodgement, and registration. Since this article was written the report of the Property Law and Equity Reform Committee, summarised elsewhere in this issue, has been published dealing with this problem. The English Land Registration Act 1925 provides a system of priority through official searching and subsequent lodgement which overcomes this hiatus. Tasmania has by the 1973 amendment to s 157 of its Real Property Act 1862 attempted to deal with this problem. The New South Wales office considers that its computer-operated system does away with the necessity of establishing a system of priority. Surely these are further factors for serious consideration before launching on amendments to our Act?

Section 43 of the Land Transfer Act 1952 was amended by s 5 of the 1966 Amendment to allow for the present system of lodgement, including what has grown out of it, the system of universal rejection rather than a qualified requisition, rejection procedure. The latter system envisages that the requisition procedure should be available for a limited period, say a month, and then the rejection process follows. Such a system has worked well in Tasmania for some years. It is submitted with due respect that this system would be a material improvement to the extent of saving reams of expensive abstract paper and repetitive typing in legal and land transfer offices. Coupled with this situation is the unacceptably high rejection rate in many large registry offices of more than 25 percent of documents lodged. Much of this rejection is for "trivia" which in no way affect the legality of the contract. There are ways and means available, some of them already operating in Australia, by which this needless exercise can be eliminiated.

In the early years of the operation of Torrens Systems in Australia and New Zealand we held a tremendous advantage through the fact that we had excellent indexes, Survey, Parish, District and Deposit Plan, in all our offices. The lack of these in Australian offices caused many of their problems. New South Wales computerised all their plan records and are now in a stronger position than we are with regard to availability of information. South Australia have what is know as the Lots Index. It does appear that we could move with advantage from our present reliance on Deposit Plan and other Indexes to index-based Certificate of Title references. Computer processes allow such systems to be introduced.

There is obviously much room in New Zealand for an improvement in the "Approval of Forms" system. This has now been allowed to fall behind the development of the system and could be substantially amended. The Australian system, which allows for specimen forms to be lodged with basic clauses for various types of instruments, again seems to have considerable advantages.

There is a good case for a rearrangement of the sections of the existing Act. Now that for all practical purposes all the land in New Zealand is held under Land Transfer title many of the early sections are of much less importance than formerly. A good

example of what can be done in this direction is the rearrangement which occurred in the Victorian legislation.

Their example could also be followed in the updating of the Indefeasability provisions and the State Guarantee. There is an evident need for a positive definition of rights under Part XI of the Land Transfer Act so that the situations which give rise to cases such as *Fraser v Walker* [1966] NZLR 331 can be dealt with administratively.

4. Conclusions

I accept that legislative changes could be introduced to improve the statement of the legal principles contained in the Act. However, I am convinced that such a project is unimportant compared with the necessity to re-examine the administrative procedures for the future. For example, the Land Transfer Regulations 1966, are quite inadequate for the purposes for which they are intended. Unfortunately they were drawn up before the measures of reform swept the Land and Deeds offices in the 1960s. No attempt has been made to write the new systems into the Regulations and in my opinion they lack the sophistication required to operate a modern system of registration and recording. The regulations which were produced for the New South Wales office on the occasion of their major reorganisation are an object lesson in what can be done in this direction.

If I might be permitted to make another suggestion, the best step which could be taken at this juncture would be to send the new Registrar-General of Land and the District Land Registrar, Auckland, to Sydney for a fortnight to make an exhaustive appraisal of the systems at present operating there. I have visited the Sydney Registry office on a number of occasions and can testify to the goodwill and co-operation there. The District Land Registrar, Auckland, has the necessary experience from his own office to appraise the mass productions methods used in Sydney and would be of great assistance to the new Registrar-General in this field.

The two great issues which must be dealt with first however are the form of the Register and the system of registration. The writer would like to make the most earnest plea that the Registrar-General of Land and the Law Society come together and debate these issues exhaustively before we allow ourselves to be sidetracked into unnecessary amendment of the legal principles of the Act.

INFANTS AND CHILDREN

COMPLAINT PROCEEDINGS — BEYOND WHOSE CONTROL?

By IAIN D JOHNSTON

PART II

This is the concluding part of the article of which Part I appeared in the last issue.

CONTENTS

6. The role of counsel for the parents

(a) General attitude

The next issue is the role of counsel for the parents in complaint proceedings. It has already been pointed out that the Act to some extent preserves an adversary procedure. Given that fact the primary task of counsel for the parents must be to represent their wishes, subject of course to the ordinary limitations stemming from his dual role as an officer of the Court ie, not actively to mislead the Court etc. At the adjudicative stage, if the parents are denying the complaint, the adversary function will entail no unusual demands on counsel, except perhaps that of persuading the Court not to attach any weight to conjecture and hearsay. At the dispositional stage it will require challenging any recommendations put to the Court which are contrary to the parents' wishes, thoroughly probing the assumptions and theories on which they are based, and possibly arranging for the production of alternative specialist reports or views.

Practical limitations on counsel's ability to perform these functions effectively will be considered under subsequent headings. A modification of tone may be appropriate eg, refraining from an aggressive manner that might needlessly antagonise social workers, who, it should be remembered, might have a continuing relationship with his clients after the hearing.

More difficult is the question whether the Court's ultimate welfare function and the statutory paramountcy of the child's interests require a more substantial modification of counsel's approach, a greater emphasis on his officer-of-the-Court role at the expense of his advocate-for-the-parents role. Suppose for example that counsel for the parents himself has serious reservations about their fitness to look after their child. What is his duty? It is submitted that while he may warn them of the strength of the case against them and indicate the possible wisdom of admitting the complaint and welcoming help or of offering to enter a s 11 agreement with the Director-General, he may not impose his views on them: he remains their adviser and advocate, not their judge, and the child is not his client. It is the Court that has the responsibility of protecting the child's interests, not counsel for the parents.

(b) Should the parents' counsel recommend separate representation for the child?

This highlights the importance of the child having separate representation, especially in abuse/neglect cases where a conflict of interest between parents and child must be expected. A strict view of counsel's duty in the situation described above would even deny the propriety of his suggesting to the Court that counsel for the child be appointed since he should only do that if he believes it

will help his clients' case. This is perhaps an unduly narrow approach. The Courts have undoubtedly treated such a suggestion by counsel for the parents as proper in any event. Realistically speaking the object of the Act must be taken to have affected counsel's duty to that extent. It is submitted though that in the absence of specific guidance in the Act counsel for the parents must otherwise adhere to an adversary role. Glib generalisations to the effect that adversary procedure undermines the protective function of this kind of legislation are unhelpful unless a workable alternative is produced which recognises not just the interests of children as defined by adults but also their rights and freedoms and the rights and freedoms of their parents:

> "Room for modification by simplification of form may well exist, but the belief that applications judicially to apply supervision of a child in his home, to remove a child from his home, or permanently to terminate parental association with a child can be resolved in amicable consensus, or that a benign inquisitor can speedily determine truth and apply wisdom that contending interests will acclaim, is itself unrealistic. Indeed, the Canadian Law Reform Commission pointed directly to the problem at issue when commenting on the experience of recently established informal family Courts; it found that, 'While there is a desirable de-emphasis on adversarial procedures, there is also a failure to provide adequate protection of the right of individuals, particularly children'.
>
> "A trial at law that fails to protect individual rights is a paradox, if not an outrage. Procedural thinking on child protection is in conflict with itself in favouring both informality and rejection of strict legal forms, in order to loosen adversarial rigidity, while at the same time favouring better protection and representation of the interests of both parents and children that the adversarial system can offer."[78]

(c) Explaining the Act to the parents

An important and separate aspect of counsel's role which has not yet been mentioned is to explain the Court and the proceedings to his clients. Parents are typically and understandably bewildered or offended by complaints which in effect label them abusive, neglectful or incompetent and appear punitive in their object, especially when the parents are sincere in their beliefs about child-rearing or have simply been doing their best in adverse circumstances. They may also be upset, again understandably, by the transformation of the social worker who has been helping them, and in whom they have confided, into a "prosecutor". Unfortunately the multiple roles of the Department — as welfare agency, complainant, and reporting agency — are inescapable in view of the limited resources at present available and could in any case never be avoided entirely without frustrating the protective function:

> "The solution to the dilemma may lie in training of agency workers, so that they can explain their obligatory function in the Court while keeping open their access to the home."[79]

7. The Department of Social Welfare's influence

As Judges in the Children and Young Persons Court generally lack relevant non-legal expertise (other than that gained through experience in sitting on the Bench) and as the Court does not have its own specialist staff, it is largely dependent on others to identify the interests of the child in each case. In practice this guidance comes almost entirely through the Department of Social Welfare principally in the form of reports prepared either by its own officers (social workers, psychiatrists, counsellors, Boys Home/Girls Home principals etc) or by outside bodies or individuals at the Department's request (eg, schools, the Education Department Psychological Service, doctors, pediatricians, psychiatrists). Social Workers' recommendations to the Court both as to custody pending the hearing or pending final disposition and as to the final order itself are almost invariably followed.[80]

The two matters of custody and final disposition will be commented on separately.

[78] Dickens, supra n9 at p 30. For the view that the statutory paramountcy of the child's interests in the custody context does substantially affect the duties of counsel for the parties see *Clarkson v Clarkson* (1972) 19 FLR 112 per Selby J at p 114.

[79] Ibid, p 36.

[80] In the Christchurch survey only three cases were discovered where the recommendation as to final disposition appeared not to have been followed. There were three further cases where the recommendation was apparently only followed in part. Recommendations regarding custody were likewise extremely influential. Strictly speaking a direction as to custody before the complaint itself is determined is made under s 43(1)

(a) Custody on adjournment

Social Welfare custody of a child is very commonly sought and granted. In the Christchurch survey over 80 percent of the cases involved Social Welfare custody of the child for at least part of the period up to the final order. These included some cases where the complaint was denied and many where the final order made turned out not to involve removal of the child from his home. A similar situation in the availability of bail for adults facing criminal charges would be regarded as outrageous. The parallel is not a perfect one given the greater welfare orientation of legislation dealing with children[81] but even allowing for this the figures seem very high. In some cases the child is alleged to be at serious immediate risk in his own home so that interim removal is justified for his protection but these constitute a very small minority.[82] In others, especially those involving uncontrollable adolescents, family relations are already very disrupted and both parents and child welcome the relief offered by temporary separation. But there remain many cases where custody is sought simply for the purpose of "observation and assessment" prior to preparation of the appropriate reports. The recommendation seldom indicates to the Court just what this observation and assessment is to consist of and why it cannot be carried out with the child in his parents' custody. Interviews with social workers and psychiatrists should not normally require taking the child away from his home other than perhaps for the interviews themselves. The additional opportunities offered by placing the child in a strange and artificial environment for a continuous period of several weeks are of dubious value:

> "This whole procedure is contrary to modern understanding of how children develop and behave. The child is removed to an environment which not only differs from that in which her 'problems' occurred and from any in which she will subsequently be placed, but which is also an environment where uncertainty over present roles and future actions is a prime fact of life. Such a removal can only be justified if it is believed that 'delinquency', 'truancy', 'absconding', 'behaviour' . . . are 'things' that the child has indelibly stamped upon her and which can therefore be 'observed' and 'assessed' wherever she may be. They cannot be, and therefore any interpretations or explanations as to the child's past or recommendations as to her future must look elsewhere than to science for their justification."[83]

One is left with the unfortunate suspicion that Social Welfare custody of a child when a case is adjourned or when a postponement order is made under s 31(3) is sometimes sought and granted for the convenience of the Department in making its assessments. This is not one of the grounds for removal from parental custody laid down in s 43(1). The grounds are:

> "(a) The child or young person is likely to abscond; or
>
> "(b) The child or young person is in need of care and control for the period of custody; or
>
> "(c) It is desirable in the interests of the child or young person that he be held in custody."

While the third ground is extremely broad it is still concerned with the interests of the child not those of the Department. Nor is Departmental convenience a proper criterion when the question of custody arises on the making of a postponement order under s 31(3). In that context s 4 governs ie, the paramountcy of the child's interests.

(b) Final disposition

In practice the social worker's final recommendation to the Court will usually be either for a supervision order or for a guardianship order.[84] In carrying out the Christchurch survey the writer gained the definite impression that most social

whereas a similar direction given *after* a complaint has been upheld (or, as is usual in practice, admitted) is authorised only under s 31(3) which deals with the Court's power to postpone final consideration of the matter. The Courts, in Christchurch at least, have not been clear on this but have tended to speak generally of "remands" in Social Welfare custody. The Department of Social Welfare is endeavouring to change this practice.

[81] See Gamble "Decision-Making in the Children's Courts of Sydney" 9 Australia & New Zealand Jo of Criminology 197 (1976).

[82] In the Christchurch survey serious physical abuse or neglect would have accounted for less than 20 percent of the cases and in some of these the risk could have been reduced to a tolerable level other than by removing the child.

[83] Sutton "Reports to the Juvenile Court — Rituals or Revelations?" *Legal Action Group Bulletin* July 1978, pp 155, 156.

workers regard the guardianship order as a drastic step which should not be recommended lightly. In most cases where it is recommended supervision, whether on a voluntary or formal basis, will already have been attempted. This does not mean, unfortunately, that all is well in the use of guardianship orders. The effectiveness of supervision may itself be amenable to improvement. This is primarily a question of resources. If the Act's object of saving families rather than allowing them to be broken up is to be achieved more public money will have to be spent on the provision of social work services:

> "Servicing a home supervision order may be very demanding, . . . upon scarce agency funds and personnel, and an agency may find it more economic of resources to have the child removed from the home and placed in care of the agency, in its own residential facility or with trusted foster parents. This may not necessarily serve the child's interests, however, since a child needs some continuity and intimacy in adult relationships. The effects of maternal deprivation and under-stimulation in institutionalised children have been long observed, for instance, and while institutions plan to counteract these effects in designing their programmes, they may not necessarily present to a Court considering disposition of a child the record of their success."[85]

Where a recommendation for guardianship is made it is in practice not adequately scrutinised by the Court. Although Judges generally acknowledge that it is a drastic step there is no legislated principle of minimal intervention and there is a natural tendency to *assume*, once the parents have been shown by proof of the complaint not to be providing adequate care, protection, or control, that the Department must be able to offer something better. This tendency stems from the misleading "best interests" concept. Remaining in his parents' custody will not be in the child's best interests but being put in the care of the Director-General will in other ways be contrary to his best interests also. Realistically speaking the scale on which the Court is operating in these cases is not "good-better-best" but "bad-worse-worst".

At the dispositional stage the Court's task is therefore like its task in a custody dispute viz, selecting the "least detrimental alternative". To perform its function effectively it must have a clear picture of the alternatives available. In practice it seldom has this because by the time of disposition the Department has often not worked out a detailed plan for the child in the event of the recommendation for guardianship being adopted. Where a foster placement has been arranged or a particular institutional placement decided upon this will be indicated in the report to the Court, which can then attempt to compare the Department's proposal with, say, continued parental custody under supervision. This task will still be impeded by the Court's lack of independent knowledge of the proposed placement — it will in practice have to take the Department's word for the merits of the foster parents or effectiveness of the institution in question. But when no indication is given of what a guardianship order will consist of for the child the Court cannot even begin to perform the balancing process: it is operating in the dark. If s 4 is to be taken seriously no opposed order for guardianship should be made until the Department has reported adequately to the Court. In the interim a postponement order under s 31(3) could be used:

> "When it is proposed that a child be removed from his home for relocation in a setting of superior care, a Court is entitled to an estimate of how much better that care is likely to prove in overall terms, bearing in mind the child's needs not only of the protection of a safe, abuse-free environment, but also of personally supportive, enriching and affectionate adult relationships. Stereotypes of abusive parents must be forsaken, since such parents do not necessarily fail to provide such relationships even when prone to occasional outbursts of intolerable violence; similarly, institutional homes do not invariably nurture each ward's individual personality, and not every child responds to, or can be lodged with, foster parents."[86]

A good illustration of the difficulties facing the Court in the sort of detailed balancing process necessary can be seen in the case of *Police v L.*[87] This

[84] The use of orders in the cases in the Christchurch survey was as follows: S 31(1)(a) Admonished — 1 case; (b) Discharged — 1 case; (a) & (b) Admonished and discharged — 5 cases; (c) Ordered to come before the Court, if called upon within two years — 1 case; (d) (i) Guardianship order — 52 cases; (d) (ii) Supervision order — 70 cases; (d) (ii) & (h) Supervision plus counselling — 2 cases; (e), (f) or (g) Compensation, restitution, forfeiture — 0 cases.

[85] Dickens, supra n9, at p 25.

[86] Idem.

case involved a 13-year-old girl of subnormal intelligence whose parents were themselves of limited ability and one of whom had a history of mental illness. Inter alia, the girl had enticed a man aged 52 to have sexual intercourse with her in return for money and had encountered schooling problems. The Department was seeking guardianship with a view to placing the girl in Salisbury residential school. Five separate opinions presented to the Court (including that of a consultant psychiatrist) all supported guardianship and the proposed placement. Counsel for the parents on the other hand argued for continued parental custody, pointing out that a recent change of school with an understanding teacher had produced a very positive response from the girl, and that the Catholic Women's League, the Maori Affairs Department and the Pentecostal Church had all recently become aware of the family's problems and were interested in providing assistance to it. Detailed proposals for back-up services from these quarters were apparently not before the Court (they had probably not yet been worked out). Nor, it should be pointed out, was a detailed account of the programme at and success record of Salisbury offered. So the Court was comparing two imprecise proposals. It made a guardianship order. No mention was made in the judgment of the price in terms of disruption of emotional relationships that would have to be paid for the benefits accruing from placement at Salisbury, an institution situated several hundred kilometres away from the parents. Yet there was an express finding by the Magistrate of a close emotional bond between the child and her parents:

> "I reach the very clear conclusion that both Mr and Mrs L are very fond of this child, and that S herself has a strong emotional contact with her parents . . .".[88]

When it is remembered how imperfect is our state of knowledge about the needs and psychology of children and how unprovable the theories and assumptions on which recommendations by social workers, psychiatrists etc are based, it is clear that the reports put before the Court are not infallible and can quite legitimately be questioned and challenged:

> "[T]here is a fundamental assumption on the part of the Courts and their social, psychological and psychiatric advisers — and also many lawyers — that all the problems of behaviour and growing up that bring children before the Courts can be understood by experts. Written Court reports are generally presented and accepted as containing scientific conclusions based on objectively found facts. But the social sciences are not, and cannot claim to be, exact and certain in the sense that the physical sciences, generally speaking, are exact. Social scientists may be conscious of this distinction but it is doubtful whether most Courts or lawyers have the same awareness. In reality, child-care work is rarely based on explicit formulated theory — but rather on implicit social assumptions of how and why children grow up to be who they are. It is heavily dependent on an unlikely mixture of sociological findings and psychoanalytic ideas, as well as, it must be conceded, considerable but unvalidated experience of dealing with children. . . . It is therefore of primary importance for lawyers and Courts as a matter of routine to examine and question the validity of reports presented to them."[89]

(c) Limitations of social workers' reports

Social workers' reports in particular should be scrutinised carefully. On the basis of a usually very limited amount of direct contact with the home on which they are reporting they present a number of "factual" observations about the family and its social background, commonly a certain amount of second-or third-hand information (eg, "alleged alcohol problems"), and also canvass future options for the family and possibilities of "treatment". Some of the observations are trivial.[90] Many are not shown to be relevant to the issues before the Court. Unless the matters observed are shown to explain the problems that have brought the family before the Court or to affect remedies that might be considered they are no more than smears and their accumulated effect can be quite prejudicial. The fact that the observations are included in the report carries the implication that they are relevant, yet the theories according to which they become relevant are seldom brought into the open:

[87] Children and Young Persons Court, Christchurch 36/78 and 64/78.

[88] This finding was accepted on appeal but the guardianship order affirmed: (Unreported, Supreme Court, Christchurch, 25 July 1978, M218/78).

[89] Sutton, supra n83, p 155.

[90] Comments about the "untidiness" of the home are so recurrent that one wonders if that is given in the Departmental manual as an example of something to say.

". . . information on whether the child comes from a 'broken home' or a one-parent family, or has had some particularly 'unusual' or even 'unsatisfactory' sets of relationships in her family, should only be accepted as scientifically valid if a direct relationship can be shown with what the report seeks to explain. Such a connection may be stated in terms of some theoretical system of what [are] claimed to be generally applicable rules about how earlier 'relationship problems' may lead to and explain later behaviour. If so, the writer of the report has introduced her own theoretical beliefs into the proceedings and they must be questioned to determine their validity."[91]

Reports by psychologists and psychiatrists might be harder to question because of the greater degree of expertise behind them but in principle they remain open to challenge as well.

Several practical problems face the lawyer who wishes to counter the influence of the Department of Social Welfare on the Courts. He will not have had access to the Social Welfare file on the family and he will only receive the report(s) to the Court at the hearing. This may leave him with inadequate opportunity to discuss the contents with the parents (so as to know what evidence, if any, to call to rebut misleading or unfair impressions conveyed), to prepare questions or submissions intended to counter theoretical assumptions underlying the recommendations, or even to decide whether alternative reports or expert opinions are worth seeking. Moreover, there may be pressures against seeking an adjournment for these purposes — from the Department of Social Welfare, from the Courts, or even from the family itself, which may feel it has suffered long enough from the uncertainty surrounding its future and wants the matter dealt with. A desire to obtain alternative specialist opinions may be frustrated by lack of finance, even if the client is legally aided. Finally the lawyer may be prevented by his own lack of non-legal training from presenting an effective challenge to Department of Social Welfare influence. This will be returned to under a subsequent heading.

8. The status of the child

(a) His lack of party status

Although the child is the subject of a complaint under s 27 and his interests are declared by s 4 to be "the first and paramount consideration" (subject to the qualifications set out in that section) he is not actually a party to the proceedings[92] and therefore has less control over them than he otherwise would. In particular:

(1) He cannot prevent his parents from admitting a complaint which he considers should be denied;
(2) He is effectively at the mercy of his parents and the Department if they collaborate in arriving at a disposition which he objects to (eg, supervision with community work; guardianship);
(3) He has no automatic right to legal representation but only such representation as the Court in its discretion grants him;
(4) His rights of appeal may be more limited than if he were a party.

Regarding the first point, although many of the grounds of complaint in s 27(2) focus on parental acts and omissions which can properly be admitted by parents, the grounds themselves call for some judgment as to the seriousness of the situation, and that should be a matter for the Court. Moreover, other grounds are concerned with behaviour by the child.[93] Yet these too can in practice be admitted by the parents without the child being effectively heard. If he is unrepresented his only way of putting his view across is by addressing the Court himself.[94] He need be given this opportunity only if he "appears capable" and, if given it, may not in fact exercise it very effectively, even if his parents are excluded from the Courtroom.[95] One would expect the Courts to be wary of upholding a complaint based on para (i) (the offence ground) simply on the basis of parental admissions and without hearing from the child, especially in view of the restrictive elements of that ground and the higher standard of proof, but are they so cautious in making findings under say para (e), a ground very commonly relied on by complainants?[96] If the child had an adequate opportunity to

[91] Sutton, supra n83, p 156.

[92] A complaint may be heard and determined in the name of the child alone only in the rare case where there is no parent, guardian or caretaker to whom it can be addressed.

[93] Paras (e), (f), (h) and (i).

[94] S 30(4).

[95] The power of exclusion is also in s30(4).

[96] The Christchurch survey disclosed that this ground was relied on by complainants more than twice as frequently as any other. It was used in approximately 45 percent of the cases.

put his explanation[97] of the behaviour before the Court, say by indicating pressures on him from influential peers, or pointing to factors which would tend to reduce the likelihood of the behaviour recurring, the Court might be less ready to find the level of seriousness necessary to substantiate the complaint.

Regarding disposition, collaboration between complainant and defendants might again preclude proper consideration of the child's view. The following comment by Dickens[98] in relation to the English Children and Young Persons Act is applicable also, it is submitted, in the New Zealand context:

> ". . . parents have been known to take the initiative to obtain a finding that their child is beyond control . . . . The power of parents so to apply judicial control to their child is not necessarily always wisely used, and Judges bear a responsibility in hearing such consensual cases to be vigilant of the child's interests. Since all adults concerned may have agreed in predetermining the issue, and require the Court simply to set the seal of its formal approval upon the terms agreed, the only officer capable of protecting the unrepresented child's independent interests may be the Judge. This is no less the case where, for instance, a child welfare agency has prevailed upon perhaps somewhat timorous parents, or a single parent, to accept the agency's assessment of the child's needs, and to concur in, or not to resist, an application for a care or protection order the agency decides to bring."

The most effective way of dealing with the problems above[99] would be to give the child automatic legal representation. In present practice appointments of counsel to represent the child are not routine even in defended cases. In admitted complaints they are extremely rare.[100] An amendment to the Act similar to that in the Guardianship Amendment Act 1980 should be considered.[101]

(b) Appeals

Finally, appeals. A child has a statutory right of appeal against any order made in respect of him under paras (c), (d), (e), (f) or (g) of s 31(1).[102] But he has no express right of appeal against a finding that a complaint is proved, even a complaint based on para (i) (the offence ground). One would have thought that if a child denied the offending behaviour on which a complaint was based he would be entitled to challenge an adverse finding in this way. The draftsman might have intended that he be able to do so by *in form* appealing against the *order* and then arguing that it was wrongly made because the complaint itself was wrongly upheld.

Although this is hardly satisfactory from a conceptual point of view (in that it is like saying an appeal against sentence could be based on the wrongfulness of the conviction) it may be the correct interpretation of the Act because the Act's treatment of parental rights of appeal in s 27 proceedings is similar. They are given power to appeal against orders under paras (c) to (h) of s 31(1) but no express power to attack the upholding of the complaint itself.[103] In practice however they are allowed to attack the finding as well although their appeal is, in form, against the order.[104]

Even if this odd approach is accepted for children as well their appeal rights remain less than satisfactory. A child who, for example, is found, in spite of his denials, to have behaved or offended in circumstances which satisfy the requirements of para (e), (f) or (i), but is then admonished and discharged has no right of appeal at all. Yet an appeal would not be pointless in this situation, especially when it is realised that such findings are recorded and may subsequently surface in probation reports

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[97] An explanation which his parents might have wrongly disbelieved.

[98] Supra, n9 at p 23.

[99] Short of giving the child party status.

[100] The Christchurch survey revealed only 10 appointments of counsel to represent the child most of which were in cases where the complaint was denied by the parents. There are local variations in practice regarding appointment of counsel. In Dunedin for example it now appears that counsel for the child is appointed as a matter of course in every defended complaint.

[101] Section 18 of the Act inserts this provision into the principal Act: ". . . in any proceedings under this Act which relate to custody of a child or to access to a child, a Court shall, if those proceedings appear likely to proceed to a hearing, appoint a barrister or solicitor to represent any child who is the subject of or who is otherwise a party to the proceedings, unless the Court is satisfied that the appointment would serve no useful purpose."

[102] S 53(3). He also has a right of appeal by way of case stated on a point of law only: s 56.

[103] S 54(1)(b). By contrast, in the context of charges the Act expressly distinguishes between an appeal against the finding and an appeal against the order: see s 53(1) and (2). This factor suggests that the omission of any right of appeal against findings in complaint proceedings is not mere oversight.

[104] See eg, *H v Department of Social Welfare* supra, n43.

presented to Judges faced with the task of sentencing the individual for later adult offending. The practice of listing such findings alongside adult convictions (if any) under the general heading "Previous Court Appearances" can only be regarded as an outrageous violation of the spirit and philosophy of the Children and Young Persons Act. Even where *charges* are upheld against young persons they do not normally constitute convictions[105] and should not be used in this way. The prejudicial presentation of findings on complaint is even grosser hypocrisy.

9. The role of counsel for the child

The importance of separate representation for children in both defended and admitted complaints has already been pointed out. The idea that adequate protection of the child's interests is guaranteed by the role of the welfare agency and by the Judge as the embodiment of the *parens patriae* doctrine has been rejected elsewhere as too glib.[106] Even accepting the good intentions of the Department of Social Welfare its approach may be influenced partly by internal institutional considerations and its views coloured by personal relationships[107] between its officers and the parents or child, so that an independent viewpoint of the child's interests may be a valuable addition to the proceedings. At least as long as the Court lacks the resources with which to form such a viewpoint itself[108] the answer appears to be the routine appointment of separate counsel. Moreover there is a difference between representation of the child and representation of the interests of the child. While the Department of Social Welfare might further what it deems to be the child's best interests it cannot be relied on adequately to convey the child's viewpoint to the Court, at least where that viewpoint differs from its own. Likewise an interview of the child by the Judge himself, even in Chambers in the absence of the child's parents, may not be adequate bearing in mind that the Judge's authority-image may well inhibit the child from frankly and effectively speaking his mind. If the child is to be effectively heard it will usually be through an advocate that he knows is working for him and is not just another adult telling him what is good for him.

There appear then to be two worthwhile functions that counsel can perform in this area — one is clearly and forcefully pressing the child's views and preferences on the Court, the other, furnishing an independent viewpoint of his best interests. These two functions appear to correspond to the two kinds of appointment envisaged by s 29(3) viz, counsel "to represent the child" and counsel "to assist the Court". Ludbrook[109] has argued that counsel for the first kind should not adopt the "independent overview" approach:

> "If counsel is appointed to *represent a child* a normal professional relationship is surely created between the child and the solicitor or counsel who is representing the child's interests. This does not allow the lawyer to take an independent overview of the situation. His actions must be directed towards enhancing the expressed interests of his client."[110]

[105] A young person who has reached the age of 15 may, in the Court's discretion, be "convicted" and sent to the District Court for sentence: s 36(1)(j).

[106] See eg, *Re Gault* (1967) 387 US 1. The *Gault* ruling was actually limited to the adjudicative stage in delinquency proceedings but it is submitted that the reasoning behind it is applicable to our s 27 proceedings especially in view of the fact that they cover children allegedly in need of control as well as protection.

[107] Engendered partly by its authority image.

[108] If a Family Court becomes established with adequate expert staff of its own and is given jurisdiction over complaint proceedings under the Children and Young Persons Act, as recommended by the Royal Commission on the Courts, dependence on counsel to provide an independent viewpoint of the child's interests could cease.

[109] "The Role of Counsel Appointed to Represent a Child" [1979] NZ Recent Law 262.

[110] Ibid, 263. The conclusion certainly follows from the premise, but it may be questioned whether "a normal professional relationship" is in fact created. Cf Dickens "Representing the Child in the Courts", in *The Child and the Courts* edited by I F G Baxter and M A Eberts (Carswell 1978) at p 273.

> "If he departs from the traditional model of an advocate in favour of serving a welfare role, the purpose of his creation may be frustrated. The only person whose judgment appears in hindsight to have been correct in the Maria Colwell tragedy was the girl herself, aged just under eight at her death. It would be a sad irony if, when represented by an advocate, a child's views were still to be unheard and unheeded." (p 294).

Morris et al also take this view in their recent book *Justice for Children* (MacMillan 1980) (at p 105).

> ". . . the lawyer's role must be to advise the child and zealously pursue what he requests of him. Where a child is old enough to advance his views, the mere fact of his youth is no justification for denying him representation of those views through a law-

Yet there will be cases where the client is too young to express his interests. In these circumstances counsel will be driven largely to the other approach though perhaps trying to look at the matter from a child's point of view. It should also be appreciated that a young child's expressed wishes and actual wishes may diverge, since he may be saying what he thinks the adults around him want to hear. A lawyer who fails to detect this in a particular case and then confines himself to advocating the child's expressed views is engaging in a pointless exercise.

Some Judges appear to welcome the "independent viewpoint" approach even from counsel nominally appointed "to represent the child".[111] Perhaps such Judges should technically make the other kind of appointment. One suspects that the distinct powers in s 29(3) have not been given close attention. If, as has been argued, both functions are valuable, is there any reason why a single appointee should not exercise the two roles? Arguably the second role (independent viewpoint) might conflict with the first by undermining the strength with which the child's own views have been impressed on the Court. On the other hand this may be an unduly rigid and narrow argument. The Australian Family Court has held that while counsel appointed on behalf of a child in a custody case is bound to put the child's wishes, if ascertainable, to the Judge "as part of the general picture" he should not stop at that but is under a duty to advance the broad interests of the child.[112] The matter is a difficult one but it is submitted that if counsel for the child senses a real conflict between the two functions in a particular case he must not sacrifice the presentation of the child's point of views. What is clear is that some authoritative guidance on this matter is needed, at least from the Judge making the appointment but preferably from Parliament itself.

A further and distinct function of counsel appointed for a child is to interpret the Court and the proceedings to his client. Children who become involved in these proceedings can be confused about what is happening and may see themselves as the recipients of undeserved punishment. The efforts of social workers may not always have prepared the child adequately for the hearing or given him a clear picture of his future. This function of counsel will call for skills and sensitivities with which his legal training has not equipped him, which leads to the last heading.

10. Advocates' lack of non-legal skills

At several points in the above discussion it has been noted that the lawyer's effective performance of his role, whether as counsel for the parents, counsel appointed to represent the child, or counsel appointed to assist the Court, will depend on significant non-legal training and skills. Ideally the lawyer involved in this area should have a knowledge of child psychology and the developmental needs of children, interviewing and communication skills going beyond those required for legal practice generally, an understanding of non-verbal communication, an appreciation of social work principles and practices, an acquaintance with current theories in psychology and psychiatry, and an ability to relate to children, to understand their imagery and know "how to perceive when the child is repressing, misdescribing or deflecting his concerns."[113] The inclusion of such matters in the training of family lawyers cannot of course hope to make

yer. The consequences of the Maria Colwell Case surely point to the need to listen to the child." (at p 105)

For another view (stated in the context of custody disputes) see *In the Marriage of Demetriou* (1976) 27 FLR 93 and Kobienia "Separate Representation in Custody Cases" 6 Adelaide LR 566 (1978). And see generally M B Patterson "Lawyers and the Children's Courts" LL B (Hons) Dissertation, Auckland University 1976.

[111] In his paper "Who Speaks for the Child? — Proceedings under the Guardianship Act and Children and Young Persons Act" presented at the Rights of the Child and the Law Conference, Christchurch 1979, Judge T A Ross, after citing Ludbrook's view, commented:

"In practice, however, sitting as a one-man tribunal on cases of importance, difficulty and emotional tension, I confess I am aided by some element of overview by independent counsel." (at p 3).

[112] *In the Marriage of Demetriou* supra n110:

". . . counsel appointed for the children is there to assist the Court and consequently the child, in assessing the broad interests of the child in respect of which the wishes of the child is only one, albeit often an important factor, in assessing those interests." per Asche SJ at p 98.

This reasoning may not be fully applicable in New Zealand however because the Australian statutory provision for separate representation of children (s 65 of the Family Law Act 1975) envisages only one kind of appointment. Asche SJ's view that counsel appointed is not bound by the child's wishes was based partly on the "absurdity" of the opposite view in relation to very young children.

them all-round experts and should not pretend to do so. But it would be an improvement on the present position and would at least make them more aware of skills and expertise which they largely lack but which others possess, so that they would know when and where to seek appropriate assistance. A final warning by Dickens is worth stressing:

> "Dangers are present, however, not only in a lawyer whose professional training and experience have not inculcated such qualities having suddenly to exercise them but also in a lawyer or other representative whose career comes to depend upon demonstrating such skills falling under the spell of fashionable theories and dogmas that cause him to apply preconceptions and stereotypes to the individual child in whose life he has gained considerable influence. Inept and doctrinaire advocacy may too easily become the norm. . . . The Judge must carefully observe his duty of listening to all sides . . . the decision as to disposition of the child remains his."[114]

[113] Dickens, supra, n110 at p 293. Because of the younger child's concept of truth and the tendency of children (especially in a state of insecurity or under a feeling of pressure) to say what they think adults want to hear there may be a significant difference between a child's expressed wishes and his actual wishes. See Dr Hilary Richards "The Wishes and Needs of the Child" 96 *Adoption and Fostering*, p 10 (1979) and references therein.

[114] Ibid, pp 293-4.

Epilogue

The individuals whose co-operation, assistance and advice made the writing of the article possible include Mr M J Cooper, Registrar, District Court, Christchurch; June Johnston, Solicitor, Christchurch; Mr N A Johnstone, District Solicitor, Department of Social Welfare, Christchurch; and Dr G F Orchard, Faculty of Law, University of Canterbury. The views expressed however are those of the author.

An attempt to meet one of the concerns of the article, viz the need for special training of lawyers involved in Children's Court work, is being made in Christchurch this year with the provision of a 26 session Extension Studies course at the University of Canterbury entitled "Law and the Needs of the Child". Aimed specifically at practising lawyers, it deals with child development and family relationships, lawyers' roles and responsibilities in family practice, communication skills, and consultancy and Court skills.

CONVEYANCING

SOLICITOR'S APPROVAL CONDITIONS and CONVEYANCING ASPECTS

By PROFESSOR BRIAN COOTE

Professor Coote examines the current state of the law in this vexed area following the recent decision in the **Provost Development** *case.*

1. Introduction

The writer's piece last year, "Solicitor's Approval — A Suggested Solution", seems to have been unlucky twice over. At first publication it was garbled. Its republication as written ([1980] NZLJ 430) coincided with a decision which rendered it more or less obsolete! The article suggested that many of the problems associated with "solicitor's approval" conditions would be avoided if, wherever possible, such conditions were interpreted to prevent the formation of a contract unless and until approval had been given. In *Provost Developments Ltd v Collingwood Towers Ltd* (judgment 31 October 1980) the Court of Appeal (Woodhouse, Cooke and Richardson JJ) has in effect held that, though every case must be decided on its own merits, "solicitor's approval" clauses in documents expressed as agreements for sale and purchase will ordinarily be taken to condition the performance rather than the formation of the contract. That being so, the Court also made it clear that, at least on facts like those before them, solicitors operating under such clauses must confine themselves to strictly "legal" considerations.

2. The *Provost Developments* Case

(a) The decision

The agreement in the *Provost Developments* case concerned a rental property in Auckland. The purchasers made their initial offer by submitting, through a land agent, a signed and completed copy of the standard Auckland form of agreement for sale and purchase. The document subsequently passed to and fro between the parties with a series of amendments (ie counter-offers) before finally being signed and initialled by them both. The price eventually agreed was $85,000, of which $5,000 was payable immediately as a deposit, the balance to be secured by a first mortgage in favour of the vendors for a term of six months. The property was to be sold free of existing tenancies and the agreement contained the clause "subject to solicitors' approval by Friday, 30 June 1978 by 5 pm". Approval was given by the solicitor for the purchasers within the time limit but was refused by the solicitor for the vendors. At the hearing before Holland J the vendor's solicitor gave three grounds for withholding his approval; that the vendors would stand out of their money for six months, that the agreement called for vacant possession to be given, and that the vendors had received a better offer from a third party. The learned Judge held that an immediate contract had been concluded between the parties but that the vendors' solicitor had acted within the powers given him by the agreement when he withheld his consent.

His Honour referred to a test stated obiter by Cooke J in *Boote v R T Shiels Ltd* [1978] 1 NZLR 445,451, that "the solicitor's approval could not be withheld capriciously or merely on the instructions of his client, but was meant to insure that the conveyancing aspects of the transaction were satisfactory from the [client's] point of view". Holland J took the words "conveyancing aspects" to mean "arising out of the duties and obligations owed by a solicitor to his client when acting for that client and advising concerning a conveyancing matter. That must include, in most cases, a considered view or opinion as to the transaction the client is entering into as a whole". He thought that if the solicitor were not entitled to apply his mind to the appropriateness of the bargain, as well as to the legal validity of the contract, there could be very little in respect of which a solicitor could exercise his discretion. Normally, a client in seeking a solicitor's opinion as to a contract would expect advice on the transaction as well as the mere legal formalities, whatever they might be. His Honour's conclusion in the case before him was that both parties intended that they should have the benefit of their solicitor's advice concerning the bargain as such. Though he thought the primary reason why the vendors' solicitor withheld approval was his knowledge of the existence of a better offer,

the agreement did contain terms unfavourable to the vendors. His withholding of approval was not capricious or in bad faith. The vendors were therefore not bound to perform the contract.

On an appeal by the purchasers the first point the Court of Appeal had to decide was whether any contract at all had come into existence. Their Honours gave a number of reasons for concluding that an immediately binding contract had been formed. The document the parties had signed was in the form of a concluded agreement for sale and purchase. The parties were commercial and their agreement had been the subject of negotiation and alteration. No matter remained to be decided between them, nor was the execution of any subsequent contractual document envisaged. A deposit was payable immediately. The context in which the condition appeared was that of an apparently concluded agreement. The condition attached to the agreement rather than to an offer or an acceptance. The approval to which the agreement was subject was that of a solicitor, not that of some more general adviser.

(b) On what grounds may the Vendor's Solicitor withhold approval?

The problem of whether an immediate contract exists shades into the second problem, that of deciding what aspects of the sale should be relevant to the practitioner qua solicitor rather than qua man of affairs. At first instance, Holland J thought that if the solicitor were confined to "conveyancing aspects" in the strict sense there would be little left upon which he could exercise his discretion. Of the three factors taken into account by the solicitor for the vendors in the *Provost Developments* case, the Court of Appeal accepted that one only could properly fall within the test they were laying down. It was that the agreement called for vacant possession on settlement. In the event, it was of no help to the vendor because Holland J had found that the sale would have been approved had there been no better offer. In any case, as Cooke J pointed out, it would be stretching the imagination to suggest that the vendors, whose business it had been to let the property, were not fully alive to the obligation to give vacant possession and to any potential difficulties which that might involve. It may be inferred from this last point that the solicitor must confine himself to those legal aspects upon which the client could not unaided have drawn for himself a correct conclusion at the time the agreement was signed. If that is so, the solicitor's discretion will depend more than ever upon the circumstances of the particular case. According to the judgment of Richardson J, refusal of approval has to be justified by objective standards. That being so the client's knowledge of the facts will no doubt be imputed to the solicitor. If the exercise of the solicitor's discretion does turn on his client's capacity to reach his own conclusion, he will be left some scope for protecting the weak and the unsophisticated. But even here there may be problems. If a widow has sold to a developer at too low a price, or if a homeless buyer has paid too much, and if there is no more to it than that, the solicitor may be powerless to protect his client unless he can show that he was intended to act under the approval condition as a general adviser, in which case a further consequence might be that there was no immediate contract at all. Presumably if misrepresentation, fraud, duress or undue influence were present they would qualify as "legal aspects" though, since the test is objective, the solicitor would need to be quite sure of his facts. But if all he could rely on was the unequal bargaining power of the parties he might be taking a risk to refuse approval, since the legal significance of unequal bargaining power is still unclear on the cases. A careless mistake by the client would seem to fall on the other side of the line as being a matter on which the client should have drawn the correct inferences for himself.

(c) Should the Solicitor's evidence be called?

Assuming the solicitor has refused to approve and the matter has come to trial, the further question will arise whether the solicitor ought to give evidence of the reasons for the refusal. In the *Provost Developments* case, the solicitor for the vendors did give evidence but there are grounds for suggesting that such a course may not be necessary. In *Caney v Leith* [1937] 2 All ER 532, Farwell J had to decide whether solicitors had been entitled to withhold their approval of a lease. His view was that it was not for the Court, in a case of that sort, to consider and hear evidence from the solicitors. The Court had to look at the document and if the disapproval "[could] be given *bona fide* and without any unreasonable conduct on the part of the solicitors" the Court would be bound to say the condition had not been fulfilled. By itself, as a decision at first instance, *Cany v Leith* is not decisive of the point. It takes weight from the fact that it was cited by Cooke J when he suggested the test of "conveyancing aspects" in *Boote v R T Shiels Ltd* [1978] 1 NZLR 445, 451. More importantly, perhaps, the judgment of Richardson J in the *Provost Developments* case contains the sentence "Where [the solicitor] has refused approval an objective justification for that

stand will usually be apparent from consideration of the terms of the document in the light of the surrounding circumstances". His Honour's next sentence contrasted the position that would obtain where the solicitor did give evidence of his reasons.

As a matter of interest, it does not follow from all this that the result would have been different had the solicitor for the vendor not given evidence in the *Provost Developments* case. It might have been more difficult for the learned trial Judge to conclude that the real reason for the refusal of approval was the existence of a better offer. And the Court of Appeal did allow that the provision for vacant possession qualified as a "legal aspect". But Cooke J's point would still apply that the vendors, whose business it had been to let the premises, must themselves have been alive to the significance of that provision at the time they signed the agreement.

Once the Court of Appeal had concluded that the agreement before them did constitute an immediately binding contract it was almost inevitable they should go on to hold that the discretion given the vendors' solicitor had been too widely stated by Holland J. If the solicitor could take into account the bargain as such, the binding content of the immediate "contract" would be minimal. The fact that the approval was to be that of a solicitor rather than some more general adviser of itself suggested that the matters to be considered were those which would concern a solicitor as a lawyer rather than as a man of affairs. In the *Provost Developments* case there was a particular reason for this conclusion which, it might be assumed, would have been in the minds of all their Honours, though only Cooke J mentioned it specifically. It was that the property was a rental one and that the vendors operated commercially in that field. They might therefore be expected to have reached their own conclusion on the commercial merits of the sale.

3. Problems remaining

(a) Is there a binding contract?

While the decision of the Court of Appeal has done much to clarify the law it will still, of course, leave practitioners with a number of problems of application. The first will continue to be whether the "solicitor's approval" agreement before them constitutes an immediately binding contract. Prima facie, that will present more of a problem in, say, Christchurch than it will in Auckland. But even in Auckland it will be necessary to watch for variations in the wording of the approval clause and for differences in the circumstances surrounding the making of the agreement. What, for example, should the solicitor conclude if the agreement were subject to solicitor's approval "in all respects"? Should those words be taken literally and, if so, would they prevent the formation of an immediate contract? Then, too, what if the client were not a commercial concern but an unsophisticated first-time house buyer, pressed into a bad bargain through an urgent need to find accommodation? That might suggest that the solicitor was to act as a general adviser. If so, could that intention prevent the formation of an immediate contract?

(b) Critique

Taking the document at its face value all of these reasons are persuasive and, taken together, seem amply to support the conclusion reached. And for practical purposes there no doubt the matter must end. What gives one pause is that so many of the reasons would, one suspects, in a great many cases be matters of mere accident rather than of the conscious design of the parties. Thus, in the normal case the use of a form of offer and acceptance rather than of an agreement for sale and purchase will depend, not on the parties or even on the land agent, but on which form is in current use in the part of New Zealand where the contract is made; the difference for example between Christchurch, where the form is an offer and acceptance, and Auckland where it is an agreement for sale and purchase. The form will be filled in by the land agent and the "solicitor's approval" clause will be drafted by him. If the form provides for the payment of a deposit he too will fill in the details. If deposits are ordinarily payable on the signing of an agreement it may in reality be no indicator of the client's intention to contract that the agent has failed in a particular case to depart from what he understands to be the normal practice. In any event initial deposits are not unusual in England where agreements are made "subject to contract". The absence of any provision in a New Zealand agreement for the signing of a subsequent contract will usually be a matter not of a particular contractual intention but of mere convenience. In this country, a principal reason for obtaining the signature of both parties to the standard form is to obviate the need for any further document once the solicitor's approval has been given. The fact that the approval sought is that of a solicitor rather than that of any other person is itself not necessarily conclusive. To the lay understanding the role of a solicitor may well be that of a general adviser along the lines envisaged by Holland J. Even the appearance of the word "agreement" ought in the legal sense to be relatively

colourless, since it is quite possible in law to have an agreement which does not, or does not yet, constitute a contract.

4. Conclusion

The writer's suggestion last year that "solicitor's approval" clauses be treated as precedent to the existence of any contract was prompted by two concerns. One was for consumer protection and the other for the plight of practitioners, particularly those who might be called upon to approve an agreement contrary to the wishes and best interests of their clients. Both of these concerns were dealt with by Cooke J. Obviously, he thought, it suited some purchasers to be able to withdraw late and at will and some to be able to hold the vendor to the bargain. "I am not sure" he concluded "that on balance the interests of purchasers as 'consumers' would be better served by treating an agreement of the present type as totally ineffective." Perhaps the truth is that until some more detailed study is made one guess is as good as another. As to the plight of solicitors Cooke J's comment was that "As professional men and women, they will be no less capable of reconciling that responsibility with their other duties to their clients than, for instance, an employer's engineer giving certificates under a building contract". Of course, that has to be so. But in any event, it now seems that the writer's concern for solicitors in this context is not one they feel for themselves. In recent months there has been a move by the profession in Auckland to alter the standard form of agreement for sale and purchase to provide that all conditions be treated as conditions subsequent. All that need be said about that is that it does nothing to diminish the case for some form of consumer protection by legislation.

CONVEYANCING

PROTECTION AGAINST LAST-MINUTE ENCUMBRANCES

Bradley v Attorney-General: *Report of the Property Law and Equity Reform Committee*

In *Bradley v Attorney-General* [1978] 1 NZLR 36, a firm of solicitors was held to be negligent and liable to make good to the client the loss sustained because the firm had failed to discover when searching the certificate of title prior to settlement that a mortgage had been lodged for registration but not, at that stage, noted on the title. They therefore did not take the mortgage into account when settling the purchase of the property, which had by that time become subject to the registered mortgage. As the risk of such an occurrence is always present because of the lapse of time between the receipt of a document and the entry of the memorial on the title, the Minister of Justice asked the Committee to review the law and recommend any changes.

Their recommendation, released by the Minister on 4 May 1981, is that the Land Transfer Act 1952 be amended to provide an absolute indemnity by the State for all persons dealing in good faith and for valuable consideration on the basis of search note copies of certificates of title issued within seven days before settlement or within two months after settlement, with a right for the State to recover by subrogation against any solicitor or other person whose negligence caused or contributed to the loss.

The indemnity would be met out of the consolidated revenue account in exactly the same way as under Part XI of the Act. It is intended that the purchaser be able to apply the money to satisfy claimants under charges such as caveats or liens and so have the title freed. It would only be where the adverse claim is to the land itself (eg, a matrimonial property notice) that the disappointed purchaser may have to be satisfied with monetary compensation.

The rationale behind the plan is that as the State provides the registration system and compels all citizens to use it, so it should indemnify innocent citizens who suffer loss as a result of the workings of the system.

It is envisaged by the Committee that every solicitor in a conveyancing transaction would

search the title within seven days before settlement to satisfy himself that there are no adverse interests and would proceed to registration within two months after settlement. His client would be reimbursed by the State for any loss suffered by the appearance of an adverse document not shown on the search note. The State would not have any right of subrogation against the solicitor unless it could prove negligence against him.

The purpose of the plan is to protect the individual purchaser and not the solicitor. The time limits proposed by the Committee are not intended as a statutory yardstick for reasonable diligence. A solicitor may comply with the seven day and two month time periods but may still be negligent in taking the length of time he did. In that situation the client will receive automatically the indemnity based on the pre-settlement check, but the State would be entitled to claim by subrogation against the solicitor for failing to exercise all proper professional skill and care.

If registration cannot be completed within the two month period, it is intended that the purchaser continue to registration, and, if in the interm some adverse interest arises, he should lodge a claim in the Court. The Court may then decide whether the facts justify an extension of the time limit.

Where the two months limit is exceeded, or where priority is lost because of rejection by the Registrar, it is considered that the State guarantee should still apply if the Court finds that the document is in substantially registrable form, and that the rejection does not affect its equitable nature.

It is accepted by the Committee that this solution is not a "real cure". However in these terms the only real cure is to abolish all registration or noting of instruments except on production of the certificate of title, which would in effect abolish all caveats, liens, statutory land charges, matrimonial property notices, charging orders and so on. The Committee's plan is recommended as the best solution to the problem created by the conflicting interests.

Doubtless a number of problems will arise if this solution is adopted. Two that spring to mind are, first — and this is mentioned by the Committee — the time limits for searches are measured from "settlement". When is a transaction settled? The Committee sugests a transaction is settled when the money passes beyond the purchaser's control.

Secondly, if the scheme is to protect purchasers, and if solicitors are to remain liable for negligence, it will presumably need to be made quite clear that a solicitor is not to be regarded as negligent for failing to check behind the title for documents that have been lodged but not noted.

MOIRA THOMPSON

Below are two extracts from an address given by the Honourable J K McLay to the Northcote Rotary Club, on 11 May 1981:

> In his book "Trial by Jury" the then Sir Patrick Devlin noted some of the more romantic explantions provided for the choice of 12 jurors. These included the 12 Tribes of Israel and the 12 Apostles. Both explanations could be regarded as unfortunate. The first might imply that there is generally a 13th juror lost somewhere along the way; and the second that there is always a Judas in every jury.
>
> But to my mind, apart from being a bulwark against tyranny and standing between the citizen and an all-powerful state, the greatest advantage of the jury system has been the fact that it has forced everyone involved in a Court case, but particularly the professionals (the Judges and the lawyers), to present their arguments and their material in a manner that is understandable to every man and woman. And so the cult of the expert is kept within reasonable limits. The jury is living evidence of the way in which the average citizen can keep experts and officials in check, so that the experts are serving the community, and not themselves.

JURISPRUDENCE

PRIVATIVE CLAUSES AND JUDICIAL REVIEW

*By JOHN SMILLIE**

A number of statutes which establish tribunals of limited jurisdiction contain provisions which purport to exclude or limit the inherent power of the High Court to review and set aside decisions made by these tribunals. Such provisions are generally known as "ouster clauses" or "privative clauses", and it is the latter term which is used in this article.

The scope of judicial review of decisions of inferior tribunals in the face of privative clauses remains a subject of controversy and confusion.

1. The recent decisions

(a) Anisminic

In *Anisminic Ltd v Foreign Compensation Commission*[1] the House of Lords held that a general privative clause excluded review for non-jurisdictional error of law on the face of the record, but did not prevent the Court from declaring that the Commission had committed a jurisdictional error which rendered its decision ultra vires and a nullity. The House of Lords also treated a wide range of errors as being capable of taking a tribunal outside its jurisdiction. At the same time, however, their Lordships were clearly of the opinion that there remains a place for patent errors of law within jurisdiction which will provide grounds for certiorari in the absence of a strong privative clause.[2] Uncertainty as to the true meaning and implications of *Anisminic* continues to trouble the Courts. The full extent of the present confusion is demonstrated by recent decisions of the English Court of Appeal, the Privy Council, and the House of Lords.

(b) Pearlman

In *Pearlman v Keepers and Governors of Harrow School*[3] a majority of the Court of Appeal (Lord Denning MR and Eveleigh LJ) held that an erroneous conclusion by a County Court Judge that work done on rented premises did not amount to a "structural alteration" in terms of the controlling statute was a jurisdictional error which entitled the Court to quash the decision despite the presence of a strong privative clause. Because the conclusion reached by the County Court judge was inconsistent with what Eveleigh LJ regarded as the true meaning of the term "structural alteration", his Lordship reasoned that the Judge must have "asked himself the wrong question"; an error which, on the authority of *Anisminic*, took him outside his jurisdiction. The dissenting Judge, Geoffrey Lane LJ, took the view that the county Court Judge had asked himself the right question (viz did the work amount to a structural alteration?) but had given the wrong answer to that question. This was an error of law within his jurisdiction and the privative clause operated to exclude certiorari. Geoffrey Lane LJ appeared to distinguish *Anisminic* on the ground that the Commission's misconstruction of its empowering provision led it to add to the number of requirements which, on a true interpretation, the applicant must satisfy in order to succeed, thereby asking itself and deciding a question it had no right to consider; whereas in *Pearlman* the Judge's error consisted merely of misinterpreting a requirement which was properly applicable to the applicant. His Lordship pointed out that if a wrong, but not capricious or unreasonable, interpretation by an official of a term of his empowering statute takes him outside his jurisdiction there can be no place left for errors of law within jurisdiction. Lord Denning MR clearly appreciated the force of this reasoning. Consequently

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[1] [1969] 2 AC 147.

[2] The significance of the distinction between jurisdictional errors and errors of law within jurisdiction is not limited to the effect of privative clauses. Even in the absence of a privative clause, the availability of relief other than an order in the nature of certiorari or prohibition (eg a declaration) is, in principle, dependent on proof of a jurisdictional error which renders the decision ultra vires. Although the Judicature Amendment Act 1972, s 4(1) simplified the procedure for obtaining public law remedies, it did not change the substantive law relating to the grounds upon which the different forms of relief can be issued: see eg *Waikouaiti County Ratepayers' Association v Waikouaiti County* [1975] 1 NZLR 600 at 606; *Daemar v Gilliand* [1979] 2 NZLR 7 at 21-22. Similarly, a decision will be subject to "collateral" attack in tort or criminal proceedings only if it was outside the jurisdiction of the inferior body.

[3] [1979] QB 56.

Lord Denning, unlike Eveleigh LJ, made no attempt to describe the judge's error of construction in terms of one of the categories of jurisdictional error identified in *Anisminic*. Instead he attempted to destroy the premise upon which Geoffrey Lane LJ's reasoning was based by abolishing the distinction between jurisdictional and non-jurisdictional errors. Lord Denning declared that the practical effect of *Anisminic* was to make the distinction between jurisdictional error and error of law within jurisdiction so fine and so open to manipulation that in reality a reviewing Court enjoys a complete discretion whether to treat a proved irregularity as taking an official outside his jurisdiction.[4] Lord Denning took the view that it was time to give express recognition to this state of affairs by denying the existence of errors of law within jurisdiction:[5]

> "The way to get things right is to hold thus: no Court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."

(c) Fire Bricks

The New Zealand Court of Appeal has not found it necessary to choose between the different approaches taken in *Pearlman*.[6] However, both the Privy Council and the House of Lords have now declared that the decision of the majority in *Pearlman* was wrong. Yet the combined effect of these cases is to compound, rather than resolve, the confusion as to the proper scope of jurisdictional review. In *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*[7] the applicant did not contend that the Industrial Court of Malaysia had exceeded its jurisdiction, but argued that the Court had power to issue certiorari for non-jurisdictional errors of law on the face of the record despite the existence of a strong privative clause in the controlling statute. The Privy Council emphatically rejected Lord Denning's view that the distinction between jurisdictional errors and errors of law within jurisdiction should now be discarded, and expressly approved the manner in which the distinction had been applied to the facts of *Pearlman* by Geoffrey Lane LJ. Since the Industrial Court had "applied its mind to the proper question for the purpose of making its award",[8] the privative clause operated to exclude review by certiorari.

(d) Racal

But in *Re Racal Communications Ltd*[9] a decision which was handed down just nine days after *Fire Bricks*, only one member of the House of Lords referred to the decision of the Privy Council. In *Racal* a High Court judge had refused an ex parte application by the Director of Public Prosecutions for an order under s 441 of the Companies Act 1948 (UK) authorising an inspection of the company's records. Despite the plain words of s 441(3) of the Act, which provided that "the decision of a Judge of the High Court . . . in an application under this section shall not be appealable", the Judge gave leave to appeal and the Court of Appeal reversed him. The Court of Appeal[10] held that the High Court Judge had misconstrued the terms of his empowering provision. The Court then applied the approach taken by Lord Denning in *Pearlman*, concluding that this error of law took the Judge outside his jurisdiction so that the "not appealable" clause could be disregarded on the authority of *Anisminic*. The House of Lords reversed this decision holding that the Court of Appeal had no authority to review the decision of the High Court Judge. The Court of Appeal's general statutory jurisdiction to entertain appeals from decisions of the High Court had been expressly excluded by s 441(3) of the Companies Act 1948, and the Court of Appeal enjoys no original supervisory powers of judicial review. Original inherent powers of judicial review are vested exclusively in the High Court itself, and are exercisable only in respect of decisions of inferior Courts and tribunals. As decisions of the High Court itself are not subject to judicial review, the Court of Appeal's reasoning

[4] For similar expressions of opinion by New Zealand Courts, see *James Aviation Ltd v Air Services Licensing Authority* [1979] 1 NZLR 481, 489 (Vautier J); *Bay of Islands Timber Co Ltd v Transport Licensing Appeal Authority*, unreported, Supreme Court, Auckland, 4 April 1977, A1569/75 (Barker J).

[5] [1979] QB at 70.

[6] The Court of Appeal declined an opportunity to consider *Pearlman* in *Attorney-General v Bay of Islands Timber Co Ltd* [1979] 2 NZLR 511. One High Court Judge has expressly approved the reasoning of Geoffrey Lane LJ in *Pearlman*: see *Eastern (Auckland) Rugby Football Club Inc v Licensing Control Commission* [1979] 1 NZLR 367 at 373-374 per Speight J.

[7] [1980] 3 WLR 318 (PC).

[8] Ibid, at 325.

[9] [1980] 3 WLR 181 (HL).

[10] In *Re A Company* [1980] Ch 138.

based on *Pearlman* and *Anisminic* was wholly inapplicable. Lords Salmon and Scarman were content to decide the appeal solely on this narrow ground, and they offered no opinion as to the propriety of Lord Denning's approach in *Pearlman* in respect of inferior Courts and tribunals. This was unfortunate in view of the apparent conflict between the opinions expressed by Lords Diplock and Edmund-Davies.

Lord Edmund-Davies referred to the decision of the Privy Council in *S E Asia Fire Bricks*[11] and expressly endorsed the reasoning and conclusion of Geoffrey Lane LJ in *Pearlman*. His Lordship concluded that even if the *Anisminic* doctrine were properly applicable to the facts of *Racal*, the High Court Judge had not exceeded his jurisdiction.

Lord Diplock proposed a completely novel approach to judicial review. While his Lordship agreed that a High Court Judge is not subject to judicial review at all, he volunteered a further distinction between "administrative tribunals or authorities" and "inferior Courts of law". Lord Diplock tacitly approved the approach of Lord Denning in *Pearlman* to review of decisions of administrative tribunals, declaring that *Anisminic* had, "for practical purposes", abolished the distinction between jurisdictional and non-jurisdictional errors of law in respect of such decisions. He explained that because administrative tribunals are not "Courts of law" it is presumed that Parliament did not intend to confer upon them "power to decide questions of law as well as questions of fact or of administrative policy".[12] However, no such presumption is raised where statutory powers of decision are conferred on inferior Courts of law. Whether a privative clause operates to exclude review of a decision by an inferior Court remains to be determined by application of pre-*Anisminic* principles, and this "may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before *Anisminic*."[13] Applying this "subtle" and "confusing" distinction to the facts of *Pearlman*, Lord Diplock found the reasoning of Geoffrey Lane LJ "conclusive".[14] Thus, according to Lord Diplock, Lord Denning's interpretation in *Pearlman* of the effect of *Anisminic* was correct in relation to "administrative tribunals or authorities", but was wrongly applied to the decision of the county Court judge in the *Pearlman* case itself. Lord Keith of Kinkel (who, like Lord Edmund-Davies, had sat on the Judicial Committee in *Fire Bricks*) was content to concur in Lord Diplock's speech without further comment.

Lord Diplock's approach promises to compound the confusion which already prevails in this difficult area of the law by introducing new distinctions which are not capable of consistent interpretation and application. In respect of "administrative tribunals or authorities", his Lordship suggests a distinction between errors of law, which will always take a tribunal outside its jurisdiction, and errors in relation to questions of "fact" or "administrative policy" which presumably will continue to be classified as jurisdictional or not according to existing principles. However questions of law, fact and policy inevitably merge in the context of administrative decision-making, and in many cases there is no clear-cut distinction between them.[15] In practice, Lord Diplock's approach may have little effect on the scope of review of administrative decisions. It is clear that a tribunal will commit an error of law if there is insufficient evidence in support of its decision to justify a reasonable official reaching that conclusion.[16] However the Courts have already been prepared to hold that an error of this kind also takes the tribunal outside its jurisdiction.[17] Dicta in recent cases also indicate that the Courts may now be prepared to quash decisions made in ignorance of established and relevant facts, or based on mistaken or incorrect facts.[18] In respect of administrative tri-

[11] Supra, n 7.

[12] [1980] 3 WLR at 187. Lord Diplock concedes that this "presumption" can be rebutted by "clear words". However his Lordship's approval of the decision in *Anisminic* indicates that a strongly worded general privative clause will not have this effect.

[13] Ibid.

[14] Ibid, at 188.

[15] See eg the discussion in *de Smith's Judicial Review of Administrative Action* (4th ed 1980) 126-139, and Wade, *Administrative Law* (4th ed 1977) 774-779.

[16] Eg *Edwards v Bairstow* [1956] AC 14; *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, 582.

[17] Eg *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341, 353.

[18] The relevant cases are discussed in some detail by Cooke J in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 145-149. Cooke J found that the Minister had acted on a mistake of fact, and he relied on this finding as an alternative ground for declaring the Minister's decision invalid. Richmond P and Richardson J preferred to express no opinion as to whether "mistake of fact" now constitutes a form of reviewable error.

bunals, Lord Diplock's approach would merely confirm Lord Denning's view that a privative clause does not prevent a reviewing Court from quashing a decision if the Court considers that the tribunal's interpretation of a crucial statutory term is wrong, although not completely arbitrary or unreasonable. However, to the extent that the opportunity to manipulate the vague distinction between questions of "law" and questions of "fact and degree" would enable some Judges to further obscure and divert attention from the real policy reasons underlying their reluctance to subject certain kinds of administrative acts to close scrutiny, introduction of this distinction is undesirable.

(e) A-G v BBC

Adoption of Lord Diplock's distinction between "administrative tribunals or authorities" and "inferior Courts of law" would raise more serious problems. The judgments delivered in *Attorney-General v British Broadcasting Corporation*[19] demonstrate that there is no clear definition of an "inferior Court". The statutory description of a body as a "Court" or as a "tribunal" is not necessarily conclusive of its status. Nor is a decision-making body a "Court" merely because it has many of the powers and trappings of an ordinary Court of law, or is obliged to act in a "judicial" manner (viz fairly and impartially in accordance with natural justice).[20] In *Attorney-General v BBC*[21] three members of the House of Lords[22] held that a local valuation Court was not an "inferior Court" for the purpose of contempt of Court because its function and purpose was "administrative" rather than strictly "judicial" in character. Attempts to classify inferior decision-making bodies as "Courts" or "tribunals" for the purpose of judicial review according to whether their functions are "judicial" or "administrative" would result in confusion and uncertainty. For example, in *Racal* Lord Diplock treated the Foreign Compensation Commission (whose order was the subject of review in *Anisminic*) as an administrative tribunal. Yet in *R v Secretary of State for the Environment, ex parte Ostler*[23] Lord Denning MR described the Foreign Compensation Commission as a "truly judicial body". Only recently have Commonwealth Courts recognised that to make the application of implied procedural requirements conditional upon classification of a tribunal's function as "judicial" rather than "administrative" often leads to arbitrary and unjust results. The Courts have now abandoned this approach in favour of the more flexible standard of "fairness".[24] It is difficult to justify resurrecting this troublesome distinction for the purpose of determining the scope of review for substantive errors of law.

The rationale of Lord Diplock's distinction between inferior Courts and administrative tribunals is also open to challenge. In practice, the extent to which a reviewing Court feels prepared to subject the decision of an inferior body to close scrutiny depends on a number of factors. One important factor is the relative competence of the Court and the authority in respect of the subject matter of the decision under challenge.[25] Lord Diplock seems to have assumed that "inferior Courts" are always better qualified to decide questions of law than "administrative tribunals", and therefore their decisions are entitled to more respect in review proceedings. However it is a mistake to elevate such an impression into a rule of general application. A large number of statutory tribunals have legally qualified chairmen, others are chaired by District Court Judges,[26] while some authorities consist of a single officer who holds the status of a Judge.[27] It

[19] [1980] 3 WLR 109 (HL).

[20] In *Attorney-General v BBC*, ibid, at 127 Lord Edmund-Davies concluded: "At the end of the day it has unfortunately to be said that there emerges no sure guide, no unmistakable hall-mark by which a 'Court' or 'inferior Court' may unerringly be identified. It is largely a matter of impression."

[21] Ibid.

[22] Viscount Dilhorne, Lord Scarman and Lord Fraser of Tullybelton.

[23] [1977] QB 122 at 135.

[24] See, eg, *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 141-145 per Cooke J.

[25] Other relevant factors include:

(i) the terms of the empowering provision — is the authority's function defined only by reference to broad policy objectives, or is its function more narrowly defined by reference to reasonably detailed statutory criteria?

(ii) the presence of a privative clause;

(iii) administrative efficiency and expediency;

(iv) the seriousness of the alleged error and the extent to which it influenced the final decision;

(v) the seriousness of the effect of the decision on the applicant's interests;

(vi) the need to ensure that statutory powers are exercised in a fair and consistent manner. See generally, Smillie, "Judicial Review of Administrative Action — A Pragmatic Approach" (1980) 4 Otago LR 417 at 436-446.

cannot be assumed lightly that such bodies are more likely to err in law than "inferior Courts". In fact, given the wide potential scope of review for error of law, considerations of relative expertise and familiarity with the subject-matter of decisions under review suggest that superior Courts of general jurisdictional should assume a more tolerant and less active supervisory role in respect of many administrative tribunals than they do in respect of inferior Courts of law.

However Lord Diplock's judgment could be interpreted as inviting High Court judges to ignore legislative attempts to limit judicial review of specialist tribunals charged with regulating complex, technical or rapidly developing activities by reference to vague, open-ended statutory criteria designed to allow the tribunal considerable freedom to develop its own policies and standards. At the same time, Lord Diplock insists that a strong privative clause should prevent a High Court Judge from substituting his own interpretation of a crucial statutory term for that of an inferior Court even where (as in *Pearlman*) the inferior Court enjoys no advantage of expertise in respect of the subject-matter of the decision and a definitive ruling is desirable in order to ensure consistent exercise of the power. It is hardly surprising that the distinction between judicial and administrative functions has been used in the past to achieve quite the opposite result to that contemplated by Lord Diplock. In *R v Secretary of State for the Environment, ex parte Ostler*[28] Lord Denning MR and Goff LJ distinguished *Anisminic* on the basis that the Foreign Compensation Commission performed judicial functions in respect of which a wider, more assertive approach to judicial review was appropriate. Their Lordships considered that a narrower, more restrained approach to review was called for in *Ostler* because the decision under challenge had a greater policy content and was therefore administrative in character. Similarly, in *S E Asia Fire Bricks* the Judicial Committee noted that the Industrial Court was required to consider broad considerations of policy, and observed in relation to the privative clauses that "[t]he reason for keeping questions remitted to the Industrial Court away from the ordinary Courts may be that its functions are not purely judicial."[29]

The effects of the recent decisions

What, then, is the effect of these recent decisions? For English Courts, a majority of the House of Lords in *Re Racal Communications Ltd* (Lords Diplock, Keith and Edmund-Davies) favoured preserving the distinction between jurisdictional and non-jurisdictional errors in respect of decisions of "inferior Courts of law", and approved the manner in which Geoffrey Lane LJ applied that distinction in *Pearlman*. However, *Racal* leaves English law of judicial review in respect of administrative tribunals in a state of complete uncertainty. New Zealand Courts are faced with a decision of the Privy Council in *S E Asia Fire Bricks* which seems to require application of the approach of Geoffrey Lane LJ in *Pearlman* to all inferior decision-making bodies. It may be open to a New Zealand court to distinguish *Fire Bricks* on the ground that the decision under review was that of an "inferior Court", and apply the approach of Lords Denning, Diplock and Keith to a decision by an administrative tribunal. However the observation made in *Fire Bricks* that the functions of the Industrial Court were "not purely judicial" presents an obstacle to this approach. In any case, Lord Diplock's distinction between inferior Courts and administrative tribunals is unsatisfactory for reasons already given.

In a recently published article which was written before the decisions in *Fire Bricks* and *Racal* were handed down, I argued that the approach taken by Lord Denning in *Pearlman* is sound, and that the distinction between jurisdictional errors and errors of law within jurisdiction should now be completely abolished.[30] In support of this proposition I sought to demonstrate the following points:

1. All existing attempts to find a sensible and workable basis for distinguishing between jurisdictional and non-jurisdictional errors have failed.
2. The distinction is undesirable because it tends to obscure and divert attention from the underlying policy considerations which influence the willingness or reluctance of a Judge to review and set aside particular administrative acts.[31]

[26] Eg Planning Tribunal, Social Security Appeal Authority.
[27] Eg Accident Compensation Appeal Authority, Taxation Review Authority.
[28] Supra, n 23.

[29] [1980] 3 WLR 318 at 325.
[30] Smillie, "Judicial Review of Administrative Action — A Pragmatic Approach" (1980) 4 Otago LR 417.
[31] See supra, n 25.

3. It is not necessary to preserve the concept of non-jurisdictional error as a device for enabling Judges to justify policy decisions not to interfere with particular acts by inferior tribunals. Other more appropriate "avoidance devices" are available which reflect and bear a recognisable relationship to the underlying policy considerations which in fact deter the Court from intervening.[32]
4. The major obstacle to abolition of the distinction is conceptual rather than practical. It has been argued that if every proved error takes a tribunal outside its jurisdiction, privative clauses "will have no sphere of operation at all, and the judicial attitude will be exposed as one of naked disobedience to Parliament".[33] Yet the present approach (which concedes only a limited field of operation in respect of non-jurisdictional errors of law to provisions which purport to exclude judicial review completely) is equally inconsistent with the plain words of privative enactments. Nor would abolition of the distinction between jurisdictional and non-jurisdictional error necessarily mean that privative clauses would be denied any practical effect at all. A more flexible approach which treats a privative clause as an indication that Parliament intends the Court to allow the tribunal considerable latitude in interpreting and applying its statutory mandate would be no more inconsistent with the plain words of privative enactments than the present approach, and should free discussion of the effect of such provisions from the obscurity and confusion attracted by arguments based on concepts of "jurisdiction", "voidness" and "nullity". By this approach, the existence and terms of a privative clause would be considered by the reviewing Court along with other relevant factors[34] in determining the extent to which the Court should subject the inferior decision to critical examination.

In one recent case Cooke J gave open recognition and approval to an overt policy-based approach to judicial review. He declared:[35]

> "When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account."

Unfortunately, the decision of the Privy Council in *S E Asia Fire Bricks* may make New Zealand Judges feel compelled to continue to justify their decisions (at least where a privative clause applies) in terms of a barren conceptual distinction between jurisdictional and non-jurisdictional errors.

[32] The Court can use the theoretical limitations on the substantive grounds of invalidity to justify a finding that no recognised form of error has been proved. Alternatively, the Court may conclude that there is no sufficient causative link between the error and the final result (viz the decision probably would have been the same even if the error had not been committed); or it may refuse to grant a remedy in the exercise of its discretion. See generally Smillie, supra, n 30 at 446-456.

[33] Wade, (1979) 95 LQR 163.

[34] See supra, n 25.

[35] *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 at 4. A privative clause was not in issue in this case.

OBITUARY

ALFRED JOHN HENRY JEAVONS

Mr Alfred Jeavons died on 9 January 1981. He was for many years the undisputed leader of the Dunedin Bar, and a special ceremony to mark his death was held in the Dunedin High Court on 3 February. After a speech by Mr D J More, President of the Otago District Law Society, in which he paid tribute to the late Mr Jeavons, the following address was given by the presiding Judge, His Honour Mr Justice Roper:

Mr More, Members of the Bar, Ladies and Gentlemen:

The Chief Justice, Sir Ronald Davison, and my brother Judges throughout New Zealand have asked to be associated with this tribute to the late Alfred Jeavons, and particularly Mr Justice Cook who, of course, practised in this city for many years, and also Mr Justice Casey, for an entirely different reason; he appeared, unsuccessfully he recalls, in a number of civil cases where his opponent was Alfred Jeavons. All join with me in expressing their heartfelt sympathy to Mrs Jeavons and his family.

At the height of his powers there would have been few jury advocates in New Zealand to equal Alf Jeavons; some would say there was no equal. While members of the profession in other parts of New Zealand may have been hard put to recall the names of leading counsel in Dunedin, they would have known the name Alf Jeavons, just as in earlier years they would have known the name Alf Hanlon. It is interesting to speculate how much the one influenced the other.

Alfred Jeavons was a fine advocate and lawyer and the numbers present at this gathering are an indication of the esteem in which he was held and the diversity of his interests. He was an acknowledged leader of your Bar, but let us not forget his other qualities. His courage and determination — determination to persist in his practice of the law during the frustrating Depression years when financial returns were minimal, determination to survive in the Western Desert during the war when he was given up for dead; and most notably, his courage when, as the result of an operation in 1970, this renowned advocate and accomplished singer found himself voiceless. He fought back then as he had always done. We remember too his courage in the pursuit of what he saw as justice, and that delightful humour which was probably as important as his courage and determination in seeing him through life.

He was a supporter of the underdog; and there must be hundreds, if not thousands, of people who were charged with criminal offences, injured in accidents at work or on the road, or in other kinds of strife, who owe him a debt of gratitude. Perhaps today he is holding a watching brief. If he is it will be with one foot on a chair; and, if so, I know he would wish to farewell you as the late Mr Justice W McGregor did when he left Dunedin, where he was Crown Solicitor, on his appointment to the Bench. He concluded with a line of Tennyson:

> "May there be no moaning at the bar when I put out to sea."

That, I believe, is the way Alf Jeavons would want it.

AN INJUDICIOUS COMPILATION

*By ANTHONY GRANT**

An Article in three parts concerning some of Her Majesty's Judges.

PART 2

Some judicial attributes

(a) Plain speaking

It is customary for lawyers to be so polite that they often say the opposite of what they mean. They say "We regret" when they mean "We are glad"; "with respect" when they mean "can't you even understand that?"; "my learned friend" when they mean "the unlearned person beside me" and so on.

An appeal concerning a Somerset JP may show how ingrained the habit is. Throughout the hearing of the case, counsel observed that the JP exhibited the usual symptoms of sleep to be seen occasionally on the Bench — in counsel's words, the Justice kept "nodding off". His client appealed. If there are some who think that the Appeal Court's decision was an illustration of the politeness principle, they may perhaps be forgiven for doing so. While accepting counsel's evidence that the Magistrate dropped his head occasionally, the Judges of the Divisional Court found that this was not because he was sleeping: rather, he was concentrating![1]

With this background, it is interesting to see that some Judges still speak their minds unconcerned by the dangers that await them for doing so. Mr Justice Melford Stevenson recently said this of the Sexual Offences Act 1956: "Some years ago Parliament committed itself to pass a buggers' charter which enabled perverts and homosexuals to pursue their perversions in private if their partners are over 21". There was an instant outcry and the Lord Chancellor responded by saying that he "strongly deprecated the expression used by the Judge . . . and I have told him that this is my view".[2] The Judge was never afraid of controversy and he has the distinction of having been overruled in three cases on the same day.

A more extraordinary case concerned Lord Chief Justice Keeling. In about 1667, an advocate referred in his address to Magna Carta to which the Judge replied "Magna Farta? What ado with this have we?". For this and two other matters he was called to Parliament where he persuaded the House not to impeach him. Of the allegation just referred to he explained that he did not remember if he did in fact utter the saying but that "it might be possible, Magna Carta being often and ignorantly pressed upon him".[3]

(b) Great intelligence

The cleverest people often manifest the most glaring faults. Scrutton LJ, according to his fellow Judge Sir Frank McKinnon, "never had good manners and he indulged in petulant rudeness to counsel". Eventually all the chief City solicitors, his former clients, gave a joint retainer to a leading junior to make a protest to the Judge in Court. Scrutton apparently listened to the novel address without much comment but his subsequent conduct was said to be better.[4]

In the history of the law few names stand in such high regard as Lord Mansfield's and it is therefore strange to see that he apparently told this story about himself. Because he was quick to grasp the important points in a case he would take a book or a newspaper and read while counsel continued to address him. On one occasion a Mr Dunning ceased to address the Judge until the latter stopped and said "Pray go on Mr Dunning". To which came the reply, "I beg your pardon, my Lord, but I fear I shall

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* Barrister, of Auckland.

[1] *R v Weston-super-mare Justices ex Taylor, The Times* 13 November 1980.

[2] The incident occurred in July 1974 and was widely reported.

[3] Commons' examination of LCJ Keeling 1667, referred to in Kenyon, *The Stuart Constitution Documents and Commentary*, p 427.

[4] *Dictionary of National Biography* 1931-1940, p 800.

[5] Heighton, *Legal Life and Humour*, p 128. It appears from Lord Campbell's *Lives of the Chief Justices* Vol 2 that Mansfiedl would on occasions read the Public Advertiser in Court, and that his reason for doing so was to give a hint that the time of the Court was being wasted. He also used to write letters while being addressed by counsel — Heward, *Lord Mansfield* p 62.

interrupt your Lordship's more important occupations. I will wait until your Lordship has leisure to attend to my client and his humble advocate."[5]

Sir William Blackstone had an immense knowledge of the law yet it is recorded of him that more of his judgments were upset than those of any other Judge of his day.[6] This is a matter of some interest since it shows that knowledge of the law and sound judgment are two quite different things. Jeremy Bentham was so upset by Blackstone's bland acceptance of the law in his Commentaries that he gave up the professional study of law to devote himself to law reform.[7] This unadventurous acceptance of decided law may provide an insight into the reason for Blackstone's lack of success as a Judge.

Sir John Salmond, probably New Zealand's cleverest Judge, had a poor reputation for his handling of counsel. In his hands, counsel were quickly placed in a Catch 22 dilemma. If he approved of a submission he usually said that it was a waste of time to state it since it was obvious from the outset of the case, and if the submission was unacceptable he said that it should never have been made in the first place![8]

F E Smith, subsequently Lord Birkenhead, had an exceptional mind. He obtained a first-class degree in jurisprudence at Oxford and was a brilliant lawyer. So much so that he even found the judicial work of the House of Lords to be too trivial to retain his interest.[9] Yet, having one of the finest minds that ever came to the Bar, he had his faults. Especially in later years he drank heavily, failed to file income tax returns, was both obsessed with money and heavily in debt, had various rather sordid sexual adventures and plagiarised the writings of others.[10] Sir Patrick Hastings in his autobiography refers to an incident when Birkenhead apparently lied to gain access to some documents. Hastings at the time was Attorney-General and access to the documents was only possible with his consent. Birkenhead told the Secretary to the Director of Public Prosecutions that he had Hastings' approval to see the documents when no such permission had been given. Hastings records that he never spoke to Birkenhead again. [11]

One of New Zealand's most distinguished lawyers, Sir Francis Bell, had an encounter with Birkenhead which must have wounded the former's pride. At the Imperial Conference in 1926, Bell observed that he was unable to understand a certain document. In New Zealand, that would have conclusively damned the drafting but from the confident Birkenhead it brought the response, "Well if God hasn't given you any brains, I can't".[12]

Not all great minds are accompanied by such behaviour. Sir Joshua Williams, New Zealand's only permanent appointment to the Privy Council, is universally praised in the annals of this country's jurisprudence. How many Judges are there who when they decide a case against a party personally recompense them thereafter? Yet when Williams decided that some nuns who ran a home for the aged would have to pay rates on the property, he sent them a cheque and an accompanying letter asking them to accept the money as some assistance towards the expense which he knew the litigation must have caused. And when he sentenced a man to imprisonment he sent 20 pounds to the chaplain of a prisoners society (of which Williams himself was President for a time) saying that "I find that this criminal has a wife and four children and they will find life difficult with their breadwinner in jail. I wish you would see what can be done, and I would like to make a small contribution."[13]

Some undesirable habits

Pomposity may not be all that common these days but when it is found there isn't usually much that can be done about it.

Mr Justice Johnson, newly arrived in New Zealand from England in 1860 or 1861, was most upset that the Napier Sheriff had not arranged for javelin men to attend his arrival. When it was explained that they didn't have javelin men in New Zealand, Johnson instructed the Sheriff to ensure that when he next came to Napier "proper respect is paid not to *my* dignity but to the dignity of my office". When the Judge returned six months later the Sheriff hired actors from a local touring company and had them dress up in cheap theatrical props: javelins of lath, tinfoil blades, tin breastplates, and clothing of tragic impressiveness. News got out of what was happening and people gathered to see the "javelin men" (who looked more like scarecrows). The Judge received a cheer, but it was a cheer of mockery and

[6] Birkenhead, *Fourteen English Judges*, p 213.
[7] Plunkett, *A Concise History of the Common Law* 5th ed, pp 73-74.
[8] *Portrait of a Profession*, p 328.
[9] Stevens, *Law and Politics*, p 232.
[10] Ibid.
[11] The Autobiography of Sir Patrick Hastings, pp 243, 244.
[12] *Portrait of a Profession*, p 169.
[13] W Downie Stewart, *Portrait of a Judge*, pp 76-78, 72.

derision. This was the only occasion when a New Zealand Judge has been attended by javelin men.[14]

If pomposity is seen from time to time, obvious alcoholism is fortunately much more scarce. It is recorded of Judge Jeffreys that in his later years on the Bench he would come into Court hours after the appointed time with bleary bloodshot eyes and shaking hands, his temper inflamed beyond control by disease and drink.[15]

Lord Braxfield, described by Cockburn as "the Jeffreys of Scotland", liked more than a "wee dram". It is said that he thrived on a "stintless regime of beef, brandy and claret" and was firmly persuaded that a point of law was more easily studied after drinking a bottle of his favourite beverage than by abstemiousness[16], an opinion which no doubt some lawyers even today might be interested to put to the test.

Asking too many questions of witnesses is a common problem. After the Court of Appeal overturned a judgment of Mr Justice Hallett's in *Jones v National Coal Board* [1957] 2 QB 55 because he had intervened too much in the trial, the Lord Chancellor sent for the Judge and it was arranged that he would sit for a little while and then resign — which he did.[17]

It is one of the advantages of the system of Recorders which exists in England that such tendencies can sometimes be detected before an irreversible appointment is made. One of the best known QCs in England seems doomed to be excluded from the Bench because, in the mid-1960s when he sat as a Special Commissioner, he intervened excessively in the case he was trying.

It is one thing to intervene to ask questions but another to harangue a witness. Judge Jeffreys was a master of this unfortunate art. These are some of the remarks he addressed to the witness Dunne in the famous trial of Lady Alice Lisle:

> "It seems that the 'Saints' have a certain charter for lying. They may lie and cant and deceive and rebel, and God Almighty takes no notice of it .... See how they can cant and snivel and lie and forswear themselves.
>
> "Jesus God! That we should live to see such creatures (as the witness) among mankind, and among us, too, to the shame and reproach be it spoken of our nation and religion! . . . I pity thee with all my soul, and pray for thee, but it cannot but make all mankind to tremble and be filled with horror, that such a wretched creature should live upon the earth!
>
> "Jesus God! That ever we should have such a generation of vipers among us. . . .
>
> "How hard the truth is to come out of a lying Presbyterian knave.
>
> "Hold the candle to his face, that we may see his brazen face.
>
> "Thou art a strange prevaricating, shuffling, snivelling, lying rascal.
>
> "Show me a Presbyterian and I will engage to show a lying knave." [18]

Bias is another undesirable characteristic. It is very rare for bias to be declared but a few years ago some lay Magistrates in England were naive (and honest) enough to declare that "in cases of doubt they always preferred the evidence of the police" and the Divisional Court set aside the conviction which had been achieved by this expedient process.

Almost the only way was to prove actual bias is to put the Judge in the witness box and ask him a few pertinent questions. Many litigants must long for this opportunity. Maurice Margorot was one who actually achieved it. This is the extraordinary sequence of questions which he put to Lord Braxfield in 1794:

> "Did you dine at Mr Rochead's at Inverleith in the course of last week? — 'And what have you to do with that, sir?'
>
> "Did any conversation take place with regard to trial? — 'Go on, sir.'
>
> "Did you use these words: 'What should you think of giving him (Margorot) a hundred lashes together with Botany Bay', or words to that effect? — "Go on. Put your questions if you have any more."
>
> "Did any person — did a lady say to you that the mob would not allow you to whip me? And, my Lord, did you not say that the mob would be the better for losing a little blood? These are the questions, my Lord, that I wish to put to you at present in the presence of the Court. Deny them or acknowledge them."[19]

Braxfield appealed to his colleagues as to whether he should answer the questions, but all his fellow

[14] O T J Alpers, *Cheerful Yesterdays*, pp 125, 126.

[15] Birkenhead, op cit, p 91.

[16] W Forbes Gray, Some Old Scots Judges quoted in Blom-Cooper *The Law as Literature*, p 248.

[17] Lord Denning, *The Due Process of Law*, pp 58-62.

[18] 11 State Trials 354 ff.

[19] W Forbes Gray, op cit, pp 255, 256.

Judges replied that they were irrelevant and ought not to be answered. It is thought that Braxfield had in fact uttered the remarks and a lady had indiscreetly repeated them. In a subsequent trial an offer was made to establish the truth of the story by evidence independent of the Judge, but the Court refused to allow the matter to be gone into — "a proceeding which", as Cockburn remarks, "it is difficult to reconcile with any hypothesis except one."[20]

"Say not, 'Why were the former days better than these?' For it is not from wisdom that you ask this."[21]

In Part 3

Some Oddities
The Trials a Judge has to Face
Trouble with Counsel

[20] Ibid.
[21] Ecclesiastes 7:10.

False fears — "The end of our marriage seemed to me curiously tepid. It was all very English and very reasonable, with the added spice of that ludicrous charade of sending a detective to a prescribed room in a transient hotel where Isolde would be discovered playing cards with a hired adulterer. It all worked like a spell, without a trace of collusion, and soon I was ready for the Law Courts. One morning my solicitor called me to tell me to hurry up, the hearing was at 11 o'clock, and the Judge was Mr Justice Tudor Rees. I sat in my bath with a copy of *Who's Who* on my wet knees. I looked up Mr Justice Tudor Rees just to know what I was up against. His credentials seemed overwhelming for a mere divorce, but I did happen to notice that his wife's maiden-name was Dorothy Sidebotham, a distinguished name in the northern countryside which is hard to forget.

"I reached the Law Courts as the previous divorce was in progress: I found I was next on the agenda. My lawyer, a Member of Parliament from Ulster, asked me a series of predictable questions, which I answered in an over-produced theatrical voice, so eager was I not to be misunderstood. I was given technical custody of Tamara, although this right was waived owing to the child's age. All seemed to be going swimmingly in this hypocritical ritual, when the Judge suddenly fixed me with an eye both awake and aware.

" 'Why?' he asked, without continuing. Emergency was written all over my lawyer's face.

" 'Why?' repeated the Judge again. 'Why did you give your daughter the eccentric name of Tamara?'

" 'I don't consider the name at all eccentric,' I replied, not without haughtiness.

"The Judge flushed with irritation.

" 'In all my experience,' he remarked, 'it is among the most eccentric names which have come to my notice'.

" 'You must realise, m'Lud, that my surname is Russian,' I said. 'It would be ridiculous were I to call my daughter, say, Dorothy.'

"He looked up in surprise, forgetting for a moment to frighten me. 'Dorothy's a perfectly good name' he said.

" 'In certain circumstances, m'Lud, it cannot be bettered. Not, however, in mine.'

"A mischievous smile played about his lips for a moment. I saw an anecdote forming in his mind. On arriving home that night, he was going to say — 'Oh, incidentally, Dorothy my dear. You'll never guess. I had that actor-fellow Ustinov in Court today, and d'you know what happened . . . .?'

"Thanks to *Who's Who*, I was through the minefield. I left Court a free man, with all that entails, now once more open to burdensome temptations and the unnecessary exhaustion of uncertainty."

From "Dear Me" Peter Ustinov, p 204 — as noted in *Obiter Dicta*.