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GOVERNING THE PROFESSION

The Law Practitioners Bill has now been introduced. It is intended to replace the Law Practitioners Act 1955 and is expressed to come into effect on 1 April 1983. The principal changes, as described in the explanatory note to the Bill, are outlined below. There has been some rearranging and redrafting of sections. The result is a considerable improvement on the present Act.

From the earliest Act to the latest Bill the essential structure of the legislation has remained the same. There is provision for the establishment of a Law Society, certain functions are reserved to law practitioners, there is provision for controlled entry and internal discipline, and more recently (ie, this century) there has been a strengthening of practice supervision through audit requirements and fidelity guarantee funds. Within each of those separate components there has been a progressive development. This includes a move from voluntary to compulsory Law Society membership and the opening of the disciplinary proceedings to lay observers. The changes have tended to be gradual and to some extent compartmentalised. However there are changes proposed in the Bill that invite a more searching look at some long-standing aspects of the legislation which may otherwise be taken for granted.

The first concerns the functions to be reserved to lawyers. In the 1931 Act and earlier legislation these functions were expressed in terms of *acting* as a barrister or solicitor; it was an offence for any person to *act* as a barrister or solicitor in any court unless enrolled. Barristers and solicitors were forbidden to *act as such* unless they held a certificate evidencing current enrolment. It was also an offence for anyone other than a barrister or solicitor to *act* as a conveyancer. A distinction may be noted between acting as a barrister or solicitor *in any Court* and acting *as such* — although the distinction seems to bear on penalty.

This distinction is continued in the 1955 Act and also in the Bill, but with two differences. In both, work of a *conveyancer* is specifically defined and reserved to holders of a current Practising Certificate; and the Act incorporates an earlier amendment placing restrictions on a practitioner's ability to practise on his or her own account. To this the Bill adds a definition of a "solicitor who is for the time being engaged in the practice of his profession on his own account" for the purposes of the part dealing with the solicitors fidelity guarantee fund.

In summary then there are three categories of lawyer. First, there is the person who is enrolled and who therefore has the status of a barrister or solicitor but who does not have a Practising Certificate and therefore cannot practise and is unlikely to be eligible for membership of the Law Society. Secondly, there is the person who has a Practising Certificate but cannot practise on his or her own account. Thirdly, there is the person entitled to practise on his or her own account. Perhaps we could add also those who have a law degree but who have not enrolled.

These distinctions are not new and indeed we have lived with them since about 1935 — so why raise them now? The reason is that the Bill alters the qualifications for practising on one's own account. The change is a good one, which will ease the way for lawyers in business or the universities to switch to private practice. Whereas, today, practising on their own account is limited to those who have had

three years experience in a legal office or in the legal branch of a government department, under the Bill *experience of legal work* in the office of a local authority or in the employ of a company or other body corporate and experience of full-time law teaching in a law faculty of a university can count also. It is a healthy move and one that widens the base of the profession. But in doing so it complicates the definition (such as it is) of the functions reserved to law practitioners.

Defining the functions in the terms of *acting* as a barrister or solicitor may have been adequate in past years when perhaps a law practitioner's sphere was clearly demarcated — but this proposed change acknowledges that the scope of legal work — solicitor's work? — is broadening, and one may question the desirability of continuing to attach criminal sanctions to such undefined statutory prohibitions.

This is not a trifling matter. There exist real areas of doubt as to the ambit of the protected functions. They range from the trivial — can a solicitor without a Practising Certificate take a declaration? — to the more weighty, such as whether a corporate employee looking after tenancy documentation is drawing documents "on behalf of any other person" (if not no Practising Certificate is needed). This is not an issue at the moment, but may well become so if the work is done by a solicitor without a Practising Certificate who later claims such work as part of his legal experience. Company employees may also be confronted with the prospect of union membership. Under s 112A (and Schedule 1A) of the Industrial Relations Act 1973 a person whose duties require him to have a Practising Certificate under the Law Practitioners At 1955 may claim exemption from union membership. Deciding whether a Practising Certificate is required may well turn on the answer to such fundamental questions as whether the employer body is the employee solicitor's client and whether the work is being done "on behalf of any other person".

In other words an acknowledgement that legal experience may be gained outside the traditionally recognised areas of practice carries with it acknowledgement that a solicitor's field of *activities* is broadening and that the traditional words for defining the scope of a law practitioner's functions are becoming less rather than more certain.

It would be an impossible task to attempt an inventory of a law practitioner's functions, and indeed it is hardly necessary at the moment as the matters outlined are not causing problems and may well rest happily until the next revision which, on the basis of past trends, will be in about 1996. However, if they do brew up, the existing and proposed legislation invites a decision based on what barristers and solicitors have traditionally done. There does seem to be a case for suggesting that a better basis would be to go back to first principles. This licensing regime has been established to protect certain vulnerable interests (see [1980] NZLJ 257). Does the protection of those interests require that performance of the function in question be restricted to law practitioners? It has been suggested in other jurisdictions that the public interest component be incorporated by requiring the consent of the Attorney-General to prosecutions. Alternatively the Act could simply list factors to be taken into account in deciding what functions should come within the restriction. These factors would be intended to introduce a current perspective to counter tradition.

This broadening of the base also raises the question of whether the membership provisions of the New Zealand Law Society are not too restrictive. To some extent this is an internal matter and there is power to deal with it as such. But there does seem to be a case for basing membership eligibility at least on enrolment rather than practice. This would enable the group most likely to practise law to associate with the profession (of which they are part by virtue of status) should they so desire and as such it seems a desirable move. A non-practising membership would be more appropriate for this group than the existing provision for honorary members. To widen membership eligibility any further would involve moving from enrolment as an officer of the court to academic qualification — a proposition of doubtful acceptability and little merit.

There is much more that could be said but one other point must suffice. The Bill has been criticised and doubtless will continue to be criticised for its emphasis on the legal profession rather than on the provision of legal services. The emphasis on the legal profession reflects the common approach to any licensing regime — it describes functions to be reserved and who may perform them. For the legislation to go further and impose positive requirements raises the question of who pays. This point is mentioned only to transfer this avenue of criticism from the legal profession, where some might like to leave it, to whichever government emerges — where it properly belongs.

TONY BLACK

COMMERCIAL LAW

CONFIDENTIALITY ORDERS UNDER THE COMMERCE ACT 1975 — I

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This is the first part of an article examining the statutory and other methods of protecting the private interests of commercial litigants in proceedings under the Commerce Act. The second part will appear in the December issue.

1. Introduction

The principle that Courts and Tribunals carrying out judicial functions should administer justice in public is well known and of long standing.[1] Indeed, this principle is expressly enshrined in s 9(1) of the Commerce Act 1975. Such a requirement preserving the public interest in having proceedings of the Commerce Commission administered in open sessions is not surprising given the themes of consumer protection and public interest which underpin the Act — See the Long Title and also s 2A which sets out the "general objects" of the Act.

There also exists within the Act a recognition of a further public interest, namely the preservation of the right of access to the Commerce Commission for all commercial litigants in the knowledge that their private interests will be fully protected. Such private interests include the protection of a wide range of confidential material which might be relevant to the particular proceedings before the Commission. Reference will later be made to various types of information or material which may attract the label of commercial confidentiality. Suffice it to note at present that litigants in proceedings involving competition and commerce will normally (and very properly) be concerned to ensure that confidentiality is preserved for all commercially valuable and sensitive material.

The Commerce Act seeks to protect confidential material in various ways. First, although the Commission must generally hold its hearings in public, it is empowered under s 9(2) to deliberate in private. Proceedings however may by virtue of s 9(3) be held as to the whole or part *in camera*. In respect of the mergers and takeovers provisions in Part III of the Act, there is specific power for the Commission to hold the whole or any part of the inquiry in private where "the business or any activities or arrangements in the course of the business carried on by any person would be seriously prejudiced in a material respect if the Commission were to sit in public. . . ."[2]

Secondly, the Commission may under s 9(3)(c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing. Thirdly, the Commission has power under s 15(3), in circumstances where either a party to any proceedings or any person has furnished any information, particulars, or documents either to the Commission itself or to any party for the purpose of proceedings before it, to order that some or all of such information, particulars or documents be supplied to any party to the proceedings or to any other named person subject to such terms or conditions as it thinks fit. Any terms or conditions imposed by the Commission may relate not only to the *supply* of, but also to the use to be made of such information, particulars or documents. Fourthly, the common law has developed certain principles for the protection of confidential information in various types of judicial and administrative proceedings.[3] If any application for confidentiality did not fall strictly within the statutory provisions, and the Commission were to hold that the information concerned

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[1] See *Scott v Scott* [1913] AC 417 (HL); also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL).

[2] Section 77(3). By s 77(4) the Commission has power when making an order under s 77(3) to make such further order as it thinks necessary for the purpose of aiding in or maintaining secrecy in respect of any merger or takeover.

[3] See 13 *Halsbury's Laws of England* 4th ed, para 86. See also *Scott v Scott*, supra, n. 1; *Attorney-General v Leveller Magazine Ltd*, supra, per Lord Diplock at 450; *Distillers Co (Biochemicals) Ltd v Times Newspaper Ltd* [1975] 1 QB 613; *Warner-Lambert Co v Glaxo Laboratories Ltd* (1975) RPC 354; *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881 (CA); *Medway v Doublelock Ltd* [1978] 1 WLR 710; *D v National Society for Prevention of*

nevertheless required protection, the Commission could resort to the common law principles.[4]

In view of these provisions, and given the natural desire of commercial litigants and their advisers to ensure that confidential commercial information is fully protected, the Commerce Commission will be faced in many proceedings with resolving the conflict between the two types of public interest already mentioned. The classic justification for a private hearing (that being one method of ensuring confidentiality) is referred to in the judgment of Viscount Haldane LC, in *Scott v Scott* [1913] AC 417, 437-438 as follows:

> "[I]t may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration."

This topic was recently considered by the Full Court of the Federal Court of Australia in the context of trade practices litigation.[5] The case involved an allegation by the Australian Broadcasting Commission that an agreement in relation to the promotion of cricket matches in Australia between the Australian Cricket Board and three corporations (including World Series Cricket Pty Ltd), was contrary to s 45 of the Trade Practices Act. The parties to the agreement sought confidentiality in respect of certain clauses of the agreement relating to financial figures and other commercially valuable matters. At first instance the application for confidentiality was refused. On appeal to the Full Court, it was held by a majority that an order should be made under s 50 of the Federal Court of Australia Act 1976 restricting publication of certain parts of the agreement. The case contains an excellent discussion of the two competing interests of open justice on the one hand and protection of confidential information on the other.

The learned Chief Justice, one of the majority Judges, referred to the concept of "open justice" and noted the existence of another public interest namely "the public interest that the Court should endeavour to achieve *effectively* the object for which it was appointed: to do justice between the parties".[6] The Chief Justice also stated:[7]

> "It is in the interests of the administration of justice that the very proceedings before the Court should not be permitted to destroy or seriously depreciate the value of such confidential information. If it were otherwise, not only might the parties and members of the public consider the Court was not paying proper regard to confidentiality but also it might open the way to abuse."

It is proposed in this article to deal with the following questions[8] relevant to the resolution of the conflict between these important interests in proceedings under the Commerce Act:

(a) What principles are applied to determine confidentiality applications?
(b) What types of confidential information arise in Commerce Act proceedings?
(c) At what stage in investigations, inquiries and proceedings do questions of confidentiality arise?
(d) What are the modes of protecting confidential information?

Cruelty to Children [1978] AC 171; *Church of Scientology of California v The Department of Health and Social Security* [1979] 1 WLR 723 (CA); *Science Research Council v Nasse* [1980] AC 1028 (HL); *R v Tait and Bartley* (1979) 24 ALR 473; *Thomas Marshall (Exporters) Ltd v Guinle* [1979] 1 Ch 227; *British Steel Corporation v Granada Television Ltd* [1980] 3 WLR 774 (HL); and *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1981) ATPR para 40-204 (Fed Ct of Aust).

[4] By virtue of s 8 of the Act, the Commission may "regulate its procedure in such manner as it thinks fit." It is submitted that the procedure for protecting confidential information would clearly fall within this section.

[5] See *Australian Broadcasting Commission v Parish and Others* (1980) ATPR para 40-154, p 42, 193.

[6] Ibid, p 42, 196. See also *Trade Practices Commission v Queensland Aggregates Pty Ltd & Another (No 2)* (1981) ATPR para 40-233.

[7] Ibid, p 42, 197; for a detailed consideration of this case, see Zipfinger, "Confidentiality in Commercial Proceedings", Commercial Law Association Bulletin, Vol 12, p 101.

[8] It is beyond the scope of this article to consider broader issues of confidentiality of commercial documents; eg upon the grounds of legal professional privilege. These aspects are discussed in an article by J A Farmer, "The Confidentiality of Commercial Documents and Their Disclosure and Production in Litigation", Commercial Law Association Bulletin, Vol 12, p 1.

2. What Principles are Applied in Determining Confidentiality Applications?

The Commerce Act contains no definition of the term "confidential information". Section 9(3) merely empowers the Commission to make certain types of listed orders where the Commission is satisfied that it is desirable to do so "by reason of the confidential nature of any evidence or matter." No guidance is given as to the circumstances in which the Commission should consider that it is "satisfied" as to the desirability of making an order. The Courts generally have been reluctant to define what classes of information come within the category of "confidential". The tendency has been to approach the question in a broad way without reference to a specific definition. Thus, in the *Australian Broadcasting Commission* case, the learned Chief Justice stated as follows:[9]

> ". . . we are familiar with cases where an order forbidding or restricting publication is appropriate. Thus, where the proceedings concern a secret process and publication of the process would destroy the subject matter of the proceedings and render them nugatory, an order is necessary to prevent prejudice to the administration of justice. Where proceedings are brought to restrain publication of confidential material, similar considerations apply. Disclosure would prejudice the Court's proper exercise of the function it was appointed to discharge, to do justice between the parties. The possible cases where an order may be necessary to prevent prejudice to the administration of justice range fairly widely. The categories of this public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and legislation develop. . . ."

The nearest that the Commerce Act comes to defining what constitutes confidential information is in s 77(3). As already noted, that section empowers the Commission to sit in private where it is of the opinion that "the business or any activities or arrangements in the course of the business carried on by any person would be *seriously prejudiced in a material respect*" (emphasis added) if the Commission sat in public. Thus, the circumstances required for the Commission to go into private session are outlined by reference to a test of serious prejudice in a material respect.[10] This is in contrast to s 9(3) where no such definition is given.

When considering applications for confidentiality orders in circumstances outside the provisions of s 77, the Commission appears to resort to a test of whether disclosure of the information will cause harm. In the decision in respect of the proposed takeover by LD Nathan & Co Ltd of McKenzies (NZ) Ltd[11] it was stated (p 338, para 18):

> "The Commission . . . considers it retains discretion as to confidentiality and publication, even over material originally supplied to the Examiner pursuant to s 81J . . . . As to the test proposed by Nathans, that there needs to be a compelling reason before material submitted pursuant to section 81J could be released, this the Commission rejects. In the Commission's view the test to be applied in these circumstances is whether the disclosure of such information will cause harm".

The Commission added (p 340, para 26):

> "The Commission must equally seek to avoid harm to any party which might occur through the misuse or unnecessary disclosure of [confidential] material.[12]

It is significant that the test is not pitched as high as the requirement of serious prejudice referred to in s 77. It seems that the Commission is required in each case to consider each document or piece of evidence, in respect of which confidentiality is claimed, in the light of the following factors:

[9] Footnote 5, supra, p 42, 196. Compare the approach of Deane J, in *A C Hatrick Chemicals Pty Ltd* (1977) ATPR para 40-044, p 17, 507 at 17, 509-17, 510.

[10] Similarly, the public notification of statutory investigation by the Examiner may be dispensed with, with leave of the Commission, where serious prejudice would result from notification: s 77(1). The wording of s 13(3)(b) of the former Trade Practices Act 1958 referred to the concept of substantial damage to "legitimate business interests".

[11] See *Re Proposed Takeover by LD Nathan & Co Ltd of McKenzies (NZ) Ltd* (1981) 2 NZAR 321 at 335-378 (Decision No 42A).

[12] A similar approach appears to have been taken by the Commission in Decision No 6; see paras 23-28 where reliance was placed upon the Privy Council decision of *Collymore and Another v Attorney-General of Trinidad and Tobago* [1970] AC 538; compare the test propounded by Woodward J, in *Re Queensland Co-operative Milling Association Ltd* (1976) ATPR para 40-012 (issue was whether disclosure "could cause commercial harm or personal embarrassment . . .").

(a) the particular proceedings;
(b) the relationship of the material to the issues involved;
(c) the nature of the material;
(d) the requirements of the litigants themselves and any other persons concerned in the material; and
(e) relevant public interests.

A consideration of these factors, against the background of a requirement that no harm and/or prejudice be caused to any party or person concerned, should generally ensure that the overall interests of justice are preserved. In the *Australian Broadcasting Commission* case, supra, the learned Chief Justice put the matter thus: "The degree of encroachment on the principle of open justice will depend on a number of factors, including the degree of restriction in the order. It is, of course, clear that any order made should be in such terms that it ensures as far as possible that justice will be done between the parties" (pp 42, 197).

The resolution of confidentiality applications will not be easy in many cases. This point is aptly demonstrated by the following words of Deane J, in the *A C Hatrick Chemicals Pty Ltd*[13] case (pp 17, 509-17, 510):

> "The question whether Dr Norman should be given access to the confidential documents produced in answer to the summonses has caused me considerable difficulty. On the one hand, this Tribunal must be anxious to respect the legitimate claims to confidentiality which parties and witnesses before it, and those summoned to produce documents to it, are concerned to maintain in respect of confidential information and documents. On the other hand, it is essential, in the public interest, that parties be in a position to present the case they wish to present to the Tribunal and that, in an appropriate case, the Tribunal have the advantage of expert evidence from economists (on matters which are properly the subject of such expert evidence) to assist and guide it in the performance of its functions. It is inevitable that these considerations will, on occasion, conflict and give rise to inconsistent claims. In each case, the conflict must be resolved in the context of the particular proceedings, the relevance and importance of the contents of the documents to the issues involved in these proceedings, the nature and the degree of confidentiality of the information, and the measure of protection which can properly and lawfully be given to preserve confidentiality."

Given the difficulties of providing a precise definition of what constitutes confidential information in the context of Commerce Act proceedings, it is now proposed to consider various examples. By drawing on illustrations from Australia, England and New Zealand, it is hoped to present a clearer picture of the subject matter under review. It is not proposed to draw on illustrations from the United States, although it is to be observed that there is a body of relevant authorities from that jurisdiction.[14]

Confidentiality of information in respect of the Federal Trade Commission has been the subject of recent legislation in the form of the Federal Trade Commission Improvements Act of 1980, 94 Stat 375, enacted by Congress on 28 May 1980. Sections 3, 4 and 14 deal with procedures governing confidentiality of material submitted to the Federal Trade Commission. Confidentiality was also the subject of legislative enactment in the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 90 Stat 1383, enacted on 3 September 1976. The United States Supreme Court recently considered the question of confidential information in *Chrysler Corp v Brown, Secretary of Defence*, 441 US 281 (1979). In that case, the Supreme Court established the basic rules governing the release by federal agencies generally of material coming under the protection of the Trade Secrets Act (which material includes by definition "confidential statistical data, amount or source of any income, profits, losses or expenditures of any person . . ."); see also McCarthy and Kornmeier, "Maintaining the Confidentiality of Confidential Business Information Submitted to the Federal Government" *The Business Lawyer*: Vol 36 November 1980, p 57.

3. What Types of Confidential Information Arise in Commerce Act Proceedings?

If one were endeavouring to compile a list of the various types of information which could fall within this category, one would undoubtedly include the following:

[13] (1977) ATPR para 40-044, p 17, 507.

[14] Eg two articles by Ernest Gellhorn, "The Treatment of Confidential Information by the Federal Trade Commission: The Hearing", 116 U Pa L Rev 401 (1968); "The Treatment of Confidential Information by the Federal Trade Commission: Pre-Trial Practices", 36 U Chi L Rev 113 (1968)

A. Financial
- (i) the accounts of private companies;
- (ii) costings of manufacturing, producing or marketing goods or services;
- (iii) price or discount lists.

B. Competitive
- (i) secret processes or formulae;
- (ii) customer lists;
- (iii) information as to market shares;
- (iv) market research surveys or strategy plans (prepared for the promotion of products or services);
- (v) information relevant in a material way to competition;
- (vi) agreements, or parts thereof, relating to any of the above.

This list does not purport to be exhaustive. In the light of the legal principles described in the previous section of this article, a complete list could not be compiled.

In contrast to the Commerce Act, it is noteworthy that a section of the now repealed Trade Practices Act 1958 contained a reference to certain types of information which were not required to be entered in the public Register. By virtue of s 13(3) of that Act the following matters could, subject to the direction of the Commission, be entered in a special section of the Register: "(a) Particulars containing information the publication of which would in the opinion of the Commission be contrary to the public interest; (b) Particulars containing information as to any secret process of manufacture or as to the presence, absence, or situation of any mineral or other deposits, or as to any other similar matter, being information the publication of which, in the opinion of the Commission, would substantially damage the legitimate business interests of any person". No definition in similar terms is attempted in the sections of the Commerce Act dealing with confidentiality.

The position in Australia

If reference is made to the Australian Trade Practices Act 1974, s 89(5A)(a) provides that the Trade Practices Commission must in certain circumstances accept a claim for confidentiality of information which is the subject of an authorisation application and which would normally be placed on the public Register.[15]

Under the Australian statute, automatic confidentiality is granted for documents or submissions containing particulars of:

- (a) any secret formula or process;
- (b) the cash consideration offered for the acquisition of shares in the capital or assets of a body corporate;
- (c) the current costs of manufacturing producing or marketing goods or services.[16]

In the case of documents or material beyond these statutory categories, the Trade Practices Commission retains a discretion to exclude the whole or part of any document or submission from the public Register.[17] Such a power may be exercised by the Commission "if it is satisfied that it is desirable to do so by reason of the confidential nature of matters" contained in any document or submission.[18] As in s 9(3) of our Commerce Act, no definition is given of the confidential matters falling within this second category of confidentiality.

Apparently this lack of statutory guidance caused some difficulty,[19] and consequently the Commission, in Information Circular, No 2 dated 10 December 1974[20] set out the kinds of documents for which confidentiality would ordinarily be granted.

Three years later these guidelines were superseded by Information Circular, No 24 dated 24 December 1974.[21] This noted that in cases where the Commission retains a discretion in granting or refusing a request for confidentiality, the request is more likely to be granted if:

"(a) the request for confidentiality is confined to specific information on particular conduct and the general nature of that conduct is described elsewhere in the document or submission; or

"(b) the document or submission is so prepared that, in the event of the request for confidentiality being granted, the

[15] Section 89(5) provides that any person presenting submissions in support of an authorisation application may make confidentiality claims.

[16] A similar provision applies with respect to notifications to the Trade Practices Commission of exclusive dealing conduct: s 95(3)(a).

[17] Section 89(5A)(b). See also s 95(3)(b) for the same powers in respect of notifications.

[18] The machinery for making such confidentiality applications is set out in reg 24(1) of the Australian Trade Practices Regulations. See Vol 2, ATPR p 20,000.

[19] See Donald and Heydon, *Trade Practices Law* (1978) Vol 1, pp 20-21.

[20] Reproduced in Vol 2, ATPR para 55-001.

[21] Reproduced in Vol 2, ATPR para 55-024, p 60, 254.

> material remaining on the public Register will convey to a reader as much as possible of the substance of what is put to the Commission."

This circular went on to indicate that confidentiality would ordinarily be granted for documents containing:

(a) current lists of customers and individual prices and discounts;
(b) proposed marketing strategies, plans for new products and the like; and
(c) normally, material which has already been granted confidentiality by another regulatory body.

The Commission noted that such material would not be protected by a confidentiality order if the material was so much "at the heart of the application that reasons for decision cannot be published without referring to it." (See para 9). In addition, it was suggested that requests for exclusion from the public Register would not be granted for the application or notification forms themselves, for to do so would make the whole application private. Furthermore, requests for exclusion were *unlikely* to be granted by the Commission for:

(a) market shares where relevant to the issue;
(b) particulars of agreements relevant to the issue other than the particulars for which confidentiality will be granted as a matter of course or will ordinarily be granted by the Commission;
(c) information that is already available to the public from other sources, eg Corporate Affairs Commission or Stock Exchange;
(d) published accounts and attendant accounting statements, subject to possible temporary confidentiality to allow for auditing or for notification to shareholders or stock exchanges; and
(e) other published material whether published in Australia or elsewhere. (See para 10).

Thus, the Australian Trade Practices Commission has by the use of such information circulars endeavoured to define both by inclusion and exclusion the types of matters to which s 89(5A)(b) of the Act relates.

The position in England

In England, the various statutes dealing with monopolies, mergers and restrictive trade practices make specific provision for protecting certain types of confidential information. The Fair Trading Act 1973, which governs, inter alia, monopolies and mergers, contains two such sections dealing with the contents of reports (s 82) and publication of information and advice (s 124). Section 82(2) requires the Advisory Committee or the Commission when making any report under the Act to have regard to the need for excluding, so far as that is practicable, the following:

"(a) any matter which relates to the private affairs of an individual, where the publication of that matter would or might, in their opinion, *seriously and prejudicially affect the interests of that individual*, and
"(b) any matter which relates specifically to the affairs of a particular body of persons, whether corporate or unincorporate, where publication of that matter would or might, in the opinion of the Advisory Committee or of the Commission, as the case may be, *seriously and prejudicially affect the interests of that body*, unless in their opinion the inclusion of that matter relating specifically to that body is necessary for the purposes of the report." (Emphasis added)

A power in almost identical terms is conferred by s 124(2) on the Director-General of Fair Trading in relation to the publication of information and advice pursuant to the duty imposed upon him by s 124(1).

The Restrictive Practices Court, when dealing with cases under the restrictive practices legislation, has adopted procedures to ensure that confidential evidence is protected. In *Re Phenol Producers Agreement*[22] the Restrictive Practices Court, during a hearing in which the Phenol Producers Association sought to justify certain restrictions under para (b) of s 21 of the Restrictive Trade Practices Act 1956 (now repealed), held that it had a discretion in appropriate instances to direct that an answer of a witness be written down as distinct from the normal method of giving evidence orally.[23] The witness in that case was giving evidence in relation to a confidential trade document which would have been valuable to his competitors.

In *Re British Bottle Association*[24] evidence was

[22] (1960) LR 2 RP 1; [1960] 1 WLR 464.
[23] This technique is also applied in appropriate circumstances by the Commerce Commission.
[24] *The Times*, 9 February 1961.

given by one witness of a special document containing confidential figures and statistics relating to individual corporate members of the Association. When the witness was cross-examined, the Court sat *in camera*. The ground of the application in that case was that "it would prejudice members if the confidential figures in the special document were disclosed in open Court."[25]

In the now current English legislation governing restrictive trade practices, namely the Restrictive Trade Practices Acts 1976 and 1977, confidentiality is dealt with in s 23 of the former Act. That section provides for the keeping of a register which is required to be open to public inspection. Section 23(3) requires the maintenance of a special section of the register, in which are to be entered or filed such particulars as the Secretary of State may direct, being:

> "(a) particulars containing information the publication of which would in the Secretary of State's opinion be contrary to the public interest;
>
> "(b) particulars containing information as to any secret process of manufacture (or, in relation to Part III of this Act, any secret process) or as to the presence, absence or situation of any mineral or other deposits or as to any other similar matter, being information the publication of which in the Secretary of State's opinion would substantially damage the legitimate business interests of any person."

The wording of this subsection is very similar to that in the New Zealand, now repealed, Trade Practices Act 1958 (see s 3 supra).

Provision is also made in s 41 of the English Restrictive Trade Practices Act 1976 for the restriction or disclosure of information obtained about "any business", so long as the business continues to be carried on. Such information may be disclosed if the consent of the person carrying on the business is first obtained. The restriction on disclosure does not however apply to any disclosure of information made for, inter alia: (a) the purpose of facilitating the performance of any functions of the Director, the Monopolies and Mergers Commission, the Secretary of State, or any other Minister under this Act or the Fair Trading Act 1973; and (b) the purpose of any proceedings before the Court or any other legal proceedings, whether civil or criminal, under this Act or the Fair Trading Act 1973.

Reference should also be made to the English Competition Act 1980 which makes provision for the investigation and control of anti-competitive practices. Section 16 of that Act, which relates to the making of reports by the Monopolies and Mergers Commission or the Director-General of Fair Trading, contains in subs (1)(a) wording designed to protect confidential information in similar terms to s 82(2) of the Fair Trading Act 1973. Section 17 of the Competition Act 1980 (relating to laying reports before Parliament) deals with confidentiality in subs (5) as follows:

> "(5) . . . if the Secretary of State considers that it would not be in the public interest to disclose —
>
> (a) any matter contained in a report made to him under ss 8(1), 11(10) or 13(5) above relating to the private affairs of an individual whose interests would, in the opinion of the Secretary of State, be seriously and prejudicially affected by the publication of that matter, or
>
> (b) any matter contained in such a report relating specifically to the affairs of a particular person whose interests would, in the opinion of the Secretary of State, be seriously and prejudicially affected by the publication of that matter,
>
> the Secretary of State shall exclude that matter from the copies of the report . . . ."

The illustrations of various types of confidential information and legislative provisions relating to confidentiality referred to in this section do not purport to be a complete catalogue of what falls within the term "confidential information". They are examples only. Further examples relating in particular to the New Zealand context will be given in Parts 4 and 5 which follow.

[25] The Court also sat *in camera* during the hearing in *Re Linoleum Manufacturers Association* [1963] 3 All ER 221.

[To be concluded]

SALE OF LAND

RECOVERY OF DEPOSITS BY DEFAULTING PURCHASERS UNDER THE CONTRACTUAL REMEDIES ACT 1979

By FRANCIS DAWSON and DAVD McLAUCHLAN***

It will perhaps come as little surprise to practitioners who attended one of the New Zealand Law Society's seminars last year on the Contractual Remedies Act 1979 that the first major decision on the Act should concern its effect on the law relating to deposits in sale of land contracts. In the course of those seminars a number of issues concerning deposits seemed to spark considerable interest and debate. One of those issues was whether and in what circumstances the Courts would grant relief to a defaulting purchaser against forfeiture of a deposit. The view that seemed to be accepted was that, while there was jurisdiction under s 9 of the Act to grant relief (at least in the absence of an express forfeiture clause), the Courts would not normally order repayment of the whole or part of the usual 10 percent deposit. However, at the same time it was recognised that, for two reasons, it was hazardous to forecast the likely attitude of the Courts. First, s 9 confers the extremely wide power to order one party to pay to another "such sum as it considers just". Secondly, while s 9(4) lists a number of factors which the Court should take into account, these factors seem to give little clue as to how the discretion might be exercised in relation to deposits.

Worsdale v Polglase

Although we feel that it is unlikely to be the last word on the subject, the decision of Davison CJ in *Worsdale v Polglase* (to be reported, judgment 25 June 1981, M541/80, Wellington Registry) has confirmed that restitution of deposits will not be easily obtained. In a judgment which closely parallels the common law position, His Honour rejected an application for relief against forfeiture of a 10 percent deposit by purchasers who had wrongfully repudiated the contract.

The facts of *Worsdale v Polglase* were quite straightforward. On 20 June 1980 the applicants agreed to purchase the respondents' property. The written contract provided:

> "The purchase price is $60,000. The deposit of $6000 shall be paid in part payment of the purchase price immediately upon acceptance hereof."

That deposit was duly paid. The contract was conditional upon the applicants being able to arrange sufficient finance to complete the purchase by 4 July 1980. Settlement was to take place on or before 31 October 1980.

The applicants anticipated obtaining the requisite finance from the proceeds of a business transaction and the sale of another property. Although these funds were not in sight by 4 July the applicants, being anxious to complete the purchase, instructed their solicitors to advise the respondents that the condition as to finance had been satisfied. In the event, however, the funds were not forthcoming and on 10 October (21 days before the settlement date) the applicants advised the respondents of their intention not to proceed with the purchase. The respondents accepted this repudiation, cancelled the contract and forfeited the deposit. On the very next day the respondents resold the property unconditionally on exactly the same terms as to price ($60,000) and completion date (31 October).

In these circumstances the applicants claimed the return of $4,250, being the balance of their deposit after deduction of the land agents' commission. They relied on s 8(3) and s 9 of the Contractual Remedies Act. Section 8(3) provides:

> "Subject to this Act, when a contract is cancelled the following provisions shall apply
> (a) . . .
> (b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract."

Section 9, so far as is material for present purposes, provides:

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"(1) When a contract is cancelled by any party, the Court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section.

"(2) An order under this section may . . . .

(b) Subject to section 6 of this Act, direct any party to the proceedings to pay to any other such party such sum as the Court thinks just.

"(3) . . .

"(4) In considering whether to make an order under this section, and in considering the terms of any order it proposes to make, the Court shall have regard to —

(a) The terms of the contract; and

(b) The extent to which any party to the contract was or would have been able to perform it in whole or in part; and

(c) Any expenditure incurred by a party in or for the purpose of the performance of the contract; and

(d) The value, in its opinion, of any work or services performed by a party in or for the purpose of the performance of the contract; and

(e) Any benefit or advantage obtained by a party by reason of anything done by another party in or for the purpose of the performance of the contract; and

(f) Such other matters as it thinks proper."

The applicants' argument on the basis of these provisions was broadly as follows. First, in view of s 8(3)(b), they were not to be divested of the deposit paid under the contract by reason only of the cancellation of the contract. Secondly, since the respondents had resold the property at the same price and had benefited from the first contract by the sum of $4,250, it was just that the Court should direct repayment of the whole or part of such sum of $4,250. Thirdly, in deciding what is just the Court should also have regard to the type of damages to which the respondents would be entitled at common law and the circumstances under which the contract was cancelled. In this case, no damages would be awarded for loss of bargain, and the applicants had acted reasonably and fairly in repudiating the contract early to enable the respondents to resell.

In addition to disputing the applicants' interpretation of s 8(3)(b) and denying that it would be just to grant relief, counsel for the respondents argued that resort to s 9 was barred by s 5. That section provides:

"If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to that provision."

It was contended that by describing the sum of $6000 as a "deposit", which by definition is forfeitable upon breach, the contract "expressly provided" for a remedy and therefore it prevailed over s 9. (The contract did not contain an express forfeiture clause.)

In essence, three issues were raised for decision. First, what is the true interpretation of the word "divested" in s 8(3)(b)? Secondly, to what extent has s 9 altered the former position as to forfeiture of deposits? Thirdly, what is the meaning of "expressly provides" in s 5?

(a) Interpretation of section 8(3)(b)

It was argued that this provision could properly relate to the applicants as purchasers so that they should not be divested, by reason only of the cancellation of the contract, of the moneys which they had paid over as a deposit. This argument was rejected on the ground that, once paid over, the deposit was vested in the respondents. It belonged absolutely to them. On cancellation, therefore, the only persons who could be divested of that deposit were the vendors. It followed that the true interpretation of s 8(3)(b) was that it was the *vendors* who in this case were not by reason only of the cancellation of the contract to be divested of the deposit. Something additional to the mere cancellation of the contract was required to divest the vendors of a deposit properly paid to them and retained by them on termination of the contract.

If we may respectfully say so, this interpretation of "divest" seems to be in accord with the scheme of this part of the Act. Sections 8(3), 8(4), 9 and 10 are designed in part to restate in a concise form and in part to modify the complicated set of rules that formerly governed the consequences of the termination of contracts for breach and the rescission of contracts for misrepresentation. The basic idea behind these provisions is that the parties' rights and obligations on a cancellation, whether as a result of breach or misrepresentation, should be treated in exactly the same way as they were at common law when a contract was discharged for breach or repudiation. At common law both parties are discharged from further performance of their primary obligations, but rights to money and to property which have been unconditionally acquired are not divested by

reason of the discharge of the contract: see *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 475-478 esp at 477; *Moschi v Lep Air Services Ltd* [1973] AC 331, 350.

Since one of the Act's objectives is to treat representations as if they were terms of the contract, the remedies for breach and misrepresentation had to be assimilated. It was decided that the best way to implement this objective was to replace the common law on the consequences of rescinding a contract ab initio for misrepresentation by a set of rules which effectively, to use the old terminology, "rescind" the contract de futuro in cases of both misrepresentation and breach. Accordingly it was necessary to enact that a party who had acquired money or property was not to be divested (as he was formerly on a rescission for misrepresentation) merely because a contract was cancelled for misrepresentation. Instead the scheme of the Act required that money paid or property transferred pursuant to the contract remain in the party to whom it was transferred, as it did at common law in cases of breach and repudiation.

(b) Treatment of deposits under section 9

In denying the relief sought by the applicants, Davison CJ said:

> "In considering then whether it is just in terms of s 9 of the Act for the Court to order repayment of part of the deposit, the Court should, in my view, have regard to the purpose of the deposit and to the amount of it. It would not be just, on the one hand, to order a refund of part or the whole of a normal deposit of ten percent because to do so would be to erode the sanction of the deposit paid under the contract, and if buyers thought they could obtain repayment of portion, or even the whole, of such deposit, then the whole nature and purpose of the deposit would be destroyed.
>
> In my view, it would not be just to the vendor to order repayment of a deposit in such circumstances.
>
> On the other hand, a Court might well find it just under s 9 to order repayment of the whole or part of an excessive deposit, or if instalments of purchase price which had been paid before the contract was cancelled were still in the possession of the vendor . . . .
>
> None of the grounds advanced on behalf of [the applicants], in my view, justify the relief being granted under s 9. To grant such relief would not be just, because to do so would be to deprive the respondents of their entitlement to retain a deposit of an amount not penal in nature which they had properly received from the applicants as a guarantee of the applicants' performance of the contract. The applicants did not perform the contract and, in my view, the deposit was rightly forfeited."

His Honour thus placed considerable emphasis on the essential characteristics of a deposit in coming to the conclusion not to grant relief under s 9. Because a deposit is in the nature of an earnest or guarantee that the contract will be performed,[1] it was considered that it would not be just to order a refund of part or whole of the normal 10 percent deposit. To do so would be to destroy the whole nature and purpose of the deposit. This reasoning is very similar to that in *Howe v Smith* (1884) 27 Ch D 89, the locus classicus of the common law on deposits, and it indicates that the common law approach to deposits will by and large be preserved. Indeed, His Honour observed earlier in his judgment that "it would be extremely unlikely that circumstances would exist when a deposit of 10 percent would be held to be penal in nature and its retention unconscionable."

We wonder whether other Judges will adopt the same view that generally the 10 percent deposit is inviolate. Even prior to the Act there was some authority for the view that relief can be granted. In *Weyde v Homedale Building Co Ltd* [1978] NZ Recent Law 99, a decision not apparently cited in the *Worsdale* case, White J held that a builder could not retain all of the $4,100 deposit on a $41,000 transaction. His Honour decided that, taking into account all the circumstances (including the conduct of the parties and the "successful resale of the property") and looking at the matter "broadly", retention of the deposit would be "wholly disproportionate" to the damage suffered. He allowed recovery of half of the deposit.

It is interesting to consider what the result would, or *ought to*, have been in *Worsdale* if the vendors had resold at a price substantially greater than that provided for in the first contract, say $65,000 or even $70,000. On the basis of his reported reasoning it is perhaps fair to surmise that Davison CJ would have remained unmoved. Is that the result that Parliament, in conferring on the Courts very broad powers to do what is "just and practicable" in the circumstances of each case, would have intended? Would those of us who

[1] See *Soper v Arnold* (1889) 14 App Cas 429, 435; *Howe v Smith* (1884) 27 Ch D 89, 95; *Stockloser v Johnson* [1954] 1 QB 476, 490.

agree with the decision on the actual facts of *Worsdale* still be happy to allow the vendors to keep the deposit and the profit on the resale? Perhaps some of us would. There is indeed much to be said for the view that for the Courts to determine the availability of relief in relation to the loss (if any) actually sustained would produce "intolerable uncertainty".[2] However, such an argument is at odds with the philosophy behind the enactment of s 9. We believe that many Judges would favour an award of some monetary relief in circumstances where the vendor resold at a substantial profit. And, in view of the wide terms of s 9 — the Court may order a party to pay "such sum as the Court thinks just" — that relief may or may not be explained as relief against forfeiture of "the deposit".

Perhaps the real problem is that 10 percent is too high a figure to allow to be forfeited. In times when $100,000 land sales are becoming closer to the norm rather than the exception, automatic forfeiture of a $10,000 deposit does seem harsh. In this context it is worth referring to the English Law Commission's Working Paper No 61 on *Penalty Clauses and Forfeiture of Monies Paid* (1975). In the course of its review of the law in this area, the Commission recognised that deposits on sales of land merited special treatment and recommended that "if the deposit does not exceed a statutorily specified percentage of the purchase price, it should be valid and subject to forfeiture" (para 66). However, the Commission continued:

> "We are by no means convinced that at the present time ten percent is the right figure and we are inclined to think that a lower figure, perhaps five percent, would be preferable."[3]

We share this reservation. Although 10 percent is commonly accepted as a reasonable deposit,[4] it is in truth an arbitrary amount. Its acceptance arises purely from business practice and there is no obvious reason why it should be preferable to any other (smaller) figure.

[2] See English Law Commission, Working Paper No 61, *Penalty Clauses and Forfeiture of Monies Paid* (1975), paras 30, 41, 65.

[3] It was also noted that the California Law Commission in its 1973 Recommendation on Liquidated Damages suggested that a 5 percent deposit on a sale of land should be deemed to be valid.

[4] ". . . there is nothing unusual or extortionate in a 10 percent deposit on a contract for the sale of land": *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, 93 per Lord Hailsham LC.

(c) Interpretation of section 5

As noted earlier, counsel for the respondents argued that the parties had expressly provided for a remedy (ie forfeiture) within the meaning of s 5 of the Contractual Remedies Act by stipulating that a "deposit" of $6000 was payable. Davison CJ rejected this argument. It was held that the words "expressly provides" in s 5 should be given their ordinary meaning of "plainly or clearly providing" as opposed to "providing by implication" and that use of the term "deposit" merely implied a forfeiture. For s 5 to apply, an express forfeiture clause was required.

What then is the position where an express forfeiture clause is included in the contract? It would be very odd if the presence of such a clause should materially affect the outcome of an application for relief against forfeiture for, as just noted, it merely expresses what is already implied in the use of the term "deposit". Let us suppose that a vendor exacts a 20 percent deposit which he forfeits pursuant to a forfeiture clause upon the purchaser's repudiation. It is clear that the Courts do not have jurisdiction to grant relief under s 9. However, there is no reason why they should not rely on the line of cases allowing a defaulting purchaser an equity of restitution.[5] It is true that there is a considerable overlap between s 9 and these cases. Indeed, in *Worsdale*, Davison CJ treated them as laying down the kind of guidelines to be applied by the Court in considering relief under s 9 against forfeiture of deposits and part payments. However, the important point is that there is nothing in the Act which affects the survival of these cases as an independent source of relief. They can be invoked when an express forfeiture clause bars resort to s 9. If this view is correct then the sensible result is reached that an express forfeiture clause will not adversely affect the defaulting purchaser's entitlement to relief against forfeiture of a deposit which is penal in nature.

His Honour's observations as to the meaning of "expressly provides" in s 5 are not, however, without significance. They may, for example, cause difficulties in connection with the enforcement of restraint of trade and arbitration clauses contained in contracts which have been cancelled. The position under the Act is that, unless s 5 can be

[5] See, eg, *Stockloser v Johnson* [1954] 1 QB 476, *Codot Developments Ltd v Potter* [1977] NZ Recent Law 64 and *Weyde v Homedale Building Co Ltd* [1978] NZ Recent Law 99.

invoked, such clauses do not survive cancellation, for s 8(3)(a) states that when a contract is cancelled "no party shall be obliged or entitled to perform it further". The problem is that, while these clauses will usually be intended to apply notwithstanding a cancellation, it will not be "plainly or clearly" provided (as opposed to provided "by implication") that they should continue to have effect. On the basis of Davison CJ's interpretation of "expressly provides", restraint of trade and arbitration clauses will often be prima facie unenforceable. It may therefore be necessary for the cancelling party to seek an order under s 9(2)(c) directing compliance with such clauses.

THE IMPACT OF EXPORT SUBSIDIES ON INTERNATIONAL TRADE

By LESTER DALLY BA LLB (Hons) LLM (Harvard)

1 Introduction

The recent threatened action by an American producer association against lamb exported to the United States by New Zealand brought into sharp focus the conflict between New Zealand's export incentive taxation schemes[1] and international trade policy.

Devco, the company which markets New Zealand lamb in the United States, is the largest supplier of foreign lamb to the United States and the exported lamb cuts[2] attract an export incentive based on the amount of domestic content or processing of the exported product.

The export incentives were designed by Government to reduce the balance of payments deficit by stimulating large-scale exporting. One of the side effects for New Zealand exporters is that subsidised goods can be positioned competitively in foreign markets, and in many cases undercut local products in terms of volume of sales and price.

The National Association of American Wool Growers allege that incentives applicable to New Zealand lamb exports yield a 15-20 percent price advantage over the local product. Their concern has led them to file a petition with the US Department of Commerce alleging that the incentive constitutes a subsidy under United States law and that the domestic industry has suffered injury as a result. Ordinarily a successful claim would trigger the imposition of countervailing duties on the imports by the United States authorities equal to the amount of the net subsidy, thus removing any advantage achieved by the New Zealand exporter.

This action initiated a round of trade negotiations between New Zealand and the United States concluding with an exchange of letters between the two Governments and this country becoming a signatory to the GATT[3] Code on Subsidies and Countervailing Duties.[4] The effect of the export incentive schemes and the implications of these negotiations must be examined first within the multilateral framework of trade and the obligations arising under the GATT. Secondly, it is important to assess the impact under United States law.

2 The International Trade Context

(a) The nature of subsidies

Subsidies cause considerable problems to international trade policy, and nations can use them to affect trade flows in a variety of ways. Basically there are two types of subsidies: the production subsidy; and the export subsidy. The production sub-

[1] Ie the Seven Schemes contained in ss 156-158A Income Tax Act 1976.

[2] 1980 value: $US31.3 million.

[3] General Agreement on Tariffs and Trade (1947 As Amended) 55 UNTS 194.

[4] Ie "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (Subsidies and Countervailing Measures)", effective 1 January 1980, reprinted in "Agreements Reached in the Tokyo Round on Multilateral Trade Negotiations", HR Doc No 96-153, part 1, 96th Cong, 1st Sess 257 (1979).

sidy is a subsidy granted to an industry merely for the production of a product, irrespective of whether the product is exported or not. A production subsidy provides a local manufacturer with a competitive margin over imported goods because its goods can be priced below the price levels of similar products which are imported.

An export subsidy is one paid to an industry for each of its products which are exported. For example, a local manufacturer producing units at one dollar each and receiving a 20 cent subsidy for each unit exported could sell the units abroad for about 80 cents each. The units sold in the domestic market, however, would cost a dollar each, and presumably would be priced at about that level. The result in general terms is that exported goods are sold abroad at a price below that of the goods marketed locally. In fact these effects may not be so simple, because a manufacturer may spread the results of that subsidy into the price of both the exported and the domestic goods. Nevertheless, since the subsidy will only be received for goods which are exported, there is an added incentive for the firm to export.

The use of export subsidies is generally considered to be "unfair" in international trade, unless their use causes no injury or damage. An importing nation can respond to subsidised imports by imposing countervailing duties. These comprise tariffs calculated equal to the amount of the foreign subsidy in order to offset the export promotion feature of the particular subsidy.

In contrast to the problems associated with dumping and anti-dumping duties, contervailing duties and subsidies (production or export) involve foreign governmental action. A private firm may "dump" its goods into foreign markets by pricing the goods exported at lower levels than those sold domestically. Ordinarily a subsidy originates from a government either as a cash grant, a tax credit, or some other measure conferring a particular benefit on the producer. The major distinction for international trade policy between the problems of anti-dumping duties and the problems of countervailing duties is that, as the latter usually involve responses to governmental action, each potential countervailing duty case tends to become the focus of intense intergovernment negotiation, as in the present case. The negotiations exposed the conflict between the legitimate interests of a United States domestic industry confronted by price competitive subsidised imports, and the export incentive schemes used by the New Zealand government as part of the economic plan of boosting foreign exchange earnings to improve the balance of payments deficit. This conflict of interests is a recurring theme in international trade and against this background the GATT seeks to restore some balance.

(b) GATT rules for subsidies

The fundamental principle underlying the GATT is that trade should be conducted by member countries on a non-discriminatory basis. The key provision is the most-favoured-nation clause[5] under which contracting parties in the application and administration of import and export duties agree to grant one another treatment at least as favourable as they grant any other country. The GATT invokes the concept of consultation aimed at avoiding damage to the trading interests of the contracting parties, and to this end provides a framework for negotiations for the reduction of tariffs and other barriers to trade, and a structure for incorporating the results of negotiations in a legal instrument.

The GATT rules provide very little limitation on the use of subsidies but specifically authorise an importing country to take counter-measures. Articles XVI and VI are the relevant provisions.

Article XVI contains the general obligations on subsidies. Consisting originally of one paragraph (XVI:I) establishing an obligation to report all subsidies which operate to increase exports or decrease imports, the article was amended during the GATT 1954-55 review session. Four paragraphs were added to Article XVI containing two key obligations: one obligation[6] was against using an export subsidy on primary products which results in obtaining more than:

> "an equitable share of world export trade in that product . . . ."

A second obligation[7] prohibits a subsidy on the export of non-primary products which results in an export price lower than the comparable price for similar goods which are not exported.

Article VI authorises unilateral government responses using countervailing duties. The use of both anti-dumping and countervailing duties for the same situation is prohibited and proof of "material injury" to an industry is a pre-requisite to countervailing duties. If these conditions are met, a government is authorised to apply a countervailing duty on imported goods in an amount "equal to the estimated bounty or subsidy" granted directly or in-

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[5] Article I.

[6] Article XVI:3.

[7] Article XVI:4.

directly on the "manufacture production or export".

Since its inception the GATT has continued a programme of consultations and negotiations designed to expand international trade and to reduce or remove tariff and non-tariff barriers to trade. One of the important results of the "Tokyo Round" of multilateral trade negotiations, which was initiated by a ministerial meeting in September 1973 and finally concluded at the November 1979 meeting of contracting parties, was the Code on Subsidies and Countervailing Measures.[8]

(c) The GATT Code on subsidies and countervailing measures

The Code sets out international guidelines on subsidies and countervailing duties practice and expands GATT Articles VI, XVI and XXIII.[9] Principal features of the Code are as follows:

(a) A signatory may request information from another on the nature and extent of any export-oriented subsidy (Article 7).

(b) Export subsidies contrary to the Code are proscribed (Article 8).

(c) Signatories agree to avoid causing injury or serious prejudice to another by using any subsidy (Article 8).

(d) Export subsidies on products other than primary products derived from farming, forestry and fishery are prohibited (Article 9).[10]

(e) Export subsidies on primary products of major world exporters of that product are not permitted where their effect is to displace the exports of another signatory (Article 10:1).

(f) Export subsidies on primary products are prohibited where in particular markets the result is prices materially below those of other suppliers to the market (Article 10:3).

(g) Signatories agree to avoid using subsidies other than export subsidies where the effect is to cause injury to a domestic industry of another signatory or seriously prejudice their interests or nullify or impair their benefits under the GATT (Article 11).

(h) A process of consultations and conciliation is established to resolve disputes between signatories about the existence of export subsidies proscribed by the Code (Articles 12 and 13).

(i) A model domestic procedure for determination of particular subsidy infringements is established involving notification, investigation, evidence, findings and consultations (Articles 2 and 3).

(j) A comprehensive test for determination of "material injury" and the factors to be taken into account is prescribed (Article 2, fn 6 and Article 6).

(k) Countervailing duties may be imposed following a final affirmative determination of "material injury" unless the subsidy is withdrawn (Article 4).[11]

(l) A Committee on Subsidies and Countervailing Measures is established comprising representatives from each signatory to review the Code and conciliate and adjudicate disputes referred to it (Articles 16, 17, 18).

(m) Each signatory has an obligation to harmonise national legislation to conform with the provisions of the Code (Article 19:5).

(n) An Annex to the Code sets out examples of types of export subsidies used.

Until the recent events, New Zealand, although a participant in the Tokyo Round, has declined to become a signatory to the Code.

3 United States Developments

Over the past decade the United States has been increasingly preoccupied with the procedural aspects of countervailing duties investigations and determinations. At the same time, the United States was an initial signatory to the GATT Code on Subsidies and Countervailing Measures and its principles were incorporated into United States law by the Trade Agreements Act of 1979.[12] The applica-

[8] Note (4) supra.

[9] Article XXIII provides a procedure for resolving disputes about measures adopted which undermine ("nullification or impairment") the GATT objectives or failure to carry out GATT obligations.

[10] NB refer Note AD Article XVI of the GATT for definition of "certain primary products" in Article 9.

[11] It also prescribes limits for the amount of the countervailing duty levied.

[12] Pub L 96-39:101, 93 Stat 14, 19 USC 1671 (effective Jan 1, 1980 for anti-dumping and countervailing duties measures).

ble countervailing duty provisions are contained in the Trade Act 1974.[13] In particular, s 303 of the Tariff Act of 1930 was amended (1) to include non-dutiable merchandise within the scope of the countervailing duty provision; (2) to compel the Treasury Department to determine the existence of a bounty or grant within a specified time; and (3) to extend to United States producers the right to judicial review of negative countervailing duty determinations.

The Trade Agreements Act of 1979 enacted further changes in the countervailing duty law. Duties may be imposed:

(a) under s 303 of the amended Tariff Act of 1930[14] to non-Code signatories merely upon a finding by the United States Commerce Department of the existence of an export subsidy.

(b) under s 701 of the Trade Agreements Act of 1979 to Code signatories upon (i) a subsidy finding by the Commerce Department and (ii) a determination by the International Trade Commission (ITC)[15] that the subsidised export "materially injures" a United States industry or "materially retards" its establishment.

The Act establishes the procedural and administrative requirements for subsidy investigations including initiation of proceedings by industry interests by petition and representation by other parties (including affected exporters). Time limits are prescribed within which preliminary and final determinations must be made and assessment and imposition of countervailing duties in the event of an affirmative determination. There is provision for judicial review in the first instance to the United States Court of International Trade.[16]

Although the Trade Agreements Act was designed to incorporate provisions of the Subsidies Code into domestic law, significant disparities remain.[17] In particular, under United States law material injury is defined as:

> "harm which is not inconsequential, immaterial or unimportant".[18]

This language appears to underline the guidelines established in the Code which sought to revise the standard of injury required for the imposition of a countervailing duty. In addition, under United States law, imposition of countervailing duties is mandatory rather than permissive. Finally, the Code calls for a duty which is to be assessed only in the amount necessary to offset the injury to the domestic industry. Under United States law, however, the duty is assessed in an amount equivalent to the foreign subsidy.

4 International Implications of Signing the Code

(a) Under United States law

New Zealand becoming a signatory to the Code means that under United States law United States sectors alleging harm from subsidised exports must prove before the United States International Trade Commission that the particular industry is materially injured by the imports. An affirmative finding by the ITC may lead to the imposition of countervailing duties on the imported goods equal to the amount of the net subsidy.

Before becoming a signatory to the Code, under United States law countervailing duties could have been levied almost automatically on imports where the United States Commerce Department determined that an export subsidy existed.

Under this previous situation, any or all of New Zealand's exports assisted by export incentives could have been subject to the arbitrary imposition of countervailing duties on the application of the powerful protectionist United States interests. The *Delta Plastics* case[19] already established that the New Zealand export incentive schemes constitute "subsidies" under United States law. The effect of countervailing duties is to cancel any advantage given to an exporter receiving a subsidy or bounty from its government.

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[13] Pub L 93-618, Tit 3, 88 Stat 2043, 19 USC 2101-2487.

[14] As amended in s 103 of the Trade Agreements Act of 1979, fn 12 supra.

[15] Established by s 330 of the Tariff Act of 1930 (19 US C:1330) as amended by ss 171-174 of the Trade Act 1974 (fn 13 supra).

[16] Customs Court Act of 1908, Pub L No 96-417: 201, 94 Stat 1728, 28 USC 1581(c): This section governs actions brought under the Tariff Act of 1930: 516A, 19 USC: 1516a (1980) as added by the Trade Agreements Act of 1979, Tit X, 93 Stat 300 (1979).

[17] Refer G Bryan: "Taxing Unfair International Trade Practices" Lexington Books, DC Heath & Co, Mass 1980, p 262.

[18] Ibid p 262.

[19] US ITC Decision on Investigation No 303-TA-14 (17.2.81).

Now, proof of "material injury" as an essential pre-requisite means that lamb exports and other exports receiving incentives are more secure from retaliatory duties. The *Delta Plastics* case and other United States case law shows that the proof of "material injury" is not without difficulty and, given the relative volume of goods exported to the United States contrasted with the size of the United States market, petitions brought by the United States industries might be difficult to sustain. However, the matter rests initially with the United States ITC, and each case will be assessed on its merits. A number of factors will be examined. The Commission stated in the *Delta Plastics* case:

> "In considering whether there exists material injury by reason of imports of the subsidised product, we are required by statute to consider, inter alia, the volume of imports, their impact on domestic prices, and the consequent impact on the domestic industry."[20]

Likelihood of injury must be "imminent, not a mere supposition or conjecture" and based on evidence of "demonstrable trends".[21] Appeals from decisions of the ITC lie in appropriate cases to US Federal Courts.

(b) Under New Zealand law

This situation has produced other side effects.

There are international repercussions to New Zealand signing the GATT Code. It means that the seven export taxation incentive schemes (ss 156-158A Income Tax Act 1976) and possibly other schemes need to be brought into conformity with the principles and spirit of the Code. In practical terms, at the insistence of the United States Special Representative for Trade Negotiations (the President's Chief Trade Official),[22] New Zealand has agreed to a formula for a phased withdrawal of the seven export incentive schemes "within a reasonable time". This formula, negotiated in terms of the Subsidies Code, was reduced to an exchange of letters between the two Governments and subsequently made public.

There are two sets of expectations arising from the negotiations. Although defining New Zealand exports incentives as subsidies, and therefore in conflict with the Code, the United States has agreed to maintain merely a "reasonable expectation" about withdrawal of the incentives at their statutory expiry date of 31 March 1985. (The incentive schemes which expire in 1983 are already being overlapped administratively with the schemes that replace them, so that the expiry date for all schemes is 1985).

For its part New Zealand, despite a commitment in principle to lifting the subsidies, has made it clear it cannot commit itself to any particular time for fulfilling that obligation. This does not appear to match the American expectation about removal of the scheme. However, in 1985 the United States, in terms of the Code, may assess whether New Zealand has made a reasonable effort to bring the incentives into line with the expectations reached in the recent agreement. Nevertheless, as signatory to the Code, New Zealand now has an overriding international obligation to review all incentive schemes and potential subsidies with the objective of harmonising its policies and legislation with the provisions of the Code.

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[20] Ibid p 5.

[21] Ibid p 12.

[22] Appointed under Ch 4, sec 141 of the Trade Act of 1974 (fn 13 supra).

LAW REFORM

ACCESS TO MEDICAL RECORDS

On 28 April 1981 His Honour Mr Justice Kirby, Chairman of the Australian Law Reform Commission, delivered the Kennedy-Elliott Memorial Lecture 1981 to members of the Wellington Medical-Legal Society. The subject was "Medicine and Law Reform". With His Honour's consent, and by courtesy of the Society, we publish below a major section of that lecture.

Access by the patient

The issue which has caused the liveliest debate between the medical profession in Australia and the Australian Law Reform Commission arises from a general reference given to the Commission by the Attorney-General of Australia on the subject of laws for the protection of privacy. The concerns of this project go far beyond the particular problems of medical privacy and the confidentiality of doctor-patient files. They extend into the growing powers of officialdom to enter, search and seize property; new business methods which involve intrusive practices; optical and listening devices and other modern means of surveillance and the general increase in the computerisation of personal information, with its capacity to create a total "data profile" on the individual, upon the basis of which important decisions will be made by government and by business. Tentative proposals for federal legislation in Australia have been put forward in two discussion papers of the Commission.[1] In the course of debating the general problem, a number of issues relevant to the medical profession are raised:

— Should patients generally have a right of access to medical and hospital records about themselves and if not, with what exceptions, according to what principle and with what alternative safeguards for accuracy and up-to-dateness as personal medical records are increasingly computerised?

— Should a parent have a right of access to medical information about a child, and if so, to what age and with what exceptions if the child claims a privilege to have advice on intimate personal medical problems kept confidential with the doctor?

— What rules should be followed to ensure respect for individual privacy in the conduct of scientific research? Should informed consent of the patient be required and subject access guaranteed?[2] Is there a danger that a requirement of specific consent may prevent epidemiological and other medical research on anonymous hospital and medical records, such as the research done which showed side effects in the use of oral contraceptives? The latter research was the result of large-scale studies in which hospital and medical records were used, and which would have been impossible to carry out had the actual consent of the patients been required.[3]

— Should Courts have an unlimited right of access to personal medical files, as in most jurisdictions in Australia, or should there be a privilege against disclosure to the Court without the patient's consent, as in some Australian jurisdictions[4] and as pro-

[1] Australian Law Reform Commission, Discussion Paper No 13, *Privacy and Intrusions* (ALRC DP 13), 1980; ibid, Discussion Paper No 14, *Privacy and Personal Information* (ALRC DP 14), 1980.

[2] S Simitis, *Data Protection and Research: A Case Study on the Impact of a Control System*, in Papers for the Tenth Council of Europe Colloquy on European Law, 23 September 1980, *Scientific Research and the Law*, mimeo. See also J Visser, *Control Mechanisms and Bodies with Special Reference to Medical and Genetic Research* in Papers, and P Sieghard, *Need for Control Systems and interests Involved*, ibid, and L F Bravo, *International Aspects of the Control of Scientific Research*, in ibid.

[3] L Gordis and E Gold, *Privacy, Confidentiality and the Use of Medical Records in Research*, *Science*, 207 (4427): 153, 206 (11 January 1980).

[4] ALRC DP 16, 5. See Evidence Act 1958 (Vic), s 28; Evidence Act 1910 (Tas), s 96; Evidence Act 1980 (NT), s 12; Evidence Act 1908 (NZ), s 8.

vided under s 8 of the New Zealand Evidence Act 1908? Should this privilege be extended from civil trials to criminal cases, so that people with problems of drug addiction and sexual deviance may nonetheless seek out medical help without the risk of compulsory disclosure to a criminal Court?[5]

— Are psychiatric records, with their specially intimate disclosures, in a particular class? Should safeguards as to notice to the patient be introduced whenever a patient's records are subpoenaed by the Crown or third parties?

The patient's entitlement to access to medical and hospital files must be seen as one aspect only of a general right of access. This is the facility which has been adopted in many laws on privacy and data protection as a security for the accuracy, up-to-dateness and relevance of the data profile of the individual. In suggesting a right of subject access, the Australian Law Reform Commission is in no way singling out the medical profession. On the contrary, the suggestion is that the right of access is a general remedy that will become increasingly important in an age of computerised data bases containing data profiles upon all of us.

Some commentators have asserted that medical records, though personal and about an identifiable patient, are in a special category and should not be subject to the general rule of access. Some opponents propose the denial of patient access on the basis of possible ill effects on the patient's health or welfare. Others suggest it may possibly reduce the inclination of practitioners (or more so hospital staff) to record, in reliable records, opinion, comment and other observations which may be useful for a total profile of the patient and for his treatment, but not suitable to be seen by the patient who could be embarrassed, hurt or confused by the entry. Others urge that a right of access would put pressure on already hard-pressed doctors and hospital staff, who do not have appropriate facilities for inspection. It is pointed out that problems of identification could arise. Where group or family records are kept together, problems of separation and possible loss of records could arise.

Doctor's privacy?

Some medical opponents have even adopted a somewhat "mercantile" stance. A resolution for consideration at a recent medical conference in Australia reflects this approach. It read:

> That this conference believes that medical records of a doctor's opinions about any particular patient are private to that doctor and that it would be an invasion of the doctor's privacy were his written thoughts to be made available *to the patient* . . . without the doctor's prior consent.[6]

If this rule were to become commonly accepted in record systems generally, every bureaucrat and administrator would claim that notes on individual citizens were his *own* notes. No matter how untrue, prejudicial, out-of-date, irrelevant or unfair they were, he could claim to deny access, without *his* consent, lest there be an invasion of his, the record-keeper's, privacy. It seems unlikely to me that privacy should be given such a connotation. What we are dealing with here is the power of the individual to have control over information about himself. Increasingly in the future decisions about all of us will be made on the basis not of personal interview and observation but of recorded information. It is for this reason that the laws of so many countries have adopted the general principle of the right of access. The information penumbra which surround us should normally be accessible to us so that we can see ourselves, literally, as others see us, in the computer. It is a matter of keeping control over the extensions of one's data personality. There may be reasons to provide for exceptions. The Freedom of Information Bill before the Australian Parliament does in fact provide for certain exceptions and for intermediary access in the case of some medical material.[7] The New Zealand Committee on Official Information contemplated exemptions to protect the privacy of individual citizens and public health and safety.[8] But the New Zealand report did not deal with the limitations (if any) which should exist upon access by an individual to medical data about him-

[5] New Zealand Torts and General Law Reform Committee, *Report on Medical Privilege*, 1974; Appendix I in Report of the New Zealand Torts and General Law Reform Committee, *Professional Privilege and the Law of Evidence*, 1977.

[6] Draft resolution, in Papers for the 14th Annual Conference of the General Practitioners' Society in Australia, Sydney, March 1981, mimeo.

[7] Freedom of Information Bill 1981 (Aust), cl 30(3).

[8] New Zealand, Report of the Committee on Official Information, *Towards Open Government* (Sir Alan Danks, Chairman), 1980, 18.

self in the hands of government. It is clearly an issue for future debate in New Zealand.

The notion of complete denial of patient access to doctors' records, whether held by a government or private doctor or hospital, based on the claim of the doctor's or hospital's privacy, without the doctor's or hospital's consent, is not a notion which currently appeals to me. If the principle of record-keeper privacy becomes paramount, we can probably throw the debate about subject privacy out the window. The Australian Law Reform Commission's proposal is that a health care record-keeper should be entitled to require indirect access to an intermediary, but only when he believes that there is a risk of significant harm to the patient or to a third party if direct access is allowed.[9] The general reaction to this proposal in the public hearings held by the Commission throughout Australia has been favourable.

Disclosure to third parties

Much more controversial is the disclosure of confidential patient information to third parties, whether within large institutions, by compulsory reporting requirements to government and its agencies, to government inspectors of various kinds or to organs of peer review.

In a number of the public hearings of the Australian Law Reform Commission, representatives of the General Practitioners' Society in Australia and others have come forward to make submissions addressed to all of the above issues but specially concerned with the activities of officers of the Australian Department of Health. Complaints were made of the violation of doctor-patient privacy by the manner, time and place of interrogations of medical practitioners, the seizure and removal of confidential patient files, the interrogation of patients (many of them sick old people) without first asking the doctors involved[10] and even alleged victimisation of general practitioners who held out against the so-called "health bureaucracy".[11] Attention has been drawn to s 104 of the National Health Act 1953 (Aust) which provides extremely broad powers of entry, search and seizure to persons authorised by the Australian Minister of Health or the Director-General. No precondition of judicial warrant, given upon proof of reasonable grounds, is required in such cases. One of the factors addressed in the Australian Law Reform Commission's discussion papers was the erosion of privacy by the proliferation of powers of this kind: doubtless intended for a good social cause but often expressed in the most ample language and without the preconditions of independent judicial scrutiny which are the special mark of those countries which take their law from England and which since Magna Carta have sought to preserve people and their property from sudden, unexpected official intrusion. The Commission has proposed a uniform regime, requiring, normally, judicial authorisation before such powers of entry, search and seizure may be exercised.[12]

When it comes to access by government officers to patient records for the purposes of investigating frauds against the revenue or other offences provided for by law, some diminution of doctor-patient confidentiality seems inevitable. Even in the case of legal practitioners' privilege, so well entrenched and long established, the privilege may be overridden in certain circumstances where the dealing between lawyer and client is itself fraudulent or criminal. It would appear to me to be too facile to say that a doctor's records should not be examined without his consent (or even his patient's consent) when investigating an offence alleged against the doctor or patient himself. Otherwise, we could be submitting investigation and enforcement of the criminal law and breaches of statute to the consent of the very person under suspicion or other persons upon whom he may sometimes exercise influence. The Australian Pharmaceutical Benefit Scheme currently involves payments of substantial sums by the Commonwealth, presently running at more than $300 million per year. Cases of frank fraud or practices forbidden by the National Health Act do occur, involving medical practitioners and their patients. Committees of Inquiry have been established as an alternative to Court actions against doctors, but whether in Court or in a committee of inquiry, provision is made for sanctions. Sometimes, let us be perfectly frank, sanctions are entirely warranted. The various branches of the medical profession have asserted that their concern is not to protect the dishonest, fraudulent doctor or patient but to ensure that, in investigating cases, the privacy of patient records should so far as possible be guarded and secured, and the investigation limited so that it does

[9] ALRC DP 14, 43.

[10] D P Mackey, Submission, Exhibit H3, Transcript of public hearings of the Law Reform Commission (Privacy Protection), Hobart, 21 November 1980, *Transcript*, 693.

[11] Ibid, Exhibit H3.

[12] Law Reform Commission, *Criminal Investigation* (ALRC 2), AGPS, 1975, 88ff; ibid, ALRC DP 13, 40ff.

not unnecessarily upset sensitive, worried and sometimes highly vulnerable patients.

Computer analysis of prescribing patterns

One matter which has been the subject of bitter controversy in Australia is the computer analysis of prescribing patterns followed by particular doctors. It is claimed that this intrudes upon the privacy of the relationship between doctor and patient. On the other hand, the Australian Department of Health has argued before the Law Reform Commission that reports on doctors' prescribing practices are generated by computers sometimes at the request of the individual doctor and frequently for general statistical information on the use of particular drugs. The machinery, it is said, provides an opportunity for doctors to compare their own particular prescribing patterns with the average of other doctors. It is acknowledged that in some cases there are justifiable reasons for differences. But in other cases, it is claimed, there is a legitimate social entitlement to call differences to attention and even, possibly, to raise the question of irregularity. Mention was made in one submission to us of the use of the drug Depo-Medrol. The average dispensed price of pharmaceutical benefits for this drug is less than $5 for five ampoules. The drug has a Commonwealth dispensed price of $14.07. It is the highest priced of the relevant long-acting injections. Long-term usage of the drug is said to produce unwanted systemic effects, including so-called "moon-face" changes. The Australian Drug Evaluation Committee has reported on adverse drug reactions. It is claimed that, in these circumstances, there is a legitimate social interest in prescription patterns which go beyond the normal in relation to this drug. It is expensive to society as a whole. It may be potentially damaging to patients. At the very least doctors who are well out of line with the average should, so it is said, be counselled, lest they are not aware of problems and side effects.

In days gone by, before national health and the facility of computer analysis, it is true that the prescription patterns of doctors were not considered a legitimate matter of concern to Departments of Health. One of the issues before the Australian Law Reform Commission is whether the introduction of public funding and the potential of computer scrutiny warrants a breakdown in the absolute confidentiality of the doctor-patient relationship. Many doctors in Australia resist these developments, even to the extent in some cases of refusing to use prescription forms which facilitate computer scrutiny of the kind I have mentioned. On the other hand, there will certainly be many in Australia, and I suspect New Zealand, who would say that he who pays the medical piper may call the tune, at least to the extent of protecting the revenue against clear exceptional claims and protecting patients against individual practitioner ignorance or oversight.

In this debate, which is continuing, two things stand out. First, the day of the medical "lone ranger" seems to have passed. The result of the high price of public funding and escalating health care costs is inevitable pressure to monitor to some extent the conduct of medical practitioners as this conduct impacts the revenue: whether by frank fraud or, as is much more difficult, by eccentric prescription patterns. Secondly, the privacy of the doctor-patient relationship is still important for its success. Intrusions upon it should be few. When they occur they should be handled sensitively and always with respect for the intimacies of the patient, given usually upon an expectation that normal privacy and confidentially will be observed.

Nobody claims that privacy is an absolute value. It is relative to other competing social claims. Working out the balance between individual privacy and the legitimate demands of modern society is a difficult process. The main point of the Australian Law Reform Commission's papers was to show that in Australia at present the law's protections are feeble and new guardians are necessary to speak up for privacy and to defend it against erosion. I expect that in New Zealand you will need to turn, in due course, to the same debates.

THE LEGAL POSITION OF ASSESSORS AND LOSS ADJUSTERS

*By J K MAXTON and A A TARR**

1: THEIR DUTIES AND LIABILITIES

Part I of this article covers the investigation of claims and the different ways in which assessors can incur liability.

In Part II, which will appear next month, the authors examine the extent to which privilege attaches to the reports of assessors and loss adjusters.

Assessors and loss adjusters[1] are a vital element of any successfully functioning insurance market in that they investigate the validity of claims under policies, and estimate the value and causes of losses.[2] In the performance of these functions assessors will normally be acting on behalf of insurers,[3] but it is not uncommon for the insured to seek their professional services in order to facilitate the processing of claims.[4] In *Frewin v Poland* [1968] 1 Lloyds R 100, 102, Donaldson J commented

> "There is an old adage that 'claims sell insurance; but no one has ever had the temerity to suggest that the same is true of litigation in relation to insurance claims."

Notwithstanding the undoubted accuracy of this comment, assessors frequently find themselves embroiled in the quagmire of litigation, and it is to the concern arising out of this involvement that this article addresses itself.

1. Investigation of Claims

(a) Liability in contract

The obligations of a professional assessor charged with the task of investigating the validity and quantum of any claim under a policy depend upon the terms of his contract. However it is a term of all contracts, unless expressly excluded, that each party will carry out his obligations under that contract with reasonable care and skill, so that if an assessor carelessly carries out his investigations of an accident, for example, and the insurer who engaged him thereby suffers loss, the insurer can recover that loss from the assessor.[5] The duties owed by an assessor were recently considered in *Gold Star Insurance Co Ltd v Dominion Adjusters Ltd.*[6] In this case the plaintiff insurance company alleged that the defendant loss adjuster had negligently, and in breach of its contract with the plaintiff, investigated and assessed a motor vehicle accident. The relevant facts were as follows.

A taxi that was comprehensively insured with the plantiff collided with another vehicle in fair, fine weather conditions on a sealed highway. As the taxi was on the wrong side of the road the inference was that the driver of the taxi, who was killed in the accident, was responsible. The defendant in accordance with arrangements with the plaintiff investigated and reported upon the accident and, there being nothing in the report suggesting any ground upon which the plaintiff might refuse indemnity, the plaintiff made payment under the policy.

However at the subsequent inquest into the death of the taxi driver it was (a) reported by a Ministry of Transport inspector that the front tyres of the taxi were defective in that their tread depth was less than the minimum permitted under the Traffic Regulations, and (b) stated that the taxi driver had

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[1] Unless the context indicates otherwise, the term "assessor" shall hereafter be taken to include "loss adjuster".

[2] See *Fire & All Risks Insurance Co Ltd v Caratti (Bullfinch) Pty Ltd* [1969] WAR 49, 52.

[3] Some insurers, especially those engaged in writing motor vehicle insurance, employ their own assessors.

[4] See, for example, *Harris Trustees Ltd v Power Packing Services Ltd* [1970] 2 Lloyds R 65.

[5] 34 *Halsbury's Laws of England* (4 ed) 12; Contractual Remedies Act 1979, ss 9, 10. Of course it is necessary in such cases to look closely at the terms of the particular contract to see whether the parties have agreed to modify the duties of care which the law would otherwise impose upon them. See for example *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

[6] High Court, Hamilton, 10 September 1980, (A319 74).

been affected by intoxicating liquor at the time of the accident.

The relevant motor vehicle policy contained two general exceptions which excluded liability both for loss of or damage to the insured vehicle and for liability to third parties, if (a) the vehicle was being driven in an unsafe condition where (i) such condition caused or contributed to the accident and (ii) the driver was aware of such unsafe condition or by the exercise of reasonable diligence ought to have been aware of it; and (b) where the vehicle was being driven by a person under the influence of intoxicating liquor.

The plaintiff claimed that the defendant had failed to fulfill its contractual obligations, in that the assessor employed by the defendant had failed to carry out his duties in a proper manner by exercising such reasonable care and skill as would be exercised by an ordinary assessor. In order to succeed the plaintiff had to show, on a balance of probabilities, not only that there was a breach of that standard of care but that as a result the loss was suffered by the plaintiff.

On the causation question, Greig J held that, by virtue of the arrangement between the plaintiff and the defendant, the plaintiff was entitled to rely on the assessment, reports and recommendations of the defendant, and did in fact make payments in reliance thereon. The defendant's argument that the final decision was the plaintiff's alone and that there was no reliance was rejected by the Court. While conceding that the particular circumstances, namely, the small size of the insurance company, imposed a particular obligation on the insurer to examine claims with some considerable care, Greig J nevertheless concluded that the plaintiff rightly accepted the recommendation of defendant and made payments in reliance thereon.

The next issue was whether the plaintiff would have been entitled to deny liability if the assessor had reported the alcohol consumption and alleged tyre defect. As regards the alleged tyre defect there was a dispute between the assessor and the vehicle inspector as to the tread depth on the front tyres. In the circumstances Greig J did not find it necessary to determine this factual issue in that the terms of the exception in the policy relating to vehicle safety required that a causal link be demonstrated between the unsafe condition and the accident. The learned Judge concluded that, there being no suggestion that the state of the tyres caused or contributed to the accident, the plaintiff could not have declined liability under this exception.

As regards the question of alcohol consumption the Court accepted that there was a substantial concentration of alcohol in the deceased's blood,[7] and concluded that, because the exception clause in the policy relating to driving under the influence of alcohol was purely temporal in meaning, the plaintiff would have been entitled to decline liability under the policy.[8]

Turning to the crucial matter of the standard of care demanded of an assessor or loss adjuster Greig J stated, (p 7), that

> ". . . the standard is that of the ordinary skilled assessor exercising his skills in the normal way. It is not required that he should show more than a fair and reasonable degree of skill. . . . This is a case where the allegation is one of omission and it is therefore necessary to show that the assessor in question failed to make enquiries which would have been undertaken by other assessors in like circumstances, to show that his omissions were so obvious that it was folly for him to neglect them."[9]

The assessor in question made enquiries over two or three days within the first week of the accident. He made enquiries of a number of the deceased's fellow taxi drivers, the person who had been concerned with the transport and storage of the wrecked taxi, and the local police. However he did not make enquiries of the deceased's widow or other parties to the accident, he did not follow up the fact that an inquest was to be held, nor did he ascertain that a blood sample had been taken after the accident that revealed the concentration of alcohol; nor did he trace the deceased's movements during the period preceding the accident.

Nevertheless Greig J concluded[10] that overall

[7] 162 milligrams of alcohol per 100 millilitres of blood, that is, more than double the "legal limit".

[8] The position of non-causative exemptions or exception clauses has been affected considerably by the Insurance Law Reform Act 1977, s 11. This section states that indemnity shall not be denied if the insured proves that the breach of the exclusionary clause was not causative. This Act was not applicable to the policy in the *Dominion Adjusters* case, the policy having been entered into prior to its commencement, but see *Sampson v Gold Star Insurance Co Ltd* (High Court, Auckland, 14 March 1980, M1332/79).

[9] Greig J acknowledged that here he was paraphrasing the frequently cited words of Lord Dunedin in *Morton v William Dixon Ltd* (1909) SC 807.

[10] *Dominion Adjusters* case, supra, at 10.

the defendant's assessor made reasonable enquiries and satisfied the standard of care which he was required to meet in his assessment and investigation.

At first sight this appears to be a somewhat surprising conclusion given that the accident occurred without any apparent cause in broad daylight with good road conditions and involved a professional driver. This, it was found (p 9) alerted the assessor to the possibility that alcohol consumption might have been a factor. However the enquiries made of the police[11] and the other taxi drivers did not reinforce any potential suspicions, and the claim form provided to the assessor through the deceased's solicitor contained a negative answer to the question as to whether any liquor had been consumed in the twelve hours before the accident. Furthermore the Court accepted that, notwithstanding the fact that the other taxi drivers might be prejudiced in favour of the deceased, reasonable enquiries of the other taxi drivers might well have disclosed the truth because the assessor had a particular association with some of these drivers through other assessing work. On the negative side there was evidence before the Court that another assessor of considerable experience discovered sufficient to give rise to a suspicion about alcohol immediately on entering on his enquiries. However, it was held this did not mean that the defendant's assessor was negligent. Greig J held (p 10) that

> "I do not consider that he failed to make any enquiry which would commonly be done by a skilled assessor, nor did he fail to do anything which was obviously folly in the particular circumstances."

Thus the assessor is under a duty to exercise that standard of care and skill which can reasonably be expected of those engaged in that profession.[12] In the overwhelming majority of cases the assessor will be acting in pursuance of a contract; and by virtue of the "rule" as derived from *McClaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100, the existence of a contractual relationship will exclude an action in tort for want of professional care. For a critical appraisal of this "rule", see Sutton and Mulgan, "Contract and Tort" [1980] NZLJ 366. As the authors point out, however, this proposition, that the existence of a contract limits the parties obligations to those arising out of the contract, has been endorsed in cases.[13]

(b) Liability in Tort

In the absence of a contractual relationship between assessor and client, however, it is clear that the assessor may be liable in tort if he is negligent. A duty to take care arises independently of contract in cases where a person holds himself out as having special expertise and gives information or advice in the field of that expertise to a person seeking such information.[14] For example, consider a recent case involving an insurance broker. In *Cherry Ltd v Alliance Insurance Brokers Ltd* [1978] 1 Lloyds R 274, the plaintiff insured dispensed with the defendant brokers' services and requested cancellation in mid-term of policies arranged by them. Although of necessity some sort of relationship existed between the parties to enable the position to be resolved where the insurers were refusing to cancel the policies or refund part of the premiums, the contractual relationship had ended. The insured arranged fresh insurance elsewhere in respect of consequential loss, but the brokers led him to believe that the original policy was still in force, as the insurer was refusing to cancel it and there was no provision in the policy allowing the insured to do so; consequently the insured was advised to cancel his new insurance for the time being. In the meantime, the original insurer relented and allowed the cancellation of the original policy and a refund of part of the premium, and advised the brokers. Unfortunately the broker did not advise the insured that the original cover was now cancelled and, with the cancellation of the fresh cover, there was no insurance in respect of consequential loss when a fire subsequently damaged the insured's premises.

However it was held that the brokers were liable

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[11] The officer in charge of the local police station had "a reluctance to provide information" per Greig J ibid, at 9.

[12] The same applies to other professional persons. For example, see; *Stafford v Conticommodity Services Ltd* [1981] 1 All ER 691 (commodity brokers); *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550 (solicitors); *Bagot v Stevens Scanlan & Co* [1966] 1 QB 197 (architects); and *Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Pty Ltd* (1973) 2 NSWLR 7 (insurance brokers).

[13] Eg *Rowe v Cleary* [unreported, Palmerston North, High Court, 26 November 1979, Quilliam J]; *Young v Tomlinson* [1979] 2 NZLR 441; *Marlborough Properties Ltd v Marlborough Fibreglass Ltd* unreported, Blenheim, High Court, 26 October 1979, Jeffries J. See also the subsequent decision in *Rowe v Turner Hopkins & Partners* (supra at 559).

[14] See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

in negligence on the basis of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (supra, n 14) in that they had given information in a professional context and they knew, or ought to have known, that it would be taken seriously and acted upon. There was accordingly a duty of care owed to the insured which had been broken.[15]

The assessor, in investigating the validity and extent of any claim, must act reasonably expeditiously. An insurer has an obligation to process claims within a reasonable period and, having regard to the interests of both itself and the insured, must act reasonably.[16] Consequently, while it is well established that an insurer is entitled to withhold a decision in relation to a claim pending investigation and verification of the facts,[17] the insurer must comply with its duty to act reasonably in carrying out that investigation. If the insurer unreasonably delays the settlement of a claim the insured may institute proceedings under the policy, seeking, in addition to the indemnity, damages and/or interest. For example, in *Zybert v CML Fire & General Insurance Co Ltd* (1980) 1 ANZ Insurance Cases 60-414, the Supreme Court of New South Wales awarded interest on a judgment against an insurer at a rate of ten percent from the date of the loss. Furthermore in *Davidson v Guardian Royal Exchange Assurance* (1978) 1 ANZ Insurance Cases 60-005 an insurer was held liable for loss of profits sustained by its insured where it unreasonably delayed the completion of repairs to a vehicle which was used in the insured's business. The Court held that it was an implied term of the contract of insurance that where an insurer elected, in accordance with the policy terms, to reinstate the vehicle, it had to do so with reasonable care.

Alternatively the insured may be able to institute proceedings in negligence against the individuals or agents responsible for the processing of his claim. For example, where the investigation into a claim has been delegated by an insurer to an independent assessor, that person may be careless in processing the claim and thus cause loss to the insured. Although there is no contractual link between such an assessor and the insured it may be successfully argued that the assessor owes the insured a duty of care.[18] Therefore, if the assessor fails to act with reasonable care and reasonable speed in the investigation of a claim and in consequence the insured sustains a financial loss, the assessor may be liable to the insured as a result of a breach of that duty. The insured will recover any financial loss which he can show that the assessor ought to have foreseen as likely to occur to him as a result of careless conduct, provided that the assessor should have anticipated the possibility of the kind of financial loss that the insured in fact suffered.

Before leaving the question of claims investigation, it is worth mentioning that the mere fact that an insurer decides to investigate a claim and employs an assessor to undertake this task does not constitute a waiver of any breach of condition or warranty under the policy, or indeed of any other vitiating factor.[19] To constitute a waiver there must be conduct on the part of the insurer which is referable only to an intention to keep the contract of insurance in force despite the vitiating factor or circumstance.[20] In the *Nisner Holdings* case, supra, the insured argued that the insurer's action in retaining an assessor to investigate a claim under a fire policy and in seeking, through the assessor, a second quotation for the carrying out of repair and restoration work constituted an affirmation of the contract of insurance and thus a waiver of a condition in the policy as to double insurance — a condition that the insured had failed to satisfy. In rejecting this argument Sheppard J held (p 410) that

> "The [insurer] was entitled to a reasonable period of time in which to investigate the claim

[15] See also *Anns v Merton London Borough Council* [1978] AC 728, 751-752; *Elderkin v Merrill Lynch, Royal Securities Ltd* (1978) 80 DLR (3d) 313; *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1978] 3 All ER 571; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.

[16] *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* [1974] 2 ALR 321. This duty to act reasonably in the processing of claims is implied in all contracts of insurance and arises out of the fact that a contract of insurance is a contract uberrimae fidei.

[17] See *Nisner Holdings Pty Ltd v Mercantile Mutual Insurance Co Ltd* [1976] 2 NSWLR 406, 410; *Randall v Lithgow* (1884) 12 QBD 525.

[18] There is no reason why the principles developed in the "economic loss" cases should not apply to this situation. See, for example, *Caltex Oil (Australia) Property Ltd v The Dredge (Willemstad)* (1976) 11 ALR 227; *Ross v Caunters* [1979] 3 All ER 580; *Rivtow Marine v Washington Iron Works* (1973) 40 DLR (3d) 530.

[19] *Nisner Holdings* case, supra, note 17. As to waiver, generally, see Sutton, *Insurance Law in Australia and New Zealand* (1980), 421; Thomas, *Guidebook to Insurance Law in Australia and New Zealand* (1981), 210.

[20] *Earl of Darnley v London, Chatham and Dover Railway Co* (1867) LR 2 HL 43, 57; *Somerville v Australian Mercantile Union Insurance Co* (1887) 6 NZLR 108, 114; FAME *Insurance Co Ltd v Spence* [1958] NZLR 735.

which was made against it. There could be no suggestion that the time taken by it was unreasonable, so as to bring about a situation in which it was seeking to approbate and reprobate. Nor was it unreasonable for the [insurer], during and for the purpose of this investigation, to employ a loss assessor who would seek a quotation for the cost of the work of repair and renovation to be carried out. After all, the loss assessor's investigation might have disclosed other grounds upon which the [insurer] would have been entitled to rely for refusing to indemnify the [insured]."

2. Settlement of Claims

When an assessor is satisfied as to the validity of a claim, it may be part of his job to ascertain for what amount the claim can be amicably settled, and generally impossible for an assessor to ascertain from the insured on what basis the insured is likely to settle his claim without disclosing his own opinion of what would be a proper basis.[21] What then are the legal consequences of such disclosures by an assessor?

In *Fire & All Risks Insurance Co Ltd v Caratti (Bullfinch) Pty Ltd* (supra, n 2) the respondent company was insured by the applicant insurer against damage to crops by hail. The policy did not cover damage by rain, and when the crops were damaged by a storm comprising both rain and hail the insurer denied liability, contending that the damage was all attributable to rain. The dispute was referred to arbitration and the arbitrator found that thirty percent of the loss was due to hail damage. This assessment was based on evidence from the respondent company's manager concerning a conversation between himself and an assessor employed by the insurer. The insurer applied to have the award set aside on the ground that the finding was based solely on inadmissible evidence; that is, it was asserted that the assessor was employed merely to assess the loss, if any, and to report to the insurer, and that the assessor had no authority to make any admission on its behalf. In rejecting this argument, Hale J cited with approval a passage from *Cross on Evidence*[22] which reads as follows:

"Statements made by an agent within the scope of his authority to third persons during the continuance of the agency may be received as admissions against his principal in litigation to which the latter is a party. So far as the reception of admissions is concerned, the scope of authority is a strictly limited conception. It is sometimes said that the agent must be authorised to make the admission, but that is a confusing statement for admissions are often received although no one was expressly or impliedly authorised to make them. A better way of putting the matter is to say that the admission must have been made by the agent as part of a conversation or other communication which he was authorised to have with a third party."

The learned Judge concluded that the assessor, in disclosing his own opinion as to what would be a proper basis for settlement, was acting vis-a-vis the insured as the agent of the insurer and consequently his communications were the insurer's own communications. Therefore, the assessor's admissions to the respondent company's manager were admissible in evidence against the insurer.

However it is clear that not all admissions by an assessor will be admissible against the person for whom he is acting. First, the question whether an assessor is acting as an agent for his client will depend on the circumstances — assessors sometimes act as agents, at other times as independent contractors providing professional or technical services. It is only when they represent their clients so as to affect, or have the potentiality to affect, the client's legal position in respect of third parties that they act as agents in the strict legal sense.[23] Therefore the existence of the agency must be proved before any question of admissibility of an assessor's statements as against his client can arise.[24]

Secondly, even where it is established that an assessor is acting as agent for a client, a distinction is drawn between authority to do an act and authority to talk about it; that is, the scope of the agent's authority as regards the making of admissions may be narrower in scope than his authority to act.[25]

Where the determination of the loss and calculation of the indemnity are likely to be complicated,

[21] See the *Caratti* case, supra, note 2; *Chandler v Poland* [1933] 44 Lloyds LR 349, 352; Sutton, op cit, 180.

[22] (3rd ed; 1967), 441. See also *Cross on Evidence* (3rd NZ ed; 1979), 504-505.

[23] Fridman, *The Law of Agency* (4 ed; 1976), 8; *Bowstead on Agency* (14 ed, 1976), 1.

[24] *Russell & Somers Ltd v Wellington Harbour Board* [1977] 2 NZLR 158; *G (A) v G (T)* [1970] 2 QB 643.

[25] *Maxwell v Inland Revenue Commissioner* [1959] NZLR 708; *R v Downer* (1880) 43 LJ 445; Morgan (1929) 42 Harv L Rev 361, 464. But see the Criticism of this distinction in Fridman, op cit, 268.

policies may provide for the appointment of an assessor whose conclusions are to be binding on both parties. For example in *Frewin v Poland* (supra) the policy contained a clause which provided that in the event of a loss arising the insured and the insurer should appoint an assessor to be mutually agreed upon whose findings were to be binding on both parties. Donaldson J, while recognising that such clauses might be convenient and useful, pointed out in the following passage (p 105) that considerable problems could arise:

> "For example, is the assessor to occupy a quasi-judicial position in which he is bound to disclose to the assured any information given to him by underwriters? At what stage do his findings bind the parties? It may be that the investigation at first fully supports the assured's claim and the assessor reports accordingly, but that later he obtains further information which throws a different light upon the matter. Are underwriters bound by the first report?"

Where an assessor is appointed pursuant to such a clause so that his findings are binding on both parties, it is difficult to know on what grounds his decision may be challenged. As *MacGillivray & Parkington on Insurance Law*[26] state "he is different from an arbitrator although he occupies an analogous position". In *Recher & Co v North British and Mercantile Insurance Co* [1915] 3 KB 277 the respondent insurers agreed to pay the insured in the event of damage by fire to their property an agreed percentage of the amount by which turnover in each month after the fire should in consequence of the fire be less than the turnover for the corresponding month of the year preceding the fire. A clause in the policy provided that the amount of the loss should be assessed by the insured's auditors. During the currency of the policy the insured property was damaged by fire and the auditors duly assessed the amount payable. The insurers denied liability on the ground, inter alia, that the loss in turnover so assessed was not in fact a consequence of the fire. The matter being referred to arbitration in terms of a provision in the policy, the auditors' certificates of assessment were put in evidence. A member of the firm of auditors, called as a witness by the insured, stated that when he gave the certificates he was satisfied that the losses of turnover were in fact sustained in consequence of the fire.

A question arose as to whether the assessments made by the auditors of the loss sustained and amounts payable under the policy were merely prima facie evidence of the loss and amounts payable, or whether they conclusively bound the insurer.

Lord Reading CJ held (p 86) that

> ". . . if the auditor properly directs himself . . . the amounts assessed would conclusively bind the insurance company, but not if it were established that the auditors had omitted to take into consideration any of the provisions of the policy, or some other material matter."

Thus an assessor's determination could be challenged if he made a mistake of law or in the construction of the insurance policy and applied an erroneous method of assessment. If he omitted to take into account a material fact or took into account a fact which was not material, his decision could probably be set aside. The assessor can be called as a witness and cross-examined in order to determine whether he made his assessment in accordance with the provisions of the policy.[27]

[26] (6 ed, 1975), para 1780.

[27] Ibid, at 287.

[to be concluded]

A RECENT CAR INSURANCE CASE

By J T EICHELBAUM QC

Without intending to doubt the correctness of the decision reached by Barker J in *Sampson v Gold Star Insurance Co Ltd* [1980] 2 NZLR 742, it is respectfully submitted that it contains a dictum of some importance concerning the effect of the Insurance Law Reform Act 1977 which is erroneous. Section 11 of that Act provides:

"11. *Certain exclusions forbidden* — Where

(a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and

(b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring,—

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances."

Sampson was concerned with the usual provision in insurance policies that on the occurrence of an accident it shall be the duty of the insured to make certain that, in furnishing the insurer with such information as may be required, all such particulars are in every respect true and correct and that no information has been witheld. The insured had given a false account of the accident. His Honour decided the case in favour of the insurer on the basis that nothing in s 11 excluded the common law duty of the insured to act with the utmost good faith.

In the course of his reasons, however, His Honour accepted that s 11 may apply to policy conditions of the kind stated. It is respectfully submitted that this view is wrong.

By virtue of subpara (b), s 11 applies where, in the view of the Court, the insurer has limited its liability because the happening of particular events or the existence of certain circumstances was in the view of the insurer likely to increase the risk of loss occurring. The "loss" in question, in terms of subpara (a), is loss against which the insurer is bound to indemnify the insured — that is to say, in terms of motor vehicle insurance, loss of or damage to the car. Untruthful information as to the occurrence of the accident cannot increase the risk of the loss of or damage to the vehicle. That has already occurred, at the time that the untruthful statement is made.

As His Honour himself pointed out, the defect in the law that Parliament had in mind in enacting s 11 was that a series of cases (stretching back to *Trickett v Queensland Insurance Co Ltd* [1936] NZLR 116) had established that, where the insured was in breach of a condition that exculpated the insurer if (eg) the car was being driven in an unsafe condition, it did not matter that the breach was not causative of the loss. It is submitted that the section has no application to provisions of the kind in issue in *Sampson*. Their efficacy remains a matter of contract, unaffected by the 1977 Act.

SOVEREIGN IMMUNITY

By Dr JEROME B ELKIND,
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Marine Steel Ltd v The Government of the Marshall Islands (High Court, Auckland. 29 July 1981 (A 533/81) was a judgment by Barker J on an ex parte motion by plaintiff for leave to serve out of New Zealand a writ of summons and a statement of claim.

Plaintiff was a ship repairer, carrying on businesss in Auckland. The suit was on a contract with the Government of the Marshall Islands to be performed wholly in New Zealand. The defendants raised the defence of "sovereign immunity".

Mr Justice Barker held that the Marshall Islands have not as yet achieved the status of a sovereign state. Therefore the doctrine of sovereign immunity does not apply to the present Marshall Islands Government. He took care to stress that his holding was provisional and that further information could alter his view. However, for the purpose of an ex parte motion, the plaintiff had overcome its initial difficulty. He did however take some trou-

ble to canvass the law on the subject of sovereign immunity.

New Zealand has no Act comparable to the State Immunity Act 1978 of the United Kingdom. Therefore the Court must look to the UK Jurisprudence on sovereign immunity to determine the state of New Zealand law.

Here it is faced with two apparently conflicting cases, the decision of the Privy Council in *The Philippine Admiral* [1977] AC 373, and the decision of the Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 All ER 881.

In the former case the Judicial Committee adopted the "restrictive theory" of sovereign immunity with regard to actions *in rem*. It held that such actions were maintainable against a foreign sovereign in normal commercial transactions. But it also said that actions *in personam* were not maintainable. In the latter case the Court of Appeal allowed an action *in personam* against the Central Bank. Lord Denning M R concluded that the rules of international law had changed as regards sovereign immunity and criticised the *Philippine Admiral* Decision.

Having just received an airmail copy of the House of Lords decision in the case of *I Congreso del Pertido*, "The Times" 18 July 1981, Mr Justice Barker noted that their Lordships also had criticised the *Phillipine Admiral* decision as unnecessarily restrictive. The House saw no distinction between actions *in rem* and actions *in personam*.

As to the question of whether New Zealand Courts are bound by the Privy Council decision, Mr Justice Barker considered Lord Denning's assertion in Trendtex at p 89 to the effect that "international law knows no rules of stare decisis". He accepted that this conclusion appears to be supported by learned commentators on international law. But he preferred to rest his opinion on the grounds that statements in the Privy Council decision concerning actions in personam were obiter and that he was bound only by the ratio of the Privy Council decision.

Mr Justice Barker's statements on sovereign immunity appear to be obiter as well. But the case is worth noting because of his suggestion that it is perhaps time for responsible officers in New Zealand's Departments of Foreign Affairs and Justice to consider whether a statute comparable to recent United Kingdom and United States sovereign immunity statutes should be enacted in this country.

LANDLORD AND TENANT

SECTION 22 OF THE RENT APPEAL ACT 1973 — COMMISSIONS PAYABLE TO REAL ESTATE AGENTS

*By D M FORSELL**

This article is written with reference to the paper by Mr Andrew Alston entitled "The Rent Appeal Act 1973 and Payments by Tenants to Estate Agent", [1981] NZLJ 354 and 355.

Section 22(3) of the Rent Appeal Act 1973 states:

"(3) Every person commits an offence against this Act who stipulates for or demands or accepts, for himself or for any other person, any payment or other consideration (not being commission lawfully payable to a real estate agent) for obtaining or offering to obtain or doing anything for the purpose of obtaining any dwellinghouse or property for the occupation of any other person."

That subsection should be read in the light of s 62 of the Real Estate Agents Act 1976 which, in relevant part, reads:

"62. No person shall be entitled to sue for or recover any commission, reward, or other valuable consideration in respect of any service or work performed by him as a real estate agent unless —

(a) . . .

(b) His appointment to act as agent or perform that service or work is in writing signed

*The author is the Office Solicitor to the Housing Corporation of New Zealand. The views expressed, however, are his own.

> either before or after the performance of that service or work by the person to be charged with the commission, reward or consideration or by some person on his behalf lawfully authorised to sign the appointment."

It is therefore quite clear that if a real estate agent has not, in terms of that s 62, obtained a written appointment, he cannot sue for or recover any commission, including, of course, a commission alluded to in s 22(3) of the Rent Appeal Act.

Let it be supposed (as very often occurs) that:

(i) *L* is the proprietor of a flat — a "dwellinghouse" within the meaning of s 2(1) of the Rent Appeal Act:

(ii) *L* instructs *A*, a licensed real estate agent, to find a suitable tenant for the flat, on the basis that, if *A* does so, any relevant commission is to be paid to *A* by the tenant and not by *L*:

(iii) *T*, seeking a tenancy of a flat, approaches *A*:

(iv) *T* signs an instrument, sufficient for the purposes of s 62 of the Real Estate Agents Act, appointing *A* the agent of *T* to find a suitable flat for *T* to take on lease, and undertaking to pay to *A* a proper commission if *A* shall so do and if *T* shall become the tenant of the flat so found:

(v) As a consequence of *L's* instructions to *A* and *T's* approach to *A*, a tenancy agreement in relation to *L's* flat is entered into between, as landlord, *L* and, as tenant, *T* at a rent of $50.00 per week:

(vi) *A* claims for *T* a usual commission of $50.00 — a sum equal to one week's rent — but *T* refuses to pay.

In those circumstances, in the opinion of Mr Alston, *A* cannot recover the $50.00 from *T*, for the following reasons:

(a) "Where an agent is acting for a landlord he cannot assert that the money paid to him by the tenant is lawfully paid commission. The only person from whom he can accept commission is the person for whom he is acting as agent, in this case the landlord."

(b) That the appointment, pursuant to s 62(b) of the Real Estate Agents Act, of *A* by *T* "is a sham" because *A* "continues to act exclusively in the landlord's interest."

Mr Alston further asserts that, in the circumstances, there arises on the part of *A* a conflict of interest and furthermore that in no way, in interviewing *T*, is *A* acting as *T's* agent: he is acting only on behalf of *L*.

It is true that so long as an agent *A* is the agent of one party *L* he cannot act as agent of the other party *T* without the knowledge and permission of *L* with whom *A* had originally established an agency; and, furthermore, it is true that where *A* originally establishes an agency with *L* he cannot obtain a commission from *L* as well as a commission as agent for *T* without the consent of his first principal *L* — see *Fullwood v Hurley* [1928] 1 KB 498 and *Harrods Ltd v Lemon* [1931] All ER (reprint) 285.

But in the circumstances outlined above:

(i) It is clear that *A* will not be seeking a commission from *L* in addition to a commission from the other party *T*; and

(ii) *L* knows full well that *A* contemplates acting as agent for some other person — *T* — as well as agent for *L*, because *A* has made it clear to *L* that he will seek a commission only from that other person; a commission being a payment made to an agent for agency work — see *Drielsma v Manifold* [1894] 3 Ch 100.

Thus if a real estate agent does not seek a separate commission from each of the parties, landlord and tenant, for whom he acts but only from the tenant; and if he makes it clear, expressly or by necessary implication, to the landlord that he contemplates acting as agent for some other party, (a prospective tenant), then, it is submitted, the estate agent may lawfully act as agent for both parties, tenant and landlord, respectively and charge the tenant a commission for any services provided for the tenant by the agent. If that submission be correct, then *T's* appointment, pursuant to s 62 of the Real Estate Agents Act, of *A* to act as agent for *T* is, seemingly, no sham.

Acting for both parties

In his paper Mr Alston, whilst straining at the gnat, in the circumstances, of the conduct of real estate agents, seems to be prepared, albeit with a small degree of diffidence, to swallow the camel of solicitors acting for both parties to particular pieces of business. He says:

> "There are of course situations where a fiduciary may act in one transaction for both parties, for example, a solicitor who acts for both vendor and purchaser or mortgagor and mortgagee or landlord and tenant: but in these cases, although the practice is questionable . . . there is not necessarily a conflict of interest. The solicitor is

not exercising a discretion on behalf of one party which disregards and affects the interest of the other party."

It is submitted that where a solicitor acts for both parties to a transaction, (say, for example, the vendor and the purchaser of land), a conflict of interest may very well arise and the solicitor may very well be put into the uncomfortable position of having to exercise a discretion. How, where he is acting on behalf of a vendor of land as well as a purchaser of land, is a solicitor to behave if the purchaser fails or refuses to settle on the day fixed for the settlement of the sale? Whose interest is the solicitor to uphold, that of the vendor or that of the purchaser? In this context, the address given at the recent New Zealand Law Conference at Dunedin, "Mind Your Business" by Mr R E Wylie, is worth very careful study indeed.

Is there consideration for the agent's services?

In the circumstances above set forth, there may be an apparent difficulty not fully alluded to in Mr Alston's article. Although *A* may have obtained from *T* a proper written appointment; although *A* seeks a commission from *T* only, and although *A* makes it clear to *L* that he proposes to act also for a prospective tenant, the question is whether *A* does provide any services at all for *T*; or, to put it another way does, *A* provide any legal consideration for *T* or is everything done by *A* done exclusively on behalf of *L*? For if *A* gives no such consideration to *T*, then *A* cannot lawfully recover any commission from *T*.

In relation to this facet of the affair it should be noted that an agreement to do an act which a promisor *A* is under an existing obligation to a third party *L* to do may amount to valid consideration vis-a-vis the promisee *T*, because *T* obtains the benefit of a direct obligation — see *New Zealand Shipping Co Ltd v A M Satterthwaite and Co Ltd* [1974] 1 NZLR 505.

Furthermore, it is strongly arguable that, in his dealings with *T*, *A* is "matching up" *T*'s requirements with an available dwelling with a view to creating a tenancy agreement suitable to *T* as well as to *L*, and is thus acting for *T* as well as for *L*. L wants a suitable tenant: *T* is invoking *A*'s assistance in finding a flat suitable for his needs and at a rent which he is prepared to pay. If, for example, *A* takes *T* to inspect the flat or makes arrangements for *T* to inspect it, further services are provided by *A* for *T*'s benefit. The introduction, by *A*, of *T* to *L* or to *L*'s solicitor would be a service performed by *A* for *T*'s benefit. A particular act performed by *A* in the interests of *L* may well also be done by *A* in the interests of *T*.

If *A* proceeds in a proper and circumspect fashion, then, although he may be acting for both *L* and *T*, *T* may find it very difficult to maintain that a commission is not lawfully payable by *T* to *A*: and if a commission is so payable, then *A* commits no offence contrary to s 22(3) of the Rent Appeal Act.

"Commission lawfully payable"

But the very words, in s 22(3), "(not being commission lawfully payable to a real estate agent)" may in themselves cause difficulty.

Let it be supposed that, in circumstances alluded to in the Rent Appeal Act, a real estate agent has in fact acted as agent for a landlord or for a tenant but, by oversight, has not obtained from his principal an appointment in writing sufficient to satisfy the provisions of s 62 of the Real Estate Agents Act. Let it be further supposed that the agent claims from the principal a commission which, had such an appointment been acquired by the agent, would undoubtedly have been payable by the principal. Is the commission so claimed a "commission lawfully payable" to the agent? If it is not, then the agent commits an offence under s 22(3) of the Rent Appeal Act.

It is not without significance that s 22(3) refers to a "commission lawfully payable to an estate agent". It does not refer to a "commission lawfully recoverable by an estate agent".

Section 62 of the Real Estate Agents Act does not, in terms, allude to payments to a real estate agent. That section merely forbids such an agent "to sue for or to recover a commission, reward or other valuable consideration" in respect of work done by him as a real estate agent unless, inter alia, he holds a proper and appropriate written appointment. That section merely bars the agent's remedies for unpaid commissions: he cannot sue for or recover them.

What the section does not do is to make any payment of a commission to a real estate agent unlawful. Thus, where a real estate agent has performed, for his principal, real estate agency work but the agent does not hold a proper appointment in writing, there is nothing to stop the principal from waiving the lack of written appointment and making payment to the agent. The payment is a lawful payment. In making it, the principal commits no crime and indulges in no civil wrong. Furthermore, having made the payment it seems that the principal cannot, pursuant to s 11 of the Rent Appeal Act, recover the amount paid from the agent because the payment by the principal was not

made in contravention of s 22 of that Statute.

Those words "(not being commission lawfully payable to a real estate agent)" may give rise to additional problems. Let it be taken that a real estate agent, *A*, is duly appointed in writing by the owner of a dwellinghouse, *O*, to act as *O's* agent for the purposes of letting the house. *A* finds a suitable tenant, *T*, for the house, but neither acts nor purports to act for *T* in the matter. A tenancy agreement is entered into between *O* and *T*. In that agreement *T* covenants with *O* to pay to *A* the commission lawfully payable by *O* to *A*. *A* is informed of the covenant and demands payment of the commission from *T*. Does *A*, by so demanding, infringe the provisions of s 22(3) of the Rent Appeal Act?

It is arguable that he does not do so because, although it is clear that *A* cannot sue *T* for the commission — no privity of contract, no consideration — it is nevertheless clear that the commission is lawfully payable to him, albeit by *O*, and s 22(3) of the Rent Appeal Act is quite silent on the topic of by whom a commission is payable.

It is suggested the words in brackets in that section could and, indeed, should, conveniently be amended to read "(not being a commission lawfully recoverable by a real estate agent from his principal)".

It is respectfully submitted that the whole matter of real estate agents' commission and the payment and the recovery thereof, in the context of s 22(3) of the Rent Appeal Act and offending by real estate agents against that section, may perhaps be not quite so clear cut, simple and straightforward as Mr Alston conceives it to be.

It must be borne in mind that s 22(3) creates a criminal offence and therefore its provisions, in so far as they may be ambiguous or opaque, will be construed by the Courts in favour of any real estate agent who, allegedly, has contravened them. Unless a real estate agent is utterly feckless and completely devoid of prudence and astuteness, it is going to be very difficult to entoil him in the apparently defective net of s 22(3).

Role of the Housing Corporation

There is one other feature of Mr Alston's article that should not pass unremarked. Towards the end of that writing he says:

> "Another possible solution is to put the matter in the hands of the Housing Corporation whose responsibility it is to administer the Act. This includes the prosecution of persons who commit offences against the Act."

It is quite true that, as a matter of law and practice, the Housing Corporation of New Zealand does administer the Rent Appeal Act. But there is nothing in that statute which compels the Corporation to undertake prosecutions under it. The Corporation's duties and functions in relation to the Act are set out therein — see, particularly the Rent Appeal Amendment Act 1977 — and those duties and functions do not include any obligation to prosecute, or responsibility for prosecuting, alleged offenders against the Act. There is, in the Rent Appeal Act, no provision similar to that of s 56 of the Tenancy Act 1955 which requires proceedings in respect of offences against that statute to be "taken in a summary way on the information of a Rents Officer" — and see also s 57 of that Act. The Rent Appeal Act is quite silent upon the topic of who is to or may prosecute for offences against it; and therefore any person may do so.

Uncertainty of the penal provisions

It is submitted that, as regards its penal and punitive aspects, the Rent Appeal Act is far from satisfactory. Not only is the wording of s 22(3) in some respects lacking in suitability, but s 21 of the Act is also by no means clear — see the brief essay, by the author hereof, headed "Section 21 of the Rent Appeal Act 1973" (1980) NZLJ 58.

Furthermore, not infrequently a tenancy agreement, prepared by the solicitor acting exclusively for the landlord, in relation to the letting of a dwellinghouse, contains a stipulation that the solicitor's fee for drawing up the document is to be paid by the tenant. What, in the light of ss 22(1) or (3) of the Rent Appeal Act, is the effect of such a stipulation? Does it give rise to actual or potential criminality? Perhaps it is imprudent to look too closely into matters of that sort.

What is the effect of the words "or property" in ss 22(2) and (3) of the Rent Appeal Act? Do the provisions of s 22(3) extend beyond a dwellinghouse as defined in the Act? Might not the words "or property" extend those provisions to, say, a houseboat? What is the true meaning and purport, in the section, of the word "property", which word, it may be remarked, does not appear in s 22(1)? Here again there is, in the Act, yet another "grey area".

It is submitted that, perhaps, the whole topic of unlawful and improper payments under the Rent Appeal Act could conveniently be removed from the circumvallation of the criminal law and be dealt with exclusively beneath the parasol of civil proceedings. However, if criminal sanctions are still to appear in the Act, then the provisions of the Act

which give rise to criminal behaviour, and the imposition of those sanctions, should be patent and pellucid beyond a peradventure. At present, it is submitted, they are far from being so.

Mr Alston comments:

I am grateful to Mr Forsell for having drawn attention to a number of grey areas in the Rent Appeal Act 1973. But I do not think that his comments cast doubt on the main thrust of my argument, which is that in many cases agents who charge tenants commission for obtaining premises are acting illegally. My argument is set out in [1981] NZLJ at p 354 and 355 and I do not wish to cover old ground. However, I would like to comment on some of the points raised by Mr Forsell.

First, with reference to the applicability of s 62 of the Real Estate Agents Act 1976, I submit it is irrelevant that an agent may have complied with that provision. It does not purport to do away with general principles of agency, in particular the principle that an agent is a fiduciary and cannot act when he has a conflict of interest. Nor does it purport to override the provisions of the Rent Appeal Act 1973.

Secondly, assuming an agent has a conflict of interest, it is no less a conflict if the landlord has consented to the agent acting for the tenant, or if the agent has charged commission from the tenant only and not the landlord. The point is that an agent can charge commission only from the person for whom he is acting as agent — usually the landlord.

Thirdly, my comments on solicitors acting for two parties in the one transaction were not intended to be taken as a defence of the practice. Rather I believe that, if that practice is to be distinguished, it is on the basis that it may not necessarily involve a conflict of interest at the outset whereas, in the case of an agent acting for both a landlord and a tenant, there is always a conflict at the outset which arises from the very nature of the relationship. The reality of the situation was well summed up in a recent letter to "The Press", Christchurch (Wednesday, October 12, 1981) by V M Onslow:

> "I rented a flat from an agent a few months ago, and all the agent did was give me the key to have a look around. When I took that flat I was charged a letting fee. I was also subjected to intensive questioning to see whether I measured up to the landlord's standards, a very degrading experience. This suggests to me the real estate agent was acting for the landlord and not for me, and charging a letting fee was really adding insult to injury."

Fourthly, Mr Forsell correctly points out that the Rent Appeal Act is silent as to who is to or who may prosecute for offences against it. However, it does not follow that the Housing Corporation does not have a duty to do so. First, s 32 imposes a positive duty on the Housing Corporation to administer the Act: "This Act shall be administered by the Housing Corporation". Secondly, the Act contains a number of provisions specifying offences against it for which s 27 specifies penalties. I submit it follows that the Housing Corporation has a duty to enforce these provisions and that, in an appropriate case, it should do so by initiating a prosecution.

Finally, in view of the controversy over this matter and in view of the "grey areas" to which Mr Forsell has referred, I submit there is an obvious need for an extensive review of the Act.

CONFERENCE PAPERS CONTRACT AND TORT

FIFTY STEPS AND MORE

By R P SMELLIE QC

The author was born in Dunedin and has always practised in Auckland. In 1975 he was awarded the Bruce Elliott Memorial Prize. Active in Law Society and Community affairs, Mr Smellie is also Chancellor to the Archbishop of Melanesia.

In his masterly paper Mr Smellie traces the common law development of redress for house-owners who suffer injury or loss through building defects.

Introduction

In his vigorous and prophetic dissenting judgment in *Donoghue v Stevenson,* Lord Buckmaster said [1932] AC 562, 577, 578:

> "There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article and I cannot see any reason why it should not apply to the construction of a house. If one step, why not 50? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists according to English law, although I believe such right did exist according to the laws of Babylon."

Forty-five years later the fiftieth step was taken by the House of Lords in *Anns v London Borough of Merton* [1977] 2 All ER 492. In that case, the earlier decision of the Court of Appeal in *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462 was approved. In *Dutton* it was held for the first time that a builder, developing a housing estate on land which he owned, and on which he built a house with inadequate foundations, owed a duty of care to a subsequent purchaser who suffered loss as a result of having to repair the defects which developed. In a subsequent case (*Sparham-Souter v Town and Country* [1976] 2 All ER 65) Geoffrey Lane LJ said of the *Dutton* decision (p 80 lines b to c):

> "(it) opened up a whole new area of actionable negligence by extending the rule in *Donoghue v Stevenson*".

The aim of this paper is to examine the development of the law of negligence over the last 50 years as it relates to the building and construction industry. This will involve more than just the builder-developers' new liability referred to above. For over the period architects, engineers, subcontractors and local bodies have been increasingly affected, not only as to liability, but also in respect of the nature of the damages which can be awarded against them. There have also been developments in the areas of negligent misrepresentations and excavations. The rate of change has been particularly rapid in the last decade, and there are areas where the full picture has not yet emerged. I will touch on these and hazard one or two predictions for the future towards the end of the discussion.

The Position before Donoghue v Stevenson

When Lord Buckmaster issued his warning he was echoing the sentiments of Alderson B, who in 1842 had declared in the case of *Winterbottom v Wright* 10 M and W 109:

> "the only safe rule is to confine the right to recover to those who have entered into the contract; if we go one step beyond that, there is no reason why we should not go 50".

That statement was make in a case where a coach passenger was seeking damages for personal injury suffered as a result of the negligence of a repairer with whom, however, he had no contractual relationship.

By the time the House of Lords came to consider Miss Donoghue's case in 1932 the general rule pro-

pounded by Alderson B still held, but there were two well-established exceptions in relation to chattels. Lord Buckmaster identified them (at p 569 of the *Donoghue* report) as:

> "(1) In the case of an article dangerous in itself: and (2) where the article, not in itself dangerous, is in fact dangerous, by reason of some defect or any other reason and this is known to the manufacturer."

So far as realty was concerned, the position was static and established. Landlords and vendors of landed property were immune from negligence actions. The situation was considered in some detail by Lord MacDermott LCJ in the case of *Gallagher v N McDowell Limited* [1961] NI 26 in the Court of Appeal of Northern Ireland. After a survey of the earlier cases His Lordship summed the position up at p 35 of the report (lines 15 to 25) as follows:

> "Pausing here, on the threshold, as it were, of *Donoghue v Stevenson*, I think it may be said that the authorities just considered affirm that the owner of land, as such, enjoys under English law two well settled immunities — (1) if he lets his house unfurnished to a tenant he is under no duty (apart from contractual and statutory obligations) to his tenant, or his tenant's family, invitees or licensees, to take reasonable care that at the time of letting the premises are fit for habitation and free from defects of a dangerous kind: and (2) if he sells his house to a purchaser he is under no duty (again apart from contractual and statutory obligations) to the purchaser or to his family, invitees or licensees, to take reasonable care that at the time of sale the premises are, as in (1), fit for habitation and free from defects. I am also of opinion that these immunities are not affected by the fact that the owner has himself constructed the defect."

In the field of misrepresentations the general misconception as to the effect of the House of Lords' decision in *Derry v Peek* (1889) 14 App Cas 337 dominated the scene. As a consequence a right to damages for negligent, as opposed to fraudulent, misrepresentations, was not recognised. So far as excavations were concerned, there was no New Zealand authority but, again, the Common Law was dominated by the House of Lords' decision in *Dalton v Angus* (1881) 6 AC 740, which appeared to deny (or at least severely circumscribe) a remedy for damage to buildings caused by excavations on neighbouring land.

Architects, engineers and subcontractors were all at that stage sheltering successfully behind the proposition that only obligations which arose contractually could involve them in liability. The professionals also enjoyed a supposed immunity as certifiers, the view being taken that when performing that function they were engaged in a quasi-judicial or arbitral activity. Outside of all that the proposition that a local body might be liable for failing to exercise reasonable care in respect of its statutory control over building activities was quite unheard of, as was the view that a plaintiff could sue in both contract and tort. While in the area of damages there was no support for claims for purely economic loss which were not associated with physical injury or damage.

Of all the changes that have occurred, however, perhaps the most significant is the extension of the rule in *Donoghue v Stevenson* to apply to realty; and in such a way that not only injury to persons and property can be compensated for, but also defects in the premises themselves. Because of this, it is appropriate to examine the basis upon which the vendor-builder's supposed immunity rested.

The Basis of the Vendor-Builder's Supposed Immunity

The year before *Donoghue v Stevenson* the Divisional Court in *Miller v Canon Hill Estates Limited* [1931] 2 KB 133 had considered the basis of the immunity in the course of a case concerning the sale of an as yet uncompleted house. Holding that the immunity did not apply in such circumstances, Swift J said, at pp 120 and 121:

> "I think it is quite a clear law that if one buys an unfurnished house there is no implication of law, and there is no implied contract, that the house is necessarily fit for human habitation. That must be good sense because a man who buys an empty house may not necessarily need it as a dwellinghouse; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable amount of money for restoring it. He may buy a house which wants a new roof put on or which has other obvious defects of which he knows, and may have defects of which he does not know, and if he wants to buy a house which is fit for habitation then he must expressly stipulate that the house shall be fit for habitation. He can always get an express warranty that an unfurnished house is fit for habitation if he is prepared to pay the price which attaches to an unfurnished house which has such a warranty, rather than the price which a vendor is willing to

take for an unfurnished house without such a warranty. The position is quite different when you contract with a builder or with the owners of a building estate in the course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live."

Five years later, in *Otto v Bolton* [1936] 1 All ER 960 (a case we shall have to return to later) Atkinson J put it rather more succinctly when he said, at p 965:

"It is settled law that the vendor of a house, even if also the builder of it, gives no implied warranty as to its safety. A purchaser can make any examination he likes, either by himself or by somebody better qualified so to do. He can take it or leave it, but if he takes it he takes it as he finds it. It is, perhaps, the strongest example of the application of the maxim 'caveat emptor'."

In addition to "caveat emptor", however, it was generally considered until *Dutton's* case that *Donoghue v Stevenson* was restricted in its application to chattels. This is brought out by the speech of Lord Wilberforce in *Anns*, where he said, referring to the basis of the rule (p 504, lines f to g):

"That immunity, as I understand it, rests partly on a distinction being made between chattels and real property, partly on the principle of 'caveat emptor' or, in the case where the owner leases the property, on the proposition that (fraud apart) there is no law against letting a 'tumbledown house' (*Robbins v Jones* (1863) 15 CBNS 221 per Erle CJ)".

Having briefly set out the basis of the rule it would now be instructive to observe how it fared between 1932 and 1977 before considering its final demise. The period in question was, of course, extremely significant because over those years the principles advanced by Lord Atkin in *Donoghue* gained ever-increasing application. Negligence began to push other torts into the background and to threaten the position of contract within the framework of the common law.

The Steady Erosion of the Immunity

Immediately prior to the *Donoghue* decision the immunity of the builder-owner had been reaffirmed in the case of *Bottomley v Bannister* [1932] 1 KB 458. At p 468 of the report Scrutton LJ is found declaring emphatically:

"Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence."

Similarly, Greer LJ, in his judgment, having referred to *Cavalier v Pope* [1906] AC 428, endorsed the position, saying:

"A purchaser of the freehold is, in my judgment, in no better position than a tenant."

It is clear from the references made to *Bottomley v Bannister* and *Cavalier v Pope* in *Donoghue v Stevenson* that the later decision was not intended to overthrow the established immunities in what Lord MacMillan described as "a different chapter of the law". Lord MacDermott appears to have captured the situation accurately when he said in *Gallagher's* case, at p 32:

"The fact seems to be that the concept of negligence as a separate cause of action developed too late to avoid certain anomalies. The flood it begot submerged parts of the older law but it had to eddy round and leave intact others that derived from the forms of action and the notions of an earlier age."

As we shall see, however, although the position held for some time, the "flood" steadily eroded the immunity until it was no longer able to withstand the logic and justice of the Atkinian neighbour principle.

Initially, however, the vendor-builder's position was strongly upheld by Atkinson J in *Otto v Bolton* [1936] 1 All ER 960. Miss Otto purchased a house from a building owner with a warranty that it was well constructed. She and her mother went into residence. The ceilings were dangerous owing to negligent construction and the mother suffered personal injury and sought damages. The Judge said (p 964):

"This claim raises the very difficult question as to whether the builder of a house, which he is building for the purpose of sale, is under any obligation towards persons who may come to live in it to take reasonable care in the building."

Having referred to *Bottomley v Bannister*, the

"caveat emptor" rule and the entrenched position of landlords and vendors of realty, he continued at p 966 saying:

> "Now unless the law there laid down has clearly and plainly been declared to be wrong in the case of *Donoghue v Stevenson* it is, of course, binding upon me. That was a case dealing with chattels, and there is not a word in the case from beginning to end which indicates the law relating to building and sale of houses is the same as that relating to manufacture and sale of chattels."

This supposed distinction between chattels and realty remained unchallenged for nearly a quarter of a century. In the meantime, however, there was a development of some significance when the House of Lords decided the case of *A C Billings and Sons Limited v Riden* [1957] 3 All ER 1. There it was held that contractors reconstructing the front entrance of a house owed a duty of care to visitors to the premises. *Donoghue v Stevenson* was not actually mentioned in the opinions delivered by the Lords, but the case emerges as one of high authority which broke away from the view that the duty to take care in such circumstances depended upon contract or some degree of occupancy of the land.

It was in 1961 in the case of *Gallagher v N McDowell Limited*, to which reference has already been made, that the distinction between chattels and realty was subjected to close scrutiny. Lord MacDermott LCJ, as we saw earlier, did not dispute the immunities of landlord and owner, but after a careful review of the authorities denied their application to the circumstances of the case before him. The facts were that the tenant's wife had suffered injury as a result of the negligence of the building contractors, who had erected the premises for the Northern Ireland Housing Trust. Lord MacDermott held as follows (p 38):

> "In my opinion, the cases since *Donoghue v Stevenson* show that the landowner's immunities which I have described as settled before that decision have not been disturbed by it. But the fact that these immunities arise in relation to defects and dangers on land does not mean that the law imposes no neighbourly duty of reasonable care as respects defects and dangers of that kind. The immunities attach to landowners as such and I do not think one is at liberty to jump from that to saying that the law of negligence in relation to what is dangerous draws a clear distinction between what are chattels and what, by attachment or otherwise, form part of the realty. Why should it? Such a distinction does not justify itself, and it is not required by the immunities I have mentioned when one is not dealing with landowners as such."

Shortly after that enlightened contribution from Northern Ireland there followed in England the cases of *Sharpe v ET Sweeting and Son Limited* [1963] 2 All ER 455, and *Clay v AJ Crump and Son Limited*[1963] 3 All ER 687. In *Sharpe's* case Nield J had to decide whether the builders of flats erected for a corporation were liable to a subsequent tenant who suffered injury when a negligently constructed concrete canopy collapsed and injured him. The precise issue, it was observed, had not previously come before an English Court. The corporation was not joined as a party, presumably because of the owner's immunity, and the contention of the builders was that they should escape liability on the same basis.

Having referred to *Bottomley v Bannister* and *Otto v Bolton* the Judge said, at p 462:

> "It is not easy to understand entirely the reason for what one might call 'the owner's immunity'. Counsel for the defendants urged the view that perhaps the chief reason was that it was unfair that an owner should be called on to meet a claim made after a lapse of years. He urged, too, that logically for the same reason such immunity should be enjoyed also by builders. For myself I doubt the cogency of this reason. It is true that it might be difficult after a lapse of years to know whether a dangerous defect in a house was due to age or interference or negligent building. But that difficulty should surely be capable of being met by applying the general principles of the onus of proof under which the plaintiff would be required to prove that the dangerous defect was due to negligent building and by excluding other causes. However, the rule as to the owner's immunity is too deeply embedded in the common law to be capable of disturbance by this Court. Nonetheless I would say that whilst it is contended that it is right to disallow an extension of the principles in *Donoghue v Stevenson* it is certainly right in my judgment to disallow any extension of the principles relating to owner's immunity."

On the following page of the report the emphatic statement is found:

> "In a sentence, I consider the law to be this: the fact that the owner is also the builder does not remove the owner's immunity, but when the builder is not the owner he enjoys no such

immunity."

In so holding Nield J expresssly adopted the opinions of Lord MacDermott and the other members of the Court of Appeal of Northern Ireland.

The other case (*Clay v A J Crump and Sons Limited*) concerned the liability of an architect to employees of the builder for damages for personal injury. After cursory enquiry of the demolition subcontractor and a perfunctory inspection the architect had agreed to an unsafe wall being left standing on the building site. The arguments advanced for the architect are summarised by Ormerod LJ at pp 693-694, as follows:

> "It was contended on behalf of the architect that he was employed under a contract with the owners and in consequence was answerable to them alone, if by any act or omission he was in breach of that contract. It may be that there was a time when this view of the law would have prevailed. Decisions in recent years, however, have broadened the basis on which persons may be found liable if they are in default in the performance of their contractual duties, and in considering whether the architect in this case owed a duty to the plaintiff other questions have to be taken into account than the contractual liabilities of the architect to the building owner.
>
> "Counsel for the architect submitted that the case did not come within the principles laid down in *Donoghue v Stevenson* and that it would be dangerous to apply those principles to cases other than chattels of the type in question."

And a little later, on p 694, he said:

> "Is this a case in which it can be said that the plaintiff was so closely and directly affected by the acts of the architect as to have been reasonably in his contemplation when he was directing his mind to the acts or omissions which are called in question? In my judgment there must be an affirmative answer to that question."

The other members of the Court agreed with that approach and the architect was held liable despite the absence of contract and in the face of a submission that it would be dangerous to apply *Donoghue v Stevenson* to other than chattels.

This brief survey demonstrates, it is submitted, that over a period of 30 years the Courts came to regard the immunity as something of an anomaly, and with increasing firmness refused either to extend its influence or to allow it to stand in the way of claims which otherwise fell within the proximity test laid down in *Donoghue v Stevenson.*

Owner-Builder Immunity — Out Local Body Liability — In

The changes indicated above were largely effected by three leading cases, viz:

(1) *Dutton v Bognor Regis Urban District Council* [1972] 1 All ER 462.
(2) *Bowen v Paramount Builders* [1977] 1 NZLR 394.
(3) *Anns v London Borough of Merton* [1977] 2 All ER 492.

I do not propose to quote at length from these decisions, partly because their significance is reasonably well appreciated, but also because of the strictures of space. I should record, however, that the portions of Lord Denning's judgment in the first case, and Lord Wilberforce's in the third, under the heading in each case of "The position of the Builder" capsulise much of what I have been endeavouring to say so far, but with an elegance and penetration which I have been unable to attain.

It is one of the ironies of the Common Law that, because of the supposed inviolability of the landowner's immunities, the plaintiffs in *Dutton* and *Anns* were forced to seek redress from the much less culpable local bodies, and in so doing, unwittingly brought about the ultimate abrogation of the very rules which had initially denied them a remedy.

In the first case, Mrs Dutton accepted a modest settlement of her claim against the builder because she feared the immunity would defeat her. When she was prepared to soldier on against the local body, however, its reply was: "How can we be liable if the builder escapes?" That drove the Court to consider the builder's position. The developments I have outlined so far were noted in the leading judgment delivered by the Master of the Rolls, and then, with a splendid confidence, Lord Denning rolled on to hold that the immunity was out of date; the distinction between chattels and real property "quite unsustainable", and that there was "no sense in maintaining (it)". As a consequence he held that *Bottomley v Bannister, Otto v Bolton* (and probably *Cavalier v Pope*) were no longer good law.

Having thus demolished the owner-vendor's immunity, the way was clear to apply *Donoghue v Stevenson* principles to the relationship between Mrs Dutton and the local body. Lord Denning

quickly found that the relationship was sufficiently promixate and awarded compensation on the basis that the damage to the house was physical damage and the plaintiff was entitled to recover the cost of repairs. He carried Sachs LJ with him in most of this, but Stamp LJ took a more cautious line, especially on the question of damages.

Apart from the revolutionary application of *Donoghue v Stevenson*, the other demonstrably new factor was that damages were awarded for diminution in the value of the property itself, and not, as in the traditional negligence action, for damages caused by defects in the article sold.

When two or three years later *Bowen's* case came to be dealt with at first instance, it was primarily this aspect of the matter which caused Speight J to reject the plaintiff's claim. He felt, as Stamp LJ did in *Dutton's* case, that to award damages for defects in the house itself (effectively for diminution in value) would be to open up a new field of liability, the extent of which could not be controlled.

In the Court of Appeal, however, all three Judges (Richmond P, Woodhouse and Cooke JJ) saw no impediment in principle and granted damages, not only to repair the defects, but also to compensate for irrecoverable diminution in value and some loss of rental. Prima facie, some of this was straight economic loss. Richmond P acknowledged this when he said (p 411):

> "In one sense it can be described as economic loss, but it is economic loss directly and immediately connected with the structural damage to the building and as such is properly recoverable."

Cooke J described the objection that the loss was economic, and only contract should give a remedy, as of a "doctrinal nature" and added, at p 423:

> "I do not see why the law of tort should necessarily stop short of recognising a duty not to put out carelessly a defective thing, nor any reason compelling the Courts to withhold relief in tort from a plaintiff misled by the appearance of the thing into paying too much for it. But for the purposes of disposing of the present case it is enough to say that the damage is basically physical."

Although the Court of Appeal in *Bowen* went fully into the question of damages and a number of other novel aspects which the case threw up, it was careful to point out that the action was against the builder only. Accordingly, the issue as to whether the immunity of the owner-builder still applied did not arise.

In *Anns,* however (decided a few months later) the House of Lords was confronted squarely with that issue. Lord Denning's approach was substantially approved by Lords Wilberforce and Salmon, with whom the other law lords agreed.

Lord Wilberforce, having outlined the basis of the builder's immunity (as quoted earlier in this paper) said, at p 504:

> ". . . I am unable to understand why this principle or proposition should prevent recovery in a suitable case by a person who has subsequently acquired the house on the principle of *Donoghue v Stevenson*: the same rules should apply to all careless acts of a builder: whether he happens also to own the land or not."

Lord Salmon specifically adopted Lord Denning's comments about the distinction between chattels and real property being unsustainable and said (p 512):

> "The contrary view seems to me to be entirely irreconcilable with logic or common sense."

So in *Anns* we see the fiftieth step being taken resulting in the owner-builder's immunity being effectively done away with. And, of course, the new liability of local bodies, which the case also confirmed, was a further development well beyond anything Lord Buckmaster had envisaged.

I should, however, specifically record that "caveat emptor" almost certainly still applies in the case of the ordinary house owner who sells without having created or having any knowledge of a defect. In that limited sense the owner's immunity appears to survive.

The new liability of local bodies was quickly applied in New Zealand after *Dutton*. Notably by Moller J in *Gabolinscy v Hamilton CC* [1975] 1 NZLR 150; Chilwell J in *Hope v Manukau CC* (unreported A1553/73 Auckland Registry, Judgment 2/8/76) and Mahon J in *Johnson v Mt Albert Borough Council* [1977] 2 NZLR 530. The last-mentioned case went on appeal and demonstrates a difference between the law of New Zealand and that of England relative to the basis of liability for local bodies. In *Anns* Lord Wilberforce laid considerable stress on the health and safety aspect of the matter. Some English commentators suggest that unless the defects affect or threaten health and safety, the cause of action will not be made out.

In the judgment of Cooke and Somers JJ in the *Johnson case* (*Mt Albert Borough Council v Johnson*

[1979] 2 NZLR 234), however, Their Honours state, at 239, lines 5 to 10:

> "But the speeches in *Anns* were influenced by the emphasis in the background legislation there on the health and safety of persons: see for instance Lord Wilberforce at [1978] AC 728, 752, 753 and 759; Lord Salmon at 761; and the many references in the argument. In *Bowen* all three members of this Court held that a purchaser in Miss Johnson's position can recover in tort for economic loss caused by negligence, at least when the loss is associated with physical damage. That is the current law in New Zealand. Even apart from the effect of *Bowen* as a precedent we are attracted to that view."

And a little later on the same page (lines 20 to 25):

> "At all events, in the present case neither appellant has contended that, apart from the events of 1967, the kind of damage suffered by Miss Johnson would not be actionable. In that connection we need add only that, if(contrary to the view that we prefer) imminent danger to personal safety were essential, the separation of the outside steps from the house and the sloping of the floor would no doubt satisfy such a test."

Having so far demonstrated that the *Donoghue v Stevenson* principles extend even beyond the point which Lord Buckmaster foresaw, it is now appropriate to consider what had been happening concurrently in the field of misrepresentations.

Liability for Negligent Advice and Information in Building Cases

It was a banker's case, *Hedley Byrne and Co v Heller and Partners* [1963] 2 All ER 577, which made the breakthrough in this area of the law. But cases concerning builders had provided the occasion for some pioneering before that, and indeed, may be said to have stolen a march on *Hedley Byrne* although, because of inadequate reporting, the development went largely unnoticed.

It is appropriate, however, to start with the case of *Le Lievre v Gould* [1893] 1 QB 491, in which the mortgagees of the interest of a builder under a building agreement advanced money to him on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. There was no contractual relationship between the surveyor and the mortgagees but as a consequence of the surveyor's negligence the certificates misrepresented the extent of progress that had been made. The case was decided some four years after *Derry v Peek*, and because of the general misconception as to the effect of that case the plaintiff failed. Lord Esher MR said, at p 497 of the report:

> "No doubt the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud?"

As is well known, the House of Lords in *Hedley Byrne* held that *Le Lievre's* case should have been decided the other way.

Jumping forward now to 1958, there was a case that year reported as *Townsend (Builders) Limited v Cinema News Pty Management* [1959] 1 All ER 7, where the Court of Appeal held an architect liable for negligent misrepresentation to a builder regarding the obtaining of bylaw approval for the work undertaken. The case, however, was not reported on that point and this significant development in the field of negligent misrepresentations appears to have escaped the notice of Bench and Bar alike. The learned author of the 10th edition of *Hudson on Building Contracts* says, at pp 65 and 66:

> "In the ninth edition it was pointed out that the reasoning of the Court of Appeal (ie in the *Cinema News case*) somewhat startlingly anticipated, on Lord Devlin's view, the reasoning of the House of Lords in *Hedley Byrne v Heller*. In the *Townsend* case an architect had told a builder he would be responsible for issuing the necessary notices to obtain bylaw approval."

There is then set out in the text part of the transcript of the Court of Appeal's judgment, which makes it clear that the architect was held liable in negligence and obliged to indemnify the builder in respect of costs incurred by him with the owner consequent upon the work not having been authorised.

Four years later, in *Clayton v Woodman and Son (Builders) Limited* [1961] 3 All ER 249, Salmon J at first instance held an architect liable for damages for personal injury suffered as a result of incorrect advice as to the safety of a building operation. The Court of Appeal reversed the decision on the facts but Sellers LJ recognised that if Salmon J had been right the case would have represented ". . . an extension of *Donoghue v Stevenson* far beyond anything which (had) yet been achieved."

The discussion to this point is perhaps of academic interest only. Of greater immediate significance is the subsequent general application of

the *Hedley Byrne* principles to building contract case situations.

In New Zealand the application is illustrated by *Day v Ost* [1973] 2 NZLR 385 (Cooke J); *Clark Contractors v Drewet* [1977] 2 NZLR 556 (Richardson J) and *J and JC Abrams Limited v Ancliffe* [1978] 2 NZLR 420 (Casey J).

Day was a simple case where the architect misrepresented the financial stability of the owner to a plastering subcontractor. Likewise the *Clark Contractors* case was a direct application of the principles in respect of negligent advice to a digger operator as to the existence of electric cables along the lines he was instructed to excavate.

The third case is rather more sophisticated, but in essence Casey J held that on the *Hedley Byrne* and *Anns* basis a builder owed a duty of care not only when giving an estimate early in the job, but thereafter on a continuing basis until the final price was established.

In Australia there have also been cases. The two best known are *Morrison Knudsen International v The Commonwealth* (1972) 46 ALJR 265 and *Dillingham Construction Pty Limited v Downs* [1972] 2 NSWLR 49.

The first case is somewhat inconclusive because it reached the High Court of Australia in effect on an argument on a point of law. Furthermore, the issues fell out in such a way that it was not so much whether the plaintiff (the contractor) had a cause of action but rather whether the defendant had a complete defence pursuant to the provisions of the contract documents. The terms relied upon were typical of many civil engineering and other contracts and in effect the High Court said that such provisions do not rule out the possibility of a claim in negligence when the information given is shown to be false, inaccurate or misleading.

The *Dillingham* case was decided five months later by Hardie J in the Supreme Court of New South Wales. The plaintiffs had contracted with the State Government to deepen the Newcastle harbour. They experienced great difficulty and incurred enormous extra expense in breaking up the harbour bed. This, they said, was primarily due to worked-out mine shafts below the surface which dissipated the effect of blasting. The defendants knew of these workings but failed to disclose them.

The plaintiffs contended, on *Hedley Byrne* principles, that the defendants owed a duty of care to put the tender information together carefully and include such relevant information as the mineworkings under the harbour. The defendants replied, inter alia, that they could not owe a duty of care in the pre-contractual negotiations stage.

Hardie J said a duty could arise at such a stage, but the plaintiffs failed because, in fact, they had not relied upon the tender information in submitting their bid.

In ruling that the relationship of the parties was not affected by the fact that the nexus which bound them was pre-contractual negotiations, Hardie J's holding was the precursor of the decision of the English Court of Appeal in *Esso Petroleum v Mardon* [1976] 2 All ER 5, where the same conclusion was reached.

Allied to the topic of negligent misrepresentation is the question of the nature of the damages recoverable. It is clear, of course, that pure economic loss is recoverable in a *Hedley Byrne* type action. What is not satisfactorily explained is why such losses are not otherwise recoverable. I have already indicated in an earlier section of this paper that the damages awarded in *Bowen* were, in part at any rate, economic in nature. Their classification (reclassification?) as physical damage was, I suggest, somewhat forced and unsatisfactory.

As the topic of economic loss is the subject of another paper to be presented I do not propose to consider the subject in detail. I do, however, wish to draw attention to certain passages in the speeches of Lord Devlin in *Hedley Byrne*, and of Gibbs J in the recent High Court of Australia decision — *Caltex Oil v The Dredge "Willemstad"* (1976) 11 ALR 227. Both Judges challenge in robust terms the distinction based upon whether or not the loss is caused through physical injury. At pp 602 and 603 Lord Devlin is recorded as saying:

> "This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor commonsense in this.

"I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle. It just happens to be the line which those who have been driven from the extreme assertion that negligent statements in the absence of contractual or fiduciary duty give no cause of action have in the course of their retreat so far reached."

In similar vein Gibbs J, after referring to the spectre of an unlimited liability for "an indetermi-

nate time to an indeterminate class", says, at p 255:

> "However, to counter this spectre by rejecting all recovery for economic loss unless accompanied by and directly consequential upon such physical injury is Draconic; it operates to confer upon such physical injury a special status unexplained either by logic or by common experience. No reason exists for according to it such special status other than its character of tending to ensure a reassuringly proximate nexus between tortious act and recoverable damage; to this alone does it owe such merit as it may have as a necessary element in the recovery of damages in negligence."

As earlier indicated, in building cases the effect in reality, if not in theory, is that plaintiffs are compensated for loss of value; especially when damages are awarded to meet the cost of remedying threatened structural failures. It seems probable that in due course this will be openly acknowledged.

Excavations and Certifications

These two topics have nothing in common except that both have experienced significant development in recent times. The changes that have taken place have obviously been greatly influenced by the freeing-up of the application of *Donoghue v Stevenson* due to the impact of *Hedley Byrne* (supra) and *Home Office v Dorset Yacht Co Limited* [1970] 2 All ER 294. As Lord Wilberforce observed in *Anns* (supra), that trilogy of cases has developed the law of negligence to a point where it is no longer necessary to find a precedent for any particular fact situation. Rather, it is a matter of applying the broad principles in two stages, asking first: is the proximity there? — and, secondly, are there any reasons why liability should be negatived or limited?

As we shall now see, the approach works equally well in reverse as a means of testing whether existing precedents should be allowed to stand.

The evolution of the law relative to liability for damage to buildings caused by excavations on neighbouring land (which is not the same issue as loss of natural support) is nowhere better expounded in my respectful opinion than in the judgment of Turner J in *Bognuda v Upton and Shearer Limited* [1972] NZLR 741. In that case the Court of Appeal broke away from the established House of Lords precedent of *Dalton v Angus* (1881) 6 AC 740 and, adopting the new approach, held that a property owner owes a duty, when exercising his rights to excavate on his own land, to take reasonable care for the protection of buildings on his neighbour's property.

Turner J demonstrates in his judgment the analogy between the development of the *Hedley Byrne* principles and the conclusion reached in *Bognuda*. He points out that in fact in *Dalton v Angus* negligence had not really been considered, and concurred with the other Judges in holding that the ratio of *Dalton's* case had no application under our system of land tenure. At p 766 (lines 15 to 30) he summed the position up as follows:

> "So it may be said plainly that no issue of an action for negligence ever arose in *Dalton v Angus* on the facts as they came before the Court, nor was the existence of such a cause of action in issue in that case either in the Court of Appeal or in the Lords. *Derry v Peek* continued for three-quarters of a century to dominate the cases of misrepresentation: *Dalton v Angus* has for an equal time dominated the excavation cases. The dynamic expansion of negligence as a cause of action led ultimately to a pronouncement by the Lords (in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*) that modern commercial conditions necessitated the recognition of the extension of the action in negligence to misrepresentations in circumstances where the relationship between representor and representee reasonably gave rise to a duty to take care. I think that the same conditions and the same kind of legal development require the same kind of extension in the law of negligence to the field of excavation of neighbouring properties."

Turning now to the field of certification — here we find another instance of a misconception creating an immunity from liability in negligence. This heresy was finally exorcised by the House of Lords in *Sutcliffe v Thackrah* [1974] 1 All ER 859.

At the turn of the century the Court of Appeal in England had ruled in *Chambers v Goldthorpe* [1901] 1 KB 624 that a certifier could not be liable in negligence, because he was engaged in performing a quasi-judicial function. This case was faithfully followed for three-quarters of a century, the New Zealand application of it being found in *Greenfield v Major* [1958] NZLR 37.

In *Sutcliffe v Thackrah*, however, it was pointed out in clear and compelling terms that the fact that a person is called upon to act fairly and impartially as a certifier does not give him the immunity from negligence which Judges, arbitrators and jurors of necessity enjoy. As was said by Lord Salmon (p 881):

> "The heresy (as it seems to me) has, however, grown up that if a person engaged to act for a client ought to act fairly and impartially towards the person with whom his client is dealing, then he is immune from being sued by his client — however negligent he may have been. In short, liability to compensate your client for the damage you have caused him solely by your own negligence is excluded because of your obligations to act fairly and impartially towards someone else."

Dealing with the same point, Lord Reid said at p 864:

> "I can see no good grounds for this view. . . . Persons who undertake to act fairly have often been called 'quasi-arbitrators'. One might almost suppose that to be based on the completely illogical argument — all persons carrying out judicial functions must act fairly, therefore all persons who must act fairly are carrying out judicial functions. There is nothing judicial about an architect's function in determining whether certain work is defective. There is no dispute. He is not jointly engaged by the parties. They do not submit evidence as contentious to him. He makes his own investigations and comes to a decision".

Accordingly, in *Sutcliffe's* case, the certifier was held liable to compensate the owner for loss suffered as a consequence of negligence. It will be noted, however, that it was a case in which the claim was made pursuant to the contract between the owner and his architect. It is submitted, however, that the same duty of care would be owed by the architect to the builder, and that the absence of a contractual relationship between them would not prevent liability from being imposed. Strong support for that proposition is to be found in the subsequent decision of the Lords in the case of *Arrenson v Casson Beckman Rutley and Co* [1975] 3 All ER 901. There the plaintiff complained of negligence in the valuation of shares by auditors, with whom he was not in a contractual relationship. Applying the reasoning in *Sutcliffe's* case the Lords held that as there was no dispute there was no immunity and the duty of care was owed to the plaintiff pursuant to the application of accepted *Donoghue v Stevenson* principles.

So far the certification issue does not appear to have come before the Courts of New Zealand, so that *Greenfield v Major* still stands. But it is inevitable that the new line of authority discussed above will be followed in New Zealand before long.

Liability in Contract and Tort

The discussion at the end of the last section leads logically into one aspect of the topic now to be considered; viz, whether or not architects, engineers and quantity surveyors can be sued in both contract and tort. This question has been before the Courts for some time but has now been joined by the wider issue as to whether there is any impediment to a litigant, irrespective of the status of the parties involved, raising concurrent causes of action in tort and contract against a single defendant.

The currently accepted view in New Zealand is that, so far as both professionals and others are concerned, where there is an established contract between the parties a cause of action in tort is precluded.

So far as professionals are concerned, the leading case is *McLaren, Maycroft and Co v Fletcher Development* [1973] 2 NZLR 101, where Richmond J said he agreed entirely with Diplock LJ's holding in *Bagot v Stevens Scalan and Co* [1964] 3 All ER 577.

Since McLaren's case Somers J in *J W Harris and Son Limited v Demolition Roading Contractors* [1979] 2 NZLR 166, and Quilliam J in *Young v Tomlinson* [1979] 2 NZLR 441, have ruled that the holding in *Bagot's* case is not confined to professional men and can be applied similarly to other parties; in the cases mentioned to the builder and the vendor respectively.

This is out of step with developments in England where, through a line of cases, including *Esso Petroleum v Mardon* [1976] 2 All ER 5, *Batty v Metropolitan Property Realisations Limited* [1978] 2 All ER 445 and *Midland Bank Trust Co Limited v Hett Stubbs and Kemp* [1978] 3 All ER 57, it is now well established that causes of action in tort and contract can be run together. *Batty* doubted *Bagot's* case, but in the *Midland Bank* case Oliver J refused to follow it altogether.

Sutton and Mulgan have published an interesting paper ("Contract and Tort" [1980] NZLJ 366) in which they argue persuasively that:

> "While on occasions the Courts have been required by statute to categorise a particular obligation as contractual or tortious it is unsound to rely on those decisions as authority for the more general proposition that the existence of a contract inevitably limits the parties' obligation to those arising from the contract."

Either on the basis espoused by the English Judges or on the rather more limited, but perhaps more logical, basis advanced by Sutton and Mulgan, it is submitted that when the issue next comes before

the Court of Appeal the law in New Zealand will change.

Of course in many instances it will make little difference whether the claim is brought and sustained in contract or tort. But the measure of damages, although often identical, can be different, and when a question of limitation arises the issue can become one of prime importance.

Initially there was some uncertainty as to when the cause of action arises where a property owner sues an architect, builder or local body in respect of defects which have developed as a result of negligence. In *Dutton* Lord Denning MR said that the cause arose when the negligent work was executed. Four years later, however, in *Sparham-Souter v Town and Country* (supra), he changed his view:

> "But now, having thought it over time and again — and been converted by my brethren — I have come to the conclusion that, when building work is badly done — and covered up — the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it." (see p 69, line h).

In the New Zealand cases also, Mahon J can be seen preferring one view and Moller J the other.

But it was all laid to rest when the Court of Appeal in *Mt Albert Borough v Johnson* [1979] 2 NZLR 234 followed the lead given by the House of Lords in *Anns* and held (p 239, line 10):

> "Such a cause of action must arise, we think, either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution."

The case of *Batty v Metropolitan Property Realisations*, referred to above, warrants further consideration. The claim made against the first defendant (the developer from whom the Battys had purchased) was in tort for negligence and for breach of contract. The builders were the second defendants and were sued in tort only. Initially, the plaintiff succeeded against the first defendant in contract only, but on appeal judgment in tort was entered as well.

Megaw LJ, who delivered the leading judgment, with which the other two members of the Court concurred, said of the decision at first instance at p 453:

> "Crichton J, as I understand his judgment, thought that he was bound so to hold on his reading of a passage in the judgment of Diplock LJ sitting as a Judge of first instance in *Bagot v Stevens Scanlan and Co Limited*. The learned Judge, having cited that case, went on to say: 'I have also had regard in that respect to the case of *Esso Petroleum Co Ltd v Mardon*. But I do not find that this case detracts in any degree from the finding of Diplock, LJ, as he then was.'
>
> I fear that I feel bound to disagree with the learned Judge's view that *Esso Petroleum Co Ltd v Mardon* does not affect the position . . . There can, I think, be no doubt . . . that the ratio decidendi of *Esso Petroleum Co Ltd v Mardon* necessarily requires that in a case such as the present we should hold that the mere fact that the plaintiffs have obtained judgment for breach of contract does not preclude them from the entitlement which would have existed, apart from contract, to have judgment entered in their favour also in tort."

The other intriguing aspect of *Battys'* case was that the house itself had been soundly built and, at the time of the judgments at first instance, and on appeal, had not suffered any damage. But half the back garden had fallen into a steep gully and the rest, along with the house, was due to go at any time. That factual situation, said the Court of Appeal, warranted damages not only for the loss of the house, which was "doomed", but also modest damages for Mrs Batty, whose health and peace of mind had been understandably somewhat disturbed. Like the New Zealand Court of Appeal cases this decision, on the face of it, suggests that physical damage is not necessary to establish liability.

The circumstances under which both the developer and the builder owed a duty of care resulted from the fact that they had both inspected the site before deciding to go ahead on what was, in effect, a joint venture basis. As Megaw LJ said, at p 458:

> "I am quite satisfied that on the evidence the Judge was right in his finding that the symptons were such that investigation was called for by a reasonably careful builder, and that if the investigation which was called for by reason of those symptons had been made the house would not have been built."

Very little was said about the basis on which damages for Mrs Batty were awarded, but in similar circumstances both Moller J in *Gabolinscy* (supra) and Speight J in an unreported decision delivered in

September 1979 awarded $500 and $1,500 respectively.

Another problem related to the issue of which causes of action are available to a plaintiff is illustrated in the decision of Somers J in the *Harris* case, referred to above. There the builder was sued in contract and the local body in tort. In the event the local body was exculpated on the facts, but at the end of his judgment Somers J drew attention to a situation which is potentially unjust. He said at p 180:

> "The position as I understand it to be is this: (a) the employer has a cause of action in contract against the builder; (b) a local authority has, in certain circumstances revealed by the cases and perhaps still developing, a duty of care to the employer and successive occupiers for the breach of which he and they have an action in negligence; (c) the successors in occupancy of the employer may have an action against the builder in negligence; (d) the builder has, in relation to inspections by the local authority, no action against that authority of the type available to the employer; (e) as between builder and the local body where the claim is made by the employer no right of contribution exists, for both are not tortfeasors.
> It is the last consideration which is capable I think of producing an injustice. If an employer successfully sues both his builder in contract and a local body in negligence, the defendants, the breach of whose duties, the one contractual the other delictual, has caused the damage, have no recourse to each other although the 'fault' of one may be such as to suggest its 'responsibility' is the greater. And if one defendant meets the judgment the other is absolved by that payment."

I will refer further to this point and the question of apportionment of contributions in the final section which follows.

The Path Ahead

It is difficult to know at this stage whether to be cautious or provocative. I have elected in the end to set out what I think will happen or ought to happen, irrespective of how it may strike my reader.

By way of a preliminary, I observe that *Prosser* in "The Law of Torts" 3rd Ed in his chapter on "Contract and Tort", says under the heading "Supplier of Chattels":

> "Here tort and contract are closely interrelated; and no other group of cases affords so striking an illustration of the historical sweep of the Common Law and the constant change which it undergoes by slow degrees".

As a result of the dramatic developments culminating in *Anns'* case, that comment can now be said to have a valid application to the suppliers of buildings and landed property on which buildings and other structures have been erected. Constant change there has been, particularly in the last decade, and there is no logical reason why it should now suddenly stop, although conceivably it may slow down.

My views as to likely developments in the foreseeable future are briefly set out in the following paragraphs.

I would not expect further developments in the now almost complete eclipse of the builder's immunity, even though our Court of Appeal has not yet said unequivocally that *Bottomley v Bannister* will not be followed. But I affirm my belief that the certifiers' immunity of which I spoke will soon go.

In actions against builders and local bodies for defects developing from negligent construction I expect the view as to the nature of the damages which Cook J obviously preferred in *Bowen* and which Lord Devlin in *Hedley Byrne* and Gibbs J in *The Dredge "Willemstad"* powerfully supported will be adopted in due course. Until then one must just be patient with the illogicality of classifying economic loss as "physical damage."

In the Common Law context it is obvious from cases like *Day v Ost; Dillingham v Downs; Morrison Knudsen v The Commonwealth* and *Esso Petroleum v Mardon* that actions by parties misled by negligently prepared or presented pre-tender information have a bright future. In New Zealand, however, the full flowering of that development will not be seen, for I fear the Contractual Remedies Act 1979 will bring the growth to a summary halt. That piece of legislation, which had its origins in work done by the Contracts and Commercial Law Reform Committee prior to March 1967, was promoted and passed possibly without a full appreciation of how far the law had advanced in the intervening decade. Be that as it may, however, s 6 of the Act dealing with damages for misrepresentation says that any misrepresentation whether innocent or fraudulent which induces the contract shall be treated as a term of the contract, and a party —

> "6(1)(b). . . shall not, in the case of a fraudulent misrepresentation or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation."

Referring to the tort/contract dichotomy, I have already expressed the view that *McLaren, Maycroft v Fletcher Development* will soon be overruled. I think also that the Sutton and Mulgan contention is worthy of further consideration. In essence they suggest that the problem of limitation rights may be better dealt with not by denying a cause of action in tort outright but rather by, in effect, refusing relief where the justice of the case demands that the defendant's statutory immunity from suit be preserved.

Also in this part of the paper I refer to the potential injustice recognised by Somers J in the *Harris* case. The answer there is simple. We should adopt the English solution by enacting our own equivalent of their Civil Liability (Contribution) Act 1978. It is simply a matter of extending the right to contribution to all defendants found liable to the plaintiff, rather than restricting it to those who are joint tortfeasors, as at present.

Turning now to the question of apportionment of blame. In the first reported case where a builder and a local body were found liable (Mahon J's decision in *Johnson v Mt Albert Borough*) the defendants were held equally to blame. But on appeal the apportionment was adjusted to make the builder 80% responsible. In a recent case in England on similar facts the builder was found 75% to blame. I have little doubt that this will be the usual pattern in the future. As the editors of the Building Law Reports (BLR) have said recently:

> "It would appear that the 'offender' rather than the negligent 'policeman' will retain primary liability."

Finally, there are two further matters I should mention, although I have not discussed them earlier and intend only to touch on them here.

In *Bowen* the Court of Appeal recognised that there was a potential danger of a negligent builder being sued over and over again. In *Johnson v Mt Albert Borough* there were subsidences in 1967 and 1970 which, however, the Court held were sufficiently distinct to obviate the necessity of discussing the question of continuous damage. But the next case may not be so clearcut and there remains the prospect of an unscrupulous owner pocketing the compensation money, or effecting inadequate repairs, and then selling off, leaving the builder potentially exposed when the next cracks appear. What the solution here will be is difficult to tell. Richmond P in *Bowen* thought a vendor who sold without warning in such circumstances should be liable. That seems just, but it would be a further denial of the principle of "caveat emptor". Perhaps, if the problem becomes sufficiently prevalent, legislation will be enacted requiring some notice to appear on the title.

Finally, I should advert to the fact that in *Mt Albert Borough v Johnson* the Court of Appeal served clear notice on developers that they will not escape liability by blaming their independent contractors; first, because the developer's duty as owner to comply with bylaws etc is non-delegable; and secondly, rather more inferentially, because except in the clearest of cases he is likely to be held to have retained ultimate control and will therefore remain primarily liable.

The brief comments which follow are lifted, with the kind permission of the editors of that publication, from p 13 of "Conference Brief".

D L Tompkins QC, Hamilton, remarked that in relation to building contracts whereas 50 years ago the law was clear certain and unjust, it was now just but unclear and uncertain.

He considered the present attitude of the Courts and legislature would throw up problems. There could be a "free for all" between all parties as in a building contract situation the proximity test would usually be satisfied. An owner now has a direct cause of action against his sub-contractors.

With reference to the issue of concurrent liability in tort and contract Mr Tompkins agreed with Mr Smellie that the principle in McLaren's case will not survive if it has the effect subsequent High Court decisions have given to it.

Concurrent liability appeared to be inevitable but problems could arise such as the establishment of time and in relation to the Contributory Negligence Act 1947, which only enabled an allegation of contributory negligenc as to the cause of action in tort.

Mr Tompkins questioned whether s 6 of the Contractual Remedies Act would result in a party losing a right he would otherwise have had in tort. He prophesied that the Act would be a boon for lawyers similar to the Matrimonial Property Act.

The developments in relation to building contracts liability highlighted the abandonment of the contractual nexus of care, said **A A P Willy**, Christchurch. Judgments clearly show that the indefinable notions of justice and public policy have been substituted for the contractual nexus.

Anns' case had referred to no less than five public policy points and there were of course the many references by Lord Denning to the signifi-

cance of public policy. The contractual nexus Lord Denning had dismissed as "old hat".

Dr K A Palmer, Auckland, commented that consideration should be given as to how liability could be disclaimed as it appeared we were reaching the situation where there could be liability by all persons for anything said and done negligently.

It appeared liability can be effectively disclaimed, as occurred in *Hedley Byrne*. Local authorities are including disclaimer of liability clauses in their correspondence. If immediate liability could be excluded it should also be possible for subsequent persons also to exclude liability, Dr Palmer commented.

Local authorities can now refuse a building permit where it is considered land is unstable, leaving the builder to obtain, if he can, a permit from the Planning Tribunal. That protects the local authority from liability but the builders' liability continues.

An unfair emphasis in favour of the buyer was apparent, Dr Palmer commented. The principle of caveat emptor still had some virtues.

Licensing Control Commission

We have been asked by the Tribunals Division to publish the following note:

Since the coming into force on 1 April 1981 of the Sale of Liquor Amendment Act 1980, the Licensing Control Commission has been able to deal with a number of matters on the papers without requiring the attendance of any party. Previously any uncontested matters required formal proof at a public sitting.

The Commission is finding some difficulty in dealing with applications on the papers because it does not have before it the information which it customarily received in evidence tendered at its public sittings. Examples would be proof of demand required by s 110(a) of the Sale of Liquor Act 1962 on an application for a food and entertainment licence, or the evidence necessary to enable the Commission to fix the hours of sale pursuant to s 117C on an application for a club licence.

The Chairman of the Licensing Control Commission, Judge G B Fea, has therefore issued the following direction:

"Determination of applications on the papers — Section 14A Sale of Liquor Act 1962

"In the case of any application which is to be determined on the papers pursuant to s 14A of the Sale of Liquor Act 1962 (enacted by s 64 of the Sale of Liquor Amendment Act 1980) the Licensing Control Commission will require evidence as to any criteria it is required by the Act to take into account or which it may under the Act take into account in considering the application.

"Such evidence is to be provided by the applicant by way of affidavit or statutory declaration and will be in addition to the documents required to be filed by the Act or by the Sale of Liquor Regulations 1963."

CORRESPONDENCE

Dear Sir,

I have just read with interest Mr Anthony Grant's article in the September edition of your publication entitled "Bad Language and the Law". I commend both the author and the editor for reaching out beyond the confines of the purely academic to that now usually MUNDANE WORD.

Footnote 4, however, numbed my mind for an instant. It also brought me back to a time in my early youth in New York. The day was 2 December 1964. A well known American poet, in the company of other equally eminent brothers in poetry, introduced his reading with reference to an historic event. It had occurred on the campus of the University of California at Berkeley the previous day. Mario Savio, it appears, had used the DREADED WORD on the steps of Sproul Hall while speaking to thousands through a loud hailer. The gathered throng joined with him to chant THE WORD. The poet in New York, three thousand miles away, one day later, assured us that with Savio's brash utterance, the revolution had begun. The "Free Speech Movement" was under way.

The poet who saw fit to spread the conflagration of THE WORD was Allen Ginsberg, not Arthur as your otherwise learned author has it.

Yours faithfully
J E BOYACK
Henderson